

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1973

OPINION NO. 109 TOWN BOARDS—Nothing in [NRS 269.017](#) requires that the town board in towns organized prior to July 1, 1967, be restructured so as to consist of two members of the board of county commissioners and three persons who are residents, qualified electors and real property owners in the respective towns. Nor does anything in [NRS Chapter 269](#) prohibit such a restructuring, if that is the desire of the residents of that town and they present a petition to this effect to the board of county commissioners as provided for in the Chapter.

Carson City, January 24, 1973

Honorable Robert C. Manley, Elko County District Attorney, Elko County Courthouse,
Elko, Nevada 89801

Dear Mr. Manley:

Your predecessor in office, Mr. Mark C. Scott, Jr., requested the opinion of the Attorney General as to the retroactive effect, if any, of [NRS 269.017](#), a 1967 amendment to [NRS Chapter 269](#), governing unincorporated cities and towns.

QUESTION

Does [NRS 269.017](#) require that the town board in towns organized prior to July 1, 1967, be restructured so as to consist of two members of the board of county commissioners and three persons who are residents, qualified electors and real property owners in the respective towns?

ANALYSIS

Prior to 1967, Nevada communities desiring to have a town government formed could, pursuant to [NRS Chapter 269](#), petition the board of county commissioners for the county in which the community was located, and if the commissioners determined that a town government for the area was in its best interest, a town government would be established with the board of county acting as the governing body for the town.

In 1967, the Legislature amended [NRS Chapter 269](#) (Stat. 1967, 1723) to provide for a town board form of government once again to be created by the board of county commissioners upon petitioning by the residents of the town. However, the town board under the new law would consist of two county commissioners and three persons who are residents, electors and property owners in the town.

Nowhere in the 1967 amendments to Chapter 269 or in any subsequent amendments did the Legislature specifically direct that the governing bodies of existing towns should be restructured in accordance with the provisions of [NRS 269.017](#). On the contrary, the Legislature seems to have been fully aware that some towns in Nevada had been earlier organized under the county commissioner system and would continue to be so organized in the future.

Support for this statement can be found in the wording used in certain sections of Chapter 269. For instance, [NRS 269.025](#), governing meetings, speaks of the “town board or board of county commissioners of any county in this state having jurisdiction of the

affairs of any town or city, as in this chapter provided, * * *.” Also [NRS 269.045](#) is directed towards “any member of a town board or board of county commissioners acting for any town. * * *” Similar references to a town board or board of county commissioners acting on behalf of a town appear in 21 other sections of [NRS Chapter 269](#). Further support for this interpretation can be found at [NRS 271.115](#) in which the term “governing body” is defined for purposes of the Consolidated Local Improvements Law. Paragraph 2 of that section, also added to NRS in 1967, reads:

In the case of an unincorporated city or town, “governing body” means the board of county commissioners or, if appropriate, the town board.

It is also noteworthy that the phrase “board of county commissioners of any county in this state having jurisdiction of the affairs of any town or city, as in this chapter provided,” is the same language which appeared in the old law also at [NRS 269.025](#).

All of these references lead to but one conclusion: The powers granted by the present [NRS Chapter 269](#) may be exercised either by a town board organized since 1967 or by a board of county commissioners having jurisdiction over a town organized as such prior to 1967. Both governing schemes remain in effect.

However, this is not to say that a town government organized under the old law could not be legally reorganized under the new law if that were the expressed desire of the residents of the town. Nothing in the present law appears to forbid the residents of a Nevada town from petitioning the board of county commissioners to reorganize the town government in accordance with present law, with the result that the town board would be reconstituted with a membership reflecting that provided in [NRS 269.017](#).

CONCLUSION

Nothing in [NRS 269.017](#) requires that the town board in towns organized prior to July 1, 1967 be restructured so as to consist of two members of the board of county commissioners and three persons who are residents, qualified electors and real property owners in the respective towns. Nor does anything in [NRS Chapter 269](#) prohibit such a restructuring, if that is the desire of the residents of that town and they present a petition to this effect to the board of county commissioners as provided for in the chapter.

Respectfully submitted,

ROBERT LIST
Attorney General

By: William E. Isaeff
Deputy Attorney General

OPINION NO. 110 MUNICIPALITIES—VEHICLE REGULATION—Local authorities have the power to enact local traffic ordinances covering vehicle sizes and weights, but some local authorities have no power to regulate motor vehicle carriers in general.

Carson City, January 29, 1973

Mr. Howard Hill, Director, Department of Motor Vehicles, 555 Wright Way, Carson City, Nevada 89701

Dear Mr. Hill:

In a recent letter you requested this office to provide further clarification concerning Attorney General's Opinion No. 105, dated November 20, 1972, dealing with the jurisdiction of misdemeanor traffic offenses.

QUESTION

Do local municipalities have the authority to adopt ordinances or traffic regulations covering the same subjects provided for in [NRS 484.745](#) to [484.757](#), inclusive, and Chapter 706 of NRS, regulation of truck sizes and weights and motor vehicle carriers, respectively?

ANALYSIS

The Nevada State Legislature, with respect to [NRS Chapter 484](#), "Traffic Laws," has taken the position that local authorities should be allowed the broadest possible latitude in copying state traffic laws into their own ordinances. Your attention is invited to [NRS 484.777](#), the second paragraph of which reads:

Unless otherwise provided, any local authority may enact by ordinance traffic regulations which cover the same subject matter as the various sections of this chapter if the provisions of such ordinance are not in conflict with this chapter.

After this very broad language in paragraph 2 of [NRS 484.777](#), the Legislature went on to specify three distinct areas where local authorities may not enact ordinances copying state law. The prohibited areas are listed in [NRS 484.777](#), subsection 3:

- A local authority shall not enact an ordinance:
- (a) Governing the registration of vehicles and the licensing of drivers;
 - (b) Governing the duties and obligations of persons involved in traffic accidents; or
 - (c) Providing a penalty for an offense for which the penalty prescribed by this chapter is greater than that imposed for a misdemeanor.

Prior to the 1971 Session of our Legislature, a fourth restricted area regarding "DUI" offenses was also listed, but legislation in 1971 returned authority over this type of offense to local municipalities.

This action by the Legislature in listing three specific areas where local ordinances are not sanctioned is a fairly clear indication of the legislative intent to allow local authorities to enact traffic regulation ordinances on all other subject areas covered in [NRS Chapter 484](#) including vehicle sizes and weights. Had the Legislature intended to restrict local authorities with respect to regulation of vehicle sizes and weights, as set out in [NRS 484.745](#) to [484.757](#), inclusive, it would have been a simple enough matter for the Legislature to have added such a restriction to [NRS 484.777](#), subsection 3. But as of this date no such specific restriction has been added by the Legislature. Before this office can determine further restrictions on local authority with regards to the matters covered in [NRS Chapter 484](#), any such restrictions must be clearly stated in the language of Chapter 484. We find no evidence of any such intention with respect to these vehicle size and weight sections. It is a long recognized rule of statutory construction that where the Legislature specifies exemptions to a general rule, further exemptions will not be implied. See *Galloway v. Truesdell*, [83 Nev. 13](#) (1967); *Giloti v. Hamm-Singer Corp.*, 396 S.W.2d 711 (Mo. 1965); *Galstan v. School Dist. Of City of Omaha*, 128 N.W.2d 791 (Neb. 1964);

Uline v. Motor Vehicle Accident Indem. Corp., 213 N.Y.S.2d 871 (N.Y. 1961); 82 C.J.S., Statutes, § 333.

In your letter of November 28, 1972, you asked us to consider the possible implications of subsection 1 of [NRS 484.755](#), which reads as follows:

Authority for the enforcement of the provisions of [NRS 484.745](#) to [484.757](#), inclusive, shall be vested in the Nevada highway patrol and in motor carrier field agents under the jurisdiction of the department of motor vehicles.

After reviewing this language thoroughly, it appears that this section of [NRS Chapter 484](#) is merely an indication by the Legislature as to which state agency shall enforce these sections on behalf of the State. We have no reason to believe that this section should be read as a preemption by the State of enforcement of this type of traffic law nor should it be read into this section that enforcement of provisions like these is vested exclusively in the Nevada Highway Patrol and motor carrier field agents of the Department of Motor Vehicles. Repeating what has been set forth above, any further restrictions on the authority of local municipalities with respect to traffic ordinances on the same subjects as those appearing in Chapter 484 must be clearly implied from the language of the chapter. We do not find this in the language of [NRS 484.755](#), subsection 1.

However, it should be noted that the Legislature has decreed that before a local traffic ordinance intended to be effective on federal and state highways constructed and maintained under the authority of [NRS Chapter 408](#) can be enforced by any police agency, the ordinance must first be submitted to and receive the approval of the board of directors of the State Department of Highways in Carson City. [NRS 484.779](#). Thus, a limited state role is retained here. While some states have opted to keep vehicle size and weight regulation purely a state concern, our Legislature has chosen to share this responsibility with local authorities.

As for the authority of local government units to enact local ordinances on the same subjects presently regulated by the State under [NRS Chapter 706](#) ("Motor Vehicle Carriers"), no such authority appears to exist in local government units in Nevada. This conclusion is based on two relevant considerations. First, Chapter 706, when viewed in its entirety, clearly creates a comprehensive scheme for the regulation of motor vehicle carriers. This scheme for the regulation of motor vehicle carriers. This scheme is to be carried out by a special state agency, the Public Service Commission and/or the Department of Motor Vehicles, which has particular expertise in the complex matters encompassed in the chapter. The declaration of legislative intent appearing at [NRS 706.151](#), subsection 1(a), is further evidence that state regulation by the PSC/DMV is exclusive, especially in view of the fact the license fees authorized by the chapter are specifically intended for use in the construction, maintenance, and repair of the highways of this State. [NRS 706.151](#), subsection 1(b). In addition, the sort of fair, impartial, and economical regulation of the motor carrier industry intended by the Legislature could not be readily attained if every local authority could establish its own regulatory scheme in this important area of motor transportation. [NRS 706.151](#), subsection 1(c).

The second consideration upon which the conclusion that local authorities have no power in areas covered by [NRS Chapter 706](#) is the complete lack of any language in the chapter similar to the broad grant of power to local authorities which appears in Chapter 484 at NRS at [NRS 484.777](#). In view of the expressed need for fair, unified regulation in this particular industry, the absence of language of this type is not surprising.

CONCLUSION

Local authorities have the power to enact local traffic ordinances covering the same subjects regulated at the state level by [NRS 484.745](#) to [484.757](#), inclusive, but the same

local authorities have no powers in the area of motor vehicle carrier regulation. Authority over motor vehicle carriers is exclusively the province of the State Public Service Commission and/or the Department of Motor Vehicles under [NRS Chapter 706](#).

Respectfully submitted,

ROBERT LIST
Attorney General

William E. Isaeff
DEPUTY Attorney General

OPINION NO. 111 SOLID WASTE SYSTEMS—Such systems, established under Chapter 444 of Nevada Revised Statutes, may be smaller than boundaries of municipalities creating them and may charge a fixed collection fee, but non-payment of this fee does not give rise to a lien on realty.

Carson City, January 29, 1973

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

Dear Mr. Macdonald:

In your letter of November 27, 1972, you presented the following questions for an opinion by the Attorney General:

QUESTIONS

1. Does [NRS 444.520](#) permit a county to pass an ordinance establishing a solid waste management system for less than an entire county?
2. If so, can it provide that all residents in the system must pay a fixed monthly collection fee?
3. Can such an ordinance provide that such fees shall be a lien on the real property if not paid?

ANALYSIS—QUESTION ONE

[NRS 444.510](#) directs every municipality (defined as county, city, or town) or district board of health to develop a plan for a solid waste management system “* * * which shall adequately provide for the disposal of solid waste generated within the boundaries of the municipality or within the area to be served by the system.”

The last ten words of this directive clearly imply that a municipality’s solid waste disposal system may cover an area that is different from or does not correspond exactly with the boundaries of the municipality itself. This grant of discretion with respect to the boundaries of the system appears quite reasonable when one considers that the solid waste problems of various areas within the limits of a municipality may vary considerably depending upon the population density and the types of business operations being pursued. This would be particularly true with respect to the various counties in our State, which often are large in land area but have a highly concentrated population in only one place or at most a few places.

Under such circumstances, the municipality (county) might well consider it more desirable and more reasonable to create one or more systems for handling the particular solid waste disposal problem of each area within the municipality having such problems. In this way, relevant differences between areas within the municipality may be reflected in the system created to serve any one particular area. The language of [NRS 444.510](#), subsection 1, appears both to envision this approach and to authorize it.

ANALYSIS—QUESTION TWO

Authority for the governing board of a municipality to provide for the levy and collection of fees and charges reasonably necessary for the operation of a solid waste disposal system if contained in [NRS 444.520](#). A fixed monthly collection fee payable by all residents who live within the area of the waste disposal system is clearly one of the types of fees or charges sanctioned by this section.

ANALYSIS—QUESTION THREE

With respect to your third question, liens in the United States are nearly always the result of a contract between two or more parties or are created by a statute enacted by a state legislature. Certain common law liens based upon a possessory interest in personalty are also recognized in our law, but are not pertinent here. 51 Am.Jur.2d Liens, §§ 6 and 20. Likewise, the so-called equitable lien is not pertinent here, since none of the elements necessary for such a lien are present in the situation embraced by your third question. 51 Am.Jur.2d Liens, § 24.

A thorough reading of the 19 sections which comprise the Solid Waste Disposal Act, [NRS 444.440](#) et seq., reveals that no statutory authority has been granted by the State Legislature to the governing boards of municipalities to prescribe that any failure to pay a fee levied by such a board for waste disposal purposes shall create a lien on the realty of the delinquent fee payer. The lack of such language in [NRS 444.440](#) et seq. contrasts sharply with the express lien provisions of Chapter 318 on general improvement districts. See [NRS 318.200](#), [318.450](#), and [318.470](#). For an enlightening discussion of lien law in Nevada as related to special districts see *Macgee v. Whitacre*, [60 Nev. 209](#), 96 P.2d 201 (1939).

CONCLUSIONS

A solid waste disposal system established under [NRS Chapter 444](#) may be smaller than the boundaries of the municipality it serves and may charge a fee for its operations, but such fee does not become a lien upon realty if it is not paid when due.

Respectfully submitted,

ROBERT LIST
Attorney General

By: William E. Isaeff
Deputy Attorney General

OPINION NO. 112 MATERNITY LEAVE POLICIES without reference to the employee's physical capacity to perform her duties are a denial of equal protection of the law.

Carson City , January 29, 1973

Mr. Robert I. Rose, President, State Board of Education, Carson City, Nevada 89701

Dear Mr. Rose:

This is in reply to your letter concerning maternity leave policies of the various school districts.

QUESTION ONE

First, do the Equal Employment Opportunity Commission (EEOC) guidelines preempt school district regulations pertaining to employment during pregnancy?

ANALYSIS

The EEOC adopted guidelines on April 5, 1972 prohibiting special maternity leave disability rules. This guideline is found in 29 Code of Federal Regulations § 1604.10(b) as follows:

Employment Policies Relating to Pregnancy and Childbirth.

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits and privileges, reinstatements and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

These specific guidelines have never been reviewed by a court that we have discovered. However, other EEOC guidelines have been held by the courts to carry varying amounts of weight. Some authorities strongly oppose the guidelines. For example:

[C]ourts in interpreting the guidelines would do well to avoid ratifying them in their entirety because they leave the commission too many opportunities for excessive stringency. 84 Harv.L.Rev. 1109, 1139 (1971).

The federal court in Missouri went even further, stating:

Interpretations of the EEOC are not binding or conclusive on the courts. *International Chemical Workers Union v. Planters Manufacturing Company*, 259 R.Supp. 365, 366 (N.D. Miss. 1966).

The Supreme Court of the United States has stated:

Interpretation given a statute by an agency which was established to administer the statute is entitled to great weight. *Udall v. Tallman*, 380 U.S. 1, 15 (1965).

However, this statement was distinguished by that same court in cases where legislative history to the contrary can be shown. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Also in support of the proposition that the guidelines have legal sufficiency is 20 Hastings L.J. 305t, 319 (1968-1969), which states that "such interpretive rulings have, therefore, been held to have legal effect and are important to developing the law. * * *" This principle has been applied to EEOC interpretations of Title VII in *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F.2d 28 (5th Cir. 1969).

In answer to your first question, the EEOC guidelines should be given great weight by school districts in light of the above U.S. Supreme Court decision in *Udall*. Where school district policies appear to be in conflict with these guidelines, the school trustees should look primarily to Title VII of the Civil Rights Act of 1964 as amended in 1972 and the case law interpreting that congressional act.

QUESTION TWO

Second, can the various Nevada school districts require an employee to request an unpaid leave of absence or submit a resignation at a specific point in her pregnancy?

ANALYSIS

This office has conducted a survey of all 17 school districts in Nevada and find that there are 17 different maternity leave policies. Six of the 17 county school districts have maternity leave provisions in their collective bargaining agreement with their certificated employees. This opinion is not intended to call in question any of the provisions of these voluntary agreements between school districts and their employees.

The United States Supreme Court for the first time in 1971 issued a decision finding protection from discrimination based on sex to be covered by the Equal Protection Clause of the 14th Amendment in the case of *Reed v. Reed*, 404 U.S. 71 (1971). In that case, discrimination between the sexes in the Probate Code of Idaho was found to be denial of equal protection of the laws.

There have been several courts that have considered challenges to maternity leave policies of school districts as being unconstitutional denials of equal protection of the law. The maternity leave policies under challenge have generally required the school teacher to take maternity leave without pay or resign at a certain time prior to childbirth.

In *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972), the school district had a maternity leave policy of requiring the teacher to take maternity leave without pay at least 5 months prior to birth and under which the teacher could not return to work in less than 3 months after birth. The Sixth Circuit Court of Appeals found that policy to be in violation of the 14th Amendment of the U.S. Constitution Equal Protection Clause. The court cited *Reed* and said at page 1188 as follows:

* * *Male teachers are not subject to pregnancy, but they are subject to many types of illnesses and disabilities. This record indicates clearly that

pregnant women teachers have been singled out for unconstitutionally unequal restrictions upon their employment. Additionally, as we have observed, the rule is clearly arbitrary and unreasonable in its overbreadth. *
* *

In *Cohen v. Chesterfield County School Board*, 467 R.2d 262 (4th Cir. 1972), the court considered a school district maternity leave policy that required the school teacher to take leave without pay 4 months prior to birth and permitted reemployment when approved by her physician but no later than start of next school year. The appellate court upheld the lower court decision that the regulation denied equal protection of the law and followed the LaFleur decision in saying at pages 265-266:

* * * The record is literally devoid of any reason, medical or administrative, why a pregnant teacher must accept an enforced leave by the end of the fifth month of pregnancy if she and her doctor conclude that she can perform her duties beyond that date. Of course her employer is entitled to reasonable notice of when they conclude her leave should begin, so as to enable the employer to provide an adequate substitute, but it would seem that in most instances notice of not more than thirty days would be ample for that purpose. We cannot find in the record, nor can we imagine, any justification for requiring greater certainty as to the effective leave date of a pregnant teacher than of any other teacher, male or female, who may be absent for a prolonged period as a result of illness, emergency surgical procedure, or elective surgical procedure.

* * *

Both the enforced leave before and after birth were held impermissible, [in LaFleur] because there was lacking, as here, medical evidence or any other valid reason to support the extended period of mandatory leave. While the court recognized that continuity of classroom instruction and relief of burdensome administrative problems would both be served if the regulation were upheld, it concluded that these problems were no more acute with respect to pregnant teachers than other teachers, male or female, who suffered other actual disabilities; and moreover, that administrative convenience could not be permitted to override “the determinative issues of competence and care.” (Citations omitted.) Rejected also was the argument that the teacher was bound by her employment contract which required adherence to the regulation because “constitutional protection does extend to the public servant whose exclusion * * * is patently arbitrary or discriminatory.” *Wieman v. Updegraff*, 344 U.S. 183 (1952).

The only U.S. Circuit Court of Appeals to uphold a school district’s forced maternity leave policy was the Fifth Circuit in *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972). The case was dismissed for lack of jurisdiction because the case was brought under the 1964 Civil Rights Act and at that time the act did not apply to state or local governments. The court upheld in dicta a maternity leave policy that required unpaid leave to commence 2 months prior to birth with reemployment at the discretion of the school district. This case was distinguished in both LaFleur and Cohen.

The Ninth Circuit, which has appellate review jurisdiction for Nevada, has not yet ruled on this issue. However, on a similar issue in *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), it affirmed the dismissal of an action brought by a female officer who challenged her involuntary discharge from the Air Force required by reason of her having become pregnant. See also *Gutierrez v. Laird*, 346 F.Supp. 289 (D.D.C. 1972). This case is not conclusive, however, as in that instance the plaintiff was a nurse in Vietnam and the court accepted the Air Force’s argument that in a combat or emergency

situation she could easily have had a miscarriage and thus become a liability. In *Robinson v. Rand*, 340 F.Supp. 37 (D. Colo. 1972), no emergency situation was shown and the WAF was ordered reinstated, distinguishing Struck.

The most persuasive case for consideration in Nevada is *Williams v. San Francisco Unified School District*, 340 F.Supp. 438 (N.D. Cal. 1972). The federal court in California considered a maternity leave policy of the San Francisco Unified School District. The policy required leave without pay for pregnancy for 2 months before birth and permits reemployment no sooner than one month following the birth. The court distinguished Struck and Schattman and followed LaFleur and Cohen in striking down the regulation. The Williams court held at page 450 as follows:

[W]e find that the District's maternity leave policy is violative of the Equal Protection Clause of the Fourteenth Amendment because it singles out pregnant certificated employees for classification without any rational relationship to any legitimate objective of the District and, in addition, promotes no compelling interest of the District or State of California.

The court also set out an indication of what would be a permissible maternity leave policy at pages 449-450 as follows:

Even assuming that the District would attempt to support its maternity leave policy by referring to every rationale forwarded in any of the cases dealing with a similar issue, it nonetheless remains true that its methods of dealing with pregnancy are draconian with respect to the disabilities posed thereby. No matter what the objectives of the District are under its maternity leave, they could be served by means less restrictive than those now employed.

For example, the District might have a maternity leave provision but of significantly shorter duration than that now in effect. Or the District might continue its present policy but provide for partial or whole pay for some or all of the period of absence. Or the District might scrap its present policy in favor of a more flexible approach which would permit case by case determination of when a pregnancy leave was called for either by reference to a doctor's periodic certificate of good health and continued ability to work or by reference to the satisfaction, rationally founded, of supervisory personnel.

We hasten to add that the above suggestions are just that and nothing more; the situations contemplated thereby are not now before this court and we express no opinions on their constitutional validity. What they do illustrate, however, are viable alternatives by which the District could preserve its legitimate interests, whatever they might be.

The San Francisco Unified School District chose not to appeal the case and adopted a policy that requires no maternity leave but permits leave of up to a year and a half upon the request of the employee. Their policy also permits the payment of sick leave for illness during pregnancy.

In *Bravo v. Board of Education of City of Chicago*, 345 F.Supp. 155 (N.D. Ill. 1972), a maternity leave policy was found in violation of the Equal Protection Clause that required resignation 4 months prior to birth and prevented the teacher from returning until 2 months after birth.

In *Heath v. Westerville Board of Education*, 345 F.Supp. 501 (S.D. Ohio 1972), a maternity leave policy was found in violation of the Equal Protection Clause that required resignation 4 months before birth and prevented reemployment for a year after birth.

Congress passed the Civil Rights Act of 1964 which provides in Title VII, Section 703(a), as amended in 1972 (42 U.S.C. § 2000e-2(a)), of that Act as follows:

(a) It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, *sex*, or national origin. (*Italics added.*)

The original 1964 act defined "employer" to exclude states and political subdivisions of states. However, on March 24, 1972, the 1964 act was amended by Public Law 92-261 codified at 42 U.S.C. § 2000e(b) to include state and political subdivisions of states as employers and this included local school districts.

None of the cases referred to above have been based on the 1972 Amendment to the Civil Rights Act of 1964 or the recent EEOC guidelines promulgated subsequent to the act, nor have we found any cases that interpret these provisions.

CONCLUSION

The EEOC guidelines are not controlling on the courts or on the school districts but they should be given great weight. Maternity leave policies that require a pregnant female employee to take leave without pay at an arbitrary time for an arbitrary period without reference to the individual female's physical capacity to perform her duties constitutes a denial of equal protection of the law in violation of the 14th Amendment of the United States Constitution.

Respectfully submitted,

ROBERT LIST
Attorney General

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

OPINION NO. 113 OPEN MEETINGS—Neither the Nevada Constitution nor the Nevada Open Meetings Law requires every aspect of a legislative committee meeting to be open and public.

Carson City, February 1, 1973

The Honorable Jean Ford, Nevada State Assembly, Legislative Building, Carson City, Nevada 89701

Dear Mrs. Ford:

In your letter of January 25, 1973, you requested an opinion of the Attorney General on the following:

QUESTION

Does either the Nevada Constitution or statutory law require that all aspects of a legislative committee meeting be open and public?

ANALYSIS

In 1960, the Nevada Legislature enacted [NRS Chapter 241](#), the so-called Open Meetings Law, covering the meetings of state and local agencies. The legislative intent, as expressed in [NRS 241.010](#), is that “all public agencies, commissions, bureaus, departments, public corporations, municipal corporations, and quasi-municipal corporations and political subdivisions exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.” It should be noted that in this declaration of legislative intent none of the bodies or institutions mentioned includes the Legislature itself. Nor is the Legislature mentioned in [NRS 241.020](#), that section of the law which specifically directs that the meetings of the public agencies listed in the statute shall be open and public.

The Attorney General’s Office has never before rendered an opinion as to whether the Nevada Open Meetings Law covers meetings of the Legislature and its committees. However, in 1961, in Attorney General’s Opinion No. 241, dated August 24, 1961, this office took the position that the Open Meetings Law had no application to meetings of whatever nature conducted by the Governor in his executive capacity. This implied exemption for the Governor would appear to be equally applicable to the Legislature, since the Legislature failed to specifically include either the Governor or itself within the apparent scope of the Open Meetings Law.

The Nevada Open Meetings Law is based on California’s so-called “Brown Act,” California Government Code, Section 54950 et seq. The California statute strictly covers “local agencies” like cities, towns, counties, school districts, or boards, commissions and agencies thereof. There was no intent in the California statute to require open meetings of the state legislature as a result of the “Brown Act.” In 1967, the California Legislature added Sections 11120 to 11131 to its Government Code, thus extending the open meetings concept to state agencies. However, the term “state agencies” was not defined so as to include the legislature or its committees. If California is any sort of a guide in this area, it can be safely said that legislatively enacted open meetings laws do not apply to the Legislature itself or its committees, absent an express declaration to this effect.

The only reference to open meetings in our Nevada law appears in the Nevada Constitution, Article IV, Section 15, entitled “Open Sessions.” This section of our Constitution requires that the “doors of each House shall be kept open during its session except the Senate while sitting in executive session * * *” may hold a secret meeting. This particular part of our Constitution has never been interpreted by our Supreme Court. Reference to the 1864 Nevada Constitution Debates and Proceedings, page 142, provides only limited guidance in interpreting this language. When one delegate to the convention posed the question whether or not the houses of the Legislature could hold secret sessions, Delegate J. Neely Johnson, himself a lawyer, replied that it was his opinion Section 15 prohibited secret sessions of either house of the Legislature. The discussion in the debates is entirely limited to general meetings of the actual house itself and no reference is made to any of the various committees of the Legislature and meetings that they might hold.

Article IV, Section 6 of the Nevada Constitution grants authority to each house of our Legislature to determine its own rules of proceedings. Thus, either house could, if it so desired, adopt a rule for open meetings in its various committees. In the absence of any

such rule, it appears the committees are each individually free to decide the open meetings question in any manner they think best.

CONCLUSION

Neither the Nevada Constitution nor the Nevada Open Meetings Law, [NRS Chapter 241](#), requires every aspect of a legislative committee meeting to be open and public. A rule governing this question may be adopted by either house for all of its committees or, in the alternative, by an individual committee for its own proceedings.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 114 ABORTION—Nevada Criminal Abortion Law is unconstitutional interference with personal liberty and right to privacy of pregnant woman.

Carson City, February 2, 1973

The Honorable Robert Broadbent, *Nevada State Assembly*, Legislative Building, Carson City, Nevada 89701

Dear Assemblyman Broadbent:

In your capacity as a member of the Nevada Legislature you recently requested an opinion from the Attorney General's Office on the following:

QUESTION

What is the effect on Nevada's abortion laws of two recent United States Supreme Court decisions on state regulation of abortion practices and procedures?

ANALYSIS

On Monday, January 22, 1973, the United States Supreme Court issued two historic decisions concerned with state regulation of abortion practices and procedures. The first of these cases was *Roe v. Wade*. Case No. 70-18. The second case is entitled *Doe v. Bolton*, Case No. 70-40. Justice Blackmun wrote the majority opinion in each case.

In *Roe*, the Supreme court took the position that state criminal abortion laws that exempt from criminality only a life-saving procedure on the mother's behalf, without regard to the stage of her pregnancy and other interests involved, violate the Due Process Clause of the 14th Amendment. The court declared the 14th Amendment protects against state action the right to privacy which includes a woman's qualified right to terminate her pregnancy. However, though a state cannot override that right, the court went on to recognize a state has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which grows and reaches a "compelling" point at various stages of the woman's approach to term. This expression of the court is based on the long standing rule that a state may not interfere with a person's liberty absent a compelling state interest. *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

The decision in *Roe* is especially noteworthy in that the Supreme Court attempted to set forth guidelines or standards for the states as an aid in preparing new abortion legislation. Specifically, the court said that for the stage prior to approximately the end of the first trimester, the abortion decision and the means of its effectuation must be left to the medical judgment of the pregnant woman's attending physician. In short, during the first trimester the state has no interest in the abortion decision with the single exception that the state may limit the effectuation of an abortion to a duly licensed physician as opposed to an unlicensed layman.

During the second trimester period, the state in promoting its interest in the health of the mother may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. It is during this time that the interests of the state arise to such a degree that the state may impose some standards on the means and methods used to effectuate an abortion. However, the medical standards chosen must be "reasonably related to maternal health."

In the third trimester of the pregnancy, i.e., the stage subsequent to viability of the fetus, the state, in promoting its interest in the potentiality of human life, may, if it chooses, regulate and even proscribe abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Although not mentioned in the decision, abortions intended for the preservation of the potential life of the child appear to be within the meaning of the court's decision.

The court further declared that a state may define the term "physician" to mean only a physician currently licensed by that state and may proscribe any abortion by a person who is not a physician as so defined, with appropriate penalties.

[NRS 201.120](#), the Nevada Criminal Abortion Statute, is very similar to that statute declared unconstitutional by the U.S. Supreme Court in *Roe v. Wade*:

201.120 Abortion: Definition; punishment. Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life or that of the child whereof she is pregnant, shall:

1. Prescribe, supply or administer to a woman, whether pregnant or not, or advise or cause her to take any medicine, drug or substance; or
 2. Use, or cause to be used, any instrument or other means;
- shall be guilty of abortion, and punished by imprisonment in the state prison for not less than 1 year nor more than 10 years.

Our statute makes all abortions illegal except those performed to preserve the life of the mother or the child of which she is pregnant. This statute allows no consideration of other relevant factors and totally fails to differentiate between the various trimester periods. Measured against the standards enunciated by the court, [NRS 201.120](#) can be said to sweep too broadly. Since it interferes with the personal liberty and right to privacy of the pregnant woman in almost an identical manner as that of the Texas statute ruled unconstitutional, [NRS 201.120](#) must likewise be viewed as unconstitutional under the Due Process Clause of the 14th Amendment of the United States Constitution, as interpreted by the U.S. Supreme Court in *Roe v. Wade*.

The Legislature may wish to consider enacting appropriate new abortion legislation for the State of Nevada which will satisfy the requirements of *Roe*. With this in mind, it may be helpful to consider the court's own evaluation of its decision:

The decision leaves the state free to place increasing restrictions on abortion as the period of pregnancy lengthens so long as those restrictions are tailored to the recognized state interest. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests

provide compelling justifications for intervention. Up to those points the abortion decision in all its aspects is inherently, and primarily, a medical decision and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

In the case of *Doe V. Bolton*, the U.S. Supreme Court had before it a recently enacted Georgia statute on abortion which contained a number of procedural requirements that had to be satisfied before a pregnant woman could obtain an abortion. The court looked at each of these procedural matters and ruled on their constitutionality in light of its decision in *Roe*.

The Supreme Court first reiterated a position taken in *Roe* to the effect that a woman's constitutional right to an abortion is not absolute. Then the court examined the requirement in Georgia that a physician's decision to perform an abortion must rest upon "his best clinical judgment" of its necessity, and the court said this standard is not unconstitutionally vague since that judgment of the physician may be made in the light of all attendant circumstances. Specifically the court said that the medical judgment of the physician as to whether an abortion should be performed should include all factors relevant to the well being of the patient including physical, emotional, psychological and familial considerations, and the woman's age. Since all of these factors may relate to health, consideration of such matters allows the attending physician the room he needs to make his best medical judgment. Consideration of all of these factors operates for the benefit, not the disadvantage, of the pregnant woman, so said the court.

It is important to note at this point that by basing the abortion decision on the physician's medical judgment, it can be said, and was said by Justice Burger in his concurring opinion, that the U.S. Supreme Court has not, repeat not, sanctioned abortion on demand. The court took great care to limit its decision to medical abortions.

The Georgia statute under attack in *Doe* required that an abortion could be performed only in a hospital accredited by the Joint Committee on Accreditation of Hospitals. The Supreme Court held the JCAH accreditation requirement invalid since the state had not shown that only hospitals (let alone those with JCAH accreditation) meet its interest in fully protecting the health of the patient. The court further said that a hospital requirement of any kind failing to exclude the first trimester of pregnancy would be invalid on that ground alone.

This is not to say that the state may not or should not, from and after the end of the first trimester, adopt standards for licensing all facilities of whatever type, including a physician's office, clinic or hospital, where abortions may be legally performed so long as those standards are legitimately related to the objectives the state seeks to accomplish.

Another feature in the Georgia statute was the requirement that advance approval for an abortion in a hospital had to be given by the hospital's abortion committee. The court held that the interposition of a hospital committee on abortion, a procedure not applicable as a matter of state criminal law to any other surgical situation, is unduly restrictive of the patient's rights, which are already safeguarded by her personal physician. Protection to the hospital can be given in the form of a provision in the law to the effect that no hospital is required to admit a patient for an abortion. The Supreme Court concluded "to ask more serves neither the hospital nor the state."

The Georgia law invalidated in *Doe* also required written certification by two copractitioners of a pregnant woman's physician before she could obtain an abortion. The court found no rational connection between the patient's needs and this particular requirement and was of the opinion that it unduly infringed on her physician's right to practice medicine. The court believed that if a physician is licensed by the state he is recognized by the state as capable of exercising acceptable clinical judgment on his own. In addition, the attending physician will know when a consultation is advisable.

Physicians have followed this routine historically and know its usefulness and benefit for all concerned, but it may not be made a requirement of state law.

The final procedural matter declared unconstitutional in *Doe* concerns the Georgia residency requirement for abortions. The Supreme Court declined to uphold the residency requirement because it was not based on any policy of preserving state supported facilities for Georgia residents only, for the bar against an abortion to a nonresident also applied to private hospitals and to privately retained physicians. The court also based its decision with respect to the residency requirement on the Privileges and Immunities Clause of the U.S. Constitution, Article IV, Section 2, believing that this clause protects persons who enter Georgia seeking the medical services that are available there. A residency requirement in any new Nevada law would likewise be unconstitutional.

With respect to the various Nevada laws related to abortion, we have already mentioned that [NRS 201.120](#) is unconstitutional in view of the decision in *Roe*. As for [NRS 200.210](#), "Killing unborn quick child is manslaughter; penalty," we believe this statute is unaffected by these U.S. Supreme Court decisions, in that this statute has an entirely different purpose. This statute is intended to deter injuries upon a mother which result in the killing of her unborn quick child. The statute is not strictly an abortion law. [NRS 201.130](#), "Selling drugs to produce miscarriage," also appears to be unaffected by the decisions in *Roe* and *Doe*, since the restriction in the statute is limited to selling drugs for use in procuring an *unlawful* miscarriage, where as in the future certain abortions will be legal in Nevada.

[NRS 200.220](#), "Woman taking drugs to procure miscarriage guilty of manslaughter; penalty," probably needs some rewording if the Legislature wishes to retain the section at all. The standard enunciated by the court in *Roe* placed heavy emphasis on the period of viability for the fetus, a period which usually occurs several weeks after the time when a fetus may be called quick. Viability usually occurs between the 26th and 28th weeks of pregnancy, whereas quickening may be observed as early as the 20th week. Since under *Roe* and *Doe* the State may not prohibit an abortion before the end of the second trimester or approximately the 24th week, this statute against a woman procuring or causing her own miscarriage would appear to violate these decisions unless reworded in terms of the period of fetus viability.

[NRS 201.140](#), "Evidence," is not affected by the decisions in *Roe* and *Doe*, in that this statute merely requires that a witness give testimony in an abortion trial after he has been given criminal immunity.

Likewise, the provisions of [NRS 202.200](#) to [202.230](#) inclusive, appear to be unaffected by these recent Supreme Court cases; however, the Legislature may still wish to reconsider the present restrictions on advertising contained in these sections.

In those chapters of NRS dealing with the professions, there are several references to abortion as constituting an act of unprofessional conduct. These references appear at [NRS 630.030](#), [632.220](#), [632.320](#), [633.120](#), and [634.010](#). However, none of these sections are affected by the decisions in *Roe* and *Doe* in that in each instance the unprofessional conduct is defined as procuring a *criminal* abortion as distinguished from a *legal* abortion.

One point alluded to in these decisions by the Supreme Court but not decided is the rights, if any, of the father in cases of abortion. The Nevada Legislature may wish to consider this point in drafting new legislation. In addition, consideration might also be extended to the desirability of creating an exemption from possible civil liability for physicians and hospitals unwilling for moral or religious reasons to perform abortions, notwithstanding their legality.

Although abortion is now legal in Nevada as a result of the decision in *Roe*, this does not mean that just any ordinary person may now begin performing abortions on pregnant women in this State. It is widely recognized that an abortion is a serious medical or obstetrical procedure that should be carried out only by or under the supervision of a trained, skilled and duly licensed physician. It is our opinion that, notwithstanding the

unconstitutionality of [NRS 201.120](#), any person, who is not a licensed physician, or who procures or attempts to procure an abortion on a pregnant woman, could properly be charged with the crime of practicing medicine, surgery and obstetrics without a license, as prohibited by [NRS 634.410](#).

In view of the seriousness of the abortion issue and the need to replace our current criminal abortion statute with a new law that is compatible with the U.S. Supreme Court decisions in Roe and Doe, this office would certainly recommend speedy consideration and action by the Legislature in this matter.

CONCLUSIONS

The basic Nevada Criminal Abortion Law, [NRS 201.120](#), is an unconstitutional interference with the personal liberty and right to privacy of a pregnant woman. The decision whether or not to abort a pregnancy is basically a decision to be made by the woman involved and her physician, especially during the first trimester. During the second and third trimesters, the interests of the State in maternal health and the possibility of human life begin to arise, thus justifying increased state regulation of abortion practices and procedures. However, any state efforts at regulation must be reasonably related to the legitimate interests of the State present during the trimester being regulated. The State may not outlaw abortions during the first and second trimesters, but the State may, at its option, make abortions illegal during the third trimester of pregnancy.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 115 PUBLIC SCHOOLS, SCHOOL PRAYER—Nondenominational, nonsectarian prayer may not be offered in classrooms of public schools by public employees on a voluntary basis.

Carson City, February 5, 1973

The Honorable T. David Horton, Lander County District Attorney, P.O. Box 157, Battle Mountain, Nevada 89820

Dear Mr. Horton:

This is in reply to your letter of December 15, 1972, that contained a copy of your formal opinion to the Lander County School Board, dated December 4, 1972. You have pointed out a conflict between your letter of December 4, 1972, and the letter from this office to Mr. Robert Lloyd, Associate Superintendent, Department of Education, Carson City, Nevada, dated December 11, 1972. Your opinion and our informal opinion concern the conduct of prayer in the public schools of Lander County, Nevada. You have propounded the following two-part question:

QUESTION

May prayer be used as part of a study in how people communicate with one another and as part of the morning exercise in the form of an invocation (to quiet the students down and set a “tone” more conducive to learning)?

ANALYSIS

Webster's New International Dictionary, Second Edition, page 1940, defines prayer as "a form of religious service or worship for the public or common use." The question presented to us implies that the prayer will be conducted by the school teacher or person conducting the class on behalf of the Lander County School Board. Therefore, it is the view of this office that the facts of the question presented come squarely within the facts of *Engel v. Vitale*, 370 U.S. 421 (1962). In that case, the Board of Education of Union Free School District No. 9, New Hyde Park, New York, directed a principal to cause a prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day. The prayer was a nonsectarian prayer, nondenominational, and it was not required that all pupils participate in the prayer. Justice Black for the court reviewed the early history of America and the experience our early settlers had with conflicts between church and state. Justice Black said, at page 429, as follows:

By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. The constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough. Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs. The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

Justice Black responded to the argument that to deny a school from proscribing a prayer would interfere with the free exercise of religion. The court said, at pages 433 and 434, as follows:

It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public school is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong.

The United States Supreme Court in the *Engel* decision clearly found that nondenominational, nonsectarian, voluntary prayer conducted by a school district in a

public school in the State of New York was in violation of the 1st Amendment of the United States Constitution as an establishment of religion. The holding of this decision has not been distinguished nor eroded away in any manner since it was rendered 10 years ago. It is not necessary to look beyond this decision to find an answer to either of the questions you have propounded.

The United States Supreme Court has held to its firm principle in forbidding entanglement of church and state in the recent case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Justice Berger delivered the opinion for the court which held that statutes providing nonsectarian financial aid to parochial schools were unconstitutional. These cases are distinguished from *Board of Education v. Allen*, 392 U.W. 236 (1968), which permits public schools to lend nonsectarian textbooks free of charge to all students in the school district irrespective of whether they attend a public or parochial school. Also distinguished in *Everson v. Board of Education*, 330 U.S. 1 (1947), wherein Justice Black delivers the opinion for the court that the state may pay bus fare for all pupils attending school irrespective of whether they attend public or parochial schools. Also distinguishable is *Zorach v. Clauson*, 343 U.S. 306 (1952), wherein the high court held that a school district's policy of releasing students to attend church services of their choice was constitutionally permissible.

The court noted in the *Zorach* case that the school could not make religious observance compulsory nor could they require religious instruction. This was consistent with the case of *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), wherein the high court found constitutionally impermissible a voluntary program of an Illinois school district, that was requested by the parents of all faiths of that school district, which program required religious education on school premises during school hours.

CONCLUSION

The public schools may not permit one of its employees to prescribe that its students may participate on a voluntary basis in a nondenominational, nonsectarian prayer during school hours in public school buildings irrespective of the purpose for which the prayer is being recited.

Respectfully submitted,

ROBERT LIST
Attorney General

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

OPINION NO. 116 SALES AND USE TAX—True silver dollars acquired by casinos and slot machine arcades for use as the jackpot payout from special slot machines are used as a medium of exchange, and therefore, are not taxable under [NRS Chapters 372, 374, and 377](#).

Carson City, February 9, 1973

Mr. Jack Hunter, Chairman, Nevada Tax Commission, P.O. Box 208, Elko, Nevada 89801

Dear Chairman Hunter:

This is in response to the request of the Nevada Tax Commission, in public session, for an official legal opinion from this office.

Several audits by the staff of the Nevada Tax Commission have raised similar questions involving the interpretation and application of the Sales and Use Tax Act in Nevada to the sale of true silver dollars.

QUESTION

Is the sale or use of true silver dollars (as opposed to the newer clad coins), at prices significantly higher than the face value of such coins, a taxable event in the State of Nevada if such coins are destined for use in slot machines in licensed gaming establishments?

STATEMENT OF FACTS

Several casinos and slot machine arcades within Nevada purchase true silver dollars, otherwise known as “cartwheels,” from private retailers at prices significantly above the face value of such coins. In some cases the purchasers issue a resale certificate, and in other cases they do not; however, no sales tax is collected by the vendor in any case. These cartwheels are used solely as the medium of payout on jackpots from special quarter slot machines. In other words, a winning gaming patron playing these special machines receives a jackpot of silver cartwheels, or, to redeem them with the casino for an amount in excess of double the face value of the silver cartwheels.

DISCUSSION

The Sales and Use Tax Act of Nevada (Chapter 397, Statutes of Nevada 1955), has been codified in Nevada Revised Statutes (NRS) Chapter 372. Identical provisions relating to the Local School Support Tax and the County/City Relief Tax are found in [NRS Chapters 374](#) and 377, respectively.

Statutes material to the question presented are:

372.065 1. “Sales price” means the total amount for which tangible property is sold, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

- (a) The cost of the property sold.
- (b) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses.
- (c) The cost of transportation of the property prior to its purchase.

372.105 For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2 percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after July 1, 1955.

372.185 An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1955, for storage, use or other consumption in this state at the rate of 2 percent of the sales price of the property.

372.085 “Tangible personal property” means personal property which may be seen, weighed, measured, felt or touched, or which is in any other manner perceptible to the senses.

It is clear from the above quoted statutes that the applicable taxes are imposed only if there is a sale of tangible personal property by a person engaged in the business of selling

such tangible personal property by a person engaged in the business of selling such tangible personal property, or, if there is a use or other consumption of tangible personal property purchased from a retailer. Both taxes are excise taxes, imposed either on the privilege of doing business, or, on the privilege of using tangible personal property. As a general proposition, all sales and use of tangible personal property is taxable unless specifically exempted.

Transactions involving money alone have not been held subject to the sales or use tax. The rationale for this view appears to be that the exchange or transfer of coins solely to be used as a medium of exchange is not a sale or use of tangible personal property since the coins represent solely an intangible, but ascertainable reservoir of value and a medium of exchange. *Cf. Klauber v. Biggerstaff*, 47 Wis. 551, 3 N.W. 357 (1879). All coins of the United States are legal tender for all public and private debts, unless otherwise provided by law. 31 U.S.C. § 392.

On the other hand, once coins acquire a special value over and above their face value, whether due to relative scarcity, the fluctuating value of precious metals, or some other factor such as a minting defect, such coins exhibit more of the attributes of tangible personal property. The Supreme Court of Ohio has held that the sale of rare coins at a premium price above their face value is a taxable event. *Losana Corporation v. Porterfield*, 14 Ohio St.2d 236 N.E.2d 535 (1968). Under the Ohio Sales Tax Act, money “* * * circulating, or intended to circulate as currency,” is exempt from taxation. O.R.C. 5701.04. In *Losana, supra*, the Ohio Supreme Court held that the rare coins sold by a dealer at a premium price do not circulate as currency and therefore lose their character as intangible personal property under the definitional structure found in Ohio Statutes.

Nevada has no statutes specifically providing for the taxability of money or coins under the Sales and Use Tax Act or related acts. Similarly, there are no statutes specifically exempting money, coins, or legal tender from the provisions of the Sales and Use Tax Act. Therefore, if coins are tangible personal property and are “sold” or “used” in manners within the scope of the applicable acts, a tax liability will arise.

Several states have issued administrative regulations or rulings stating that the sale of rare coins is a taxable event. These states include: Florida, Illinois, Iowa, Michigan, and Wisconsin. The California Sales and Use Tax Act, which was the model for Nevada’s act, has been similarly interpreted. In California, the tax does not apply to coins which are acquired for use as a medium of exchange, even though the purchaser pays an amount exceeding face value; however, the tax applies to the entire charge for coins purchased at a premium price for any other purpose, such as numismatic speculation. California Sales Tax Council Letter, June 3, 1965. Similarly, the sale of postage stamps for uses other than postage or resale is taxable. California Sales Tax Council Letter, September 19, 1950.

Since the applicable provisions in the Nevada Sales and Use Tax Act are identical to, or substantially the same as those in force in California, the above discussed rulings are persuasive. It is therefore the opinion of this office that taxes imposed by [NRS Chapters 372, 374, and 377](#) apply to coins sold at a premium price for purposes other than use as a medium of exchange, but, do not apply to sales of coins, even though sold at a premium price, for the purpose of use as a medium of exchange. This is consistent with the opinion of this office which stated that postage stamps sold at a premium in private vending machines are not taxable since they are destined for use as postage. Attorney General’s Opinion No. 639, dated January 13, 1970.

Thus, the determinative question is whether or not the special use of silver cartwheels made by the casinos in question is properly deemed use as “a medium of exchange,” or use for some other purpose. A winning gaming patron on a special quarter slot machine receives a payout in silver cartwheels. The patron may keep these coins, spend them, redeem them with the casino as earlier described; in other words, the patron may do as he or she wishes with the coins received. The casino maintains no control over such coins, or the disposition thereof by winning gaming patrons. Therefore, the casino cannot be considered a collector of such coins, rather, the casino only engages in transactions for the

acquisition of silver cartwheels as part of its normal gaming operation, which of necessity includes the acquisition of coins of all varieties to stock the various slot machines.

CONCLUSION

True silver dollars acquired by casinos and slot machine arcades for use as the jackpot payout from special slot machines are used as a medium of exchange and, therefore, are not taxable under [NRS Chapters 372](#), 374, and 377.

Respectfully submitted,

ROBERT LIST
Attorney General

By: James D. Salo
Deputy Attorney General

OPINION NO. 117 PUBLIC ACCOUNTANCY—Applicant for reciprocal CPA certificate must comply with examination and reexamination requirements in effect in Nevada at the time he passed his out-of-state examination. Board of Accountancy may not consider applicant's experience record as substitute for failure to satisfy examination requirement contained in board's rules.

Carson City, February 23, 1973

Melvin Brunetti, Esq., Laxalt, Berry & Allison, 402 North Division Street, Carson City, Nevada 89701

Dear Mr. Brunetti:

In your capacity as general counsel to the Nevada State Board of Accountancy you recently requested an Attorney General's Opinion with regard to the issuance of a certified public accountant's certificate by reciprocity, as provided for in [NRS 628.310](#) and Article III of the rules and regulations of the board.

Specifically, you pose the following:

QUESTIONS

1. If an application for a CPA certificate by reciprocity is made as of this date by a candidate who originally received his CPA certificate in another state in 1957 based upon an examination in which he passed the subject of theory of accounts in November of 1956, the subject of commercial law in May of 1957, and the subjects of accounting practice and auditing in November of 1957, does his examination qualify with board regulation Article III and [NRS 628.310](#) so as to enable the board to issue a Nevada reciprocity CPA certificate without examination, assuming that all other requirements have been met?

2. (a) If an applicant applies for the CPA certificate in Nevada by reciprocity as of this date and if he received his CPA certificate in another state based upon passing that state's examination one subject at a time, rather than under the requirement that he pass two or more subjects or the single subject of accounting practice before receiving a conditional credit for subjects passed, does such a candidate qualify for a Nevada reciprocity certificate under our law and rules?

(b) Assuming the same facts, would it make any difference if the applicant (1) had minimum qualifying experience or (2) had been actively practicing public accounting for many years and had extensive public accounting experience?

ANALYSIS—QUESTION ONE

[NRS 628.190](#), subsection 5, requires an applicant for a CPA certificate to pass “a written examination in theory of accounts, in accounting practice, in auditing, in commercial law as affecting public accounting and in such other related subjects as the board shall determine to be appropriate.”

[NRS 628.260](#) authorizes the board to prescribe in its rules and regulations the terms and conditions under which a candidate shall be deemed to have passed the CPA examination or any part thereof in this State or in any other state. Specifically sanctioned by this statute is a so-called “conditional credit” system, whereby a person may be required to pass two or more subjects or the single subject of accounting practice at his first or subsequent sitting for the examination before he may receive credit for those subjects and earn the right to be examined in the future only on the remaining subjects. A candidate who does not pass two or more subjects or the single subject of accounting practice at a particular sitting must be reexamined on all required subjects at any subsequent sitting.

The Board of Accountancy has exercised the authority granted in [NRS 628.260](#) by adopting Article II, subsection 15, of its rules and regulations, which establishes a conditional credit system for all candidates who are required to write the Nevada CPA examination. These requirements on examination credits and reexamination rights are an integral part of the examination process in Nevada.

[NRS 628.310](#) allows the board, at its discretion, to waive the examination requirement of [NRS 628.190](#), subsection 5, and to issue a CPA certificate to any person who possesses the residency, age, and moral character requirements and who substantially meets the education, experience, and examination requirements of [NRS 628.190](#).

The board has reflected the intent of the statutory sections in Article III of its rules and regulations by requiring all applicants for a reciprocal CPA certificate to meet the same requirements prescribed by law and regulation for a person required to pass a written examination in Nevada.

Although the conditional credit system sanctioned in [NRS 628.260](#), with respect to reexaminations, was not a part of Nevada Revised Statutes until 1971, it appears that such a system, while not formally referred to as conditional credit, has been a part of the examination/reexamination requirements of the Nevada State Board of Accountancy for many years. An examination of the 1957-58 rules and regulations of the board reveals that Article 11, subsection 15, even then required a candidate for a CPA certificate to pass two or more of the four required subjects before he could obtain the right to be reexamined only in the remaining subject or subjects. Any lesser performance by a CPA candidate would result in his having to sit for all four subjects at the next examination without credit for any subject previously passed.

Thus, it is the opinion of this office that the rules and regulations governing CPA examinations and reexaminations in Nevada were substantially the same in 1957 as they are today. An applicant for a Nevada reciprocal CPA certificate in 1973, who bases his application on a 1957 CPA certificate from another state, must show to the satisfaction of the State Board of Accountancy that he acquired his 1957 certificate as the result of an examination given under terms and conditions substantially the same as those in effect in Nevada in 1957, including the requirements as to credit for subjects passed at any one particular sitting and/or other reexamination rights.

Applying this interpretation to the facts presented in Question One, the board would be acting within its discretionary right if it rejected the application for a reciprocal certificate of an applicant who had obtained a CPA certificate in another state in 1957 by passing

only one subject at a time at the first two sittings and then two subjects at the third sitting and receiving full credit for each subject each time, since the rules and regulations of the board in 1957, as well as in 1972-73, rejected the policy of allowing CPA candidates to “single-shot” the written examination. In Nevada it would be proper for the board to conclude that granting a reciprocal certificate obtained in the manner described in Question One would be both unfair and prejudicial to those CPAs who wrote the Nevada examination and passed it pursuant to the regulations then and now in effect, which would have denied a certificate to this same individual had he been writing his examination in 1957 in Nevada rather than in some other state.

As the court said in *State v. DeVerges*, 95 So. 805 (La. 1923), a statute which authorizes a state board in its discretion to register the certificates of public accountants of other states and authorize them to practice as accountants in this state charges the board with the duty of ascertaining and determining the actual qualifications of applicants. Having decided that so far as Nevada examinees are concerned, the practice of allowing “single-shotting” of the CPA examination fails to truly reveal the candidate’s qualification for this important profession, the board would be derelict in its statutory duty if it did not require the same showing of qualification by persons already certificated in another state as it requires of those who seek their first CPA credentials from the State of Nevada. See *State v. Scott*, 109 S.E. 789 (N.C. 1921), wherein the court said:

The state in the lawful exercise of its police power has created the state board of accountancy and required examination of applicants to safeguard the public against incompetent accountants. Every citizen of the state is, in a certain sense, injured when the duties of the board are performed in such a manner as to let down the bars and lower the standards of the profession. There is a special injury to properly accredited members of the profession who have met the conditions imposed by law, in the manner prescribed by law. * * *

The State Board of Accountancy has been given discretion by the Legislature to grant reciprocal certificates, and this implies the power to refuse all such applications. The right to refuse to grant reciprocal certificates includes the right to grant them only upon compliance with stated conditions. *State ex rel. Thoman v. State Board of Certified Public Accountants*, 113 So. 757 (La. 1927). In any discussion of reciprocal certifications, it must always be kept in mind that such a procedure is a privilege, not a right. *Bevis v. Eastland*, 186 So.2d 818 (Fla. 1966).

ANALYSIS—QUESTION TWO

We believe that part (a) of your second question is answered by the discussion set out above. As for part (b), you asked if an applicant for a reciprocal certificate has passed his CPA examination one subject at a time in another state does it make any difference in his eligibility for a Nevada reciprocal certificate that he also has either (1) minimum qualifying experience or (2) substantial, extensive public accounting experience.

The present rules and regulations of the State Board of Accountancy make no provision whatever for the consideration of an applicant’s actual public accounting experience, be it minimal or substantial, as a substitute for the well defined requirement of state law and the board’s regulations that a certificate from another state must have been granted on the basis of an examination like that given in Nevada at the time in question. Absent such a regulation at the present time, the board may not allow an applicant’s experience record to nullify the fact that his certificate was issued pursuant to examination procedures not recognized as valid in this State. However, this is not to say the board, in its wisdom, could not adopt such a regulation in the future, if it believed that such a course of action was appropriate and still protected the general welfare of the

public who might be expected to have professional dealings with the applicant after he obtained his Nevada certificate.

CONCLUSIONS

An applicant for a reciprocal Nevada CPA certificate who acquired his original certificate in 1957 in another state by passing that state's CPA examination one subject at a time may properly be denied a Nevada certificate, since he has not substantially complied with the examination/reexamination requirements in effect in Nevada at the time he passed his out-of-state examination.

The Board of Accountancy, in the absence of a duly adopted regulation, may not consider the applicant's experience record as a possible substitute for his failure to satisfy the examination requirement of Article III of the board's rules and regulations.

Respectfully submitted,

ROBERT LIST
Attorney General

By: William E. Isaeff
Deputy Attorney General

OPINION NO. 118 IMPROVEMENT DISTRICTS—Trustees of general improvement districts have implied power to alter penalty rate on future delinquent installment assessments.

Carson City, March 2, 1973

Lester H. Berkson, Esq., Attorney at Law, P.O. Box 269, Stateline, Nevada 89449

Dear Mr. Berkson:

As attorney for the Kingsbury General Improvement District, you recently requested an opinion from the Attorney General on the following:

QUESTION

Can the Kingsbury General Improvement District Trustees, subsequent to the levy of assessments and after the sale of bonds, increase the amount of penalties on delinquent installment assessments?

ANALYSIS

The board of trustees of a general improvement district is that body charged, under [NRS Chapter 318](#), with the duties of operating the district and insuring that it meets its financial obligations, including the retirement of improvement bonds sold by the district in order to pay for a particular public improvement project.

In order to provide against the possibility of serious and substantial delinquencies in assessment payments by property owners within the district, [NRS 318.420](#), subsection 2, allows the board of trustees, upon the approval of any assessment, to provide such penalty upon delinquent payments as the board may determine. If the original penalty structure turns out in actual practice to be an insufficient stimulus to property owners to pay their

respective assessments promptly when due, there is nothing in the law of Chapter 318 which would prohibit the board of trustees from devising a new penalty formula for delinquent assessments, which is more likely to insure speedy payment by persons who would otherwise be subjected to a higher penalty than before.

The Legislature has declared that acquisition of public improvements, like streets and alleys, is clearly in the public interest. In addition, the Legislature has directed that the provisions of this chapter should be broadly construed in order to accomplish the purposes of the law. [NRS 318.015](#).

Efforts by the board of trustees to insure prompt payment of assessments appear to this office to be quite reasonable. Under the terms of [NRS 318.435](#) and [318.480](#), deficiencies in special assessments or collections are to be paid from the improvement district's general fund. The general fund is financed by a general ad valorem tax on all taxable property located within the district. See [NRS 318.225](#) to [318.240](#), inclusive. It is entirely proper for the trustees to attempt to keep the ad valorem tax, which may be in addition to any assessments, at the lowest possible level by taking appropriate steps to minimize deficiencies in assessment collections.

Although the clear implication of the language in [NRS 318.200](#), [318.435](#), and [318.480](#) is that the special assessment rate, when once established, may not subsequently be altered by the district, Chapter 318 contains no apparent restriction on altering the penalty rate for delinquent assessments.

Finally, [NRS 318.210](#) describes the implied powers of the board of trustees for a general improvement district in such terms as to remove any doubt as to the board's authority to raise the penalty rate to a more effective and appropriate level:

The board shall have and exercise all rights and powers necessary or incidental to or implied from the specific powers granted in this chapter. Such specific powers shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent of this chapter.

The specific power to set a penalty rate is granted to the trustees by [NRS 318.420](#), subsection 2, and in the absence of any expressed limitation the power to change the rate when necessary or desirable may be implied pursuant to the language quoted above.

Of course, any changes in the penalty rate for delinquent assessments should be effectuated according to the standards of due process, i.e., a formal determination by the board using procedures equal to those used to adopt the original rate, including public notice and hearing. Also, due process would require that any change in the penalty rate for delinquent assessments should only operate prospectively.

CONCLUSION

The board of trustees of the Kingsbury General Improvement District has the implied power to alter the penalty rate on delinquent installment assessments in order to facilitate its meeting its obligations and responsibilities under [NRS Chapter 318](#), notwithstanding the fact that assessments have already been made and bonds sold.

Respectfully submitted,

ROBERT LIST
Attorney General

By: William E. Isaeff
Deputy Attorney General

OPINION NO. 119 CHAPTER 277 OF NRS—An agreement between the Kingsbury General Improvement District and Douglas County Sewer Improvement District No. 1 is an agreement for services and, therefore, is an interlocal contract under Chapter 277 and not a cooperative agreement.

Carson City, March 13, 1973

Lester H. Berkson, Esq., Counsel, Kingsbury General Improvement District, P.O. Box 269, Lake Tahoe, Stateline, Nevada 89449

Dear Mr. Berkson:

The Kingsbury General Improvement District and the Douglas County Sewer Improvement District No. 1 have entered into an agreement whereby the Douglas County district's sewer treatment plant will treat the sewage of the Kingsbury district. You have requested an opinion as to the appropriate provisions of [NRS Chapter 277](#) that would be applicable to that agreement. In particular you ask the following:

QUESTIONS

1. Would the provisions of [NRS 277.045](#) and [277.050](#) apply, which would require approval by the public agency after a public hearing.
2. Would the provisions of [NRS 277.080](#) to [277.170](#), inclusive, apply? If so, since this involves sewer facilities under 277.150, would approval be required of:
 - (a) State of Nevada Health Department?
 - (b) Tahoe Regional Planning Agency?
 - (c) Public Service Commission?
3. Could the agreement be entered into pursuant to the provisions of [NRS 277.180](#) which refers to interlocal contracts?

ANALYSIS—QUESTION ONE

[NRS 277.045](#) is included in that portion of Chapter 277 entitled “Miscellaneous Cooperative Agreements.” Its purpose is to provide procedures for governing all agreements between local political subdivisions that are not covered by the “Interlocal Cooperation Act,” [NRS 277.080](#) to [277.180](#), inclusive. As will be discussed below, the “Interlocal Cooperation Act” covers two types of agreements—cooperative actions and interlocal contracts. The procedures for adopting an interlocal contract and providing for its expenses are covered by [NRS 277.180](#). Similar procedures are not provided in the “Interlocal Cooperation Act” for cooperative action. The purpose of [NRS 277.045](#) is to provide these procedures, and, indeed, they are substantially similar to those provided by [NRS 277.180](#). Since, as will be discussed below, it is the opinion of this office that the above-mentioned agreement is an interlocal contract, [NRS 277.045](#) does not apply to the agreement.

The purpose of the agreement is to contract for services. The Kingsbury district is contracting with the Douglas County Sewer District to have its sewage treated by the Douglas County district's sewer treatment plant. This is a service which the Kingsbury district is paying the Douglas County district to carry out. As such, the agreement does not constitute a sale, exchange or lease of real property by one public agency to another public agency, all of which are criteria necessary for the application of [NRS 277.050](#). Accordingly, [NRS 277.050](#) does not apply to the above-mentioned agreement.

ANALYSIS—QUESTION TWO

The “Interlocal Cooperation Act” provides for two types of agreements. There are those which are executed pursuant to [NRS 277.080](#) to [277.170](#), inclusive, and there are those which are executed pursuant to [NRS 277.180](#). The differences between the two types of agreements are pointed out by [NRS 277.110](#), subsection 2, and [277.180](#), subsection 1. [NRS 277.110](#), subsection 2, provides:

Any two or more public agencies may enter into agreements with one another for *joint or cooperative action* pursuant to the provisions of [NRS 277.080](#) to [277.170](#), inclusive. Such agreements shall be effective only upon ratification by appropriate ordinance, resolution or otherwise pursuant to law on the part of the governing bodies of the participating public agencies. (Italics added.)

[NRS 277.180](#), subsection 1, provides:

Any one or more public agencies may contract with any one or more other public agencies to perform any *governmental service*, activity or undertaking which any of the public agencies entering into the contract is authorized by law to perform. * * * (Italics added.)

Agreements made pursuant to [NRS 277.080](#) to [277.170](#), inclusive, contemplate joint expenditures of time, effort and funds by two or more public agencies toward the attainment of a common object. All the public agencies involved agree to supply the funds, manpower and facilities necessary to carry out the object of the agreement. However, the agreement between the Kingsbury district and the Douglas County district merely contemplates the purchase of a service by the Kingsbury district from the Douglas County district. The ownership of the sewer treatment plant is, as pointed out in paragraph 19 of the agreement, vested completely in the Douglas County district. Treatment of the sewage will be carried out completely by the Douglas County district’s employees. The Douglas County district will do the work and the Kingsbury district will pay for the service and reimburse the Douglas County district for the expenses of operating the plant to treat the Kingsbury district’s sewage. Accordingly, the nature of the transaction between the Kingsbury district and the Douglas County district cannot be considered the type of joint or cooperative action that is part of agreements entered into pursuant to [NRS 277.080](#) to [277.170](#), inclusive. Those sections of the Nevada Revised Statutes, therefore, insofar as they apply to joint or cooperative efforts, do not apply to the above-mentioned agreement. Of course, those portions of the act of general applicability, such as purpose, definitions, and powers, apply to all agreements made under the act.

In view of the above, it follows that prior approval by the State of Nevada Health Department, the Tahoe Regional Planning Agency and the Public Service Commission, which might otherwise be required under [NRS 277.150](#), would not be required for an agreement made under [NRS 277.180](#).

ANALYSIS—QUESTION THREE

Since this agreement between the Kingsbury district and the Douglas County district is in the nature of a contract for services between two public agencies, as discussed above, it must be considered an interlocal contract. Therefore, the provisions of [NRS 277.180](#) would apply to this agreement.

CONCLUSIONS

This office concludes that the provisions of [NRS 277.045](#) and [277.050](#) do not apply to the agreement between Kingsbury General Improvement District and Douglas County Sewer Improvement District No. 1. Nor do the provisions of [NRS 277.080](#) to [277.170](#), inclusive, insofar as they apply to agreements for joint or cooperative action, apply to the above-mentioned agreement. The above-mentioned agreement is an interlocal contract for the performance of a service and, therefore, the provisions of [NRS 277.180](#) apply.

We trust that the above will satisfactorily answer your questions.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Donald Klasic
Deputy Attorney General

OPINION NO. 120 PROPERTY TAXATION—Leased Railroad Right-of-Way Properties—Railroad right-of-way properties leased for non-railroad purposes are to be assessed by the appropriate county assessor, rather than the Nevada Tax Commission.

Carson City, March 22, 1973

Mr. Jack Hunter, Chairman, Nevada Tax Commission, P.O. Box 208, Elko, Nevada 89801

Dear Mr. Hunter:

This is in response to the request of the Nevada Tax Commission, meeting in public session, for the opinion of this office interpreting and applying [NRS 361.260](#) and [361.320](#).

STATEMENT OF FACTS

As a general rule, all property subject to taxation in Nevada is assessed by the local county assessors. [NRS 361.260](#). A major statutory exception provides that the Nevada Tax Commission shall annually establish the valuation of any property of an interstate or intercounty nature, including, in particular, the property of railroads “used directly in the operation” of the business. [NRS 361.320](#) (below). In the past the Nevada Tax Commission has relied substantially on information and testimony supplied on behalf of the various railroads in making its determination of which railroad-owned properties are to be assessed by the local county assessors, and which by the Nevada Tax Commission. All properties which by law are assessed by the Nevada Tax Commission, rather than the local county assessors, are commonly referred to as “centrally assessed properties.”

For several years now, Union Pacific Railroad has classified for taxation purposes all property within its right-of-ways which is leased to others for non-railroad uses as “non-operating,” and therefore subject to local county taxation. One large railroad, Southern Pacific Transportation Company (Southern Pacific), has in the past declined to so classify its leased right-of-way properties due to its legal opinion that to classify any of its right-of-way properties as “non-operating could cause the title in such properties to revert to the United States pursuant to a reversion clause in its original land grant from Congress more than 100 years ago. Recently, however, the Nevada Tax Commission has been

notified that Southern Pacific has now classified and will in the future classify all right-of-way properties leased for non-railroad purposes as “leased right-of-way properties,” subject to local taxation. It is the stated opinion of Southern Pacific that its present practice of leasing such right-of-way properties for short periods of time, under leases incorporating 30-day termination clauses, will not jeopardize the land grant title to such properties.

Due to the fact that Southern Pacific’s assessed valuation of “operating properties” as determined by the Nevada Tax Commission is apportioned to the various counties through which the railroad runs on a mile-unit valuation basis, [NRS 361.320](#) (below), it is predicted that there will be an effective “re-allocation” of a portion of the taxable valuation of Southern Pacific from the rural counties with many miles of track, but few leased properties, to urban counties with fewer miles of track, but more right-of-way properties leased for non-railroad purposes.

QUESTION

The question is:

Are properties within the right-of-way of the Southern Pacific Transportation Company which are leased for non-railroad purposes to be assessed for property taxation by the Nevada Tax Commission pursuant to [NRS 361.320](#), or assessed by the appropriate local county assessors pursuant to [NRS 361.260](#) and [361.227](#)?

APPLICABLE STATUTE

The pertinent statute is:

361.320 Nevada tax commission to establish valuations of property of interstate, intercounty nature: Procedure.

1. At the regular session of the Nevada tax commission commencing on the 1st Monday in October of each year, the Nevada tax commission shall establish the valuation for assessment purposes of any property of an interstate and intercounty nature, which shall in any event include the property of all interstate or intercounty railroad, sleeping car, private car, street railway traction, telegraph, water, telephone, air transport, electric light and power companies, together with their franchises, and the property and franchises of all railway express companies operating on any common or contract carrier in this state. Such valuation shall not include the value of vehicles as defined in [NRS 371.020](#).

2. Except as otherwise provided in subsections 3 and 4, the foregoing shall be assessed as follows: The Nevada tax commission shall establish and fix the valuation of the franchise, if any, and all physical property used directly in the operation of any such business of any such company in this state, as a collective unit; and if operating in more than one county, on establishing such unit valuation for the collective property, the Nevada tax commission shall then proceed to determine the total aggregate mileage operated within the state and within the several counties thereof, and apportion the same upon a mile-unit valuation basis, and the number of miles so apportioned to any county shall be subject to assessment in that county according to the mile-unit valuation so established by the Nevada tax commission.

* * *

8. All other property shall be assessed by the county assessors, except that the valuation of land, livestock and mobile homes shall be established

for assessment purposes by the Nevada tax commission as provided in [NRS 361.325](#).

* * *

ANALYSIS

Property subject to taxation in Nevada is assessed at thirty-five percent (35%) of full cash value. [NRS 361.225](#). All taxable property is appraised and assessed by the assessor of the county where the property is located with the sole exceptions of those classes of property which the Nevada Tax Commission is specifically directed to value. [NRS 361.315](#), [361.320](#), *supra* (interstate/intercounty property), and [361.325](#) (livestock, agricultural land, mobile homes).

All railroads in Nevada own property of an “interstate and intercounty nature,” within the meaning of [NRS 361.320](#), subsection 1, *supra*, which properties are centrally assessed by the Nevada Tax Commission. Under [NRS 361.320](#), subsection 2, *supra*, the Nevada Tax Commission is directed to “* * * establish and fix the valuation of the franchise, if any, and all physical property *used directly in the operation of any such business* * * *” and apportion such valuation on a mile-unit basis. (Italics added.) *See State v. Nevada Power Co.*, [80 Nev. 131](#) (1964). The determinative question is, therefore, whether or not railroad right-of-way properties leased to others for non-railroad purposes are “* * * used directly in the operation of any such business. * * *”

After a review of similar statutes in many sister states, it was found that the statutes are variously worded to provide that centrally assessed properties include only properties “owned or operated” by such business, Ohio Revised Statutes § 5727.07; “used and/or held for use in operation of the company as such,” Arkansas Statutes of 1947 Annotated § 84-601; used in the “continuous operation” of such business, Arizona Revised Statutes § 42-765; and, “used in the operation of any railway,” Iowa Code Annotated § 434.1. Although many statutes contain language similar to [NRS 361.320](#), none was found with identical language. Several state appellate courts have interpreted such statutory provisions to determine the limits on the definitions of centrally assessed properties. In *United New Jersey Railroad and Canal Co. v. Jersey City*, 26 At. 135 (N.J. 1893), the court stated:

We think that where an authorized right of way has been acquired, over which a railroad has been constructed, and is in good faith operated, which right of way is not devoted to another purpose, it is used for railroad purposes, within the meaning of the statute considered, although it may not, for the time being, be wholly occupied by tracks or other railroad appliances. The part of it which awaits railroad occupation, upon the demand of necessity, is in use, like the curtilage to a dwelling house or the sides of a country highway. * * * It, however, is to be added that we are also of opinion that, when any part of the lands which lie within such right of way is used or appropriated to purposes not incident to the proper construction, maintenance, and management of the railroad, or to the use of it by the corporation as a carrier of goods and passengers, it cannot then be said to be used for railroad purposes, and will be the subject of local taxation.

Similarly, in *Atchison, Topeka, and Santa Fe Railway Co. v. Wyandotte County*, 168 P. 687, 688 (Kan. 1917), the Supreme Court of Kansas stated:

When land is obtained by a railroad company and incorporated into its right of way, yards, terminals, stations, and the like, and is actually used in the operation of the railroad, it is to be assessed by the state tax commission,

and not by the local authorities. Property owned by a railroad company and held as an investment for profit, and in no way connected with the use and operation of the railroad, is subject to assessment by the local authorities, and not by the tax commission. When property, however acquired or previously held, is incorporated into the right of way or yards of a railroad, or is otherwise devoted to the use and operation of a railroad, it becomes taxable by the tax commission and cannot be assessed or taxed by local authorities.

The applicable statute in Nevada, [NRS 361.320](#), subsection 2, *supra*, is limited in its application to properties “* * * *used directly* in the operation of any such business * * *,” (italics added), therefore all railroad properties not so used are to be locally assessed in the situs county. [NRS 361.320](#), subsection 8, *supra*. The question of which properties are used “directly” in the operation of the Southern Pacific line, and which are not, is primarily an objective one since there is no requirement that any such use be “necessary” or “reasonable.” In other words, those railroad properties which are *actually* used directly in the railroads’ operation are to be assessed by the Nevada Tax Commission, all other taxable properties are to be assessed by the appropriate county assessors. It should be noted that a particular parcel of right-of-way land may be vacant and undeveloped, and remain properly classified as centrally assessed property. United N.J.R. and Canal Co., *supra*. However, once any right-of-way property is leased or otherwise used primarily for non-railroad purposes, such property is subject to local county assessment procedures.

CONCLUSION

Properties of Southern Pacific located within its railway right-of-way which are leased to others for non-railroad uses are not “used directly in the operation” of the railroad within the meaning of [NRS 361.320](#). Such leased right-of-way properties are to be assessed for property tax purposes by the appropriate county assessors, rather than the Nevada Tax Commission.

Respectfully submitted

ROBERT LIST
Attorney General

By: James D. Salo
Deputy Attorney General

OPINION NO. 121 MULTISTATE TAX COMMISSION AUDITS—The Nevada Tax Commission has the statutory power to authorize the Multistate Tax Commission to review files and records and to perform interstate audits.

Carson City, March 23, 1973

Mr. John J. Sheehan, Executive Secretary, Nevada Tax Commission, 300 Blasdel Building, Carson City, Nevada 89701

Dear Mr. Sheehan:

The State of Nevada is a party state to the Multistate Tax Commission (hereinafter M.T.C.) by virtue of the adoption of the Multistate Tax Compact (hereinafter “Compact”)

by the 1967 Session of the Nevada State Legislature. Statutes of Nevada 1967, 998. By the terms of the Compact and applicable Nevada law, the Secretary of the Nevada Tax Commission is Nevada's representative "member" on the M.T.C. [NRS 376.010](#), Art. VI, Sec. 1(a); 376.020; 360.020; 360.120. In this capacity, you have requested the opinion of this office concerning the authority of the Nevada Tax Commission to participate in "interstate audits" pursuant to the terms of the Compact.

QUESTION

Does the Nevada Tax Commission have the statutory power to authorize the Multistate Tax Commission, or its employees, to audit the books, records, equipment and operations of designated persons or corporations who may be liable for taxes due the State of Nevada?

ANALYSIS

The relevant statutes are:

372.730 The tax commission may employ accountants, auditors, investigators, assistants and clerks necessary for the efficient administration of this chapter, and may delegate authority to its representatives to conduct hearings, prescribe regulations or perform any other duties imposed by this chapter. [Identical provisions are contained in [NRS 374.735](#) and Chapter 377, when applicable.]

372.740 The tax commission, or any other person authorized in writing by it, may examine the books, papers, records and equipment of any person selling tangible personal property and any person liable for the use tax and may investigate the character of the business of the person in order to verify the accuracy of any return made, or, if no return is made by the person, to ascertain and determine the amount required to be paid. [Identical provisions are contained in [NRS 374.745](#) and Chapter 377, when applicable.]

The Compact, Article VIII, specifically provides for interstate audits of the accounts, books, papers and records of taxpayers "acting as a business entity in more than one state." [NRS 376.010](#), Art. II, Sec. 3, and Art. VIII. As a party state in the M.T.C., and pursuant to the terms of the Compact, the State of Nevada is given the authority to participate in "interstate audits," either performed within or without the State. [NRS 376.010](#), Art. VIII. Nevada specifically adopted Article VIII, Interstate Audits, by separate specific reference in Statutes of Nevada 1967, 1011. [NRS 376.060](#); [NRS 376.010](#), Art. VIII, Sec. 1. Therefore, the authority of the State of Nevada to participate in interstate audits appears to be established, absent contrary law. *See* Attorney General's Opinion No. 476, dated January 8, 1968, which upheld the constitutionality of the Compact.

As a practical matter, since Nevada imposes no income taxes, the primary interstate tax liability likely to arise under Nevada law would be in the nature of a sales or use tax liability. [NRS Chapters 372](#), 374, and 377. To the present date, the State of Nevada has not participated in or received information from any audit made by the M.T.C. staff auditors.

[NRS Chapter 360](#) defines the composition and general powers of the Nevada Tax Commission. The Secretary of the Nevada Tax Commission may employ clerical or expert assistance, [NRS 360.140](#), subsection 1, and the Nevada Tax Commission may "exercise general supervision and control over the entire revenue system of the state." [NRS 360.200](#). In addition, the Sales and Use Tax Act, the Local School Support Tax Act,

and the County-City Relief Tax Act each authorize the Nevada Tax Commission to employ accountants, auditors, and other employees to examine the books, papers, records and equipment of persons liable for sales or use taxes. [NRS 372.730](#), [372.740](#), [374.735](#), [374.745](#), and Chapter 377, when applicable, *supra*.

Auditors and accountants, as such, are not positions in the “unclassified service” under the State Personnel System classification. [NRS 384.140](#). Therefore, such state employees are in the “classified” service of the State of Nevada. [NRS 284.150](#), subsection 1. As a result, all appointments to positions as auditors and accountants for the State of Nevada “shall be made according to merit and fitness from eligible lists prepared upon the basis of examination, which shall be open and competitive. * * *” [NRS 284.150](#), subsections 2 and 3.

The question arises as to whether or not auditors and staff of the M.T.C. must comply with the requirements for appointment to the “classified service” before performing audits on behalf of the M.T.C. and the State of Nevada.

The staff members of the M.T.C. are not employed by the State of Nevada, nor other party states; rather, they are employed by and answer to the M.T.C. itself. By adoption of the Compact, the Legislature of Nevada tacitly approved of such employment by the M.T.C., “(i)rrespective of the civil service, personnel or other merit system laws of any party state. * * *” [NRS 376.010](#), Art. VI, Sec. 1(g). When and if the State of Nevada participates in, or receives information from an audit performed by the M.T.C. staff auditors, the State only will receive the end result of such audits without maintaining direct daily control over the audits in the field. Any charges levied by the M.T.C. applicable to the State of Nevada would be for the service performed by the M.T.C. in performing an audit in order to reimburse the costs of such an interstate audit, [NRS 376.010](#), Art. VIII, Sec. 2, and, no compensation is provided for from the State of Nevada to any M.T.C. staff members. Therefore, it is the opinion of this office that M.T.C. auditors and staff who perform audits on behalf of the State of Nevada are not employees of this State, and are not subject to the provisions of the State Personnel System classification and qualification requirements. The M.T.C. and its staff are, in effect, an independent contractor which may perform specific audits at the request of the State of Nevada and be compensated for such audits on a project by project basis.

Even if the Compact as adopted by the Nevada Legislature in 1967 did not specifically authorize such audits by the M.T.C., which it does, the Nevada Tax Commission has the authority to employ independent contractors to perform non-reoccurring projects. [NRS 284.173](#), [372.740](#), [374.745](#), and Chapter 377, *supra*.

The qualifications and compensation of M.T.C. auditors is a matter within the province of the M.T.C. itself. [NRS 376.010](#), Art. VI, Sec. 1(g). Under applicable Nevada law, one need not be a qualified auditor to be authorized to view tax records. [NRS 372.740](#), [374.745](#), and Chapter 377, *supra*. In fact, only a small percentage of the present Nevada Tax Commission staff is composed of auditors qualified under the State Personnel System.

CONCLUSION

The Nevada Tax Commission has the statutory power to authorize the Multistate Tax Commission to review files and records, and perform interstate audits, pursuant to the terms of the Multistate Tax Compact.

Respectfully submitted,

ROBERT LIST
Attorney General

By: James D. Salo

OPINION NO. 122 SALES AND USE TAX RECORDS—MULTISTATE TAX COMMISSION—Sales and use tax records may be examined by the Multistate Tax Commission upon proper authorization by the Governor pursuant to the terms of the Multistate Tax Commission upon proper authorization by the Governor pursuant to [NRS 372.750](#), [374.755](#), and Chapter 377.

Carson City, March 23, 1973

Mr. John J. Sheehan, Executive Secretary, Nevada Tax Commission, 300 Blasdel Building, Carson City, Nevada 89701

Dear Mr. Sheehan:

The State of Nevada is a party to the Multistate Tax Commission (hereinafter M.T.C.) by virtue of the adoption of the Multistate Tax Compact (hereinafter “Compact”) by the 1967 Session of the Nevada State Legislature. Statutes of Nevada 1967, 998. By the terms of the Compact and applicable Nevada law, the Secretary of the Nevada Tax Commission is Nevada’s representative “member” on the M.T.C. [NRS 376.010](#), Art. VI, Sec. 1(a); 376.020; 360.120. In this capacity you have requested the opinion of this office concerning the “confidentiality” provisions contained in [NRS Chapters 372](#), 374, and 377, as well as [NRS Chapter 376](#) (Compact).

QUESTION

Are auditors of the Multistate Tax Commission subject to the confidentiality provisions found in [NRS Chapters 372](#), 374, and 377?

ANALYSIS

The relevant statutes are:

372.750 1. It shall be a misdemeanor for any member or official or employee of the tax commission to make known in any manner whatever the business affairs, operations or information obtained by an investigation of records and equipment of any retailer or any other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return or copy thereof, or any book containing any abstract or particulars thereof to be seen or examined by any person not connected with the tax commission.

2. The governor may, however, by general or special order, authorize examination of the records maintained by the tax commission under this chapter by other state officers, by tax officers of another state, by the Federal Government, if a reciprocal arrangement exists, or by any other person. The information so obtained pursuant to the order of the governor shall not be made public except to the extent and in the manner that the order may authorize that it be made public.

3. Successors, receivers, trustees, executors, administrators, assignees and guarantors, if directly interested, may be given information as to the

items included in the measure and amounts of any unpaid tax or amounts of tax required to be collected, interest and penalties.

[Identical provisions are contained in [NRS 374.755](#) and Chapter 377, when applicable.]

376.010, Multistate Tax Compact, Art. VIII, Section 2 Any party State or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the Commission to perform the audit on its behalf. In responding to the request, the Commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The Commission may enter into agreements with party States or their subdivisions for assistance in performance of the audit. The Commission shall make charges, to be paid by the State or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

376.010, Multistate Tax Compact, Art. VIII, Section 6 Information obtained by any audit pursuant to this Article shall be confidential and available only for tax purposes to party States, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the States or subdivisions on whose account the Commission performs the audit, and only through the appropriate agencies or officers of such States or subdivisions. Nothing in this Article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

As a party state in the M.T.C., and pursuant to the terms of the Compact, the State of Nevada may participate in “interstate audits,” either within or without this State. [NRS 376.010](#), Art. VIII; 376.060. One purpose of such audits, in the words of the Compact, is to “(f)acilitate proper determination of State and local tax liability of multistate taxpayers. * * *” [NRS 376.010](#), Art. 1, Sec. 1. As a practical matter, since Nevada imposes no income taxes, the primary interstate tax liability likely to arise under Nevada law would be in the nature of a sales or use tax liability. [NRS Chapters 372](#), 374, and 377. To the present date, the State of Nevada has not participated in or received information from any audit made by the M.T.C. staff auditors.

Confidentiality provisions have been incorporated into Nevada’s Sales and Use Tax, the Local School Support Tax, and the County-City Relief Tax Acts. [NRS 372.750](#), *supra*, 374.755, and Chapter 377. Although these confidentiality statutes have never been interpreted by our courts, their meaning is clear. It is a misdemeanor for the Nevada Tax Commission or its agents to disclose, or to allow the review of information obtained by it, concerning the business affairs or the accounting date of any person. The effect of the above-cited statutes, *standing alone*, is to bar the Nevada Tax Commission or its agents from divulging business or accounting information from taxpayers’ files to any person. The language of these statutes is sufficiently general to prohibit disclosure of such information to the M.T.C., unless such disclosure is made pursuant to an appropriate order of the Governor, as discussed below.

It is noteworthy that the Compact was adopted by the 1967 Session of the Nevada State Legislature, 11 years after the enactment of the Sales and Use Tax Act, and during the identical session which adopted the Local School Support Tax Act. The Compact specifically provides that the M.T.C. “(s)hall have access to and may examine * * * accounts, books, papers, records, and other documents * * *” in performing interstate audits, subject to the confidentiality laws of the party requesting the audit. [NRS 376.010](#), Art. VIII, Secs. 2, 6; 376.060. The Legislature is presumed to know existing law at the

time of enactment of legislation. *Cf. State ex rel. Walsh v. Buckingham*, [58 Nev. 342](#) (1938).

The determinative question is, therefore, whether or not the confidentiality provisions in the Sales and Use Tax Act conflict with the interstate audit provisions found in the Compact.

It is the opinion of this office that there is no conflict between the Compact and the confidentiality provisions discussed above. The Compact clearly states that the “(a)availabiltiy of information shall be in accordance with the laws of the States of subdivisions on whose account the (M.T.C.) performs the audit. * * *” [NRS 376.010](#), Art. VIII, Sec. 6, *supra*. Subsection 2 of each of the above-discussed confidentiality statutes empowers the Governor of Nevada, by general or special order, to authorize the examination of records maintained by the Nevada Tax Commission under the appropriate chapters, by “other state officers, by tax officers of another state, * * * or by any other person.” [NRS 372.750](#), subsection 2, *supra*, [374.755](#), subsection 2, and Chapter 377. In addition, the Governor is empowered by the same provisions to order the extent to which such information may, or may not, be made public. Compare, [NRS 376.010](#), Art. VIII, Sec. 6, *supra*. This delegated gubernatorial power to waive or modify the scope of the confidentiality statutes was part of the Local School Support Tax Act adopted by the Nevada State Legislature in 1967, as well as part of the original Sales and Use Tax Act, as adopted by a referendum vote of the electorate in 1956.

CONCLUSION

The Nevada Tax Commission and its agents may only divulge tax records and information within the scope of [NRS 372.750](#), [374.755](#), and Chapter 377 to the Multistate Tax Commission if the Governor has authorized such disclosures under terms and conditions he deems appropriate. The auditors employed by the Multistate Tax Commission who review such records of the Nevada Tax Commission would be subject to such limitations on disclosure of information as the Governor provided in his order authorizing the review.

Respectfully submitted,

ROBERT LIST
Attorney General

By: James D. Salo
Deputy Attorney General

OPINION NO. 123 CASINO ENTERTAINMENT TAX—SHOWROOM PHOTOGRAPHS—Casino showroom photographs are subject to casino entertainment tax, but not retroactively; prior tax payments are not refundable.

Mr. Philip P. Hannifin, Chairman, State Gaming Control Board, 515 East Musser Street, Carson City, Nevada 89701

Dear Mr. Hannifin:

This is in response to your recent inquiries concerning the imposition of the casino entertainment tax, [NRS 463.401](#) to [463.406](#), inclusive, upon sales of photographs taken in casino showrooms. The several inquiries are set forth as follows:

QUESTIONS

1. Is the casino entertainment tax applicable to photographs taken in casino showrooms?
2. If the tax is applicable, should it be imposed upon sales for the past 3 years?
3. If the tax is applied prospectively only, are licensees who have heretofore paid the tax entitled to a refund or credit?

FACTS

We understand the pertinent facts and circumstances to be as follows. In many entertainment showrooms of the large hotel-casino complexes, the patrons present for the shows may have photographs taken of themselves and others in their party. The photographs are generally taken before the entertainment begins and are delivered to, and paid for, after the cessation of the entertainment show, normally while the patron is still within the confines of the showroom, or immediately upon their exit. The photographic service is often provided by a concessionaire under an arrangement with the gaming licensee wherein payments are made by the concessionaire to the licensee at a fixed monthly rate, or a percentage of sales, or a combination of both. Space upon the premises where the photographs can be processed is quite often provided.

We further understand that although a few gaming licensees have voluntarily paid the tax on sales of photographs taken within their showrooms, a majority of the licensees within the State who are generally subject to the casino entertainment tax have neither reported the sales nor made any tax payments on photographs. Also there has been no reporting or payment by the concessionaires.

You have also advised that for all practical purposes neither the Nevada Gaming Commission nor the State Gaming Control Board has heretofore advised their licensees that such a tax is applicable and that the state gaming authorities were unaware of the payments made by the few establishments paying the tax. This apparently resulted from the manner in which the casino entertainment tax was generally reported and paid, i.e., the reporting and paying was combined with all other applicable casino entertainment tax payments and no break out and allocation of the tax was made to the various incidences of the casino entertainment tax.

QUESTION ONE

Is the casino entertainment tax applicable to photographs taken in casino showrooms?

ANSWER

It is the opinion of this office that the casino entertainment tax is applicable to photographs taken within casino hotel showrooms.

ANALYSIS

The casino entertainment tax was first adopted by the 1965 Nevada Legislature to take advantage of a then contemplated decrease in the Federal Admission and Cabaret Excise Taxes imposed under 26 U.S.C. § 4231. Statutes of Nevada 1965, Chapter 525. The tax as now set forth is imposed at the rate of 10 percent upon all amounts paid for admission, merchandise, refreshment or service upon the licensed premises which are in a casino entertainment status. The taxing and operative provisions of the casino entertainment tax, while apparently adopting the general concepts of 26 U.S.C. § 4231 when that federal tax was in force, are tailored to the general peculiarities of the gaming industry.

There are several operative sections of the casino entertainment tax which require examination to determine the applicability of the tax to showroom photographs. Subsection 1 of [NRS 463.401](#) specifies the circumstances under which the tax is imposed; generally, these are as follows: (1) a licensed gaming establishment having more than 50 slot machines or more than 3 table games; (2) entertainment is afforded to the patrons of the casino; and, (3) the entertainment is afforded in reference to the selling of food, refreshment or service provided by a casino meeting the qualifications of subsection 1 of [NRS 463.401](#). Subsection 3 of [NRS 463.401](#) places the burden of payment of the tax upon the licensee.

The foregoing sections are rather broad and general and the Legislature intended that the Nevada Gaming Commission establish such rules and guidelines for the administration of the tax as was felt necessary. [NRS 463.402](#), subsection 1(b). This the commission did by the adoption of Regulation 13 of the Rules and Regulations of the Nevada Gaming Commission and the State Gaming Control Board on December 21, 1965, pursuant to the provisions of [NRS 463.145](#) and [463.150](#), governing the promulgation of gaming regulations under the provisions of the Gaming Control Act, the board and commission being specifically exempt from the Administrative Procedures Act by virtue of [NRS 233B.030](#), subsection 1(d), 1(e).

The imposition of the tax upon showroom photographs turns upon whether such photographs fall within one of the several categories enumerated in [NRS 463.401](#), subsection 1. Although a question could possibly be raised as to whether the photographs constitute "merchandise" sold to the patrons or a "service" provided the patrons, the sale thereof is nonetheless a taxable incident under [NRS 463.401](#), subsection 2, which imposes the tax " * * * upon all amounts paid for * * * merchandise, * * * or service. * * * " See to similar effect Rev. Rul. 57-263, 1957-1 Cum. Bull. 387, holding photographs of patrons to be taxable under the now repealed Federal Cabaret Tax, 26 U.S.C. § 4321(6).

In determining the time frame in which the tax is applicable no distinction need be made as to when the photographs are taken or when payment is made as long as the taxable incident is generally and logically associated and connected with the entertainment afforded the patrons. As you have indicated, the general nature of a casino showroom operation is such that photographs are normally taken prior to the performance, quite often during the dining period in the case of "dinner shows," i.e., those entertainment programs which include the privilege of receiving a meal in conjunction with seeing a performance, the latter being predicated upon the payment for the meal, or, prior to the performance in the case of "cocktail" or "midnight" shows wherein no food is served but a beverage minimum is required to be paid by the patron as an entitlement to observe the performance. The payment for food, refreshment, service, or merchandise becomes a taxable event when it occurs in that portion of the licensed premises in a casino entertainment status.

Regulation 13.020, subsection 8, designates when a casino entertainment status is achieved, thus establishing when a given transaction becomes taxable under the provisions of [NRS 463.401](#), subsection 2. The regulation reads as follows:

Casino entertainment status is attained either at the time the entertainment starts or at the time any charge for food, refreshment or merchandise, or other charge, such as admission, entertainment, cover, minimum, or other similar charge, is imposed upon the patrons which affords them the right to be present during the entertainment. This status is retained until the termination of all taxable entertainment for each day's operation. Therefore, actual payment of the charges may be made before or after the time the area is in a casino entertainment status and still be subject to the tax.

Thus, taxable status is not limited to when the entertainment is in actual progress, but rather, the regulation contemplates a unity between entertainment and the incident of taxation and consequently a taxable status may be achieved prior to, or retained after, the actual performance.

The foregoing subsection has to a great extent eliminated the problem of determining a taxable status where the entertainment is not continuous or where payments are made either prior to, or after, the performance. Thus, a problem which greatly plagued the administration of the Federal Cabaret Tax has for the most part been avoided. *See Lethert v. Culbertson's*, 313 F.2d 506 (8th Cir. 1963), and various cases examined therein.

We therefore hold that the casino entertainment tax is applicable upon photographs taken prior to, and subsequent to, a performance and the tax continues to be applicable although payment and delivery of the photographs may be made subsequent to the conclusion of the performance.

QUESTION TWO

If the tax is applicable, should it be imposed upon sales for the past 3 years?

ANSWER

The tax should not be imposed retroactively upon past sales.

ANALYSIS

Because our holding that the tax is applicable is in part based upon a preexisting regulation, the appropriateness of a retroactive application, to some degree, is dependent upon the tenor of our opinion and the effect given to the opinion by the state gaming authorities. As a general proposition, administrative rulings may have both prospective and retrospective effect depending upon the nature of the ruling and the manner in which it arises; that is, a ruling arising out of an adjudicative proceeding, by the very nature of such a proceeding, must be given retrospective effect at least to the parties involved. However, when the ruling is one which may be classified as interpretive, the better view is that the rule should be applied in a prospective manner only and should not be given a retroactive effect, particularly where to do so would work an unexpected and undue hardship by those persons who may be presently governed by the ruling. *See American Bar Foundation, State Administrative Law 267-270 (1965)*. If an agency is provided a choice between the two avenues of approach, the latter, i.e., interpretation, is preferred.

In the matter before us we understand that generally neither the gaming licensee nor the concessionaires have made any financial arrangements for the payment of the tax on past photographic sales, and that they undoubtedly would have made appropriate arrangements and adjustments in either or both the purchase price and their concession agreements had it been known the tax was applicable. The tax imposition on a retroactive basis would undoubtedly create an extreme financial hardship in many cases if the tax is now imposed upon sales for the preceding 3 years. [NRS 463.142](#). *Hercules Powder Company v. State Board of Equalization*, 66 Wyo. 268, 208 P.2d 1096 (1949). As you have advised, there is no indication that the State has heretofore formally advised its gaming licensees that the tax is applicable, and that the question has not been raised until recently, which in turn prompted the request for an opinion. Where the tax has been submitted, we are advised that the reporting and payment were grouped together with other casino entertainment taxes paid by the licensee and was made without any designation as to what incidence of tax was being recorded and paid. This last matter leads us to consideration of your third inquiry concerning the refunding of past taxes collected.

QUESTION THREE

If the tax is applied prospectively only, are licensees who have heretofore paid the tax entitled to a refund or credit?

ANSWER

Any prior payments made need not be refunded.

ANALYSIS

You have asked whether the State is obligated to refund, or give credit for, any casino entertainment tax heretofore paid on showroom photographs.

Although the tax properly should not be imposed retroactively on past sales, this is not to say that the past tax payments heretofore made were improper or erroneously made thereby warranting a refund or a tax credit to the licensee. Our response to your first and second inquiries in effect states that the tax has been applicable since the adoption of the casino entertainment tax by our Legislature, but that because of the circumstances involved, it should not be applied on a retroactive basis. Consequently, your third inquiry is governed by [NRS 463.387](#), which states:

State gaming license fees erroneously collected may be refunded, upon the approval of the commission, as other claims against the state are paid.

This section provides recovery only in those instances where the sums paid were erroneously collected. This does not provide authorization for the refund of the tax voluntarily paid on a legitimate taxable incident although the nonpayment heretofore would not impose upon the licensee any penalties since the ruling as provided herein should be applied on a prospective basis only.

CONCLUSIONS

In accordance with the foregoing, we respectively advise as follows:

1. The casino entertainment tax is applicable to showroom photographs; and,
2. The tax should not be applied retroactively; and,
3. Any taxes heretofore paid on showroom photographs are not refundable.

Respectfully submitted,

ROBERT LIST
Attorney General

By: David C. Polley
Deputy Attorney General

OPINION NO. 124 STATE CONTRACTOR'S LICENSE—A state contractor's license held in the name of a corporation which has been merged into another corporation may not be renewed in the name of the surviving corporation. Such renewals are void ab initio and a corporation holding such a void license may not bid on contracting jobs. The surviving corporation should file an application for a new license.

Carson City, April 3, 1973

The Honorable Jack R. Petitti, Vice Chairman, Board of County Commissioners, Clark County Courthouse, Las Vegas, Nevada

Dear Mr. Petitti:

You have requested an opinion regarding the validity of a renewed state contractor's license held by Gulf Oil Corporation, the survivor of a merger into which the previous holder of the license, Industrial Asphalt, Inc., was merged.

FACTS

The Clark County Board of County Commissioners has advertised for bids for a contract to pave a runway at the McCarran International Airport. Upon opening the sealed bids, it was discovered that the low bidder was the "Gulf Oil Corporation, acting through Industrial Asphalt, a division of Gulf Oil Corporation." The contract has not yet been awarded.

In 1964 Industrial Asphalt of California, Inc., a Delaware corporation and a wholly owned subsidiary of Gulf Oil Corporation, applied for and received a state contractor's license, No. 8209, from the Nevada State Contractor's Board. On November 9, 1964, the name of the corporation was changed to Industrial Asphalt, Inc. In 1965, and every year thereafter until 1972, state contractor's license No. 8209 was renewed by the Contractor's Board in the name of Industrial Asphalt, Inc. On December 10, 1971, Industrial Asphalt, Inc. and a number of other companies were merged under Pennsylvania law into Gulf Oil corporation being designated the survivor. The merger took effect on December 31, 1971. At this time Industrial Asphalt, Inc. was operating under a 1972 renewal of license No. 8209, applied for on November 19, 1971. The following year the Contractor's Board issued a 1973 renewal of license No. 8209, applied for on November 19, 1972, to Industrial Asphalt, Division of Gulf Oil Corporation.

QUESTIONS

1. Was state contractor's license No. 8209 validly renewed by the Nevada State Contractor's Board?
2. Was Gulf Oil Corporation, acting through Industrial Asphalt, a division of Gulf Oil Corporation, legally permitted to bid for this contract?

ANALYSIS—QUESTION ONE

Although wholly owned by the Gulf Oil Corporation, Industrial Asphalt, Inc., until the merger in December 1971, was in the position of subsidiary corporation. A subsidiary, though controlled by the parent, is still a separate legal entity. The subsidiary and the parent corporation each have an independent existence, except where considerations such as fraud requires one to "pierce the corporate veil." *Superior Coal Co. v. Dept. of Finance*, 377 Ill. 282, 36 N.E.2d 354, 358 (1941); *Order of Twelve Knights and Daughters of Tabor v. Fridia*, Tex.Civ.App. 91 S.W.2d 404 (1936). As an independent corporation, therefore, Industrial Asphalt, Inc. was entitled to apply for and receive a contractor's license in its own name and, furthermore, to obtain renewals of the license in its own name.

The merger, however, of Industrial Asphalt, Inc. into the Gulf Oil Corporation changes this radically. The merger took place under Pennsylvania law. Pennsylvania's corporations law provides with respect to mergers:

Upon the merger or consolidation becoming effective, the several corporations parties to the plan of merger or consolidation shall be a single corporation which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation designated in the plan of merger as the surviving corporation, and in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation. The separate existence of all corporations parties to the plan of merger or consolidation shall cease, except that of the surviving corporation, in the case of a merger. * * * 15 P.S. § 1907.

Therefore, the merger of corporations under Pennsylvania law results in a new corporation, constituting an entity distinct from its constituent companies, which are deemed dissolved and cease to exist on the completion of the merger. *Pennsylvania Co. for Insurance on Lives and Granting Annuities v. C.I.R.*, 75 F.2d 719 (1935). Nevada's law has the same effect. [NRS 78.495](#) provides:

When an agreement of merger * * * has been signed, acknowledged and filed, as required by this chapter, for all purposes of the laws of this state the separate existence of all the constituent corporations, except that of the surviving corporation in case of merger, shall cease. * * *

Thus we see that the result of the merger between Industrial Asphalt, Inc. and Gulf Oil Corporation is that Industrial Asphalt has ceased to exist as a corporate body. This is not the case of a mere name change, as occurred in 1964 when Industrial Asphalt merely gave notice of its name change and still received a renewal of its license in its own right. The merger had the effect of completely destroying the corporate existence of Industrial Asphalt, Inc. The Gulf Oil Corporation enters the scene as a different, independent corporate body. The Industrial Asphalt which now exists is a division of Gulf Oil Corporation and, therefore, may not receive a license independent of the corporation of which it is a part. Accordingly, to give Gulf Oil Corporation a state contractor's license by renewing the license of a corporation which no longer exists is illegal.

The articles of merger state, as provided by both Pennsylvania and Nevada law (15 P.S. § 1907; [NRS 78.495](#)), that the "rights, privileges, powers and franchises" of all constituent corporations vest in the surviving corporation. But it is a general rule that licenses are personal and nontransferable. 51 Am.Jur.2d § 3, Licenses and Permits. In addition, [NRS 624.035](#) specifically states that a contractor's license may not be used by any person other than the person to whom the license was issued. The statute further prohibits the assignment or transfer of the contractor's license. Further, the State Contractor's License Law and Rules and Regulations, Article VI, Sec. 1, provides in part:

* * * a licensee shall not permit or allow another not appearing as a partner or a party in interest on the license, to have a proprietary interest in his contracting business or license.

Therefore, since the holder of state contractor's license No. 8209 has ceased to exist, the Contractor's Board may not validly confer a contractor's license on a new party by renewing an old license. Gulf Oil Corporation, being a new party on the scene, must comply with [NRS 624.250](#) and apply for a new license and, in all other respects, satisfy the Contractor's Board that it has the responsibility and expertise to conduct a contractor's business in Nevada.

ANALYSIS—QUESTION TWO

Since Industrial Asphalt, Inc. ceased its existence as a corporate entity on December 31, 1971, Gulf Oil Corporation could not obtain a contractor's license through renewal of Industrial Asphalt's license. Indeed, since Industrial Asphalt, Inc. ceased existence on that date, Gulf Oil corporation was not entitled to use the 1972 license renewal applied for by Industrial Asphalt, Inc. on November 19, 1971, and granted by the Contractor's Board prior to the merger. As stated above, it was necessary for Gulf Oil Corporation as a new party on the scene to file an application for a new license under [NRS 624.250](#). Since it did not do so, Gulf Oil Corporation was not, and is not, a validly licensed contractor in Nevada.

The fact that the State Contractor's Board, the public body charged with granting contractor's licenses, countenanced this renewal procedure does not mean that Gulf Oil Corporation is entitled to this license. A public body may exercise only those powers conferred on it by statute, and where a particular mode of procedure is ordained, all other procedures are excluded. *Caton v. Frank*, [56 Nev. 56](#), 44 P.2d 521 (1935); *State v. Central Pacific Railroad*, [21 Nev. 270](#), 30 P. 693 (1892). Under Chapter 624 of NRS all persons desiring a contractor's license must apply for it under [NRS 624.250](#). Renewals may be granted only to those who have previously applied for licenses and were validly granted them.

Nor is Gulf Oil Corporation entitled to contractor's license No. 8209 by virtue of the fact it now possesses it. A license is not a contract between the sovereign and the licensee. It is not property in the constitutional sense. It does not confer a vested or absolute right, but only a personal privilege which the sovereign, in the exercise of its police powers, may modify or resolve as it sees fit. *Wallace v. Reno*, [27 Nev. 71](#), 73 P.528 (1903).

The fact that Gulf Oil Corporation may have acted on this license in all good faith and to its detriment does not estop the State from denying its validity. Estoppel will not be applied where public officials have acted wholly beyond their authority. The principles of equitable estoppel will not be applied to deprive the public of the protection of a statute because of the mistaken action of public officials. *Petty v. Borg*, 106 Utah 524, 150 P.2d 776 (1944); *McComb v. Homemaker's Handicraft Co-op*, 176 F.2d 633 (1949), cert. Denied, 338 U.S. 900 (1949).

It is sufficient to say that the principle of estoppel applicable to individuals is not applicable to the State or its municipal subdivisions or to state created agencies. Such bodies cannot be estopped by doing that which they had no authority to do. Persons dealing with agencies of government are presumed to know the legal limitations upon their power and cannot plead estoppel on the theory that they have been misled as to the extent of that power. * * * No person can claim to have altered his position for the worse by acts or promises which the law warns him he must not depend upon. *City of Birmingham v. Lee*, 254 Ala. 237, 48 so.2d 47, 55 (1950).

Gulf Oil Corporation, therefore, was not validly licensed as a contractor in Nevada. [NRS 624.230](#) provides:

It shall be unlawful for any person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, to engage in the business or act in the capacity of a contractor within this state *or to bid a job situated within this state without having a license therefor as provided in this chapter*, unless such person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, is exempted as provided in this chapter. (Italics added.)

Since Gulf Oil Corporation was not validly licensed as a contractor in Nevada, it is prohibited from bidding for the contract to pave the runways at McCarran International Airport. Since its bid was illegal, the Board of County Commissioners should disregard the Gulf Oil Corporation bid.

CONCLUSIONS

Industrial Asphalt, Inc., the holder of contractor's license No. 8209, ceased its corporate existence upon its merger with Gulf Oil Corporation on December 31, 1971. The State Contractor's Board, therefore, could not validly renew license No. 8209 for Gulf Oil Corporation. Gulf Oil Corporation should apply for a new contractor's license under [NRS 624.250](#) if it wishes to conduct a contractor's business in Nevada.

Since Gulf Oil Corporation was not validly licensed as a contractor in Nevada, it is prohibited by [NRS 624.230](#) from bidding for the contract to pave the runways at McCarran International Airport. The Board of County Commissioners should disregard Gulf Oil Corporation's bid.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 125 NEVADA CONSTITUTION, ARTICLE 10, SEC. 2; GROUND WATER BASINS—Special tax levied pursuant to [NRS 534.040](#) is within the constitutional five cents per dollar tax levy limitation if levied as an ad valorem tax, but is outside the five cents per dollar limitation if charged against water users.

Carson City, April 20, 1973

Mr. John J. Sheehan, Executive Secretary, Nevada Tax Commission, Room 300, Blasdel Building, Carson City, Nevada 89701

Dear Mr. Sheehan:

This is in response to the request for an opinion from this office interpreting Article 10, Sec. 2, of the Nevada Constitution.

QUESTION

Is a "special tax" levied pursuant to [NRS 534.040](#) to pay the salary of a ground water basin well supervisor and related expenses within the limitation on tax levies in Article 10, Sec. 2 of the Nevada Constitution?

STATEMENT OF FACTS

Several geographical areas of the State of Nevada have been established as "ground water basins" pursuant to [NRS 534.035](#). In addition, special taxes have been levied in several such ground water basins to raise funds for the salaries of "well supervisors" and other related expenses pursuant to [NRS 534.040](#). Conflicting opinions have arisen between members of the staff of the Nevada Tax Commission and local government officials as to whether or not such levies are included within the five cents per one dollar of assessed valuation tax limitation in Article 10, Sec. 2 of the Nevada Constitution.

Article 10, Sec. 2 of the Nevada Constitution states:

The total tax levy for all public purposes including levies for bonds, within the state, or any subdivision thereof, shall not exceed five cents on one dollar assessed valuation.

[NRS 534.040](#) reads in part:

1. Upon the initiation of the administration of this chapter in any particular basin, and where the investigations of the state engineer have shown the necessity for the supervision over the waters of such basin, the state engineer may employ a well supervisor and other necessary assistants, who shall execute the duties as provided in this chapter under the direction of the state engineer. The salaries of the well supervisor and his assistants shall be fixed by the state engineer.

2. The board of county commissioners shall levy a special tax annually, or at such time as the same is needed, upon all taxable property situated within the confines of the area so designated by the state engineer to come under the provisions of this chapter in such an amount as may be necessary to pay such salaries, together with necessary expenses, including the compensation and other expenses of the state well drillers' advisory board in the event the money available from the license fees provided for in [NRS 534.140](#) is not sufficient to pay such costs; but in designated areas within which the use of ground water is predominantly for agricultural purposes such levy shall be charged against each water user who has a permit to appropriate water or a perfected water right, and the charge against each water user shall be based upon the proportion which his water right bears to the aggregate water rights in the designated area. The minimum charge shall be \$1.

* * *

4. The proper officers of the county shall levy and collect such special tax as other special taxes are levied and collected, and such tax shall be a lien upon the property.

* * *

ANALYSIS

The constitutional limitation on the "total tax levy" found in Article 10, Sec. 2, *supra*, limits only the rate of annual *ad valorem* taxes on the assessed value of all taxable property. *Harris v. City of Reno*, 81 Nev. 256, 260 (1965); *State ex rel. Porterie v. Hunt*, 162 So. 777, 103 A.L.R. 9 (La 1935). The limitation is expressly applicable to the "* * * total tax levy for all *public purposes* including levies for bonds, within the state, or any subdivision thereof. * * *" (Italics added.) As a result, it must be determined whether or not the "special tax" levied pursuant to [NRS 534.040](#), *supra*, is an *ad valorem* tax for public purposes.

If the "special tax" under consideration is not an *ad valorem* tax, or, if the "special tax" does not serve a public purpose, it is outside the limitation and would be in the nature of a special assessment or other similar charge. *Harris v. City of Reno, supra*.

The determination of what a tax really is, is to be determined from its nature, and not its name. McQuillan, *Municipal Corporations*, Vol. 16, § 44.02; cited in *Harris v. City of Reno, supra*, at 260. The "special tax" authorized in [NRS 534.040](#), *supra*, may be levied in two distinct manners, depending upon whether or not the use of the ground water is "predominantly for agricultural purposes. * * *" [NRS 534.040](#), subsection 2, *supra*. Generally, the "special tax" is levied on "all taxable property situated within the" confines

of the ground water basin. [NRS 534.040](#), subsection 2, *supra*. In ground water basins with predominantly agricultural use of the ground water, the “special tax” levy is “* * * charged against each water user who has a permit to appropriate water of a perfected water right. * * *” [NRS 534.040](#), subsection 2, *supra*. (Italics added.) It must be decided whether this distinction in methods of levying the “special tax” affects the classification of the tax as an *ad valorem* property tax, or some other type of charge. *Cf. Harris v. City of Reno; In re Walker River Irr. Dist.*, [44 Nev. 321](#), 335 (1921).

When the “special tax” is levied on “all taxable property” within the basin, as is generally the case under [NRS 534.040](#), *supra*, it has the attributes of an *ad valorem* tax. It is denominated a “tax,” which the county commissioners are directed to “levy” on “all taxable property” within the designated basin. [NRS 534.040](#), subsection 2. It is therefore our conclusion that the “special tax” is an *ad valorem* tax when levied on “all taxable property” within the designated basin.

However, in situations where the special tax is “charged against each water user” in designated basins “within which the use of ground water is predominantly agricultural,” a different conclusion is reached. This is not a general *ad valorem* tax since it is *not* imposed on all taxable property and is only charged against actual water users. Under such a levy or charge procedure, the “special tax” acquires the attributes of a special assessment chargeable only against the benefited property owners, and not all taxable property within the area, and therefore the “special tax” is not an *ad valorem* tax when charged only against water users.

Regardless of the method of collection of the special tax under [534.040](#), subsection 2, a public purpose is served by collection of such revenue. The Nevada Legislature, in enacting [NRS Chapter 534](#), stated its purpose to be to “* * * prevent the waste of underground waters and pollution and contamination thereof, and to provide for the administration of the provisions thereof by the state engineer. * * *” [NRS 534.020](#), subsection 2. In addition, ground waters are declared to be public property, [NRS 534.020](#), subsection 1, and there can be little doubt that the protection of the State’s limited water supply serves a public purpose and protects the health and welfare of its citizens.

CONCLUSION

It is the conclusion of this office that the “special tax” provided for in [NRS 534.040](#), subsection 2, serves a public purpose. If such a tax is levied against “all taxable property” within a designated area it is an *ad valorem* tax within the limitation in Article 10, Sec. 2 of the Nevada Constitution. However, if the tax is levied against only the water users in basins with “predominantly agricultural use of the ground water,” it is a special assessment and is not within the scope of the aforementioned constitutional limitation.

Respectfully submitted,

ROBERT LIST
Attorney General

By: James D. Salo
Deputy Attorney General
Nevada Tax Commission

OPINION NO. 126 DISTRICT ATTORNEYS—LIMITATION ON PRIVATE PRACTICE—[NRS 252.120](#) prohibits a district attorney from representing a private client in any state or county civil action where the interests of the private client are adverse to those of the State of Nevada or any county thereof.

Carson City, April 25, 1973

The honorabale Mario L. Ventura, Esmeralda County District Attorney, P.O. Box 527,
Goldfield, Nevada 89013

Dear Mr. Ventura:

For the purposes of clarification and future application of [NRS 252.120](#), you have requested from this office an interpretation of this statute. Your specific inquiry is as follows:

QUESTION

Does [NRS 252.120](#), subsection 1, preclude a district attorney from representing a private client in any state or county civil action, either for the plaintiff or for the defendant, not only in the county wherein the district attorney or his deputy carry out their official duties, but also in any other county in the State of Nevada?

ANALYSIS

[NRS 252.120](#), subsection 1, provides:

1. No district attorney or partner thereof shall appear within his county as attorney in any criminal action, or directly or indirectly aid, counsel or assist in the defense in any criminal action, begun or prosecuted during his term; nor in any civil action begun or prosecuted during his term, in behalf of any person suing or sued by the state or any county thereof.

To facilitate interpretation, the above subsection may be logically broken down into three separate parts which would read as follows:

1. No district attorney or partner thereof shall appear within his county as attorney in any criminal action;
2. No district attorney or partner thereof shall directly or indirectly aid, counsel or assist in the defense in any criminal action, begun or prosecuted during his term;
3. No district attorney or partner thereof shall appear in any civil action begun or prosecuted during his term, in behalf of any person suing or sued by the State or any county thereof.

We deem it significant that the limiting language "within his county" does not appear in either of the latter two provisions. Instead, the language employed in the second and third parts is extremely broad in its terms and indicates with some certainty that the Legislature did not intend to restrict the private practice limitations contained therein to criminal and state or county civil cases arising only within the county where the district attorney conducts his official duties.

The statute was obviously intended to alleviate the risk of conflicts of interest where a district attorney or his partner undertake the representation of private interests adverse to those of the public.

[NRS 252.120](#) is somewhat unique in its wording. As a consequence, this office has been unable to locate any case law on the subject of interpretation. However, certain authorities have spoken to the issue of the ethical propriety of a district attorney representing private interests adverse to those of the public and these authorities lend persuasion to a broad reading of the statute.

In the case of *In re Wakefield*, 177 A. 319 (1935), the Supreme Court of Vermont concludes:

It is a matter of common knowledge, of which we take judicial notice, that it has been the practice of some state's attorneys to appear in another county in the state and defend a respondent charged with committing a crime in such other county, *or to appear in proceedings in which the state was an opposing party or had adverse interests*. Such practice is unethical and improper and it should not be followed or countenanced. A state's attorney in this state is not merely a prosecuting officer in the county in which he is elected. He is also an officer of the state, in the general matter of the enforcement of the criminal law. * * * (Italics added.)

In addition, the American Bar Association has issued an opinion concerning the propriety of a county attorney accepting employment to obtain a pardon or parole of one convicted of a crime in another county. The opinion states:

A county attorney is attorney for the state in the general matter of the enforcement of the criminal law, although the sphere of his activity is limited to a particular county. It would be manifestly improper for him to represent one whose conviction he had brought about in an attempt to obtain a pardon or parole. In so doing he would be nullifying, in the hope of personal gain, the results of the performance of his duty as attorney for the state. It is not different in principle when he seeks to nullify the results of the performance of duty by another attorney for the state with reference to the same general subject matter. *The statutory permission to practice law while in office must have been intended to be limited to matters in which the State is not a party*. For one county attorney to engage in undoing the work of another would present an appearance of confusion and pulling at cross purposes that would tend to diminish the public's confidence in and respect for law enforcement. The application for a pardon or parole appears to be a proceeding in which the state is interested adversely to the convict. The convict's representation should be left to those who are not attorneys for the state. In *Opinions 16, 30, 34 and 77* this committee has dealt with situations to which the general principles herein involved were applicable, and in each of which the conduct of the lawyers was held to be professionally improper. The question submitted is, therefore, answered in the negative. (ABA Comm. On Professional Ethics, Opinion No. 118 (1934).) (Italics added.)

CONCLUSION

[NRS 252.120](#) represents a clear legislative effort to remove from the individual conscience of the district attorney the option of choosing between divided loyalties where there is a serious risk that the public interest may be compromised in the interests of promoting a professional practice.

It is therefore the opinion of this office that [NRS 252.120](#) prohibits a district attorney from representing a private client in any state or county civil action where the interests of the private client are adverse to those of the State of Nevada or any county thereof.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 127 TAXICAB ALLOCATION—The Las Vegas Taxicab Authority must offer to all certificate holders proportionate allocations of taxicabs in keeping with existing allocations. Disproportionate allocations may be made if one or more certificate holders are unwilling or are unable to accept proportionate allocation, or when one or more certificate holders are shown to have failed the requisite standards of public convenience and necessity and have further failed an opportunity granted them to expand their services or facilities to meet such standards.

Carson City, April 27, 1973

The Honorable Harry M. Reid, Lieutenant Governor, State Capitol, Carson City, Nevada
89701

Dear Lieutenant Governor Reid:

You have requested an opinion on the following matter:

QUESTION

Must the Las Vegas Taxicab Authority allocate taxicabs among taxi companies on a proportionate basis in keeping with the present taxicab allocation?

ANALYSIS

It is provided in [NRS 706.8827](#) that:

A person shall not engage in the taxicab business unless he:

* * *

2. Obtains a certificate of public convenience and necessity from the taxicab authority as provided in [NRS 706.386](#) to [706.396](#), inclusive, and [NRS 706.406](#).

This term, “public convenience and necessity,” places the functions of the Taxicab Authority into the realm of what is called a “regulated monopoly.” Generally, the regulation of common carriers falls into the classification of a “regulated monopoly” or “regulated competition.” *Corporation Commission v. People’s Freight Lines, Inc.*, 41 Ariz. 158, 16 P.2d 420 (1932).

When a statute provides that common carriers shall be regulated in the “public interest,” the regulatory scheme is called “regulated competition.” This means that free and open competition is permitted so long as each competitor can show that he is operating in and for the public interest. With the exception of this limitation, there is no restriction of competition. But a statute which provides for the issuance of certificates of “public convenience and necessity” creates a “regulated monopoly.” In this instance, free competition is regarded by the law as a possible evil. Common carriers must show that their service is convenient and necessary, and if one company can provide most or all of the necessary service, it will be permitted to do so with little or no competition. *Arrow Transportation Co. v. Hill*, 387 P.2d 559 (Ore. 1963). The authority which grants certificates of public convenience and necessity must look not only to the interest of the public in *immediate* transportation, but to the interest of the public in *continuing* transportation. It does this by insuring the well-being and strength of the carrier or carriers providing the service. In this respect, [NRS 706.386](#), subsection 2, which is incorporated by reference into the Taxicab Authority’s enabling act by [NRS 706.8827](#), subsection 2,

provides that in awarding certificates of public convenience and necessity, the authority must consider other authorized transportation facilities in the territory.

The Nevada Supreme Court in *Checker, Inc. v. Public Service Commission*, [84 Nev. 623](#), 446 P.2d 981 (1968), in construing the statutes regulating common carriers in Nevada, noted with approval the principle that:

* * * competition is not necessarily unrestrainable. It cannot be allowed to harm the very public it was designed to protect and aid. It may be restrained for the public welfare just the same as monopoly may be restrained or as competition may be left unrestrained. * * *

Therefore, in light of these principles of “regulated monopoly,” it has been established that before a common carrier can compete with an established common carrier in an area, or before it can increase its service or facilities in that area, it not only has the burden of proving that it meets the standards of public convenience and necessity, but it also has the burden of proving that the convenience and necessity, but it also has the burden of proving that the established carrier is not meeting those same standards. However, the principle of a “regulated monopoly” is that competition, in the long run, may be harmful to the public by destroying the financial basis of the competitors. Therefore, it is also the rule that the established carrier, if there has been proof that it is not meeting the standards of public convenience and necessity, must be given the opportunity to expand its services or facilities to meet such standards. Only if the established carrier fails to do this, will a competitor be given the right to compete or expand its services or facilities in the territory. *Tucson Rapid Transit Co. v. Old Pueblo Transit Co.*, 79 Ariz. 327, 289 P.2d 406 (1955).

CONCLUSION

Keeping these principles in mind, your question is answered as follows: The Taxicab Authority, in allocating taxicabs, must always consider the continuing strength and stability of existing certificate holders. Whenever the authority determines that the public convenience and necessity require additional taxicabs in Clark County, it must follow these rules:

1. Because it must foster the economic well-being of all taxicab companies, the authority must offer all certificate holders a proportionate increase in the number of their taxicabs in keeping with the present taxicab allocation.

2. An applicant or applicants for taxicab allocation may petition the authority for a disproportionate increase in allocation, but must meet the burden of proving that one or more certificate holders are falling short of meeting the requisite standards of public convenience and necessity in the conduct of their businesses. But even if the challenging applicants can meet this burden, the authority, in the interests of maintaining the continuing strength and stability of all certificate holders, must give the challenged company or companies the opportunity to bring, or prove that they may bring, their services or facilities up to the requisite standard. If this can be done to the satisfaction of the authority, then, again, the authority must offer all existing certificate holders a proportionate allocation of taxicabs in keeping with present allocations.

3. But if one or more certificate holders are unwilling or are unable to accept an increased proportionate allocation, or if one or more companies which have been successfully challenged by other applicants are unable, after due opportunity, to expand, or show that they can expand, their services or facilities to meet the requisite standards of public convenience and necessity, then the authority may allocate taxicabs on a disproportionate basis.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 128 MINES—Persons in charge of mines must notify the Inspector of Mines of serious or fatal accidents immediately by the quickest means possible.

Carson City, May 1, 1973

Mr. Harry E. Springer, Inspector of Mines, Capitol Building, Carson City, Nevada 89701

Dear Mr. Springer:

This is in reply to your letter of February 15, 1973, requesting a formal opinion of this office interpreting Nevada's statutory mine accident reporting of serious or fatal mine accidents?

QUESTION

Your question is what is the meaning of the term "immediately and by the quickest means" as used in [NRS 512.220](#), subsection 1, in reference to reporting of serious or fatal mine accidents?

ANALYSIS

You have indicated to this office that your office has widely distributed telephone numbers that would permit persons wishing to report a mine accident on a 24-hour basis to your office. You have also indicated that in addition to these telephone numbers, that accident reporting forms have been circulated to all active mine owners or lessees. The pertinent provisions of the mine accident reporting statute are found in [NRS 512.220](#) as follows:

1. Whenever a serious or fatal accident shall occur in any mine in the State of Nevada, the owner, lessor, lessee, agent, manager, or other person in charge thereof shall, immediately and by the quickest means, notify the inspector of mines or his deputy, as may be most convenient, of such accident.
2. The inspector of mines or his deputy, or both, shall at once repair to the place of the accident and investigate fully the cause of the accident.
* * *
4. The inspector of mines or his deputy shall be present at any coroner's inquest held over the remains of any person or persons killed in any such accident, and shall have power at such inquest to examine and cross-examine witnesses at such inquest.

It should first be noted that the above-referenced statute is addressed only to serious or fatal accidents occurring in a mine. The reporting requirements for less serious accidents are found in [NRS 512.230](#) which permits up to 15 days for the report of accidents wherein the injured person loses no more working time than the day of the accident. Therefore, [NRS 512.220](#) applies, in addition to fatal accidents in mines, to accidents in mines that cause a loss of working time of the injured person of more than the day of the accident. It should be noted that [NRS 512.220](#) applies only to accidents in a mine and

would not apply to a death by normal causes. *See* Attorney General’s Opinion No. 91, dated September 11, 1917.

Your letter has indicated to us that your office has specialized testing devices, safety equipment and personnel for investigating open pit, underground mines, mills, smelters and ore reduction plant accidents. Frequently, sophisticated equipment operated by highly trained technicians is necessary to arrive at the cause of a serious mine accident. The Legislature has provided the means for the Inspector of Mines to obtain this sophisticated equipment and expert staff, as well as providing [NRS 512.220](#) to require reporting of serious mine accidents and the immediate investigation by the Inspector of Mines of those accidents. The Nevada Supreme Court, in the case of *Carpenter v. Clark*, [2 Nev. 243](#) (Reprinted at [2 Nev. 754](#)) (1866), said, at page 247 (758), that:

All statutes, * * * must be interpreted by the light of the reason or necessity which induced its adoption.

In order for the Inspector of Mines to reach an accident scene in time to prevent additional injury or loss of life, he must be summoned at the very earliest possible time.

The statute here under consideration used the term “immediately and by the quickest means” in directing owners, lessors, lessees, agents, managers or other persons in charge of a mine to notify the Inspector of Mines or his deputy of a serious accident. In the very first session of the Nevada Supreme Court in the case of *Brown v. Davis*, [1 Nev. 409](#) (Reprinted at [1 Nev. 346](#)) (1865), the court cited from the United States Supreme Court case *United States v. Fisher*, 6 U.S. 358 (1805), the following statement, found in [1 Nev. 414](#) (347):

Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently, no room is left for construction.

The Nevada Supreme Court adopted this rule of statutory construction at Nevada’s birth and has firmly held to that rule down through the years. *See Brooks v. Dewar*, [60 Nev. 219](#), 106 P.2d 755 (1940). Webster’s New International Dictionary, 2d ed., at page 1245, defines “immediately” as follows: “Without interval of time; without delay; straight away.” The Legislature in 1909, when [NRS 512.220](#) was originally adopted, not only used the term “immediately,” but also made their intention even more vivid by using the term “quickest means.”

CONCLUSION

Whenever a serious or fatal accident occurs in any mine in the State of Nevada the person in charge of that mine must without delay notify the Inspector of Mines by the quickest means possible of the occurrence of such accident. Any person in charge of a mine must, as soon as he is aware of a serious or fatal accident, dispatch himself at once to the best communications available to notify the Inspector of Mines of the occurrence of that accident. This office can envision that only the requirements of emergency first aid would delay a person in charge of a mine in notifying the Inspector of Mines of a serious or fatal mine accident.

Respectfully submitted,

ROBERT LIST
Attorney General

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

OPINION NO. 129 SCHOOL DISTRICTS—The Professional Practices Act does not apply to removal of a teacher from extra-duty position of head coach.

Carson City, May 4, 1973

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

Attention: Robert E. Heaney, Esq., Deputy District Attorney

Dear Mr. Rose:

You have requested that this office render a formal opinion in answer to a question which has arisen out of the following set of circumstances:

FACTS

The board of Trustees of the Washoe County School District wish to relieve a certain certificated teacher of his assigned duties as head coach of a major team sport at one of the district's high schools. This action will not otherwise affect the individual's position as a certificated teacher employee of the school district.

The procedure for appointment of coaches within the district is, in substance, as follows:

1. Coaches are recommended by the principals of individual schools and confirmed through final appointment by the board of trustees of the district;
2. No contract or written agreement is entered into between the district and coach, rather the services rendered by a coach are considered to be extended day duty or "extra" duty pursuant to the terms of the Professional Negotiation Agreement between the district and its teachers;
3. Coaches are compensated according to an extra duty pay schedule established by a joint district-association subcommittee utilizing a specified amount of funds available beyond the general negotiated teacher salary schedule.

QUESTION

Must the board of trustees adhere to the procedures set forth in the Professional Practices Act, [NRS 391.311](#) et seq., in order to accomplish the removal of a certificated teacher from the position of head coach?

ANALYSIS

The procedural framework of [NRS 391.311](#) et seq., prior to amendment in 1973, is of mandatory application only where the action proposed by school authorities involves a "dismissal" or "refusal to reemploy" a certified employee who is employed on a permanent basis after the end of the probationary period provided in [NRS 391.3197](#).

The situation presented clearly does not involve a "refusal to reemploy" since the basic contract of employment of the teacher is not altered by his removal from extra-duty responsibilities.

Whether the fact at issue give rise to a “dismissal” depends upon the legislative intention as to the scope and application of the act. Although there exist no Nevada cases on the subject, a number of other state courts have spoken on the issue of interpretation of the work “dismissal” where it appears in the context of teacher tenure statutes. These courts are generally in agreement that a “dismissal” constitutes a “termination of the status of a permanent teacher” and not a mere “demotion or change of duty.” *Tilton v. Board of Education of Pomona City High School District*, 25 Cal.App.2d 746, 78 P.2d 474 (1938); *Downey v. School Committee of Lowell*, 305 Mass. 329, 25 N.E.2d 738, 739 (1940); *McCartin v. School Committee of Lowell*, 322 Mass. 624, 79 N.E.2d 192, 194 (1948).

The Nevada Professional Practices Act does not embrace the question of reduction in salary, nor does it speak in terms of changes of duty. Hence, it must be presumed that the Legislature intended for the procedural safeguards of the act to apply only where a teacher is in jeopardy of losing his full-time position as a certified teacher employee of a school district. A case of particular relevance to this issue is *Van Dyke v. Board of Education*, 115 Ill.App.2d 10, 254 N.E.2d 76 (1969). In this case the Illinois Appellate Court was confronted with a situation where a school principal was relieved of his administrative duties by the board of education and was assigned to a position of teacher at a reduced salary.

In rejecting the plaintiff’s argument that the action constituted a dismissal or removal requiring compliance by the school board with the Illinois Teacher Tenure Law, the court concludes:

*A principal does not acquire tenure as a principal but does acquire tenure as a certified employee of a school district. A school board may transfer a principal to a teaching position at a reduced salary based upon some reasonable classification provided the action is bona fide and not in the nature of chicanery or subterfuge designed to subvert the provisions of the Teacher Tenure Law. * * * In our opinion, and subject to constitutional and statutory provisions, school boards must be allowed flexibility consonant with the purposes of the Teacher Tenure Law in the transfer of its certificated personnel. (Italics added.)*

This reasoning would appear equally suited to answering the question presented here. There is nothing in the Nevada Professional Practices Act to suggest that a teacher may achieve a protected status in any *particular* position within the school system. Although this office has been unable to locate any cases dealing with removal from extra-duty assignments, it could scarcely be argued that such positions would be deserving of more protection than that of school principal.

For the reasons stated above, it is the opinion of this office that the appointment to and removal from extra-duty assignments is an area best reserved to the discretion of the board of trustees.

This opinion is written in response to an inquiry concerning the application of the Professional Practices Act as presently drafted. Consequently, the opinion is not intended to encompass the amended provisions of the act which will become effective on July 1, 1973.

CONCLUSION

The Board of Trustees of the Washoe County School District need not comply with the procedures set forth in the Professional Practices Act, [NRS 391.311](#) et seq., in order to remove a certificated teacher from the extra-duty position of head coach.

Respectfully submitted,

ROBERT LIST
Attorney General

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

OPINION NO. 130 PUBLIC EMPLOYEES' RETIREMENT ACT—Substitute teachers have never been eligible for membership in the Nevada public employees' retirement program, but are now eligible for coverage under the Social Security Act of 19135.

Carson City, May 7, 1973

The Honorable Michael E. Fondi, Carson City District Attorney, 208 North Carson Street,
Carson City, Nevada 89701

Attention: F. Thomas Eck, III, Esq., Legal Advisor, Carson City School District

Dear Mr. Fondi:

This is in response to your request for an opinion regarding substitute teachers and the State Retirement System. Specifically, you have asked the following question:

QUESTION

Is a person who was a substitute teacher from 1965 to 1969 now eligible for coverage under the Public Employees' Retirement Act ([NRS Chapter 286](#)) on the basis of that service?

You also ask for guidelines that may be used in the future regarding substitute teachers.

ANALYSIS

This inquiry may be answered by determining whether substitute teachers are now or have ever been eligible for coverage under the Public Employees' Retirement Act.

Although there are no known reported cases in which the term "substitute teacher" is defined, Webster's New International Dictionary, 2d Ed., unabridged, defines the words "substitute" and "teacher" as follows:

Substitute—A person or thing put in place of another; one acting for, taking the place of, or held in readiness to replace, another. p. 2515.

Teacher—One who teaches, or instructs; esp., one whose occupation is to instruct; an instructor; tutor. p. 2588.

Based on these definitions, we hereby define a substitute teacher as a person who is qualified and willing to teach on a temporary basis for an indeterminate period of time in substitution for a regular teacher who is absent. If a person is under contract to teach part-time for a specific number of hours or days, the person does not come within the definition of a substitute teacher. The eligibility of a person under contract to teach part-time would depend on whether or not the provisions of the contract required that person to teach the minimum number of hours as provided in [NRS 286.320](#).

During the period of time in question, [NRS 286.320](#) required that a person's classification of employment as a part-time teacher would require, on the basis of 1 year of service, at least 1,200 hours of service per year. That statute further required that the position must pay a minimum compensation of \$150 for 1 month of service. Based on these mandatory requirements, substitute teachers as previously defined, are not eligible for membership in the State Retirement System. It is inherent in the nature of being a substitute teacher that such a position could not require any specific number of hours or minimum of payment for services.

In 1971, [NRS 286.320](#) was amended to require only 800 hours of employment on the basis of 9 months of service for employees of a school district. Even under this more liberal requirement, substitute teachers are still not eligible for membership in the retirement system for the reasons previously stated.

However, coverage under the Social Security Act of 1935 was provided for substitute teachers in 1971 by an amendment to [NRS 286.380](#) which extended such benefits to substitute teachers.

CONCLUSION

Substitute teachers have never been eligible for membership in the Nevada State Retirement System. Since 1971 they have been eligible for coverage under the Social Security Act of 1935.

We are aware of Attorney General's Opinion No. 214, dated April 6, 1965, in which a contrary conclusion is reached, and have concluded that said opinion was legally unsound because the conclusions reached therein do not coincide with the language of the pertinent statutes.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Margie Ann Richards
Deputy Attorney General

OPINION NO. 131 ELIGIBILITY OF FEMALES TO BE SUPERINTENDENTS AND DEPUTY SUPERINTENDENTS OF PUBLIC INSTRUCTION, SCHOOL TRUSTEES AND NOTARIES PUBLIC—That portion of Article 15, Sec. 3 of the Nevada Constitution, providing that females must be at least 21 years old and residents of Nevada for at least 1 year to be eligible for the offices of Superintendent and Deputy Superintendent of Public Instruction, school trustee and notary public, is of no force and effect in law.

Carson City, May 9, 1973

The Honorable Mike O'Callaghan, Governor of the State of Nevada, The Capitol Building, Carson City, Nevada 89701

Attention: John S. McGroarty, Administrative Assistant

Dear Governor O'Callaghan:

You have requested an opinion regarding the age and residency requirements for females wishing to become notaries public.

FACTS

Article 15, Sec. 3 of the Nevada Constitution provides that:

No person shall be eligible to any office who is not a qualified elector under this constitution. * * *

Article 2, Sec. 1 of the Nevada Constitution defines a qualified elector as:

All citizens of the United States * * * of the age of eighteen years and upwards, who shall have actually, and not constructively, resided in the state six months, and in the district or county thirty days next preceding any election. * * *

Attorney General's Opinion No. 85, dated June 19, 1972, advised that the 6-month residency requirement in Article 2, Sec. 1 was, in light of the United States Supreme Court's ruling in *Dunn v. Blumstein*, 92 S.Ct. 995 (1972), unconstitutional, and that only the time required for voter registration by [NRS 293.560](#), approximately a 30-day residency requirement, was necessary as a voter qualification.

However, Article 15, Sec. 3 of the Nevada Constitution has a proviso,

[F]emales over the age of *twenty-one* years, who have resided in this state *one year*, and in the county or district *six months* next preceding any election to fill either of said offices, or the making of such appointment, shall be eligible to the office of superintendent of public instruction, deputy superintendent of public instruction, deputy superintendent of public instruction, school trustee and notary public. (Italics added.)

Attorney General's Opinion No. 186, dated July 11, 1956, advised that, in light of the reason behind the adoption of the proviso in Article 15, Sec. 3 (to be discussed below), the 1-year residency requirement of the proviso was "inoperative" and only the 6-month state residency requirement, then applicable to qualified electors, need apply. As qualified electors in 1956 were required to be at least 21 years old, the age requirement of Article 15, Sec. 3's proviso was not discussed.

QUESTION

In view of the fact that Article 15, Sec. 3 of the Nevada constitution requires public officers to be qualified electors, that Article 2, Sec. 1 of the Nevada Constitution establishes that a qualified elector shall be at least 18 years old, and that Attorney General's Opinion No. 85 advises that a qualified elector be a resident of the State for approximately 30 days, does the proviso of Article 15, Sec. 3 add a further qualification that females be at least 21 years old and a resident of the State for at least 1 year to become notaries public?

ANALYSIS

Attorney General's Opinion No. 186, dated July 11, 1956, provides a history of Article 15, Sec. 3. The proviso was added to the article in 1912. At that time women did not have the right to vote in Nevada. Women could not become qualified electors and, therefore, could not hold public office. The purpose of the proviso was to enable women to hold

selected public offices, despite their not being qualified electors. Under the proviso, women were eligible to be Superintendents and Deputy Superintendents of Public Instruction, school trustees and notaries public if they resided in Nevada 1 year, in their county or district 6 months and were at least 21 years old.

In 1914, Article 2, Sec. 1 of the Nevada Constitution was amended to give women the right to vote. At that point the purpose behind the proviso in Article 15 ceased to exist. Indeed, as Attorney General's Opinion No. 186 states, "It is with the advent in 1914 of women's suffrage, expressed in Article 2, that the proviso in Article 15 takes on the appearance of a restriction rather than an expansion of women's rights." In fact, it was because of this reasoning that Opinion No. 186 advised that the 1-year residency requirement of the proviso was "inoperative" and only the 6-month state residency requirement of Article 2 applied.

Now, of course, Article 2, Sec. 1 has been further amended to lower the age of qualified electors to 18, and Attorney General's Opinion No. 85 has advised that its 6-month residency requirement is unconstitutional. What effect does this have on the proviso to Article 15, Sec. 3?

The effect, if the proviso is to be given its full force, would be to allow all Nevada males, at least 18 years old and residents of the State for at least 30 days, to become notaries, but to allow only Nevada females who were at least 21 years old and residents for 1 year to become notaries. It is the conclusion of this office that this would entail a clear violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution.

In the case of *Reed v. Reed*, 92 S.Ct. 251 (1971), the United States Supreme Court considered an Idaho law which provided that in choosing an executor to administer decedents' estates, males were to be preferred over females. The statute was challenged as a denial of equal protection under the 14th Amendment to the United States Constitution. In discussing that point, the court said:

[T]his Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. * * * The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

* * *

By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.

This is not to deny that states may not make reasonable age or residency qualifications as a basis for holding office, provided those qualifications are applied uniformly. Thus, [NRS 385.160](#) provides:

To be eligible to the office of superintendent of public instruction, a *person* shall:

1. Have attained the age of 21 years at the time of his appointment. * * * (Italics added.)

Although Article 15, Sec. 3 provides that all qualified electors may hold public office, the Nevada Supreme Court in *Mengelkamp v. List*, 88 Nev., Advance Opinion 140

(October 10, 1972), held that the Legislature could enact office qualifications over and above the minimum age necessary to be an elector:

Whenever the legislature draws a line, there often is little demonstrable difference between cases on opposite sides of the line and closest to it. Still, unless it be demonstrated that there is clearly no rational and legitimate reason for the distinction drawn, we must uphold the law. * * *

* * *

Implied repeal of one law through enactment of another does not occur, same when one is irreconcilably repugnant to the other.* * *

Accordingly, a statute requiring legislators to be at least 21 years old was upheld. But both the statute at issue in that case and [NRS 385.160](#), unlike the proviso in Article 15, Sec. 3, apply to all persons and not to one sex only.

It is to be noted that with regard to the offices listed in the proviso in Article 15, Sec. 3 only the office of Superintendent of Public Instruction has a specific statutory age requirement over and above that required of a qualified elector. The others do not have such an age requirement, nor do they, in addition to the office of Superintendent of Public Instruction, have any specific statutory residency requirements over and above that required of a qualified elector. [NRS 240.010](#) et seq., 385.160, 385.290, and 386.240.

Applying as it does solely to females, the proviso in Article 15, Sec. 3 arbitrarily discriminates against females for the offices listed in that proviso. The Legislature may require more stringent office qualifications than provided by Article 15 (i.e., qualified elector) as it has done with the office of Superintendent of Public Instruction, but such qualifications must apply equally to both sexes. The proviso applies to only one sex and, therefore, in the light of *Reed v. Reed, supra*, is inoperative.

All persons who are qualified electors are eligible to public office. Therefore, both sexes are similarly situated with respect to the objective of holding public office. But for the offices of Superintendent and Deputy Superintendent of Public Instruction, school trustee and notary public, the written law of Nevada requires women, and women only, to meet the additional qualifications of being at least 21 years old and a resident of the State for 1 year. In the words of the court in *Reed v. Reed, supra*, at page 254:

By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.

The court also pointed out in *Reed* that classification must have a fair and substantial relation to the object of the legislation. Here, the object for adopting the proviso ceased to exist upon the adoption of women's suffrage.

The Office of the Attorney General has previously stated its position on declaring laws unconstitutional:

This office is extremely reluctant to declare by administrative opinion that a legislative enactment is unconstitutional. This is ultimately the function of the courts. * * * (Attorney General's Opinion No. 93, dated August 21, 1972.)

Unless it is virtually certain that a court of competent jurisdiction would strike down the provisions of the State Constitution, this office would be reluctant to advise any public official not to adhere to the requirements of that Constitution. * * * (Attorney General's Opinion No. 85, dated June 19, 1972.)

The reasons for this are rooted in our concept of the tripartite form of government, i.e., the separateness of the executive, legislative and judicial branches. Only the judicial branch may strike down the legislation and actions of the other branches, and the Office of the Attorney General, being an executive office, should not presume upon the judicial function of passing judgment on a legislative enactment.

But Article 1, Sec. 2 of the Nevada Constitution requires:

[T]he Paramount Allegiance of every citizen is due to the Federal Government in the exercise of all its Constitutional powers as the same have been or may be defined by the Supreme Court of the United States.

* * *

Therefore, when rendering its advice on any subject relating to state law, the Office of the Attorney General must keep in mind the provisions of the United States Constitution and the rulings of the United States Supreme Court. But as the Attorney General must also bear in mind that state law is presumed constitutional, he should not declare a provision of the State Constitution of no force and effect unless it is certain that a court would do so. *State ex rel. Ash v. Parkinson*, [5 Nev. 15](#) (1869); Attorney General's Opinion No. 85, dated June 19, 1972. Because the United States Supreme Court was unclear and uncertain on the point, this office refused to hold a Nevada statute which prohibited aliens from public employment unconstitutional as a violation of the Equal Protection Clause of the 14th Amendment. Attorney General's Opinion No. 93, dated August 21, 1972. But “* * * where the evidence is clear, convincing and overwhelming that the United States Supreme Court regards a certain type of law unconstitutional, this office will issue an opinion regarding the unconstitutionality of a similar Nevada law.” Attorney General's Opinion No. 93, dated August 21, 1972. Thus, in light of *Dunn v. Blumstein*, *supra*, this office advised that Nevada's constitutional voter residency requirement was inoperative. Attorney General's Opinion No. 85, dated June 19, 1972. In light of the United States Supreme Court's rulings in *Roe v. Wade*, 93 S.Ct. 705 (1973), and *Doe v. Bolton*, 93 S.Ct. 739 (1973), this office advised that Nevada's criminal abortion statute was unconstitutional. Attorney General's Opinion No. 114, dated February 2, 1973.

Now in *Reed v. Reed*, *supra*, the United States Supreme Court has ruled clearly and unmistakably that dissimilar treatment of persons similarly situated, based solely on sex, and without any fair and reasonable relation to the object of the legislation, is a violation of the Equal Protection Clause of the 14th Amendment. The proviso to Article 15, Sec. 3 treats women officeholders to the same offices differently from men. The purpose of Article 15 is to define qualifications for public office and there is no reasonable relation between the object of the article and the differing qualifications prescribed for females.

CONCLUSION

The proviso to Article 15, Sec. 3 of the Nevada Constitution which provides that females must be at least 21 years old, residents of the State for at least 1 year and residents of their county or district for at least 6 months in order to be eligible to hold the offices of Superintendent and Deputy Superintendent of Public Instruction, school trustee and notary public violates the Equal Protection Clause of the 14th Amendment of the United States Constitution. Except as otherwise lawfully provided by statute, the only qualification for these offices is that the officeholder be a qualified elector, i.e., a citizen of the United States, at least 18 years old, and a resident of the State for at least 30 days prior to the next election.

Since the opinions of the Attorney General are advisory in nature and thus not legally binding, it is recommended that a constitutional amendment be proposed by the Legislature to resolve this problem.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Donald Klasic
Deputy Attorney General

OPINION NO. 132 SALES AND USE TAXES—All persons liable for a tax under [NRS Chapter 372](#), whether retailers, users or consumers, may deduct and withhold from the taxes otherwise due the “collection allowance” credit authorized by [NRS 372.370](#).

Carson City, June 1, 1973

Mr. John J. Sheehan, Executive Secretary, Nevada Tax Commission, 300 Blasdel Building, Carson City, Nevada 89701

Dear Mr. Sheehan:

A request was received from your office seeking a review and reconsideration of two opinions of the Attorney General, namely, Opinion No. 478, dated January 8, 1968, and, Opinion No. 547, dated November 27, 1968. Both opinions concern the so-called “collection allowance” provided for in the Sales and Use Tax Act. [NRS 372.370](#). Substantially similar provisions are to be found in the Local School Support Tax, [NRS 374.375](#), as well as the County-City Relief Tax, [NRS Chapter 377](#).

QUESTION

Do the provisions of [NRS 372.370](#) apply equally to the collection of both the sales tax and the use tax?

ANALYSIS

[NRS 372.370](#) reads:

The taxpayer shall deduct and withhold from the taxes otherwise due from him 2 percent thereof to reimburse himself for the cost of collecting the tax.

In Attorney General’s Opinion No. 478, dated January 8, 1968, it was stated:

The discount should be computed on all taxes *collected* by the retailer pursuant to Chap. 372 of NRS. (Italics added.)

In Attorney General’s Opinion No. 547, dated November 27, 1968, it was stated:

When a retailer *personally* uses or consumes his inventory, he must *collect* and remit a sales tax and should be allowed a collection allowance.

When a retailer uses his inventory in furtherance of his *business*, a use tax is due from the retailer directly to the State, *no costs of collection* are incurred, and no deduction is allowed. (Italics added.)

It is clear from the above-quoted statements that the prior opinions of this office interpreting [NRS 372.370](#) viewed the controlling language of the statute to be the final clause, “* * * to reimburse himself for the cost of *collecting* the tax.” (Italics added.) As a result, it was concluded that the allowance was only available to persons who “collected” the tax, as opposed to paying the tax directly out of the taxpayer’s funds.

After further study, we feel [NRS 372.370](#) is applicable to use taxes, as well as sales taxes. *Marcum v. City of Louisville*, 374 S.W.2d 865, 869 (Ky. 1963, dicta). The deduction is to be made from “taxes otherwise due,” which contemplates *both* taxes imposed by the act, the sales tax and the use tax. If the drafters of the act desired to limit the allowance to either the sales, or, the use tax, appropriate language would have been used and the plural word, “taxes,” would have been avoided.

In Attorney General’s Opinion No. 478, *supra*, it was stated:

Now we must determine if the word “taxpayer” encompasses both the retailer and the user or consumer. We think not.

We now retract that conclusion. “Taxpayer” is defined in the same act as “* * * any person liable for tax under this chapter. [NRS 372.095](#). (Italics added.)

[NRS 372.190](#) reads:

Every person storing, using or otherwise consuming in this state tangible personal property purchased from a retailer is liable for the (use) tax.

A user or consumer of tangible personal property purchased from a retailer is liable for a use tax, and is, therefore, within the statutory definition of “taxpayer.” It should be noted most such “user” or “consumer” taxpayers are exempted from paying a use tax due to the fact a sales tax was paid to the retailer at the time of purchase. [NRS 372.345](#). Therefore, retailers are “taxpayers” and may be liable for sales taxes, as well as use taxes, [NRS 372.105](#), [372.195](#), and users or consumers are also potential “taxpayers” liable for a use tax. [NRS 372.190](#), *supra*.

The prior opinions stated the collection allowance was not available in a strictly use tax situation when the use tax is due from a user or consumer since such person does not “collect” the tax from anyone. We now feel these prior opinions misconstrued the purpose of the “collection allowance” under [NRS 372.370](#). The apparent purpose of this statute was to partially reimburse “taxpayers” for their added costs of recordkeeping, reporting taxes, and making tax payments, which costs were made necessary by the enactment of the Sales and Use Tax Act. It is worthy of note that the California Sales and Use Tax Act, which served as a model for [NRS Chapter 372](#), includes no such allowance. [NRS 372.370](#) was specifically added to the Nevada act immediately after the section presently codified as [NRS 372.365](#), which specifically defines the contents of tax returns to be filed by retailers, as well as tax returns to be filed by “consumer” or “user” taxpayers.

With this apparent cost-reimbursement purpose of [NRS 372.370](#) in mind, it is meaningful to consider exactly what added costs, if any, are incurred by various taxpayers. Retailers must keep adequate records, itemize sales tax charges on customer receipts, and report and pay taxes to the State. “users” or “consumers” liable for a use tax are also obliged to keep adequate records, and report and pay taxes to the State. [NRS 372.195](#), [372.210](#), [372.360](#), and [372.735](#). We are informed that differences in costs of complying with [NRS Chapter 372](#) are inconsequential.

CONCLUSION

All persons liable for a tax under [NRS Chapter 372](#), whether retailers, users or consumers, may deduct and withhold from the taxes otherwise due the “collection allowance” credit authorized by [NRS 372.370](#). To the extent Attorney General’s Opinions No. 477, dated January 8, 1968, and, No. 547, dated November 27, 1968, are inconsistent with this opinion, they are hereby modified.

Respectfully submitted,

ROBERT LIST
Attorney General

By: James D. Salo
Deputy Attorney General

OPINION NO. 133 WATERS—Truckee River is a navigable stream.

Carson City, June 4, 1973

The Honorable Robert E. Rose, Washoe County District Attorney, P.O. Box 998, Reno, Nevada 89505

Attention: Chan G. Griswold, Esq., Chief Civil Deputy

Dear Mr. Rose

This is in response to your request for an opinion regarding the Truckee River. Specifically, you have asked the following question:

QUESTION

Is the Truckee River a navigable stream?

ANALYSIS

Based on the following authority and reasoning, it is the opinion of this office that the Truckee River is a navigable stream.

The Supreme Court of Nevada has established the following criteria to determine navigability:

A body of water is navigable if it is used or is usable in its ordinary condition as a highway of commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. *State Engineer v. Cowles Bros., Inc.*, [86 Nev. 872](#), 874, 478 P.2d 159 (1970).

The condition of the body of water at the time of the creation of statehood determines whether or not it is classified as navigable or nonnavigable. *United States v. Utah*, 283 U.S. 64 (1931), *State v. Bunkowski*, 88 Nev., Advance Opinion 170, 503 P.2d 1231 (1972), *State Engineer v. Cowles Bros., Inc.*, *supra*.

This office has not independently verified the condition and use of the Truckee River as of the date of Nevada’s statehood (October 31, 1864) concerning the navigability or nonnavigability on that date. However, the Nevada Supreme Court, the Nevada

Legislature and this office have at various times, dating back to 1862, treated the Truckee River as navigable.

The earliest known reference by the Nevada Supreme Court as to the navigability of the Truckee River was in 1873. In *State ex rel. Boardman v. Lake*, [8 Nev. 276](#) (1873), at page 285, the court refers to the Truckee River as “a navigable stream.” That case involved the rights of the holder of a toll road franchise. Part of this road, in the form of a bridge, passed over the Truckee River. Although the court’s statement that the Truckee is navigable was not necessary to the holding of the case, and therefore dicta, it is of some significance because it was made less than 10 years after Nevada achieved statehood. It may be assumed that the condition of the Truckee in 1873 was substantially similar to its condition in 1864 and that the Supreme Court, in making such a gratuitous remark, was aware of the factors upon which navigability is based.

Another Nevada Supreme Court reference to the navigability of the Truckee River is found in *Shoemaker v. Hatch*, [13 Nev. 261](#) (1878). The following language appears on page 267 of that case:

It is unnecessary to decide the question incidentally discussed by counsel as to whether the Truckee is a navigable stream within the meaning of the laws regulating the public surveys. *It is conceded to be a highway for the floatage of wood and timber*, and has been treated by the officers of the government as a navigable stream. Their action upon the matter is conclusive, so far as this case is concerned, and the district court held correctly that low-water mark, and not the middle thread of the stream, was the proper boundary of the lands of plaintiffs. (Italics added.)

This reference to the Truckee River is also dicta; however, it is indicative of how the court treated the river in the early years of Nevada statehood. The Nevada Supreme Court unquestionably accepted the Truckee as navigable in the 1870s. Absent a later contrary declaration by the same court, it is incumbent upon this office to accept that declaration of navigability.

In its recent holding that the Carson River is navigable, the Supreme Court of Nevada used language similar to that used in the Shoemaker case. In *State v. Bunkowski*, *supra*, the Supreme Court stated as follows:

[T]he early history revealed that the river was *used by loggers to float logs and timber* from the headwaters of the Carson in Alpine County, California, to saw mills near Virginia City. * * * Except for the log drivers and some dredging for gravel and various aggregates the evidence showed that there has been no other type of commercial activity in the sense of water trade on the Carson River. Pp. 1232-3. (Italics added.)

This office has, in fact, previously considered and rendered an opinion on the issue of the navigability of the Truckee River. In Nevada Attorney General’s Opinion No. 59, dated May 17, 1951, we were asked, among other things, whether or not the Truckee River is considered a navigable stream. In answering affirmatively, we cited the case *Shoemaker v. Hatch*, *supra*, and stated in that Attorney General’s Opinion: “We assume for the purposes of this opinion that the Truckee River is navigable” and “that the bed of such stream belongs to the State of Nevada below the low-water mark thereof.”

The Nevada Legislature, from territorial days to modern times, has accepted and treated the Truckee River as navigable. In 1862, the Legislative Assembly of the Territory of Nevada in Chapter XCVI granted certain specified individuals the right to construct and use a canal from the Truckee River to Washoe Valley. In 1879 the Nevada Legislature enacted legislation which authorized and empowered the Attorney General and the County Commissioners of Washoe County to “commence suits, or take such

other action as may be necessary, to maintain a regular or natural flow of water in the Truckee River” and to institute such suits in the name of the State of Nevada. 1879 Stats. of Nevada, 125. Both the 1905 and 1907 Legislatures appropriated funds to pay the expenses of litigation to prevent the pollution of the waters of the Truckee River, and in 1905 money was appropriated to build a new bridge across the Truckee River in Reno. 1905 Stats. of Nevada, 45, 155. 1907 Stats. of Nevada, 357. In 1913 the Nevada Legislature adopted a detailed statute regulating fishing in the Truckee River. 1913 Stats. of Nevada, 436. In more recent legislative sessions, statutes were passed providing for the acquisition and construction of works and improvements for upstream storage of waters of the Truckee River System (1935 Stats. of Nevada, 22), the removal of reefs and the channeling of the Truckee River (1953 Stats. of Nevada, 625), and flood control of the Truckee (1958-9 Stats. of Nevada, 164).¹ All these acts are consistent with the theory of navigability and state ownership of the water and bed of the stream.

Since the Truckee River is a navigable stream, the State of Nevada owns the water and the stream bed beneath it. The State’s title became vested in 1864 and any later changes in navigability would have no effect on the State’s title. *Shoemaker v. Hatch, supra, State Engineer v. Cowles Bros., Inc., supra.*

CONCLUSION

Based on the foregoing reasons, it is the opinion of this office that the Truckee River is a navigable stream and that ownership of the water and streambed vested in the State in 1864.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Margie Ann Richards
Deputy Attorney General

OPINION NO. 134 RETIREMENT—TEACHERS—Teachers who are paid in July and August 1973, on earnings acquired prior to July 1, 1973, need pay only 6 percent of gross compensation for retirement. School districts also pay at the 6 percent rate. School districts not required to match employee contribution of those employees who pay 9 percent or 11 percent to retirement; districts contribute 7 percent for all classes of employees.

Carson City, June 20, 1973

Mr. John R. Gamble, Deputy Superintendent and Coordinator of Divisions, Department of Education, Carson City, Nevada 89701

Dear Mr. Gamble:

In your letter of May 7, 1973, you requested the opinion of this office on the following three questions:

QUESTIONS

With reference to Chapter 717, Statutes of Nevada 1973:

1. Is the contribution of the teacher to the Public Employees Retirement System for salary earned prior to July 1, 1973, but actually paid in July and August of 1973, payable at the rate of 6 percent, which was the rate in effect when the salary was earned, or at the rate of 7 percent, which is to be the new statutory rate effective July 1, 1973?
2. Is the employer's contribution for the salary earned by teachers prior to July 1, 1973, but actually paid in July and August of 1973 payable at the rate of 6 percent or the rate of 7 percent?
3. What contribution rate must employers pay for teachers who enter the school system and the Public Employees Retirement System after their 36th birthday but before their 45th birthday, and likewise at what contribution rate must employers pay for teachers who enter both systems after their 46th birthday?

ANALYSIS—QUESTION ONE

With respect to salaries, among all classes of state employees, teachers in our public schools appear to occupy a unique position. Although their professional services are usually rendered during a 9 to 10 month period in each school year (September to June), most teachers, through contracts with their employing district, elect to receive their salaries in 12 equal monthly installments. In effect, they "earn" their salaries in 9 to 10 months, but their salaries are payable to them over a full 12-month year. The key to question one lies in the judicial definition of the word "earned" as that term is used in Section 4 of Chapter 717 of the 1973 Statutes. The first sentence of Section 4 reads:

Except as otherwise provided in this section, each employee who is a member of the system on June 30, 1973, shall contribute 7 percent of the gross compensation earned by him on and after July 1, 1973, as a member of the system.

Several judicial decisions have concerned themselves with the meaning of the words "earn" or "earned." In *The Talus*, 248 R. 670, 673 (5th Cir. 1918), the court said the word "earned" is used in the sense of owing. Referring to a pertinent federal statute, the court was of the opinion Congress avoided the use of the word "due" since by the terms of the contract between the ship and the seamen, there may be no wages due till the end of the voyage. The use of the word "earned" was obviously to describe wages, for which the seamen had done the work, whether then due or not.

Similarly, in *Seidenberg v. Duboff & Davies, Inc.*, 256 N.Y.S. 17, 19 (N.Y. 1932), the court declared the words "earn" or "earned" should be considered as referring to a just return or recompense for labor so that wages are earned the moment the labor is done and not at some future time when, perhaps pursuant to a contract of employment, actual payment becomes due.

The Supreme Court of Missouri has likewise taken this position in *Service Purchasing Co. v. Brennan*, 42 S.W.2d 39 (1931), where it said that wages are "earned" whenever services have been rendered by the employee over a stated unit of time at an agreed wage scale, whether they are then due and payable or not.

On the basis of these judicial explanations of the term "earned," it is the opinion of this office that teachers within the State of Nevada whose contracts call for only 9 or 10 months of service will have "earned" all of the gross compensation for which a retirement contribution is to be paid prior to July 1, 1973, i.e., when the public schools close in June 1973. Since such compensation will have been earned in its entirety before the date when the 7 percent contribution level goes into effect, it is the further opinion of this office that teachers are required only to pay a retirement contribution of 6 percent on those installments of their wages which are paid to them in July and August of 1973.

ANALYSIS—QUESTION TWO

The key word in the above discussion was “earned.” However, with respect to the employer’s contribution to the Public Employees Retirement Fund on behalf of employed teachers, the Legislature has used somewhat different language in Section 6 of Chapter 717, 1973 Statutes. The first sentence of Section 6 reads:

Each public employer shall pay into the public employees’ retirement fund 7 percent of all gross compensation, for members who are not peace officers or firemen, and 7.5 percent for members who are peace officers or firemen, payable on or after July 1, 1971, at intervals prescribed by the board.

The key word in this section appears to be “payable.”

Although customarily the courts have interpreted the term “payable” to mean that which is justly due or legally enforceable (*See Jamouneau v. Harner*, 109 A.2d 640 (N.J. 1954) and *United Brotherhood of Carpenters and Joiners of America v. McLain*, 46 A.2d 373 (D.C.Mun.App. 1946)), in this instance, the term “payable,” as used in Section 6 of Chapter 717, must be read in conjunction with other specific legislative language in the Nevada Revised Statutes which appears to give the term a somewhat different meaning in this context.

[NRS 354.622](#) requires that school districts conduct their business and maintain their accounting systems on a cash, accrual or modified accrual basis. It is our understanding that all school districts use the accrual or modified accrual basis. [NRS 354.479](#) defines “accrual basis” as that basis of accounting under which revenues are recorded when earned and expenditures are recorded as soon as they result in liabilities for benefits received, notwithstanding the fact that actual receipt of the revenue or payment of the expenditure may take place, in whole or in part, at some later time.

The effect of these two statutes, so far as school districts are concerned, is to make expenditures for teachers’ salaries recordable on the district’s accounting records as soon as the teacher has performed his services and hence “payable,” although actual payment may be delayed pursuant to the contract of employment between the teacher and the district.

Since school districts are required by law to consider teachers’ salaries as expenditures when the services are performed, it appears reasonable to allow the districts to apply the retirement contribution rate in effect at the time services were rendered and the salaries became “payable” expenditures. Therefore, for all teachers who have fully performed their contractual teaching services prior to July 1, 1973, the school districts need contribute to the Public Employees Retirement System only 6 percent of the teachers’ gross compensation even though actual payment of the salaries is made after that date. For teachers still performing services after this date, however, the rate is 7 percent for employer districts.

ANALYSIS—QUESTION THREE

Effective July 1, 1973, the Legislature has directed that employees of certain ages who enter the system for the first time should contribute to the retirement fund at certain percentage levels in excess of those generally prevailing. Specifically, employees between the ages of 36 and 45, entering the system for the first time, shall contribute 9 percent of their gross compensation to the retirement fund, while employees over the age of 46 shall contribute at the rate of 11 percent. All other employees who are already in the system on July 1, 1973, regardless of their ages, shall pay 7 percent of their gross compensation into the fund.

Section 6 of Chapter 717 of the 1973 Statutes requires public employers to also pay 7 percent into the retirement fund. However, Section 6 makes no reference as to any

increased contribution by public employers who employ employees who themselves, because of their age upon entering the system, must pay a higher contribution of 9 or 11 percent. Since the statute is totally silent on this point, it is the opinion of this office that the Legislature intended that public employers should pay at the rate of 7 percent regardless of the level at which the employee was paying into the fund. Had the Legislature intended public employers to match the 9 and 11 percent contributions made by some employees, it would have been easy enough for it to have included language to this effect in Section 6. There being no such language, such a matching scheme must not have been the Legislature's intention in this regard.

CONCLUSIONS

Teacher contributions to the Public Employees Retirement Fund for compensation earned prior to July 1, 1973, but actually paid in July and August of 1973, shall be at the rate of 6 percent. Also, the employer school district's contribution on salary payments made after July 1, 1973, on liabilities incurred prior to July 1, 1973, shall be at the rate of 6 percent. Public employers are not required to match employee contributions by those employees required to pay at the level of 9 and 11 percent, but rather employer contributions for all teachers regardless of age shall be at the rate of 7 percent.

Respectfully submitted,

ROBERT LIST
Attorney General

By: William E. Isaeff
Deputy Attorney General

OPINION NO. 135 CHAPTER 794, 1973 STATUTES OF NEVADA—County officers' pay increases apply prospectively and are computed on base salary as contained in the statute, according to calendar year of service beginning with the anniversary date the officials first took office.

Carson City, June 27, 1973

The Honorable Robert E. Rose, Washoe County District Attorney, P.O. Box 998, Reno, Nevada 89505

Dear Mr. Rose:

You have asked this office for an opinion on a number of questions regarding Chapter 794 of the 1973 Statutes of Nevada (S.B. 635). In addition, various questions asked by other county officials have also been answered by this opinion.

FACTS

The questions that have been asked involve Sections 2 and 4 of Chapter 794. Section 2, subparagraph 2, reads:

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

- (a) Table 1 plus a special cost of living adjustment of 10 percent effective July 1, 1973, for service prior to January 6, 1975.
- (b) Table 2 for service on and after January 6, 1975.

* * *

Section 2 then contains two tables enumerating such salaries. For example in Table 1, which is effective until January 6, 1975, the base salary for the Washoe County Clerk is \$17,500 per year. After January 6, 1975, as reflected in Table 2, the Washoe County Clerk's base salary is \$22,000 per year.

Section 4 of Chapter 794 reads:

1. On and after July 1, 1973, if an elected county officer has served in his office for more than 4 years, he shall receive an additional salary of 1 percent of his base salary provided in [NRS 245.043](#) for each full calendar year he has served in his office. The additional longevity salary provided in this section shall not exceed 20 percent of the base salary provided in [NRS 245.043](#).

2. Longevity pay under the provisions of this section shall be computed on the basis of full calendar years of service and, with the exception of those persons initially eligible on July 1, 1973, shall be computed only at the beginning of their terms of office. Those persons who would have been eligible to receive longevity pay at the beginning of their current terms shall receive such increment on July 1, 1973.

QUESTION ONE

When Section 4 of Chapter 794 speaks of paying an additional longevity salary of 1 percent of base salary per calendar year of service, does base salary mean, with regard to salaries paid before January 6, 1975, solely the salary named in Table 1 or the salary named in Table 1 plus the 10 percent cost of living adjustment provided in Section 2, subparagraph (a)? In other words, to use the Washoe County Clerk's salary as an example, is the 1 percent longevity pay based on \$17,500 or \$17,500 plus 10 percent, which is \$19,250?

ANALYSIS—QUESTION ONE

The statute makes a clear distinction between base salary and the cost of living allowance. Section 2(2) amends [NRS 245.043](#) by stating that the salary before January 6, 1975 shall be the base amount specified in Table 1. Section 4 states the longevity pay shall be 1 percent of the base salary in [NRS 245.043](#). This base salary is that which is contained in Table 1. In speaking of the cost of living allowance, Section, Section 2(2)(a) computes it as the figure in Table 1, which has been defined as the base salary, plus 10 percent. Therefore, the longevity pay shall be based on the figures in Table 1 only and not Table 1 plus 10 percent. In the case of the Washoe County Clerk this means that longevity pay shall be based only on the \$17,500 salary figure.

CONCLUSION—QUESTION ONE

All increases in pay provided by Chapter 794 are based solely on the base salaries indicated in Table 1.

QUESTION TWO

Section 4 of Chapter 794 states that longevity pay is to be paid after the county officer has served for more than 4 years. Is this initial 4 years to be excluded or included when figuring the county officer's years of service for the purposes of receiving longevity pay?

ANALYSIS—QUESTION TWO

Although the longevity pay provided in Section 4 does not become payable until after a county officer has served for more than 4 years, nevertheless the statute states that he is to receive, once he has served more than 4 years, 1 percent of base salary for each calendar year that he has *served*. This means that the initial 4 years of service will be included in the computation for longevity pay.

CONCLUSION—QUESTION TWO

The first 4 years served by elected officials in their offices will be included in the computation for longevity pay.

QUESTION THREE

Section 4(2) of Chapter 794 provides that longevity pay shall be computed on the basis of full calendar years of service and shall be computed only at the beginning of terms of office. What is a calendar year—365 days from the moment an official takes office or January 1 through December 31?

ANALYSIS—QUESTION THREE

The term “calendar year” has received conflicting definitions. Thus there are numerous cases which say that “calendar year” means a full year between January 1 to December 31. Application of Title Guarantee and Trust Co., 48 N.Y.S.2d 374 (1944); *State ex rel. Gareau v. Stillman*, 18 Ohio St.2d 63, 247 N.E.2d 461 (1969); *Finch v. Fitzpatrick*, 254 So.2d 203 (Fla. 1971). On the other hand, there are also numerous cases which say “calendar year” means simply 365 days or 12 months. *United States v. Carroll Chain Co.*, 8 R.2d 529 (1925); *In re Vernon's Estate*, 62 N.Y.S.2d 683 (1946); *Board of Education of Manchester Township v. Raubinger*, 78 N.J.Super. 90, 187 A.2d 614 (1963).

However, as Board of Education, *supra*, points out, there is no hard and fast definition of “calendar year.” Different courts have reached different interpretations based on the particular language of the statutes and the intention of the legislatures. In this particular instance, the question is decided by the fact that longevity pay is to be computed not only on full calendar years of service but must be computed only at the beginning of terms of office.

There are no constitutional provisions, as there are for state officials, relating to the prohibition of increasing a county official's pay during his term of office. The only prohibition on this point was [NRS 245.043](#). This prohibition against raising or diminishing a county official's pay during his term of office was eliminated by amendment with the enactment of Chapter 794.

This specific prohibition was eliminated to permit the change in base pay during a county official's term from Table 1 to Table 2 on January 1, 1975. Otherwise, the prohibition remains by virtue of the fact that Chapter 794 states that longevity pay shall be computed only at the beginning of terms of office. This means, for example, that an official who is entitled to 4 percent longevity pay as a result of one 4-year term shall have that computed at the beginning of his next term of office. Since longevity pay increases can be computed only then, he will receive only that 4 percent for the remainder of his term. Should he be elected to a third 4-year term, he will be eligible for 8 percent longevity pay which will be computed at the beginning of the third term. He will then

receive only that 8 percent for the remainder of his term. This has the effect of prohibiting pay increases during an official's term of office. The only other exception to this prohibition is that officials who would have been eligible for longevity increases at the beginning of their present term shall receive them on July 1, 1973.

As a result of this language regarding computation in Chapter 794, it makes no difference whether "calendar year" means January 1 to December 31 or 365 days. The mathematics will always be the same for both methods since no time of service may be computed beyond the beginning of a term of service. Since, however, computations must take place at the beginning of terms of office and since the terms of county officials begin the first Monday in January immediately following the elections, which may occur sometime after January 1, to state that "calendar year" means January 1 to December 31 would completely eliminate an official's first year of office from any computation. As a result 4 years of service would not be accrued until 1 year after he is elected to a second term. Since computation and payment does not take effect until the beginning of a term of office, this means one could not be paid for 4 years of service until after reelected to a third time. Therefore, the intent of the Legislature would only have been that "calendar year" means 365 days from the date an official first took office. Any other interpretation would be irrational.

CONCLUSION—QUESTION THREE

"Calendar year" shall be computed as 365 days from the date a county official first took office.

QUESTION FOUR

When do the accruing increases become effective?

ANALYSIS—QUESTION FOUR

The base salaries, of course, take effect on July 1, 1973. This means, too, that the 10 percent cost of living allowance also takes effect on that date. However, as explained in the analysis to Question Three, longevity pay increases are computed only at the beginning of each official's term of office and, therefore, become payable at that time. The particular increase computed then is paid at that level for the remainder of the term. The only exception to this requirement is that officials who would have been eligible for longevity pay at the beginning of their current terms shall receive longevity pay, which would have been computed at the beginning of their current terms, on July 1, 1973. Let us look at some examples to explain these interpretations of Chapter 794.

First. Assume that the Sheriff of Washoe County has been initially elected in 1970. The beginning of his term of office would be January 1971. On July 1, 1973, as a result of Chapter 794, the sheriff would receive \$19,000 per year plus 10 percent of that base amount or a total of \$20,900 per year. At this point he is not eligible for longevity pay as he has not served the 4 years required by Section 4(1). If reelected, his second term would begin in January 1975. At that time his base salary would be \$25,000. He would also be eligible for 4 percent of base salary, or \$1,000, longevity pay. For the remainder of his second term he would receive \$26,000 per year. If reelected to a third term, he would receive in January 1979, and for the remainder of his term, \$25,000 per year plus 8 percent longevity pay.

Second. Assume that the County Assessor of White Pine County was initially elected in 1968. His term of office began in January 1969. Reelected to a second term, his term begins in January 1973. On July 1, 1973, he receives \$10,600 plus 10 percent or \$11,660 per year. Additionally, at the beginning of his second term he would have been eligible for 4 percent of base pay, or \$424, longevity pay. He would be entitled to receive that on

July 1, 1973. From that date until January 6, 1975, he would receive a total of \$12,084 per year. On January 6, 197, he receives \$14,500 base pay plus 4 percent of base pay for longevity pay, or a total of \$15,080 per year. If reelected to a third term, to start in January 1977, he receives \$14,500 plus 8 percent of base pay for the remainder of that term.

Third. The present Washoe County Clerk was appointed on June 1, 1952, to fill a vacancy in the office. He was elected to fill the remaining 2 years of the term in November 1952, taking office in January 1953. Thereafter he was reelected to 4-year terms every election, his current term of office beginning in January 1971.

On July 1, 1973, he will receive \$17,500 base salary per year plus 10 percent of \$19,250 per year. Since, at the beginning of his current term, he was eligible for longevity pay, he receives this also on July 1, 1973. Since "calendar year" has been interpreted as 365 days from the date he first took office, longevity pay in this instance will be computed from June 1, 1952. Since, further, longevity pay can be computed only at the beginning of a term of office, and since the beginning of the Washoe County Clerk's current term was in January 1971. The effective period of longevity pay time is June 1, 1952, to June 1, 1970, the last full calendar year before the beginning of his current term of office, or 18 years. Therefore, the clerk will receive, on July 1, 1973, \$19,250 plus 18 percent of base pay, or \$3,150 for a total of \$22,400 per year. By January 6, 1975, should the clerk be reelected, he will receive \$22,000 base pay per year for the remainder of the term. In addition, by June 1, 1974, the last full calendar year before the beginning of his next term of office in January 1975, he will have served 22 years. However, since Chapter 794 puts a 20 percent limit on longevity pay, this is all the clerk will receive for the remainder of the term. In other words, in January 1975, he will receive \$22,000 plus 20 percent of that figure for the rest of the term.

CONCLUSION—QUESTION FOUR

For persons who would have been eligible to receive longevity pay at the beginning of their current terms, the increases take effect on July 1, 1973. Thereafter, all longevity increases take effect at the beginning of terms of offices and continue at that same rate for the remainder of the terms. The base pay increase and 10 percent cost of living allowance take effect July 1, 1973.

QUESTION FIVE

If an official served 4 years in office, was out of office for 4 years and returned to serve for 4 years, what percentage of longevity pay does he receive under Section 4 of Chapter 794? May all years of prior service in whatever official capacity be counted toward longevity pay?

ANALYSIS—QUESTION FIVE

Section 4 of Chapter 794 specifically provides that a county official shall receive longevity pay for each year served "* * * in his office." If, therefore, an official served 4 years in a particular office, was out of office for 4 years, then served 4 more years in the *same* office as before, he has served 8 full calendar years of service in his office and is entitled to 8 percent of base salary for longevity pay. If the Legislature required *continuous* service, it would have so specified this as it did in Chapter 529, the longevity pay plan for state employees. However, as can be seen by the requirement of Section 4 that an official serve more than 4 years "* * * in his office," the longevity pay is based on years of service in one particular office. A person cannot, under Section 4, serve 4 years as, for example, district attorney, then 4 years as county commissioner, and receive 8

percent longevity pay. That person is not entitled to any longevity pay at all until he serves more than 4 years in the same office.

This also means, particularly since the statute applies to elected officials, that years of service in purely appointive positions, such as deputy clerk or deputy sheriff, do not count toward computation of longevity pay.

CONCLUSION—QUESTION FIVE

Every year served in the same office shall be computed toward longevity pay even if there is a period of nonoffice holding between years. The years of service must be accrued in the elective office being currently held.

QUESTION SIX

Are all increases prospective only? That is, are there any “lump sum” payments for past services?

ANALYSIS—QUESTION SIX

A reading of the statute will indicate that it make no provision for retroactive payments for past services. The increases take effect on July 1, 1973, and apply from that day forward. County officials are not entitled to retroactive pay. The act applies prospectively. The provision in Section 4(2) that officials who would have been eligible for longevity pay at the beginning of their terms simply allows those officials to receive longevity pay during their terms simply allows those officials to receive longevity pay during their terms rather than making them wait until the beginning of their next terms of office. It does not authorize retroactive pay to the beginning of their current terms.

CONCLUSION—QUESTION SIX

The pay increases take effect prospectively only. There are no retroactive increases.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Donald Klasic
Deputy Attorney General

OPINION NO. 136 CHILD SUPPORT—If a father presently is ordered by judgment or decree to support his son until majority, that obligation will terminate July 1, 1973, if the son is then 18 years of age. If a father has obligated himself by contractual agreement to support his son until “majority,” his obligation may continue until his son is 21 years of age if the father cannot prove the intent of the parties was otherwise when they entered the contract.

Carson City, June 28, 1973

The Honorable Robert Rose, Washoe County District Attorney, Washoe County Court House, Reno, Nevada 89502

Attention: Mr. William L. Hadley, Chief Deputy District Attorney

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

Attention: Mr. John E. Harrington, Deputy District Attorney

Gentlemen:

This is in response to your requests for an opinion regarding Assembly Bill No. 66, Sec. 6 (Chap. 753, Statutes of Nevada 1973). Specifically you ask the following question:

QUESTION

If a father is ordered under the Uniform Reciprocal Enforcement of Support Act to support his son until “majority,” does A.B. 66, Sec. 6 terminate his obligation as of July 1, 1973, if his son is over 18 but under 21 years of age?

ANALYSIS

Presently, the age of majority for males in Nevada is 21 years. [NRS 129.010](#). A.B. 66, Sec. 6, establishes 18 years as the age of majority for all but limited purposes not here relevant as of July 1, 1973.

[NRS 130.090](#) provides for the determination of the duty of support of the obligor under the Uniform Reciprocal Enforcement of Support Act as follows:

Duties of support applicable under this chapter are those imposed under the laws of any state where the obligor was present during the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.

Where Nevada is the responding state, its laws must determine the obligor’s duty of support. *Lyon v. Lyon*, [75 Nev. 495](#), 346 P. 709 (1959).

In *Shoaf v. Shoaf*, 282 N.C. 287, 192 S.E.2d 299 (1972), the judgment provided for child support payments to continue “until such time as said minor child reach his majority or is otherwise emancipated.” The Supreme Court of North Carolina held that subsequent legislation changing the age of majority from 21 to 18 obligated the father to support his child only until the age of 18. The court stated at 300:

[7.] “The rule is settled beyond a doubt that majority or minority is a status rather than a fixed or vested right and that the legislature has full power to fix and change the age of majority.” *Valley National Bank v. Glover*, 62 Ariz. 538, 159 P.2d 292.

[8.] Change from minority to majority in legal effect means that legal disabilities designed to protect the child are removed. “The removal of the disabilities does not result in the creation of any new rights, but merely in the termination of certain personal privileges. There is no vested property right in the personal privileges of infancy.” *In re Davidson’s Will*, 223 Minn. 268, N.W.2d 223.

Accord: *Rosher v. Superior Court in and for Los Angeles County*, 9 Cal.2d 556, 71 P.2d 918 (1937); *Irby v. Martin*, 500 P.2d 278 (Okla. 1972); *State v. Kiessenbeck*, 167 Or. 25, 114 P.2d 147 (1941).

In *Wilcox v. Wilcox*, 406 S.W.2d 152 (Ky. 1966), the mother and father entered into an agreement which provided for support of their child until "majority." The agreement was approved by the court and made part of the divorce judgment and decree. At the time the contract was entered into, majority was 21 years. Subsequently, and while the child was between 18 and 21, majority was reduced to 18 years.

The court applied the rule that statutory provisions in effect at the time a contract is entered into are a part of the contract and held the father was bound by the age of majority at the time of the contract because he could not prove the intent of the parties was otherwise.

Collins v. Collins, 418 S.W.2d 739 (Ky. 1967), involved facts similar to *Wilcox v. Wilcox*, *supra*, and held the father was liable for support until his child attained 21 years of age. The court stated at 740:

Such was the age contemplated by the contractors in each instance, and the subsequent enactment of the statute did not serve to change the terms of the contract as was more fully discussed in the *Wilcox* case.

CONCLUSION

If a father presently is ordered only by judgment or decree to support his son until majority, that obligation will terminate July 1, 1973, if the son is then 18 years of age. If a father has obligated himself by contractual agreement to support his son until "majority," his obligation may continue until his son is 21 years of age if the father cannot prove the intent of the parties was otherwise when they entered the contract.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Wilbur H. Sprinkle
Deputy Attorney General

OPINION NO. 137 ABORTION—Reporting requirements of Section 3, sub-paragraph 4, Chapter 766, 1973 Statutes, apply only after 24 weeks of pregnancy. Doctors may perform abortions in their offices through 12th week.

Carson City, July 16, 1973

Mr. Roger S. Trounday, Director, Department of Human Resources, 515 East Musser Street, Carson City, Nevada 89701

Dear Mr. Trounday:

In your letter of June 8, 1973, you requested the opinion of this office concerning an apparent inconsistency in certain provisions of the new Nevada Abortion Law, Chapter 766, 1973 Statutes. In addition you inquired whether or not abortion may be performed in a doctor's office under the terms of this law. For the sake of convenience, we have condensed your letter into the following:

QUESTIONS

1. Under Chapter 766, 1973 Statutes, must a doctor specifically find, as the only reasons justifying an abortion, “substantial risk that continuance of the pregnancy would endanger the life of the mother or would greatly impair the physical or mental health of the mother?”
2. May abortions be performed in a doctor’s office?

ANALYSIS

The apparent statutory conflict you make reference to in your letter of June 8 concerns itself with three subparagraphs in Section 3 of Chapter 766. Subparagraphs 1(a) and 1(b) authorize the performance of abortions in Nevada by a duly licensed physician at any time within 24 weeks of the commencement of pregnancy, if said physician determines, through the exercise of his best clinical judgment in the light of all attendant circumstances, including the accepted professional standards of medical practice, that such an abortion is necessary.

Any actual grounds for abortion and the factors that a doctor may consider in making his “best clinical judgment” are not further defined in this portion of the new law.

On the other hand subparagraph 4 of Section 3 of the new abortion law requires all doctors to enter into the patient’s permanent record the facts upon which he based his best clinical judgment that there is a substantial risk that the continuance of the pregnancy would endanger the life or impair the physical or mental health of the mother. At first glance this language appears to have the effect of making these considerations or factors the only ones upon which the abortion decision may be based. This is not, however, a correct interpretation of subparagraph 4.

The limiting language of this subparagraph appears in a similar form in subparagraph 1(c) of Section 3, wherein it is stated that abortions may be performed in this State after the 24th week or pregnancy only where a procedure is reasonably believed necessary to preserve the life or health of the mother.

Since the limiting language of Section 3, subparagraph 1(c) applies only after 24 weeks of pregnancy, it necessarily follows that the same or similar language which appears in Section 3, subparagraph 4 is likewise meant to apply only to abortions performed after the 24th week of pregnancy. This interpretation is further justified by the recent decisions of the United States Supreme Court in *Roe v. Wade*, 93 S.Ct. 705 (1973) and *Doe v. Bolton*, 93 S.Ct. 739 (1973). In *Roe* the court overturned the Texas criminal abortion statute largely on the basis that the very restrictive criteria authorizing abortions in Texas violated the Due Process Clause of the 14th Amendment and the right to privacy of a pregnant woman. The Texas statute allowed abortion only as a lifesaving technique on the mother’s behalf.

In *Doe*, a case emanating from Georgia, abortion was possible only in three narrowly defined situations. The Supreme Court rejected these narrow limitations when applied to abortions before the 24th week of pregnancy and adopted, at 93 S.Ct. 747, the “best clinical judgment in the light of *all* the attendant circumstances” test. (Italics by court.)

The court also, at page 747 in *Doe*, *supra*, specifically said the physician “is not now restricted to the three situations originally specified. Instead, he may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him.”

Further on in the *Doe* opinion, the court outlined some of the various factors which a doctor may legitimately consider in making a medical judgment on abortion. Included in the list are the physical, emotional, psychological and familial factors, as well as a woman’s age; all of which are considered by the court as relevant to the well being of the patient and clearly related to her health.

Since these are the factors the U.S. Supreme Court said may be generally considered by the physician, it follows that states like Nevada may not seek to restrict the reasons for abortion in any way which would prohibit a physician from considering these items.

However, the court in Roe did recognize that during the third trimester of pregnancy (i.e., after the 24th week) the state's interest in protecting the potential of human life is sufficient enough to warrant additional restrictions on abortions such as the type specified by Section 3, subparagraph 1(c), Chapter 766.

Thus, the Nevada Legislature has in fact complied with the rulings of Roe and Doe by allowing wide latitude in the abortion decision in the first weeks of pregnancy, but much less latitude after the 24th week. The apparent inconsistency in the law is removed by viewing the recording requirements of Section 3, subparagraph 4 as properly confined to those abortions performed after the 24th week of pregnancy.

Your second question is obviously the result of the language appearing in subparagraph 2 of Section 3 of the new law which reads:

All abortions shall be performed in a hospital or other health care facility licensed under Chapter 449 of NRS.

Although on its face this language appears to be without restriction to any particular period during a woman's pregnancy, the effect of the U.S. Supreme Court's opinion in *Doe v. Bolton, supra*, is to limit the effectiveness of this language to abortions performed after the first trimester (12-13 weeks) of pregnancy.

In Doe, the Georgia law also sought to restrict all abortions to hospitals or similar facilities. Noting from the decision in Roe that states have no compelling interest capable of supporting any restrictions on abortion during the first trimester of pregnancy and that mortality in abortion during the first trimester is substantially lower than mortality in normal child birth, the court, in Doe at page 749, stated:

We hold that the hospital requirement of the Georgia law, because it fails to exclude the first trimester of pregnancy. * * * is also invalid.

Since the U.S. Supreme Court has ruled that a state may not impose a hospital requirement in the first trimester of pregnancy, and since it may be presumed that the Legislature did not intend to enact an unconstitutional law, this office concludes that the hospital or similar type facility requirement of Section 3, subparagraph 2, Chapter 766, 1973 Statutes, was intended by the Legislature to apply only during those periods when the State's legitimate interests in maternal health and the possibility of human life are said to exist in support of such a limitation, i.e., only during the second and third trimesters of pregnancy in Doe appearing at page 749:

This is not to say that Georgia may not or should not, *from and after the end of the first trimester*, adopt standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish. (Italics added.)

The above-cited U.S. Supreme Court rulings therefore compel the conclusion that abortions may be performed in the offices of Nevada doctors during the first trimester of a woman's pregnancy, but thereafter all abortions must be performed only in a hospital or other health care facility licensed under chapter 449 of NRS.

CONCLUSIONS

The requirement of Section 3, subparagraph 4, of the new Nevada abortion law that a doctor enter in a patient's permanent record the facts on which he based his best clinical judgment that there is a substantial risk to the life or health of the mother from continuance of a pregnancy applies only to abortions to be performed after the 24th week of pregnancy. The section does not constitute a limitation on the reasons for performing

an abortion at some earlier time. Abortions may be legally performed in a doctor's office during the first trimester of pregnancy in accordance with accepted professional standards, but must thereafter be performed in hospitals or other health care facilities licensed under Chapter 449 of NRS.

Respectfully submitted,

ROBERT LIST
Attorney General

By: William E. Isaeff
Deputy Attorney General

OPINION NO. 138 Insurance—Liability for Premium Tax—The Nevada general premium tax is payable by a domestic Nevada insurer on risks located outside Nevada, if the insurer is “doing business” in another state, is unlicensed there and pays no premium taxes to that state. The premium tax does not apply when the entire insurance transaction occurs in Nevada, even though the insured property of risk is located outside Nevada.

Carson City, July 18, 1973

Mr. Dick L. Rottman, Commissioner of Insurance, 201 South Fall Street, Suite 312,
Carson City, Nevada 89701

Dear Mr. Rottman:

This is in response to your request for an opinion regarding the liability of a domestic Nevada insurer for Nevada premium taxes on policies covering property, subjects or risks located outside of the State of Nevada. Specifically, you ask the following question:

QUESTION

Is a domestic Nevada insurance company, which conducts all its operation such as underwriting, collection of premiums and payment of claims within the State of Nevada, liable for Nevada general premium taxes on policies insuring property, subjects or risks that are not located, resident or to be performed within the State of Nevada?

ANALYSIS

[NRS 680B.030](#), subsection 7, requires the payment, by each insurer doing business in the State of Nevada, whether domestic or foreign, of a tax equal to 2 percent of the net premiums and net considerations received by said insurer, when filing pursuant to [NRS 680B.030](#), subsection 1, which provides as follows:

Each insurer * * * shall, on or before March 1 each year * * * file with the commissioner a report * * * showing total premium income * * * received by it during the next preceding calendar year on account of policies and contracts *covering property, subjects or risks located, resident or to be performed in this state* (with proper proportionate allocations of premiums as to such persons, property, subjects or risks in this state insured under

policies and contracts covering persons, property, subjects or risks located or resident in more than one state), * * * (Italics added.)

Total premium income from risks located in Nevada (as further qualified by [NRS 680B.030](#), subsections 2, 3, and 4) is therefore subject to additional adjustment by prorating premium income based on risks located in more than one state.

Absent other provisions of the statute, the language of this section is clear in providing that the general premium tax is applicable only to premiums received on policies and contracts covering persons, property, subjects or risks located in Nevada. However, such other provision is found in [NRS 680B.030](#), subsection 8, relating to domestic insurers, which provides:

8. A domestic insurer *doing business* in a state in which such insurer is not licensed and to which the insurer does not pay a premium tax, shall report and pay the tax on such business to the State of Nevada as though such business were transacted in this state. (Italics added.)

Under this subsection, a domestic (Nevada) insurer would have to report to the Commissioner of Insurance, and pay to the State of Nevada, the premium tax on policies and contracts written on risks in other states if such insurer was “doing business: in such other state, was unlicensed there, and had paid no premium tax there, such insurer would not be liable for Nevada premium tax if the insured risks were risks cited in such other state. Thus, the question of whether or not a domestic insurer may be liable for Nevada premium taxes for insurance written on out-of-state risks hinges on a determination of what constitutes “doing business” within the meaning of [NRS 680B.030](#), subsection 8.

The United States Supreme Court treated this issue directly in *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962). In that case, the State of Texas attempted to tax policies covering property located in Texas even though the insurance transactions took place in New York. The court, finding insufficient “minimum contracts” held the levy invalid and stated, at pages 454-455:

The insurance transactions involved in the present litigation take place entirely outside Texas. The insurance, * * *, is negotiated and paid for outside Texas. The policies are issued outside Texas. All losses arising under the policies are adjusted and paid outside Texas. The insurers are not licensed to do business in Texas, have no office or place of business in Texas, do not solicit business in Texas, have no agents in Texas and do not investigate risks or claims in Texas.

The insured is not a domiciliary of Texas but a New York Corporation doing business in Texas. Losses under the policies are payable not to Texas residents but to the insured at its principal office in New York City. The only connection between Texas and the insurance transactions is the fact that the property covered by the insurance is physically located in Texas.

The Nevada Insurance code ([NRS 679A et seq.](#)) does not define the term “doing business.” However, the term “transacting insurance” is defined in [NRS 679A.130](#), as follows:

“Transacting insurance” defined. In addition to other aspects of insurance operations to which provisions of this code by their terms apply, “transact” with respect to a business of insurance includes any of the following, by mail or otherwise or whether or not for the purpose of profit:

1. Solicitation or inducement.
2. Negotiations.

3. Effectuation of a contract of insurance.
4. Transaction of matters subsequent to effectuation and arising out of such a contract.

By applying either [NRS 679A.130](#) or the rationale of the Todd Shipyards case, the same result would follow. In order for the domestic Nevada insurer to avoid being held to be “doing business” (or “transacting insurance”) in another state, the insurance transaction, in its entirety, would have to take place in Nevada. If this in fact occurred, the situs of the risk would then determine whether or not premium tax liability would attach. If this situs were in some other state, then there would be no Nevada premium tax liability under [NRS 680B.030](#), subsection 8.

CONCLUSION

The Nevada general premium tax is payable by a domestic Nevada insurer on risks located outside Nevada, if the insurer is “doing business” in another state, is unlicensed there and pays no premium taxes to that state. The premium tax does not apply when the entire insurance transaction occurs in Nevada, even though the insured property or risk is located outside Nevada.

Respectfully submitted,

ROBERT LIST
Attorney General

By: E. Williams Hanmer
Deputy Attorney General

OPINION NO. 139 LABOR—Assembly Bill No. 66 (Chapter 753, 1973 Statutes of Nevada, p. 1577), which changed the age of majority in certain circumstances, does not affect the age requirement for serving alcoholic beverages except as noted in the amendment to [NRS 244.351](#), nor does it change the age requirement for the employment of minors in gaming establishments.

Carson City, August 14, 1973

Mr. Stanley P. Jones, Labor Commissioner, 111 West Telegraph Street, Carson City, Nevada 89701

Dear Mr. Jones:

This is in response to your letter in which you inquired as to the law regarding employment of minors in gaming establishments and areas where alcoholic beverages are served.

QUESTION

What restrictions do the Nevada Revised Statutes and recent legislation place on the employment of persons under 21 or 18 years of age in gaming establishments where alcoholic beverages are served, and may such persons serve alcoholic beverages?

ANALYSIS

As a result of Assembly Bill No. 66 (Chapter 753, 1973 Statutes of Nevada, p. 1577), which was passed by the 1973 State Legislature, there have been sweeping changes in the Nevada Revised Statutes regarding the age of majority in Nevada. Conspicuous by their absence, however, are, with one exception, any changes regarding the age requirements for persons in areas where drinking and gaming are allowed. Thus, the present state of the law is as follows:

[NRS 202.030](#) makes it illegal for any person under 21 years of age to “* * * loiter or remain on the premises of any saloon where spirituous, malt or fermented liquors or wines are sold. * * *” (Italics added.) This statute has two exceptions, however, the first of which exempts establishments where beverages are sold only in conjunction with regular meals and where the dining area is separate from the bar. ([NRS 202.030](#), subsection 1.)

The second exception provides that the statute does not apply to “any grocery store or drug store where spirituous, malt or fermented liquors are not sold by the drink for consumption on the premises.” ([NRS 202.030](#), subsection 2.) This second exception is the only area affected by Assembly Bill No. 66 (Chapter 753, 1973 Statutes of Nevada, p. 1577).

Section 13 of that bill states:

A person who has attained the age of 16 years and has not attained the age of 18 years may be employed in a retail food store for the sale or disposition of liquor if:

1. He is supervised by a person who is 18 years of age or over and who is an owner or an employee of the business which sells or disposes of liquor;
2. Such person 18 years of age or over who is supervising such person under 18 is actually present at the time that such person under 18 sells or disposes of the liquor; and
3. The liquor is in a container or receptacle which is corked or sealed.

Thus, the only change provided for by the Legislature regarding the sale of liquor is that they lowered the age of the “supervisor” of the 16-year-old seller from 21 to 18 in [NRS 244.351](#).

[NRS 202.060](#) still provides that “the proprietor, keeper, or manager of a saloon or resort where spirituous, malt or fermented liquors are sold, who shall knowingly *allow or permit any person under 21 to remain there* is guilty of a misdemeanor.” (Italics added.) The same exceptions apply as in [NRS 202.030](#) regarding dining areas and grocery/drug stores.

[NRS 463.350](#) states:

1. No person under the age of 21 years shall:
 - (a) Play, or be allowed to play, any licensed game or slot machine.
 - (b) Loiter, or be permitted to loiter, in or about any room or premises wherein any licensed game is operated or conducted.
2. Any licensee, employee, dealer or other person who shall violate or permit the violation of any of the provisions of this section and any person, under 21 years of age, who shall violate any of the provisions of this section shall be guilty of a misdemeanor.
3. In any prosecution or other proceeding for the violation of any of the provisions of this section it shall be no excuse for the licensee, employee, dealer or other person to plead he believed the person to be 21 years old or over.

This office has in the past offered opinions regarding the statutes here cited.

On December 17, 1957, in Attorney General's Opinion No. 337, we expressed the opinion that minors who were only in gambling houses to repair mechanical devices and departed upon completion of such repairs are not within the words "remain and loiter," nor within the prohibitions intended by the Legislature when it passed [NRS 202.030](#) and [202.060](#).

However, when questioned as to a waiter who would be required *to serve* alcoholic beverages, even in an area separate from the bar area and gaming area, this office responded in Attorney General's Opinion No. 368, dated March 28, 1958, that even "if the minor remains on the premises only during working hours and his exposure to gambling and drinking is minimal based upon the physical separation of the dining area from the drinking and gaming areas" that employment would be forbidden by the law.

Attorney General's Opinion No. 50, dated July 11, 1963, allows minors to attend "Theatre Restaurants" with their parents so long as they do not consume any alcoholic beverage, even though no food is served.

Also, on September 8, 1965, this office issued Attorney General's Opinion No. 260, which stated that so long as "entertainers who are minors do not loiter in lounges where liquor is sold but leave immediately on conclusion of their act" they are not in violation of [NRS 202.030](#), nor are the proprietors liable under [NRS 202.060](#) and [202.070](#).

CONCLUSION

We reaffirm these opinions and point out in conclusion that the headnote of Assembly Bill No. 66 (Chapter 753, 1973 Statutes of Nevada, p. 1577), states:

"An act relating to the age of majority; changing the age from 21 to 18 *in certain circumstances. * * **" (Italics added.) Thus it is the opinion of this office that the age requirements set out in the above statutes and opinions are not affected by this recent legislation except as noted regarding the age of the supervisor in [NRS 244.351](#).

Respectfully submitted,

ROBERT LIST
Attorney General

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

OPINION NO. 140 APPLICABILITY OF LOCAL BUILDING CODES TO STATE CONSTRUCTION PROJECTS—The State is not required to adhere to local building codes in the absence of an express legislative authorization.

Carson City, August 23, 1973

Mr. William E. Hancock, Manager, State Public Works Board, Legislative Building,
Room 306, Carson City, Nevada 89701

Dear Mr. Hancock:

You have requested an opinion on the effect that Chapter 565, 1973 Statutes of Nevada, may have on state construction projects.

FACTS

Attorney General's Opinion No. 234, dated July 21, 1961, concluded that construction of state public works projects under the jurisdiction of the State Planning Board was not subject to the requirements of local building codes and regulations. As a result of this opinion and authority conferred under Chapter 341 of NRS, the Public Works Board (formerly the Planning Board) exercises full and final authority over all state building projects. Although the Public Works Board, as much as possible, attempts to adhere to local building codes, which usually consist of variant forms of the Uniform Building Code, the Public Works Board does not obtain building permits, and it administers the Uniform Building Code, as the basis of its construction, by making such interpretations and granting such variances as it sees fit.

The 1973 Legislature, however, enacted Chapter 565, 1973 Statutes of Nevada, which reads as follows:

Notwithstanding any other provision of law, all persons, firms, associations or corporations, whether public or private, shall comply with the appropriate city or county building codes, which have been duly adopted by the respective governing bodies.

The question, formerly resolved by Attorney General's Opinion No. 234, is now open again. You have asked the following question:

QUESTION

As a result of Chapter 565, 1973 Statutes of Nevada, must the State comply with local building codes?

ANALYSIS

The basis of Attorney General's Opinion No. 234, with regard to state building projects, is that the State need not comply with local building codes because the State is not bound by any local law or regulation unless it is expressly provided by statute that the State is bound. The question to be considered, then, is whether Chapter 565 constitutes such an express statute.

Nowhere in Chapter 565 is the "State" mentioned. Instead, the statute applies to "* * * all persons, firms, associations or corporations, whether public or private. * * *" Unless these terms can be construed to mean "State," the State does not come under the provisions of the act. Omissions in a legislative act cannot be supplied. The act must be enforced as it is found. *Maynard v. Johnson*, 2 Nev. 16, 24 (1866).

A "state" is defined as a body politic or political society organized by common consent for mutual protection and defense. *State v. Inman*, 239 Ala. 348, 195 So. 448 (1940). Although under particular statutes a state, for the purposes of particular transactions, may be defined as a "person," generally speaking, a state is not a person. *Charleston v. Southeastern Construction Co.*, 134 W. Va. 666, 64 S.E.2d 676 (1951); *Baker v. Kirschnek*, 317 Pa. 225, 176 A. 489 (1935).

Obviously, a state is not a "firm," as the term means a commercial house or a partnership which transacts commercial business. *Firestone Tire & Rubber Co. v. Webb*, 207 Ark. 829, 182 S.W.2d 941, 943 (1944). Nor is a state an "association," as that term is used in law. An association is any body of persons invested with some, yet not full, corporate rights, but does not include a state. *State v. Taylor*, 7 S.D. 533, 64 N.W. 548 (1895).

Is, then, a state a public corporation? The word "corporation," in its largest sense, has an extensive meaning. Any body politic is a corporation. But there is a distinction between the State as a corporation and those "subordinate corporations" whose creation and powers are limited by law. *Chisholm v. Georgia*, 2 U.S. 419, 447 (1793). When

applied to the term “State,” the word “corporation” is used in its broadest sense, but when applied to those subordinate bodies which are created by the State and dependent upon the State for their continued existence, the word “corporation” is used in its usual and natural sense. Statutory construction is not to be strained; words should be used in their natural context. Therefore, unless a statute particularly proclaims that “corporation” means State, the use of the word “corporation” will not mean the State, but only those subordinate corporations created by the State. *State v. Atkins*, 35 Ga. 315, 10 F.Cas. No. 5, 350 (1866).

This interpretation is derived from common law views of sovereignty. Thus Blackstone states:

* * * the king is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised (any person or persons, bodies politic or corporate, & etc.) affect not him in the least, if they may tend to restrain or diminish any of his rights or interests. 1 Blackstone’s Commentaries, 261-262.

Under Article 1, Section 2 of the Nevada Constitution, all political power is inherent in the people. They are the State itself, which alone inherited from the common law the prerogative of sovereignty.

* * * But while the prerogative of the state may be invoked for the protection of the rights of the county, municipality, school district, and citizen, it does not follow that any of these possess that power. It must be held that the sovereign right, the prerogative, is lodged in the political power which is created by and is the representative of all the people—the state itself, and that prerogative of the state may not be exercised by its creature *in the absence of express authority granted to the creature*. (Italics added.) *Lothrop v. Seaborn*, [55 Nev. 16](#), 21, 23 P.2d 1109 (1933).

Therefore, there being no express provision in Chapter 565 that the “State” must comply with local building codes, and since the terms “persons,” “firms,” “associations” and “corporations” are not synonymous with the term “State,” the State, for the reasons outlined in Attorney General’s Opinion No. 234, need not comply with local building codes. Since state agencies are part of the State, this means that the Public Works Board, as authorized by Chapter 341 of NRS, has final authority over all state building projects and need not comply with local building codes. The local governments, therefore, may not require building permits from the State or its contractors, nor may the local government require building inspections by local building inspectors of state building projects.

This does not mean that the Public Works Board utterly disregards the local building codes, for the board’s policy, as indicated by the Standard Design Conditions it issues for its projects, requires as much adherence to local ordinances as possible. But the final authority for drawing plans and specifications and conducting inspections has been vested with the Public Works Board by the Legislature through Chapter 341 of NRS. Without express statutory authorization, the local governments may not interpose themselves into responsibilities, functions and powers reserved to the State.

CONCLUSION

The State is not a person, firm, association or public corporation. Therefore, Chapter 565, 1973 Statutes of Nevada, does not apply to the State. The State, through the Public Works Board, need not comply with local building codes. The Public Works Board has the sole authority for promulgating a building code for state building projects, conducting

inspections and granting variances thereto. In the absence of express legislative authorization, local governments may not bind the State by local building codes.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Donald Klasic
Deputy Attorney General

OPINION NO. 141 RETIREMENT—Retirement Board may deduct and pay premium on group insurance retained by retired public employee regardless of policy provisions.

Carson City, August 27, 1973

Mr. Gray F. Presnell, Acting Executive Secretary, Public Employees Retirement Board,
P.O. Box 1569, Carson City, Nevada 89701

Dear Mr. Presnell:

In your letter of June 30, 1973, you requested an opinion from this office on the legal effect of the provisions of [NRS 287.023](#) and Chapter 263, 1973 Statutes of Nevada, on the group insurance contracts maintained by various Nevada political and governmental entities for the benefit of their public employees.

Specifically you raise the following:

QUESTION

How can the Public Employees Retirement Board discharge its obligations under Chapter 263 of the 1973 Statutes of Nevada with respect to group insurance carriers whose policies make no specific provision enabling the employee to continue group insurance upon retirement or, in the alternative, prohibit such continued coverage?

ANALYSIS

In 1967 the Legislature added to [NRS Chapter 287](#) a new section which granted an option to any officer or employee of the governing body of any county, school district, municipal corporation, political subdivision, public corporation or other public agency of the State of Nevada who retires under the conditions set forth in [NRS 286.510](#) and who at the time of his retirement was covered by any group insurance or medical and hospital service plan established pursuant to [NRS 287.010](#) and [287.020](#) upon such retirement to (a) cancel any such coverage that he or his dependents might have or (b) continue any such group insurance or medical and hospital service coverage that he or his dependents may have upon his assuming the full premium or membership cost in such programs. Six years later, the 1973 Legislature, in Chapter 263, 1973 Statutes of Nevada, expanded upon the option rights of a retiring public officer or employee by authorizing said officer or employee the further option of notifying the Public Employees Retirement Board to deduct and pay his premium for such group insurance or medical and hospital service coverage as he may have elected to continue in effect pursuant to the provisions of [NRS 287.023](#).

In your letter of June 30, 1973, you mentioned the fact that in some instances the contract between the government agency and the insurance carrier makes no provision for an employee to continue group insurance upon retiring. In other contracts there may be an actual prohibition against such continued coverage. However, it is the opinion of this office that in neither instance is the contract language or the lack thereof the controlling factor.

It is a long established rule of law that the statutory and decisional case law in force at the time an insurance contract is entered into becomes a part of such contract and is read into it automatically. Such law has a full binding effect upon each party to the insurance contract as if the statute were written out in full in the policy itself. *See State Farm Mutual Auto. Insurance Co. v. Hinkel*, [87 Nev. 478](#), 488 P.2d 1151 (1971). For evidence of the widespread acceptance of this general rule, *see also Inter-Insurance Exchange of Automobile Club of Southern California v. Ohio Casualty Insurance Company*, 373 P.2d 640 (Cal. 1962); *Smith v. Idaho Hospital Service, Inc.*, 406 P.2d 696 (*Id.* 1965); *White v. Mote*, 155 S.E.2d 75 (N.C. 1967); *Nelson v. Southern Guaranty Insurance Company*, 147 S.E.2d 424 (Ga. 1966); *Shelton v. United Life & Accident Insurance Company*, 96 P.2d 675 (Kan. 1940); *Occidental Life Insurance Company v. Powers*, 74 P.2d 27 (Wash. 1937); and *Freund v. Freund*, 75 N.E. 925 (Ill. 1905).

In those situations where the group insurance contract specifically denies continued group coverage for a retired public employee the rule as stated in Couch on Insurance, 2nd, Section 13.7, may be said to apply:

As a general rule, stipulations in a contract of insurance in conflict with, or repugnant to, statutory provisions which are applicable to, and consequently form a part of, the contract, must yield to the statute, and are invalid, since contracts cannot change existing statutory laws.

Since our Legislature through [NRS 287.023](#) has expressly granted the right of continuing group insurance coverage to public employees who otherwise meet the requirements of that law, it necessarily follows that no insurance contract provision to the contrary may be given any legal effect.

The same may be said about a group insurance contract or a medical and health service plan which is silent on the question of continued coverage for retired employees. The statutory right is recognized in the retired employee notwithstanding the failure of the actual contract or plan to so provide. *See Freund v. Freund, supra*.

The law is also quite clear on the question of an insurer attempting to get the insured to waive the statutory rights granted to him with respect to contracts of insurance:

As a general rule, statutes which become a part of the contract cannot be waived. The rule of nonwaiver is based upon the rationale that provisions made by statute for the benefit of policyholders constitute safeguards which as a matter of public policy the legislature has seen fit to place around them in all their relations with insurers. Accordingly, such provisions may not be waived in any manner or by any device whatsoever, contemporaneous or subsequent, since such a practice would result in nullification of the statute and destruction of its protection. Couch on Insurance, 2nd, Section 13.19.

CONCLUSION

On the basis of the above-referenced cases and authorities, it is the opinion of this office that the Public Employees Retirement Board may properly deduct and pay the premium for any retired public employee coming within the provisions of [NRS 287.023](#) on his group insurance or medical and hospital service coverage without regard to the provisions of the insurance policy itself, since the statutory rights granted by [NRS](#)

[287.023](#) and Chapter 263, 1973 Statutes of Nevada, are controlling over any language in the actual policy to the contrary, including the absence of any language in the policy on the point in issue. Such premium payments must be accepted by the insurance carriers issuing such policies to Nevada governmental entities and the right to such continued coverage must be extended to all qualified, retired employees.

Although the above-cited statutory provisions clearly prevail over any contradictory policy language, this office would certainly suggest that contracting agencies and their insurance carriers should make specific provision in their policies for the rights of continued coverage granted by law. This may be done by an immediate endorsement to the present policy or no later than the time for renewal. When such language is incorporated into the actual policies involved, there will be much less likelihood of mistakes and misunderstandings.

Respectfully submitted,

ROBERT LIST
Attorney General

By: William E. Isaeff
Deputy Attorney General

OPINION NO. 142 LOCAL GOVERNMENT PURCHASING ACT—Nevada law does not require competitive bidding for the professional services of architects and engineers.

Carson City, September 6, 1973

Jack E. Hull, Esq., City Attorney, P.O. Box 831, Elko, Nevada 89801

Dear Mr. Hull:

You have requested advice on the following question:

QUESTION

Is the City of Elko, under any provision of the laws of the State of Nevada, required to submit contracts for the professional services of independent architects or engineers to do open bidding?

ANALYSIS

The Local Government Purchasing Act requires bidding on all contracts exceeding \$2,500. However, the act also makes certain exemptions to this requirement. Thus, [NRS 332.140](#) provides:

Contracts which by their nature are not adapted to award by competitive bidding * * * shall not be subject to the competitive bidding requirements of this chapter.

The law is quite clear that contracts for personal services are not adaptable to award by competitive bidding. This is particularly true of personal service contracts of a professional or technical nature. In such cases, statutes requiring competitive bidding are

not applicable. 64 Am.Jur.2d 896, Public Works and Contracts § 43; Anno. 15 A.L.R.3d 733, 746. Thus, it has been held that a public agency may contract for the services of an architect or engineer without competitive bidding. *Cobb v. Pasadena City Board of Education*, 134 Cal.App.2d 93, 285 P.2d 41 (1955); *City and County of San Francisco v. Boyd*, 17 Cal.2d 606, 110 P.2d 1036 (1941).

CONCLUSION

Architectural and engineering services are personal services requiring a high degree of professional and technical skills, which are not adaptable to competitive bidding. Therefore, by virtue of [NRS 322.140](#), local governments are not required to submit contracts for the professional services of architects or engineers to competitive bidding.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Donald Klasic
Deputy Attorney General

OPINION NO. 143 PUBLIC OFFICE—Membership on county fair and recreation board and local district boards constitutes the holding of another “public office” under [NRS 278.040](#).

Carson City, September 18, 1973

The Honorable Howard D. McKibben, Douglas County District Attorney, Douglas County Court House, Minden, Nevada 89423

Dear Mr. McKibben:

This opinion is the reply to your recent letter in which you requested an opinion on the following:

QUESTION

Does the holding of the following positions constitute a violation of [NRS 278.040](#), which prevents a member of a city or county planning commission from holding any other “public office”: Member of Board of Trustees of Gardnerville Sanitation District, Chairman of Zephyr Heights Improvement District, Member of Lake Tahoe Fire District Commission, Member of Skyland Improvement District, and Member of Douglas County Fair and Recreation Board? The question is whether these positions constitute “public offices.”

ANALYSIS

[NRS 278.040](#), as amended by the 1973 Legislature, holds that:

The members (of the planning commission) shall *hold no other public office*, except that one such member may be a member of the zoning board of adjustment. (Italics added.)

This statute thus precludes any member of a city or county planning commission from holding any other “public office” while he remains a member of that board.

To determine if a violation of [NRS 278.040](#) occurs by the holding of the above stated positions, it must be determined if these positions constitute other “public offices.”

It is held that a “public office” is authority conferred by law to exercise a portion of the government’s sovereign function for a fixed period, and an individual given such power is a “public officer,” *Pollack v. Montoya*, 55 N.M. 390, 234 P.2d 336 (1951), *Kelly v. City of Bridgeport*, 111 Conn. 667, 151 A. 268 (1930). The terms “public officer” and “public office” are inseparably connected, *Metcalf v. Mitchell*, 269 U.S. 514, at p. 520 (1926), *Alvey v. Brigham*, 286 Ky. 610, 150 S.W.2d 935 (1931), *Burnet v. McDonogh*, 46 F.2d 944 (8th Cir. 1931), so that it may be held that the definition of “public officer” also suffices as to what constitutes a “public office.”

[NRS 281.005](#) defines “public officer” to mean,

a person elected or appointed to a position which:

(a) Is established by the constitution or a statute of this state, or by a charter or ordinance of a political subdivision of this state; and

(b) Involves the continuous exercise, as part of the regular and permanent administration of the government, of a public power, trust or duty.

Thus for a position to be held a “public office” it must first be established by the Constitution of this State, or a statute of this State, or by a charter or ordinance of a political subdivision of this State, or a statute of this State, or by a charter or ordinance of a political subdivision of this State; and, second, it must involve the continuous exercise of a public power, trust or duty, as part of the regular and permanent administration of the government.

The Nevada Revised Statutes authorize the county governments to establish: General Improvement Districts (Chapter 318), Local Improvement Districts (Chapter 474), and Fair and Recreation Boards (Chapter 244). Thus it appears that the requirement of [NRS 281.005](#), subsection 1(a), is met, for the positions are established under the authority of the Nevada Revised Statutes.

The second requirement stated in [NRS 281.005](#), subsection 1(b), for a position to constitute a “public office” requires that two factors be shown. It must be shown that the position “involves the continuous exercise, * * *, of a public power, trust or duty,” and that this exercise of power, trust or duty is a “part of the regular and permanent administration of government.”

As to the requirement of a position having to involve the continuous exercise of a public power, trust or duty, it must be determined if these boards are in fact exercising “public” powers, trust or duties. “Public” is defined as that which “affects the whole body of people or an entire community,” *Black’s Law Dictionary* 712 (4th ed. 1951). The fact that the decisions of the various local district boards and the fair and recreation board affect the district or county that they are concerned with satisfies the requirement that a “public” power, trust or duty is being exercised by these boards. The Nevada Supreme Court in *State v. Lincoln Co. P.D.*, [60 Nev. 401](#) (1941), stated that,

Irrigation districts, drainage districts, utilities districts, and other similar organizations are not “municipal corporations,” but are *public agencies exercising governmental functions*, * * *. (Italics added.)

Thus the powers exercised by local improvement district boards and by a county fair and recreation board are of a definite “public” nature.

These local district boards and a county fair and recreation board have definite enumerated powers as stated in the Nevada Revised Statutes: [NRS 318.140](#) (Sanitation

District Board powers), [NRS 309.130](#) (Local Improvement District Board powers), [NRS 309.160](#) (Fire District Board powers), and [NRS 244.640](#) to [244.780](#), inclusive, and [NRS 244.7804](#) (Fair and Recreation Board powers). The exercise of these powers is of a continuous nature for the boards have the authority to exercise their enumerated powers until such time as the boards are discontinued under the provisions of the various chapters of the Nevada Revised Statutes. Until that time their existence and powers are of an uninterrupted nature.

It can be held that these boards, in the exercising of their specific enumerated powers of the Nevada Revised Statutes, are carrying out an administration of government which is of a permanent and regular nature. In public law, the administration of government means,

the practical management and direction of the * * * operations of the various organs of the sovereign; * * * Black's Law Dictionary 712 (4th ed. 1951).

As stated above, the Nevada Supreme Court has held that these types of districts are "public agencies," *State v. Lincoln Co. P.D., supra*. The boards are of a permanent nature in that they are not established for a temporary period, but are established until terminated under the provisions of the chapters of the Nevada Revised Statutes that authorize their creation.

General case law in this area has held that the position of board of supervisor of a drainage district constitutes a "public office," *Drainage Districe No. 1 of Lincoln County v. Suburban Irr. Dist.*, 139 Neb. 333, 297 N.W. 645 (1941); that members of a building committee were "public officers," *W. T. Hardison & Co. v. Yeaman*, 115 Tenn. 639, 91 S.W. 1111 (1906); and that a member of a county board of public welfare is a "public officer," *State v. Sullivan Circuit Court*, 227 Ind. 633, 88 N.E.2d 326 (1949).

Although [NRS 281.055](#) holds that an elected official can hold more than one elected office if one of those offices is "an elective office of any specific district (other than a school district), such as an irrigation district, a local or general improvement district, a soil conservation district or a fire protection district," this statute is not inconsistent with [NRS 278.040](#) for it only applies where two elective offices are concerned. The position of member of the city or county planning commission is an appointive position under [NRS 278.040](#). The fact that [NRS 278.040](#) contains a specific bar indicates further the Legislature's intent to limit the members to the holding of that "public office" only.

CONCLUSION

Members of a city or county planning commission are precluded by [NRS 278.040](#) from serving on a county fair and recreation board or local district boards, for membership on these boards constitutes the holding of another "public office" prohibited by [NRS 278.040](#).

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 144 1973 COUNTY SEWAGE AND WASTE WATER LAW—City of Las Vegas may sell effluent and expand sewage treatment capacity notwithstanding Senate Bill No. 288, but such plans must be coordinated with and approved by county as master agency.

Carson City, September 20, 1973

The Honorable Carl E. Lovell, Jr., City Attorney, City of Las Vegas, Las Vegas, Nevada
89101

Attention: Ronald L. Warren, Esq., Deputy City Attorney

Dear Mr. Lovell:

In separate letters, both dated August 6, 1973, you solicited the opinion of the Office of Attorney General on two questions related to the legal effects of the recently enacted Senate Bill No. 288, the County Sewage and Waste Water Law, on certain projects under consideration by the Department of Public Works of the City of Las Vegas, Specifically, you raise the following:

QUESTIONS

1. Is the City of Las Vegas preempted from entering into a contract with Nevada Power Company for sale to the company of the city's excess effluent by enactment of Senate Bill No. 288?

2. Is the City of Las Vegas preempted by enactment of Senate Bill No. 288 from expanding its present sewage treatment facilities at its own expense, if such expanded facilities become needed prior to the time the county "master agency," contemplated by said law, is able to provide the needed sewage treatment services?

ANALYSIS

Senate Bill No. 288, also known as chapter 790, 1973 Statutes of Nevada, is officially known as the County Sewage and Waste Water Law. The law, which took effect July 1, 1973, operates only in counties having a population of 200,000 or more, which, in Nevada, includes only Clark County and no other.

Parts of Section 4 of Senate Bill No. 288 state as a matter of legislative determination the general reasons and purposes behind the enactment of the County Sewage and Waste Water Law:

It is essential to the maintenance of the public health and orderly local government that each county * * * be empowered to become the master agency within its territory for the collection disposal and treatment of sewage and waste water.

* * *

The necessity for the County Sewage and Waste Water Law is the result of the large population growth and intense residential, commercial and industrial development in the incorporated and unincorporated areas and of the ensuing need for extensive coordinated sewage and waste water collection and treatment.

* * *

The Legislature recognizes the duty of such counties as instruments of state government to meet adequately the needs for such facilities within their boundaries, in cooperation with the state, municipalities and districts within the county and in satisfaction of federal and state requirements and standards relating to pollution.

As a further guide to interpreting this unique statute, the Legislature in Section 4(9) has directed that the act shall be broadly construed for the accomplishment of its purposes.

After taking all of the above-mentioned factors into consideration, this office, for the reasons set forth below, can find nothing in Senate Bill No. 288 which would lead us to believe that the City of Las Vegas is preempted, by enactment of this law, from (1) entering into a contract with a private power company for the sale of excess effluent which the company will use as a coolant in its generating facilities or (2) constructing additional water treatment facilities at city expense before the county is able to provide such services.

Senate Bill No. 288 clearly seems to contemplate continued ownership and operation of sewage and waste water treatment facilities within Clark County by public bodies other than the county itself. Section 5 of this law directs that the definitions contained in the Local Government Securities Law, [NRS 350.500](#) et seq., apply also to the provisions of Senate Bill No. 288, and [NRS 350.554](#) defines the term “public body,” which appears many times in the various sections of Senate Bill No. 288, to mean the University of Nevada, its board of regents, any county, city, town, school district, other type of district authority, commission or other type of body corporate and politic constituting a political subdivision of the State.

Section 22 of Senate Bill No. 288 illustrates well this particular point. Paragraph 1 of Section 22 prohibits the county, in its master agency capacity, from acquiring as a part of its facilities any properties which at the time of their acquisition compete in any area with then-existing facilities of another public body providing the same or a similar function or service, without the consent of the public body affected.

Paragraph 2 of Section 22 further illustrates the fact that the other public bodies in Clark County need not turn over their present facilities to the county master agency, but are authorized to do so if they desire. Expansion of present facilities when the need arises appears compatible with the right to retain such facilities in local public bodies.

The new 1973 Charter of the City of Las Vegas gives the city authority to sell or otherwise dispose of any byproducts resulting from the operation of the city sewage treatment facilities. Similar authority is conferred on the county in Section 25(8) of Senate Bill No. 288. It is the opinion of this office that Section 25(8) refers only to those byproducts which result from the operation of county-owned facilities. We find nothing in this or other portions of the statute which would lead us to believe that such byproducts from facilities owned and operated by another public body in Clark County become assets of the county rather than of the public body that produced them. Consequently, we believe such byproducts may be sold to a private company under a contract like that contemplated between the City of Las Vegas and the Nevada Power Company.

Although we have concluded above that the city may legally sell its sewage effluent, this does not mean that Clark County, in its master agency role under the County Sewage and Waste Water Law, has no part to play in such a transaction. By enacting Senate Bill No. 288, our Legislature clearly intended to create a countywide authority or master agency which would develop and implement an extensive coordinated plan for the collection and treatment of sewage and waste water within the territorial limits of Clark County. To carry out this intention, the Legislature gave the county extremely broad authority with reference to the adoption and enforcement of all reasonable ordinances, resolutions, rules, regulations and orders in relation to the collection, disposal or treatment of sewage and waste water which in any way affect the functions and services of the county operation. Also, Section 19 places on the county responsibility for correcting violations of federal and state water quality standards which occur after the effective date of the law or which, occurring before said date, remain uncorrected thereafter.

From these specific legislative grants of authority and the declared purposes of the law, it is the opinion of this office that the county cannot discharge its responsibility to

implement a coordinated sewage and waste water plan for Clark County unless it participates in decisions made by the other public bodies in the county who operate similar facilities. If major new programs or projects are not first coordinated with and approved by the county as master agency the intent of the Legislature in enacting Senate Bill No. 288 and assigning such a role to county officials would be quickly frustrated. Rather than a well coordinated plan involving all treatment facilities owned and operated by all the public bodies in Clark County, including the county itself, we would continue to have a badly fragmented effort to meet the serious water problems of the Las Vegas Valley. It could easily develop that treatment plans in adjoining areas might be incompatible with one another, which is a situation Senate Bill No. 288 seeks to prevent through the coordinating powers given the county as master agency.

CONCLUSION

The City of Las Vegas is not preempted by enactment of Senate Bill No. 288, the County Sewage and Waste Water Law, from (1) entering into a contract to sell effluent from city-owned treatment facilities to a private user or (2) expanding its present treatment facilities to meet an anticipated need for greater sewage treatment capacity in the city. However, such projects and programs must be first coordinated with and approved by the county to insure compatibility with the overall countywide plan for the collection, disposal and treatment of sewage and waste water, as contemplated by Senate Bill No. 288 and the master agency concept incorporated therein.

Respectfully submitted,

ROBERT LIST
Attorney General

By: William E. Isaeff
Deputy Attorney General

OPINION NO. 145 JUSTICE COURTS—Collection of filing fees from political subdivisions for the filing of justice court civil actions and small claims.

Carson City, September 20, 1973

The Honorable William R. Beemer, Justice of the Peace, Reno Township, Room 212,
Washoe County Court House, Reno, Nevada 89505

Dear Judge Beemer:

You have requested our legal opinion and advice on the following question:

QUESTION

Are political subdivisions of the State of Nevada, i.e. counties, cities, towns, etc., exempt from the statutory requirement of paying filing fees for the filing of justice court civil actions and small claims?

ANALYSIS

The Nevada Legislature has provided two specific fee paying exemptions for certain political subdivisions. They are as follows:

Supreme Court

[NRS 2.250](#), subsection 1(b), provides:

No fees shall be charged by the clerk [of the Supreme Court] in any action brought in or to the supreme court wherein the state, or any county, city or town thereof, or any officer or commission thereof is a party in his or its official capacity, against the officer or commission.

District Courts

[NRS 19.035](#) provides:

The county clerk of each county shall neither charge nor collect any fee for any service rendered by him to:

1. The State of Nevada;
2. The county of which he is county clerk;
3. Any city or town within such county; or
4. Any officer of the state, such county or any such city or town in such officer's official capacity.

Research has failed to disclose the existence of any similar statutory provision applicable to justice courts which would provide an exemption, in any form, from the payment of the fees enumerated in [NRS 4.060](#).

The omission to provide a similar exemption in the case of justice court fees appears to reflect a legislative intention to treat the subject differently.

Under generally accepted standards of statutory construction,

Where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed. (82 C.J.S., Statutes § 366 a.)

In the absence of a specific statutory exemption, political subdivisions of the State of Nevada, i.e. counties, cities, towns, etc., are not exempt from the statutory requirement of paying filing fees for the filing of justice court civil actions and small claims.

Respectfully submitted,

ROBERT LIST
Attorney General

By: William E. Isaeff
Deputy Attorney General

OPINION NO. 146 COUNTY COMMISSIONER AS HOSPITAL TRUSTEE—A county commissioner may not receive an additional salary when acting as a hospital trustee for the county hospital.

Carson City, September 26, 1973

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

Dear Mr. Hoyt:

You have requested an opinion on the following question:

QUESTION

May a county commissioner acting as a member of the board of trustees of the county hospital receive the salary provided for hospital trustees by Chapter 257 of the 1973 Statutes of Nevada?

ANALYSIS

[NRS 450.090](#), subsection 2, provides that in counties having less than 100,000 population the board of hospital trustees shall consist of five (5) regularly elected or appointed members plus one (1) member of the board of county commissioners selected by the chairman of the board of county commissioners.

Chapter 257 of the 1973 Statutes of Nevada amends [NRS 450.130](#), subsection 1, by providing:

In counties having less than 30,000 registered voters in the 1954 general election, or any subsequent election, a hospital trustee may receive a salary as follows:

(a) The chairman and secretary of the board of hospital trustees may receive \$20 for each board meeting which they attend, which sum is not to exceed \$40 per month.

(b) The other trustees may receive \$15 for each board meeting they attend, which sum is not to exceed \$30 per month.

[NRS 244.045](#) provides that each county commissioner shall receive an annual salary specified in [NRS 245.043](#). Chapter 794 of the 1973 Statutes of Nevada amends [NRS 245.043](#) to provide for new salaries for county officers, including county commissioners. Section 2 of Chapter 794 goes on to state:

* * * the annual salaries shall be in *full payment* for all services required by law to be performed by such officers. * * * (Italics added.)

A county commissioner who serves as a member of the board of hospital trustees is performing more than one service for the county. However, Chapter 794 states that the annual salary he receives as a county commissioner is to be full payment for all the services he must perform. Therefore, the county commissioner may not collect the salary for hospital trustees provided by Chapter 257.

CONCLUSION

Chapter 794 of the 1973 Statutes of Nevada prohibits a county commissioner who serves as a member of the board of trustees for the county hospital from collecting the salary provided for hospital trustees by Chapter 257 of the 1973 Statutes of Nevada.

Respectfully submitted,

ROBERT LIST

Attorney General

By: Donald Klasic
Deputy Attorney General

OPINION NO. 147 NEPOTISM—Effect of Assembly Bill No. 916 (Chapter 405, 1973 Statutes of Nevada) on [NRS 281.210](#).

Carson City, October 1, 1973

Robert L. Petroni, Esq., Legal Counsel, Clark County School District, 2832 East Flamingo Road, Las Vegas, Nevada 89121

Dear Mr. Petroni:

This is in response to your inquiry concerning Nevada's laws on nepotism.

QUESTION

The general substance of your question was “What is the present state of the law regarding nepotism in light of Assembly Bill No. 916 (Chapter 405, 1973 Statutes of Nevada, p. 563)?”

ANALYSIS

The 1973 Nevada State Legislature saw fit to strengthen the antinepotism statute ([NRS 281.210](#)) to a point where it is quite encompassing.

The law, as amended, presently forbids any individual acting:

1. As a school trustee, *or*
2. As a state, township, municipal, or county official, *or*
3. As an official or employee of the University of Nevada, *or*
4. As the head of any department of any school district, *or*
5. As the head of any department of the State, any town, any city or county, *or*
6. As a member of any state or local board, agency or commission, elected or

appointed

from employing in any capacity on behalf of the State, any county, township, municipality, school district, or the University of Nevada, any relative within the third degree of consanguinity or affinity or, in the case of a board, agency, or commission any relative within the third degree of consanguinity or affinity of any other member of that board.

There are limited exceptions in the statute but as these are unchanged by the recent legislation, they will not be discussed here.

The basic purpose of the statute is to prevent bestowal of patronage by public officers in employing their relatives regardless of how qualified the employee may be. (*See* Attorney General/s Opinion No. 203, dated September 10, 1952 and Attorney General's Opinion No. 232, dated April 23, 1937.)

There is no prohibition in the statute regarding recommendation for employment. However, if the recommendation is tantamount to employment because the individual who has written the recommendation has *effective* hiring and firing power, even though the ultimate power rests elsewhere, it is a violation of [NRS 281.210](#). (*See* Attorney General's Opinion No. 656, dated April 9, 1970 and Attorney General's Opinion No. 203, dated September 10, 1952.)

It should be noted that continued employment under a valid contract either written or oral entered into before the person within the prohibitory relationship is elected or appointed to the hiring position is valid. (Attorney General's Opinion No. 196, dated December 5, 1929.) However, renewal of that contract, if required, would violate the nepotism law. (See Attorney General's Opinion No. 427, dated July 26, 1967 and Attorney General's Opinion No. 203, dated September 10, 1952.)

CONCLUSION

If an individual, within the enumerated class of [NRS 281.210](#), has effective hiring power, regardless of where the ultimate hiring power lies, he cannot employ, reemploy or recommend for employment, on behalf of the State or any political subdivision, an individual within the third degree of consanguinity or affinity.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 148 COUNTY HOSPITALS—Board must take all formal action at open meeting; may discuss by name accounts of patients that have proved uncollectable.

Carson City, October 2, 1973

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

Dear Mr. Hoyt:

FACTS

You have informed this office that the Board of Trustees of White Pine County Hospital currently conducts its meetings in public, with citizens at large and the press in attendance. At these meetings the board sometimes discusses the names of persons indebted to the hospital, the amounts owed, and the reasons for nonpayment, prior to the board approving writeoffs on those accounts to be turned over for collection.

The uncertainty surrounding the board's potential liability for public disclosure of an individual's indebtedness has prompted the following inquiries:

QUESTIONS

1. May the county hospital board meet in executive session for the purpose of discussing individual indebtedness without later public disclosure?
2. May the county hospital board discuss an individual's indebtedness by name at the board's public meetings?

ANALYSIS—QUESTION ONE

The legislative intention in enacting the "Open Meeting Law" is expressed in [NRS 241.010](#) as follows:

In enacting this chapter, the legislature finds and declares that all public agencies, commissions, bureaus, departments, public corporations, municipal corporations and quasi-municipal corporations and political subdivisions exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

In Attorney General's Opinion No. 241, dated August 24, 1961, this office concluded a general discussion of Nevada's Open Meeting Law in the following words:

The "Open Meeting Law" is a manifestation of the fundamental right of a citizen in a democratic system "to know." However, in order to make such a law workable, recognition must be accorded to the principle that the best interest of the people sometimes necessitates privacy in the conduct of government. Chapter 241 of the Nevada Revised Statutes has no application to meetings conducted by the Governor in his executive capacity. The word "meetings" as employed in that chapter does not mean every gathering of affected public officials at which government business is discussed. But applies only to formal assemblages of public boards, commissions or agencies. The law applies when deliberations are conducted, as well as when formal action is taken. Political bodies should not attempt to evade the express purpose of the "Open Meeting Law" by means of subterfuge or invention.

As the opinion clearly points out, the act was meant to have application to *formal* actions and deliberations conducted in connection with the transaction of official government business.

It would be difficult to conceive of a situation more deserving of formal action and full public disclosure than the official compromising of indebtedness to a public institution. Such action, and the deliberations conducted in pursuit thereof, is not only a subject of intimate concern to the public but is of such a delicate nature as to mandate public disclosure in order to prevent the kind of secret dealing that the act was designed to eliminate.

CONCLUSION—QUESTION ONE

The deliberations and official actions of the county hospital board which relate to writing off, turning over for collection, or otherwise compromising indebtedness to the hospital must be conducted in meetings which are open and public.

ANALYSIS—QUESTION TWO

The just resolution of this inquiry must of necessity demonstrate a recognition of two basic policy considerations which have historically come into sharp conflict—on the one hand is the desire to preserve the confidentiality of an individual citizen's personal affairs, and on the other is the need to protect the public interest by shielding honest public servants against the ever-present hazards of litigation brought on account of actions taken in the course of exercising their public responsibilities.

The Nevada Legislature has endorsed the latter consideration by enacting [NRS 41.032](#), which provides:

No action may be brought under [NRS 41.031](#) or against the employee which is:

1. Based upon an act or omission of an employee of the state or any of its agencies or political subdivisions, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, provided such statute or regulation has not been declared invalid by a court of competent jurisdiction; or
2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any employee of any of these, whether or not the discretion involved is abused.

As pointed out earlier in this opinion, the board is required by statute to conduct its fiscal affairs in meetings which are open and public. Hence, any cause of action which may arise against the board based on public discussion of named indebtedness would be precluded by [NRS 41.032](#), subsection 1, *provided* such discussion is conducted in a reasonable manner for the purpose of furthering official business and not for the purpose of encouraging collection by casting aspersions on the character of individual debtors.

[NRS 41.032](#), subsection 2, provides an additional source of immunity where the acts complained of arise from the exercise of a discretionary governmental function. A “discretionary act” may be defined as an act which “requires personal deliberation, decision and judgment. * * *” *Morgan v. County of Yuba*, 41 Cal.Rptr. 5098, 511 (1964).

Although the acts giving rise to this immunity have been the subject of conflicting judicial precedent, it would appear reasonably certain that discussions of indebtedness in connection with the *official action* of compromising accounts would come within the definition of a “discretionary act.” *See Lipman v. Brisbane Elementary School District*, 11 Cal.Rptr. 97 (1961).

In addition to the immunities afforded to public officers and employees by statute, case law in various jurisdictions recognizes the existence of a common law privilege which attaches to the communications of a member of a governing body of a political subdivision, where such communications arise in the course of a meeting of the body, or in the course of some other official proceedings. (*See* cases collected in 40 A.L.R.2d 941.)

The State of Nevada, along with most jurisdictions, recognizes the existence of a “qualified privilege” which would insulate a public official from liability for statements made in furtherance of a public duty or interest *provided* the statements are made in good faith and not for the purpose of harassing or damaging the reputation of any person. (*See Reynolds v. Arentz*, 119 F.Supp. 82 (Nev. 1954).)

CONCLUSION—QUESTION TWO

The county hospital board may discuss an individual’s indebtedness to the hospital by name at its public meetings. However, in so doing, the board must act reasonably, and in a good faith effort to preserve the interests of the hospital while avoiding injury to the reputation or livelihood of those indebted to it.

Respectfully submitted,

ROBERT LIST
Attorney General

By: William E. Isaeff
Deputy Attorney General

OPINION NO. 149 LAW LIBRARIES; LOCAL GOVERNMENT BUDGET ACT AND LOCAL GOVERNMENT PURCHASING ACT—Law libraries organized by counties under the terms of [NRS Chapter 380](#) are “local governments” within the meaning of both the Local Government Budget Act and the Local Government Purchasing Act.

Carson City, October 23, 1973

Mr. John J. Sheehan, Executive Secretary, Nevada Tax Commission, 300 Blasdel Building, Carson City, Nevada 89701

Attention: MR. JAMES C. LIEN, Assistant Secretary

Dear Mr. Sheehan:

You have requested an opinion from this office on the question of whether county law libraries organized pursuant to the terms of [NRS Chapter 380](#) are “local governments” within the meaning of [NRS 354.474](#) and [332.020](#), thereby becoming subject to the provisions of the Local Government Budget Act, [NRS 354.470](#) to [354.626](#), inclusive, and the Local Government Purchasing Act, [NRS Chapter 332](#).

ANALYSIS

The statutory definition of “local government” for the purposes of the Local Government Budget Act is found in [NRS 354.474](#), subsection 1, which reads:

1. Except as otherwise provided in subsection 2, the provisions of [NRS 354.470](#) to [354.626](#), inclusive, shall apply to all local governments. For the purpose of [NRS 354.470](#) to [354.626](#), inclusive, local government means every political subdivision or other entity which has the right to levy or receive moneys from ad valorem or other taxes or any mandatory assessments, and includes without limitation counties, cities, towns, boards, school districts and other districts organized pursuant to chapters 244, 309, 318, 379, 474, 540, 541, 542, 543 and 555 of NRS, [NRS 450.550](#) to [450.700](#), inclusive, and any agency or department of a county or city which prepares a budget separate from that of the parent political subdivision.

Additionally, the purposes of the Local Government Budget Act are state in [NRS 354.472](#):

1. The purposes of [NRS 354.4170](#) to [354.626](#), inclusive, are:
 - (a) To establish standard methods and procedures for the preparation, presentation, adoption, administration and appraisal of budgets of all local governments.
 - (b) To enable local governments to make financial plans for both current and capital expenditure programs and to formulate fiscal policies to accomplish these programs.
 - (c) To provide for estimation and determination of revenues, expenditures and tax levies.
 - (d) To provide for the control of revenues and expenditures in order to promote prudence and efficiency in the expenditure of public funds.
 - (e) To enable local governments to borrow money to meet emergency expenditures.

(f) To provide specific methods enabling the public, taxpayers and investors to be apprised of the financial preparations, plans, policies and administration of all local governments.

2. For the accomplishment of these purposes the provisions of [NRS 354.470](#) to [354.626](#), inclusive, shall be broadly and liberally construed.

We believe the legislative intent is clear to have the Local Government Budget Act broadly and liberally construed to further the purposes of the Act, which include, generally, the assurance of proper administration, budgeting, control of revenues and supplying of public information on the part of political subdivisions of the State. [NRS 354.472](#), *supra*. With these broad purposes in mind, [NRS 354.474](#), subsection 1, *supra*, directs that “local government” for the purposes of the Local Government Act shall include “* * * every political subdivision or other entity which has the *right to levy or receive moneys from ad valorem or other taxes or any mandatory assessments*, * * *.” (Italics added.)

It should be noted that the serial listing of [NRS Chapters included](#) within [NRS 354.474](#), subsection 1, is specifically stated to be an inclusion “without limitation,” which we deem to mean that the listing is not an exclusive list of all entities falling within the definition of “local government.” This interpretation is supported by the final clause of [NRS 354.474](#), subsection 1, which, in terms includes other, non-listed entities which prepare a “* * * budget separate form that of the parent political subdivision.” We therefore conclude that the operative and controlling portion of the definition of “local government” found in [NRS 354.474](#), *supra*, absent specific inclusion by reference in the body of the definition, is the phrase “* * * *every political subdivision or other entity which has the right to levy or receive moneys from ad valorem or other taxes or any mandatory assessments*, * * *.”

We now turn to an analysis of the nature of county law libraries organized pursuant to the terms of [NRS Chapter 380](#). A law library may be established by the county commissioners of any county, with the commissioners authorized to act as trustees in counties with less than 20,000 in population, or with an independent board of trustees in larger counties. [NRS 380.010](#) to [380.020](#), inclusive. The board of law library trustees is required to make an annual report to the county commissioners, including a financial report, [NRS 380.090](#), and, administer the “law library fund” created by an ordinance of the county commissioners, funded by certain fees received by the county clerks. [NRS 380.110](#) to [380.120](#), inclusive. Upon appropriate action of the county commissioners, a special ad valorem tax may be levied on all taxable property within the county to raise a sum sufficient to discharge any indebtedness incurred by the law library, but no more. [NRS 380.130](#). In counties with less than 20,000 in population in which the county commissioners act as law library trustees, the annual reporting requirements are dispensed with. [NRS 380.010](#), subsection 3.

We conclude that a law library organized pursuant to the terms of [NRS Chapter 380](#) is a “local government” within the definition found in [NRS 354.474](#), subsection 1, *supra*. It is a political subdivision or agency of the county and it has the “right to receive moneys from ad valorem * * * taxes.” [NRS 380.130](#); 380.140. Clearly, since such boards are authorized to, and do receive and spend public revenue, the management of such funds is a proper subject of review and control pursuant to the general purposes of [NRS 354.472](#), *supra*.

The question of whether such law libraries are also “local governments” within the Local Government Purchasing Act requires an analysis of a similar, although distance statute, [NRS 332.020](#):

For the purpose of this chapter “local government” means every political subdivision or other entity which has the right to levy or receive moneys from ad valorem taxes, or other taxes or from any mandatory assessments

and includes without limitation counties, cities, towns, school districts and other districts organized pursuant to chapters 244, 309, 318, 379, 450, 473, 474, 539, 540, 541, 542, 543, and 555 of NRS, county fair and recreation boards and the Las Vegas Valley Water District.

Although worded slightly differently, the operative and controlling portion of the definition is the phrase, “* * * every political subdivision or other entity which has the right to levy or receive moneys from ad valorem taxes, or other taxes or from any mandatory assessments * * *.” This provision does not include a reference to other entities which prepare separate budgets, as is the case in [NRS 354.474](#), subsection 1, *supra*. We conclude that this is a distinction without a difference and that law libraries organized pursuant to the terms of [NRS Chapter 380](#) are also “local governments” for the purposes of the Local government Purchasing Act, [NRS Chapter 332](#), because they have the right to “* * * receive moneys from ad valorem taxes, * * *.” [NRS 332.020](#), *supra*.

CONCLUSION

Law libraries organized by counties under the terms of [NRS Chapter 380](#) are “local governments” within the meaning of both the Local Government Budget Act and the Local Government Purchasing Act.

Respectfully submitted,

ROBERT LIST
Attorney General

By: James d. Salo
Deputy Attorney General

OPINION NO. 150 OPEN MEETING LAW—Investigative meeting of State Gaming Commission where information declared by law to be confidential is to be received may be held in private, but members of the commission may not deliberate upon the information received with respect to possible future action to be taken by the commission without violating Open Meeting Law, [NRS Chapter 241](#).

Carson City, November 8, 1973

The Honorable Frank A. Schreck, Jr., Nevada Gaming Commission, 302 East Carson Avenue, Las Vegas, Nevada 89101

Dear Commissioner Schreck:

In your letter of October 12, 1973, you have requested an opinion of this office.

QUESTION

Was a gathering of state gaming officials on September 26, 1973, in the State Office Building in Las Vegas violative of [NRS Chapter 241](#) (the “Open Meeting Law”) and if so, what are the consequences thereof?

ANALYSIS

Although one member of the Nevada Gaming Commission was late in arriving, the conference was ultimately attended by all the members of the Nevada Gaming Commission,¹ all the members of the State Gaming Board,² the Deputy Attorney General, Gaming Division, and representatives of Summa Corporation, an applicant for registration. We have considered the facts set forth in your letter of October 12, 1973, and also a letter, with enclosures, dated October 9, 1973, from Chairman Diehl to Governor Mike O'Callaghan. Deputy Attorney General Polley has also given us his recollection of that meeting.

This opinion is based upon the following facts derived from those sources of information:

1. During the latter part of 1970 and early 1971 physical control of the Nevada based operations of Mr. Howard R. Hughes was taken from Mr. Robert Maheu by a group under the direction of Mr. Chester C. Davis and Mr. Frank W. Gay. Both factions claimed to have exclusive authority from Mr. Hughes. The Davis and Gay faction was successful in obtaining physical control of one of the largest gaming operations in the State.

2. Various applications concerning those operations were filed with the board and commission commencing on March 1, 1971, and continuing through May 11, 1973. None of the applications showed any change from the original licensing of Mr. Hughes in 1965 insofar as actual ultimate control and authority were concerned. That remained with Mr. Hughes. The several applications sought approval by the commission of the corporate structure by which that ultimate control and authority would be exercised and of the individuals involved as directors and officers of the various corporations. The investigation during the time the applications were pending was directed at determining if Mr. Hughes had in fact given authority to the Davis and Gay faction; if the directors and officers were suitable; and if the corporate reorganization met the requirements of the Nevada Gaming Control Act.

3. On September 19, 1973, the board recommended approval of the corporate reorganization pursuant to [NRS 463.140](#).

4. After the board meeting but before the commission meeting scheduled to be held on September 27, 1973, the United States Senate Select Committee on Presidential Campaign Activities heard testimony that one of the individual applicants in the corporate reorganization had taken part in illegal activities.

5. On September 26, 1973, the above-referenced conference was held. The background of that conference is set forth in Mr. Diehl's letter as follows:

On the 10th day of September, 1973, Phil Hannifin telephoned me and advised of a possible meeting with the officers of Summa Corporation. The purpose of the meeting was a presentation by Mr. Gay of the entire complicated corporate structure of Summa. This apparently went far beyond the reaches of the gaming operations of the company. * * *

6. The conference began at approximately 3:30 p.m. Mr. Diehl's letter sets forth what occurred as follows:

* * * we then met with the Hughes' people. As I said before: the meeting was called for one purpose and one purpose only * * * a briefing on the entire corporate structure. The presentation was made by Mr. Gay and the

¹ The members of the commission at all times relevant herein were Chairman John W. Diehl, Commissioners Pete Echeverria, Walter Cox, Frank A. Schreck, Jr., and Clair Haycock.

² The members of the board at all times relevant herein were Philip P. Hannifin, John H. Stratton, and Shannon L. Bybee.

meeting lasted for approximately one and one-half (1 1/2) hours. Mr. Gay confined his remarks to the explanation, from diagrams, of the corporate structure, the duties of the officers, the symbols [sic] utilized for each subdivision of the corporation, the history of the corporate name, some prospects for the future, and the like. He was interrupted from time to time with questions directed to these items only.

Following the above presentation Mr. Echeverria inquired as to whether or not Chester Davis would be at the meeting. He was advised by Summa counsel that they had not intended to have him present, but would make every effort to do so if necessary. Mr. Echeverria then advised counsel that there were matters in the application which bothered him; that he felt that the burden was on the applicant to prove that he was entitled to a license; that he would like to personally appraise and talk to the applicant; that under the circumstances, perhaps the application should be deferred. Mr. Cox then made some remarks relating to the Hughes' people having met the demands of the Commission; Mr. Schreck commented very generally in the same vein; the content of which I simply can't recall. I then volunteered that this Commission could not be placed in the position of prejudging this application; that I felt, however, that the demands of the state had been met, and unless the situation was substantially changed by the recent events, it was my impression that the application should be acted upon one way or the other; that it would be a breach of faith on the part of the people of this state, and might reflect on the Governor, if we did not act upon the application; and that each individual had to review the matter and act according to the dictates of his conscience.

I then pointed out that the recent events did becloud the application; among other problems, that there were problems with Mr. Winte; and that the transcript of the applicable portions of Watergate had been made available to us, and that Mr. Winte should be present at the meeting to be sworn in order to explain his participation. THAT PARTICIPATION WAS NOT DISCUSSED AT THIS MEETING! Mr. Echeverria volunteered that Mr. Winte should probably be appraised of his rights not to testify. I responded that if he did not testify when called by the Commission, he would be automatically rejected. I then advised that we did not intend to become involved in discussing the matter any further in that meeting; it would be improper. I suggested the following alternatives: he could be sworn and testify and our conclusions would then be reached based on the record; we could refer the matter back for further investigation; we could, on our own motion, conduct our own investigation; or that the applicant could request that it be deferred for the purpose of further investigation. This advice does not differ from that which might be given to any other applicant. It was felt that any further discussion would be improper, and the meeting closed.

Mr. Polley confirms the facts set forth in Mr. Diehl's letter. In addition, he states that the description of the corporate structure was the essential part of the meeting and that the colloquy between Commissioners Diehl, Cox, Schreck and Echeverria was brief.

7. On September 27, 1973, the corporate reorganization was approved by the commission at a public meeting in Las Vegas. At that meeting, however, at the applicant's suggestion, the commission deferred the application of Mr. Winte.

We turn now to an analysis of the applicable legal principles.

Our analysis of the various statutory provisions must be limited to the four corners of the engrossed bills. *Berman v. Riverside Casino Corporation*, 247 F.Supp.243 (U.S.D.C., Nev. 1964), opinion by Thompson, D. J. The normal bids to statutory construction,

known generically as “legislative history” may not be used although consideration may be given to why the bill was passed, what mischief it was designed to cure, and the conditions giving rise to its passage. *Seaborn v. District Court*, [55 Nev. 206](#), 29 P.2d 500 (1934); *Nevada Tax Commission v. Hicks*, [73 Nev. 115](#), 310 P.2d 852 (1957). The Nevada Gaming control Act is sui generis in American jurisprudence. Both the Supreme Court of Nevada and the United States Court of Appeals for the Ninth Circuit have recognized the singular position of gaming control. *State ex rel. Grimes v. Board*, [53 Nev. 364](#), 1 P.2d 570 (1931); *Dunn v. Tax Commission*, [67 Nev. 173](#), 216 P.2d 985 (1950); *Primm v. City of Reno*, [70 Nev. 7](#), 252 P.2d 835 (1953); *Nevada Tax Commission v. Hicks*, *supra*; and *Marshall v. Sawyer*, 301 F.2d 639 (1962), and 365 F.2d 105 (C.C., 9th, 1966).

The Open Meeting Law was enacted by the Legislature in 1960 and evidences a profound and mandatory public policy:

241.010 Legislative declaration and intent. In enacting the chapter, the legislature finds and declares that all public agencies, commissions, bureaus, departments, public corporations, municipal corporations and quasi-municipal corporations and political subdivisions exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberation be conducted openly.

241.020 Meetings to be open and public; attendance of all persons; exception. Except as otherwise provided in [NRS 241.030](#), all meetings of public agencies, commissions, bureaus, departments, public corporations, municipal corporations and quasi-municipal corporations and political subdivisions shall be open and public, and all persons shall be permitted to attend any meeting of these bodies.

241.030 Executive session concerning public officers, employees; exclusion of witnesses. Nothing contained in this chapter shall be construed to prevent the legislative body of a public agency, commission, bureau, department, public corporation, municipal corporation, quasi-municipal corporation or political subdivision from holding executive sessions to consider the appointment, employment or dismissal of a public officer or employee or to hear complaints or charges brought against such officer or employee by another public officer, person or employee unless such other officer or employee requests a public hearing. The legislative body also may exclude from any such public or private meeting, during the examination of a witness, any or all other witnesses in the matter being investigated by the legislative body.

241.040 Penalties. A violation of any of the provisions of this chapter or the wrongful exclusion of any person or persons from any meeting for which provision is made in this chapter is a misdemeanor.

The exemptions from that law contained in [NRS 241.030](#) are narrowly drawn, and the strong statement of policy, “* * * It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly” argues against any casual or haphazard exemption. The exemptions of [NRS 241.030](#) cannot, however, be taken as exclusive of others as the Nevada Revised Statutes do contain exemptions from public disclosure not enumerated in [NRS 463.030](#). Cf. [NRS 665.055](#) (reports of examination by the Superintendent of Banks); [NRS 703.190](#) (limited exemptions for records of the Public Service Commission); [NRS 127.140](#) (hearings, files and records in adoption cases); [NRS 62.270](#) (juvenile court records); Section 22, Chapter 729, Statutes of Nevada 1973 (violations of trade practices); [NRS 90.160](#) (information obtained for qualification of securities offerings); and [NRS 583.475](#) (trade secrets).

The Corporate Gaming Act (Chapter 220, Statutes of Nevada 1969, now [NRS 463.482](#) to [NRS 463.641](#), inclusive) was enacted in 1969 to provide for the regulation of corporations engaged in gaming, either directly or through subsidiaries. The commission is specifically granted the power to investigate corporate applicants:

The board or the commission may in its discretion make such investigations concerning the officers, directors, underwriters, security holders, partners, principals, trustees or direct or beneficial owners of any interest in any holding company or intermediary company as it deems necessary, either at the time of initial registration or at any time thereafter. [NRS 463.585](#), subsection 2.

In addition, the commission has been granted the power to expand the provisions of the Corporate Gaming Act:

The commission may, at any time and from time to time, by general regulation or selectively impose on any holding company or intermediary company any requirement not inconsistent with law which it may deem necessary in the public interest. Without limiting the generality of the preceding sentence, any such requirement may deal with the same subject matter as, but be more stringent than, the requirements imposed by [NRS 463.482](#) to [463.641](#), inclusive. [NRS 463.585](#), subsection 7.

The commission has adopted Regulation 15.1594-2 pursuant to [NRS 463.585](#), subsection 7, and pursuant to the general rulemaking power of [NRS 463.150](#), as follows:

15.1594-2 Certain Investigations. The Commission or the Board may, in their discretion, make such investigation concerning an Applicant under Regulation 15, or a licensee, or a registered company, or any person involved with a licensee or a registered company as they may deem appropriate, either at the time of initial licensing or registration or at any time thereafter.

The initial portion of the conference of September 26, 1973, was, by the terms of Mr. Diehl's letter, and by all other indications, an investigation of corporate structure. As such it was a proceeding of an investigatory nature specifically authorized by statute and regulation.

The mere fact that a proceeding is investigatory does not, by itself, provide an exemption from the Open Meeting Law. *Cf. Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 69 Cal. Rptr. 480 (1968). The investigatory process must be confidential by statute or by statutory authority.

The Legislature has conferred the broadest possible powers on the board and commission to regulate this most sensitive industry which is the economic mainforce of the State. [NRS 463.130](#), [463.140](#), and [463.143](#). One facet of the exercise of those powers is the exhaustive and minutely detailed investigation to which applicants must submit. [NRS 463.140](#), [463.200](#), [463.210](#), [463.520](#), [463.550](#), [463.585](#), [463.605](#), [463.635](#), and [463.639](#). Those broad grants of power by the Legislature are complemented by the regulations of the board and commission. Regulations 3, 4, 5, 6, 8, 15.1594-2, 15.530-1, 16.045, 16.130, 16.210, and 16.430.

Although some investigative data is taken from, or duplicated in, various public records, other investigative data is private and unknown to all but the applicant. Business data of a private nature includes such matters as income tax returns, prospective mergers and acquisitions, prospective entry into different lines of business, revenues, expenses, profits, capital improvements, lender relationships, and financial statement ratios. The

acquisition of those private items of information is dependent, at least in part, upon the willing cooperation of applicants. Public disclosure of those private items, in a substantial number of applications, would result in either increasing the cost and difficulty of investigations or in fewer corporations investing in Nevada gaming. The Legislature has provided for limited confidentiality.

[NRS 463.120](#) (which was last amended in 1971 Statutes of Nevada, Chapter 379) sets forth the legislative policies with regard to the confidentiality of board and commission data:

1. Records of “* * * all proceedings had at regular and special meetings * * *” are public. *Subsection 1.*
2. Applications and action taken on applications are public records. *Subsection 2.*
3. data as to earnings or revenue are confidential. *Subsection 4.*
4. Other data and information may be confidential at the discretion of the board or commission. *Subsection 5.*

If the confidentiality required by subsections 4 and 5 is to be preserved, not only must the physical records be confidential but also the information acquisition process, whether by documentary or oral presentations to an investigator, or to the board or to the commission.

The statutory grant of confidentiality of a record must, as a matter of the simplest logic, include a grant of confidentiality of the preparation of the record. Otherwise, the statutory grant is without substance.

In view of the foregoing, we conclude that most of the meeting of September 26, 1973, was quite properly closed. The substance of the major portion of the meeting was investigative in nature and exempt from [NRS Chapter 241](#).

There is, however, a limit to the scope of allowable activity within a closed meeting. Mr. Diehl’s letter indicates that certain matters not of a purely investigatory nature were discussed at the meeting of September 26, 1973. This colloquy between Commissioners Diehl, Echeverria, Cox and Schreck occurred after the conclusion of the presentation by the representatives of the Summa Corporation on that organization’s new corporate structure. The substance of the exchange concerned itself with the possible implications of recent events and testimony before a Senate Committee in Washington, D.C., which might be said to becloud the application for one or more of the proposed licensees.

Expressions by one commissioner that he was bothered by certain matters in an application pending before the commission and counter expressions by other commissioners that they were fully satisfied that all demands for information had been met along with the requirements of law, in our opinion constitute the sort of deliberation by the various commissioners upon which they would soon be taking formal action which is prohibited by the Nevada Open Meeting Law, [NRS 241.010](#) et seq. As explained more fully above, the commission has the authority to investigate applicants and gather data in private, but it may not engage in discussions or evaluations of the information disclosed.

As set out above, the Nevada Open Meeting Law, [NRS 241.010](#) et seq., specifically requires that deliberations of public agencies must be conducted openly. The term “to deliberate” has been defined to mean “to examine, weigh and reflect upon the reasons for and against the choice.” See *Sacramento Newspaper Guild v. Sacramento Co. Bd. Of Supervisors*, *supra*, at p. 485, a case in which the county supervisors attempted to meet with their attorney privately at a local club to discuss a public employee’s strike and the county’s efforts to enforce an injunction secured against the strikers. The California Court of Appeals held unanimously that such discussions concerning possible future action by the supervisors constituted prohibited deliberations under the law.

Although we believe a violation of law to have occurred near the end of the meeting of September 26, 1973, we are of the further opinion that this violation occurred without criminal intent by any of the participants. A reading of Mr. Diehl’s letter of October 9, 1973 to the Governor discloses the spontaneity with which this brief exchange took place and was then summarily discontinued.

In deciding the effect, if any, this unintentional violation of law may be said to have on the status of the applications subsequently approved at the commission meeting of September 27, 1973, the key consideration is whether the discussions at the meeting of September 26 had any influence on the actions of the board the next day. If the disposition of the application at the open meeting of September 27, 1973, had its genesis in the illegal deliberations of the meeting of September 26, 1973, this office must then consider the effect on the licenses granted. The question of their validity and the additional questions which you pose must therefore turn upon a finding by your commission. Only the members of the Gaming Commission themselves know the extent of influence, if any, the discussions at the meeting of September 26 may have had on any action taken the next day. We would respectfully suggest that the commission must, in the first instance, formally resolve this question.

If the formal action of September 27 had its roots in the discussion of the 26th, then the legal validity of the licenses approved at the second meeting may be questionable. On the other hand, if the commission concludes that it was not influenced by this discussion, then there exist no grounds for questioning the licenses approved by the commission for various officers and directors of the Summa Corporation.

CONCLUSION

An investigative meeting of the State Gaming Commission, where information declared by law to be confidential is to be received, may be held in private, but the members of the commission may not deliberate upon the information received with respect to possible future action to be taken by the commission without violating the Nevada Open Meeting Law, [NRS Chapter 241](#).

Accordingly, this matter is hereby referred back to the commission for further consideration as suggested above, along with a request that the commission promptly advise this office of its conclusion.

Respectfully submitted,

ROBERT LIST
Attorney General

SUPPLEMENT TO OPINION NO. 73-150 OPEN MEETING LAW—Where deliberations by members of State Gaming Commission at private meeting did not influence the commission's subsequent action on gaming application, the commission's action was valid.

Carson City, December 14, 1973

The Honorable Frank A. Schreck, Jr., Nevada Gaming Commission, 302 East Carson Avenue, Las Vegas, Nevada 89101

Dear Commissioner Schreck:

My Opinion No. 150, dated November 8, 1973, deferred consideration of the effect, if any, of the violation of the Open Meeting Law by deliberations occurring at the private meeting of commission members on September 26, 1973.

I indicated in the opinion that only those members taking part in the deliberations would know the influence, if any, those discussions may have had on formal action taken by the commission on the following day.

In addition to then-chairman Diehl's written report regarding the September 26th meeting, I have since been furnished statements by the other two commission members who participated in those private discussions. Each of those statements indicate, and I have therefore concluded, that these members were not influenced in any manner whatsoever in voting upon the matter of Summa Corporation's gaming license application for a gaming license was valid.

Respectfully submitted,

ROBERT LIST
Attorney General

OPINION NO. 73-151 JUSTICE COURTS—State of Nevada and its agencies exempt from paying filing fees in civil or small claims actions.

Carson City, November 26, 1973

The Honorable Robert G. Legakes, Justice of the Peace, Clark County Courthouse, Las Vegas, Nevada 89101

Dear Judge Legakes:

In your letter of October 5, 1973, you sought the advice and opinion of this office on the following:

QUESTION

Are the State of Nevada and its respective agencies exempt from the statutory requirement of paying filing fees for justice court civil actions and small claims?

ANALYSIS

Your question is prompted by Attorney General's Opinion No. 145, dated September 20, 1973, in which this office declared that political subdivisions of the State (i.e. cities, towns and counties) are not exempt from paying justice court filing fees. However, this same conclusion does not apply to the sovereign which is the State of Nevada itself or its various agencies.

The question of the State of Nevada being liable for filing fees, recording fees or any other type of statutory fees was settled long ago by the Nevada Supreme Court in the case of *State v. Rhoades*, [6 Nev. 352](#) (1871). Before the court in that case was the question whether or not the State of Nevada was required to pay a filing fee to the Clerk of the District Court before it could commence an action in said court. The statute requiring the payment of such fees, Statutes of 1864-5, p. 406, is similar to the present [NRS 4.060](#) in that it does not contain any specific exemption for the State of Nevada or its various agencies. Notwithstanding the absence of exemption language, the Nevada Supreme Court said, at [6 Nev. 373](#):

But it is clear the Legislature never intended to include actions by the State in the sections referred to. The fee being a tax imposed solely for revenue, upon well settled rules of law the State could not be included unless expressly named. It is a rule of the common law, that generally the

king is not in his royal character bound by statute in which there are not express words binding him.

Speaking for the court, Chief Justice Lewis concluded, at 375:

Certainly, there is nothing in the text of the act referred to, except the mere generality of the words that the fee shall be paid at the “commencement of every civil action,” from which it can be presumed that the Legislature intended to include the State. A tax levied on the State by itself, for its own transactions, is so anomalous that it cannot be supposed it was intended, unless upon the clearest language. A more appropriate application of the rule of the common law could not be made, than to cases of this kind. We conclude the Statute does not include actions initiated by the State.

For a similar ruling by the Supreme Court of a sister state, *see San Francisco Law and Collection Company v. State*, 141 Cal. 354, 74 P. 1047, 1049 (Cal. 1903), in which the court rejected the necessity of the state posting a bond on appeal with the following language:

The right of appeal in these proceedings is guaranteed to the State by the act, but there is no provision for the giving of an undertaking on appeal by the State and we know of no way in which, in the absence of legislation providing the mode therefor, the State could comply with the requirements of the general law relative to the giving of such an undertaking, or security in lieu thereof. To hold that the giving of the same is necessary to perfect an appeal by the State would be practically to deny the State the right of appeal in these cases. *See Commonwealth v. Franklin Canal Company*, 21 Pa. 117.

The decision in *State v. Rhoades, supra*, has been consistently applied by previous Attorneys General. *See* Attorney General’s Opinion No. 104, dated December 18, 1919, Attorney General’s Opinion No. 809, dated September 22, 1949, and Attorney General’s Opinion No. 195, dated August 11, 1952, all of which held that a county recorder cannot collect a filing fee from the State for filing deeds in which the State is named as grantee.

You may wonder why the State and its agencies are to be treated differently from the political subdivisions of the State including cities, towns and counties. This differentiation is essentially an attribute of the sovereignty inherent in the State through the rules of common law emanating from England and which were adopted by this State when the Constitution was framed in 1864. Political subdivisions of the State are not sovereignties, and therefore do not enjoy the perquisites inherent in this concept. As pointed out in Attorney General’s Opinion No. 145, dated September 20, 1973, there do exist specific exemptions from the filing fees in the Supreme Court and district courts for the State’s political subdivisions. For this same exemption to be extended to political subdivisions who wish to file actions in justice court, the Legislature must act.

CONCLUSION

The State of Nevada and its various agencies are exempt from the statutory requirement of paying filing fees for the filing of justice court civil actions and small claims.

Respectfully submitted,

ROBERT LIST

Attorney General

By: William E. Isaeff
Deputy Attorney General

OPINION NO. 73-152 MINORS—CRIMINAL COMPLAINT AND CITIZEN'S ARREST—Person under 21 may make citizen's arrest and sign criminal complaint.

Carson City, December 4, 1973

The Honorable Robert L. Van Wagoner, Reno City Attorney, City Hall, Reno, Nevada 89502

The Honorable James L. Parker, Chief of Police, P.O. Box 1900, Reno, Nevada 89505

Gentlemen:

Both of you have requested an opinion from this office on the following question:

QUESTION

May a person under the age of majority who is the victim of a crime make a citizen's arrest and sign a criminal complaint?

ANALYSIS

We find no provision of law which precludes a juvenile from making a citizen's arrest. [NRS 171.104](#) provides:

An arrest is the taking of a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or *by a private person*. (Italics added.)

There is no mention of legal disability by reason of the age of the arresting person. Many times a criminal may go free if a juvenile is unable to make a citizen's arrest or sign a complaint.

Chapter 129 of Nevada Revised Statutes enumerates certain legal disabilities imposed upon juveniles until they reach the age of majority. There is no mention in Chapter 129 of any disability or lack of legal capacity to make an arrest where arrest by a private person is otherwise authorized by statute. The law recognizes, with respect to persons under the age of majority, the concept of "progressive capacity." This means that, as a matter of practical necessity, a person gradually becomes able to do acts which have legal effect as he advances from babyhood to adulthood. This concept is appropriate here. We see no reason why a young person who is capable of recognizing a criminal offense committed in his presence should not be capable of making a citizen's arrest.

In the absence of statute there is no precise minimum age below which a child is deemed incompetent to testify. The competence of witnesses is a matter within the discretion of trial judges. Anno. 81 A.L.R.2d 386, 405. Nevada has no statutory minimum age for witnesses. See *William Fields, Jr. V. State*, Tex.Crim.App. No. 46,999 (Oct. 24, 1973).....S.W.2d, wherein the court held that a child 4 years of age was competent to testify in a murder case.

Accordingly, we see no reason why any person old enough to testify in court is not old enough to sign a criminal complaint. Police officers should not be compelled to seek out a parent or guardian in order to secure a signature. A parent or guardian, in most circumstances, would have no personal knowledge of the offense.

CONCLUSION

It is the opinion of this office that a person under the age of 21 years has legal capacity to make a citizen's arrest where such an arrest is otherwise authorized by law. A person old enough to testify in court has legal capacity to sign a criminal complaint.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Robert A. Groves
Deputy Attorney General

OPINION NO. 73-153 AFTER JULY 1, 1973, A SECOND CONVICTION WITHIN 3 YEARS OF DRIVING UNDER THE INFLUENCE carries a mandatory 10 day jail sentence even though the previous conviction occurred prior to July 1, 1973.

Carson City, December 4, 1973

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

Dear Mr. Freitag:

In your letter of September 11, 1973, you requested an opinion to the following question:

QUESTION

Does a conviction of driving under the influence after July 1, 1973, carry a mandatory minimum 10 day jail sentence where the person has been previously convicted for driving under the influence prior to July 1, 1973?

ANALYSIS

[NRS 484.379](#) was amended by Chapter 686 of the 1973 Statutes of Nevada wherein it was provided that upon a subsequent conviction within 3 years of an offense (driving under the influence of intoxicating liquor), a mandatory jail sentence of 10 days would be imposed. This amendment does not retroactively apply to convictions occurring before July 1, 1973, but applies only to a second conviction occurring after said date. While it appears that this may be an ex post facto law, the following two Nevada Supreme Court decisions: *Goldsworthy v. Hannifin*, [86 Nev. 252](#), 468 P.2d 350 (1970), and *Hollander v. Warden, Nevada State Prison*, [86 Nev. 369](#), 468 P.2d 990 (1970), indicate that it is not.

In *Goldsworthy v. Hannifin*, *supra*, at page 352, the Supreme Court stated:

Ex post facto laws have been defined by the United States Supreme Court as those laws which inflict greater punishment than that affixed when the offense was committed. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798). That court in *In re Medley*, 134 U.S. 160, 171, 10 S.Ct. 384, 33 L.Ed. 835 (1889), held: “any law which was passed after the commission of the offense for which the party is being tried is an ex post facto law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed, * * * or which alters the situation of the accused to his disadvantage * * *.”

Also, in the Hollander case, at page 992, the following is given as a definition of an ex post fact law:

Any law which was passed after the commission of the offense for which the party is being tried is an ex post facto law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed. *In re Medley*, 134 U.S. 160, 171, 10 S.Ct. 384, 33 L.Ed. 835 (1890). We emphasize the admonition of *Medley, supra*, as it applies to an offense for which the party is being tried. * * *

The enactment of a statute or its amendment which imposes a harsher penalty after prior convictions is not an ex post facto law. *Alaway v. United States*, 280 F.Supp. 326 (C.D.Cal. 1968); *State ex rel. Ves v. Bomar*, 213 Tenn. 487, 376 S.W.2d 446 (1964); *Wey Him Fong v. United States*, 287 F.2d 525 (9th Cir. 1961); *State v. Steemer*, [175 Nev. 342](#), 121 N.W.2d 813 (1963); *People v. Miller*, 357 Mich. 400, 98 N.W.2d 524 (1959).

As you will note in the above cases, the imposition of a harsher penalty after prior convictions does not make an amendment an ex post facto law. The criteria that determines whether an amendment is an ex post facto law is when a statute is changed so that the new penalty inflicts a greater punishment on an individual subsequent to the time the offense occurred but prior to the time the party is tried for said offense. The punishment being inflicted under this amendment is not for the previous offense but for the current offense (i.e. the second conviction of driving under the influence) only and the penalty has not been changed between the time of the committing of the offense and the trial of the party committing it.

CONCLUSION

[NRS 484.379](#), as amended by Chapter 686 of the 1973 Statutes of Nevada, would require a mandatory minimum 10 day jail sentence for anyone convicted after July 1, 1973, of a second offense for driving under the influence of intoxicating beverage even though the first conviction had occurred in the appropriate period prior to July 1, 1973.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Newel B. Knight
Deputy Attorney General

OPINION NO. 73-154 PUBLIC EMPLOYEES RETIREMENT—Retirement rights of substitute teachers explained.

Carson City, December 4, 1973

Mr. Gray F. Presnell, Assistant Executive Officer, Public Employees Retirement Board,
P.O. Box 1569, Carson City, Nevada 89701

Dear Mr. Presnell:

Your letter of September 11, 1973, addressed to this office, presented several questions concerning substitute teachers and the Public Employees Retirement System. These questions were apparently prompted by Attorney General's Opinion No. 130, dated May 7, 1973, on this subject.

For the sake of convenience, your questions can be all summarized in the following:

QUESTION

What are the legal retirement rights and responsibilities of substitute teachers in the school districts of Nevada, in view of Attorney General's Opinion No. 130, dated May 7, 1973, which concluded that substitute teachers have never been eligible for membership in the Nevada Public Employees Retirement Program?

ANALYSIS

As stated in Attorney General's Opinion No. 130, dated May 7, 1973, a substitute teacher is a person who is qualified and willing to teach on a temporary basis for an indeterminate period of time in substitution for a regular teacher who is absent. It is inherent in the very nature of the position of substitute teacher that such a position, for purposes of eligibility for membership in the State Retirement System under the terms of [NRS 286.320](#), can never be said to definitely require any specific number of hours or minimum payment for services. This is the basis of our earlier opinion this year to the effect that substitute teachers are not eligible for membership in the Public Employees Retirement System.

The 1971 Legislature appears to have recognized this problem respecting substitute teachers by amending [NRS 286.380](#) to extend to substitute teachers the right to participate in the Old Age and Survivors Insurance (Social Security) program of the federal government under agreements sanctioned by Chapter 287 of NRS.

The amendment enacted in 1971 was necessary to assure federal officials that substitute teachers were indeed eligible for Social Security, since they were not eligible for state retirement. Without such assurances from our Legislature, the Social Security Administration would not accept Nevada's substitute teachers into their program, according to a representative of the Social Security Office in Reno.

Therefore, all persons employed since July 1, 1971, for the first time as substitute teachers, though not eligible for state retirement, are instead eligible for federal Social Security protection. The responsibility rests on the substitute teacher to request that the employing school district secure an approved plan for his or her participation in the federal program. [NRS 391.375](#), which was also adopted in 1971 in conjunction with the amendment to [NRS 286.380](#) mentioned above, supports this conclusion.

Retroactive credit in the federal Social Security program may be obtained for any substitute teacher affected by this opinion by the employing school district filing with the Internal Revenue Service the necessary Form 941 (Quarterly Return on Taxes Withheld) for all quarters since July 1, 1971, in which contributions were erroneously made by both the employee and employer to the State Retirement Fund. The Public Employees

Retirement Board, in cooperation with the employing school district, could then pay over to Social Security all funds it had received (both employer and employee). Deficiencies, if any, are the responsibility of the teacher and the school district.

Partly as the result of Attorney General's Opinion No. 214, dated April 6, 1965, which was specifically repudiated in Attorney General's Opinion No. 130, dated May 7, 1973, as being in conflict with the language of the pertinent statutes, many persons who have held and continue to hold the position of substitute teacher in our various school districts were in the past allowed to participate in and make contributions to the Public Employees Retirement System. Some of these teachers have accumulated substantial service credits with the state system, but are not yet eligible for retirement.

Such a situation has produced, in the opinion of this office, an equitable estoppel situation between the Public Employees Retirement Board and substitute teachers who were members of the State Retirement System prior to July 1, 1971. To now say these individuals have acquired no rights in the State Retirement System, despite their years of faithful service and contributions made pursuant to the board's interpretation and representation of the law, would work a great injustice on these teachers. We do not believe the Legislature intended such an inequitable result when in 1971 it directed Social Security protection be extended to Nevada's substitute teachers. On this subject, the words of the U.S. Supreme Court in *Dickerson v. Colgrove*, 100 U.S. 578, 580 (1879), still ring true today:

The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden.

See also Crumpler v. Board of Administration Employees' Retirement System, 108 Cal.Rptr. 293 (1973), wherein the board was held estopped from reclassifying retroactive, to date of original hiring, certain city employees after they had been previously erroneously advised they were entitled to early retirement benefits under law.

You also raise the possibility that the word "retired" may have been inadvertently omitted from Assembly Bill No. 89 (Chapter 18, 1971 Statutes of Nevada) as this bill passed through the Legislature. Chapter 18 was the law which enacted the amendments to [NRS 286.380](#) and [NRS Chapter 391](#) as set forth above.

Chapter 18 does contain certain provisions that are specifically directed at retired school teachers who are subsequently reemployed by a school district as substitute teachers. [NRS 287.190](#), as amended by Chapter 18, 1971 Statutes of Nevada, directed that coverage under the Social Security Act shall be provided for any certified public school teacher who, while receiving a retirement allowance under Chapter 286 of NRS, is reemployed by a school district as a substitute teacher. All the substitute need do is request such coverage.

There is no evidence that the reference to retired teachers in this portion of Chapter 18 was intended to be read into other sections of the law. On the contrary, the law appears to be an internally consistent effort by the Legislature to provide Social Security protection for all classes of substitute teachers.

We note that the caption or title to the law says Chapter 18 is "An Act relating to retired certified public school teachers; allowing such teachers, on subsequent employment in positions of substitute teachers, Social Security coverage."

From a simple reading of the law in its final form, it appears that it may go beyond the scope of this title, but because it does so in areas reasonably related thereto the statute is valid under the laws of Nevada. Further, as the Nevada Supreme Court only recently noted in the case of *Las Vegas Police Protective Association v. City of Las Vegas*, 89 Nev., Adv. Op. 132, dated September 12, 1973, the title of a law does not control its meaning unless it must be read to clear up an ambiguity in the body. In any event, the title

is not to be interpreted in a way that would enlarge the scope of the law to include a subject not expressed in its body. Therefore, it would be incorrect to read the title of this law as limiting the language in the body of the statute to only retired school teachers who are temporarily reemployed as substitute teachers.

CONCLUSIONS

1. After July 1, 1971, all substitute teachers who had not previously contributed to the Public Employees Retirement System are eligible to participate in the Social Security Program but are not eligible to become members of the Public employees Retirement System.

2. Currently employed substitute teachers, who made contributions to the Public employees Retirement System prior to July 1, 1971, but are not yet eligible for retirement, may remain as members of the State Retirement System, notwithstanding the language of [NRS 286.380](#), subsection 5.

3. Former school teachers who, while receiving a retirement allowance from the Public Employees Retirement Board, are reemployed by a school district in the position of substitute teacher, are eligible for Social Security protection only with regards to their current, temporary employment with a school district.

Respectfully submitted,

ROBERT LIST
Attorney General

By: William e. Isaeff
Deputy Attorney General

OPINION NO. 73-155 RELIGIOUS SCHOOLS—EXEMPTION FROM LICENSING—For a private school to be exempt from state licensing as a religious organization, its leader(s) must have a sincere and meaningful religious belief which occupies a place in the life of the leader(s) of such organization parallel to that filled by those who clearly qualify for the exemption by having an orthodox belief in God.

Carson City, December 4, 1973

Mr. John R. Gamble, Deputy superintendent, Department of Education, Carson City, Nevada 89701

Dear Mr. Gamble:

You have asked this office for an opinion on the following:

QUESTION

What would be a legally supportable definition of a religious organization as that term is used in [NRS 394.010](#), subsection 2(b), and [NRS 394.020](#), subsection 1(b)?

ANALYSIS

The Legislature used in [NRS 394.010](#), subsection 2(b) and [NRS 394.020](#), subsection 1(b) the words “religious organization.” Strict construction of the statute can only mean that the Legislature intended the leader(s) or backer(s) of those schools qualifying for the exemption from state licensure to have *both* a “religion” and “organization.”

The United States supreme court has never expressly stated what is a “religious organization.” However, in the case of *United States v. Seeger*, 380 U.S. 163, at 165 (1964), the Court did, while interpreting a draft exemption statute, provide what is probably the best definition of a religion. The Court held:

We believe that under this construction, the test of belief “in a relation to a Supreme Being” is whether a given belief that is *sincere* and *meaningful* occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. (Italics added.)

Thus, a person, or group of persons need not believe in a Supreme Being, but rather their “religious” belief must be *sincere* and *meaningful*. The belief, whatever it is, must occupy a place in the life of the person parallel to that filled by one who has an orthodox belief in God.

The Court, in *Seeger, supra*, stated that the belief must be religious rather than political, social or philosophical in nature. Those persons who attempt to circumvent the state statutes concerning Licensing of Private Schools, Colleges and Universities ([NRS 394.010](#) to [394.120](#), inclusive) simply calling themselves a religious organization, when in fact their real intent in establishing the school is to avoid a court order, or statute, are acting contrary to law.

The court, in *Seeger, supra*, further stated, at page 185:

But we hasten to emphasize that while the “truth” of a belief is not open to question, there remains the significant question whether it is “truly held.” This is the threshold question of *sincerity* which must be resolved in every case. (Italics added.)

Since one whose claimed religious belief is based on political, social or philosophical grounds is not within the meaning of a religious belief, it necessarily follows that someone must determine upon what ground or foundation the religious belief is based. The Supreme Court stated, as quoted above, the “sincerity” of the belief can be questioned, while the “truth” of the belief cannot.

Webster’s New International Dictionary, 2nd Ed., defines “organization” as follows:

1. Act or process of organizing, whether as a living structure or as any systematic whole; as, the *organization* of an army or a government.
2. State or manner of being organized; organic structure; purposive systematic arrangement; constitution.
3. That which is organized; an organism; any vitally or systematically organic whole; an association of persons, as in a club.

The word “organization,” as it is used in the statutes, would require the leader(s) or backer(s) of the alleged school to have a purposeful and systematic structure by which they conduct the school. The structure of the organization must be such that the “organization” was not formed to defeat a law or laws or was formed as a sham.

The State Board of Education, pursuant to [NRS 394.010](#) to [394.120](#), inclusive, is the body who would be charged with determining whether a claimed religious organization is within the exemption. In arriving at its decision, the State Board of Education cannot impose its belief as to what is a religious organization and whether it is workable or

practicable, but rather must determine whether the belief is of a political, social or philosophical nature; and if not, then whether the belief is sincerely held. These evaluations must be made upon the merits of each situation and no absolute rules can be stated.

The recent case of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), involved the question whether the State of Wisconsin could compel members of the Amish Religion to send their children to high school. The Court held that the state could not compel mandatory high school attendance for members of the Amish Religion.

In so holding the Court said:

Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated.

The holding clearly established the power of a state to adopt reasonable standards concerning school attendance, but cannot do so where such regulation would infringe upon the free exercise of religion. The State Board of Education has been granted this regulation making authority under [NRS 385.080](#), [394.050](#), and 394.070. Since the State Board of Education has the authority, it can determine whether a private school, seeking the exemption, qualifies for the exemption or not. However, those schools operated by a religious organization, within the exemption statutes, will not have to comply with the state licensing provisions.

CONCLUSION

To meet the definition of a religious organization as that term is used in [NRS 394.010](#), subsection 2(b), and [NRS 394.020](#), subsection 1(b), the following criteria must be met:

1. The purported religious organization must have a *sincere and meaningful belief* which occupies a place in the life of the member of such organization parallel to that filled by the orthodox belief in God held by a member of a religious organization which clearly comes within the exemptions of [NRS 394.010](#), subsection 2(b) and [NRS 394.020](#), subsection 1(b).
2. The purpose of creating the religious organization must not be a sham or for the purpose of avoiding a law, or laws.
3. The belief of the religious organization must be religious, as that term is used in No. 1 above, and not political, social or philosophical in nature.
4. The leaders or backers of the school must have a purposeful and systematic structure by which they conduct the school.

Respectfully submitted,

ROBERT LIST
Attorney General

By: Ross de Lipkau
Deputy Attorney General

OPINION NO. 73-156 SUBDIVISIONS—PARCEL MAPS—Under [NRS 278.440](#), legal descriptions which refer to a lot number or letters on a recorded parcel may

not be utilized in instruments of conveyance of subdivision parcels which are the subject of the parcel map.

Carson City, December 10, 1973

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

Kay L. Adams, Clark County Surveyor, 2209 Paradise Road, Las Vegas, Nevada 89109

Gentlemen:

You have requested an opinion of this office regarding the legal effect of the parcel map provisions contained in Chapter 704, 1973 Statutes of Nevada (Senate Bill No. 124), amending Chapter 278 of the Nevada Revised Statutes. Specifically, you have asked the following question:

QUESTION

Does Chapter 278 of the Nevada Revised Statutes, as amended by the 1973 Nevada Legislature, permit the utilization of legal descriptions referring to a numbered or lettered lot on a recorded parcel map in the conveyance of subdivision parcels?

ANALYSIS

[NRS 278.500](#), as amended by Chapter 704, 1973 Statutes of Nevada (Senate Bill No. 124), requires a subdivider to file a “parcel map” with the county recorder prior to proceeding with the sale of any part of the subdivision if the subdivision contains not more than four lots. Such maps customarily indicate the lots into which the basic tract has been divided by a number or letter or both. However, [NRS 278.440](#) provides:

Conveyances of any part of a subdivision shall not be made by lot or block number, initial or other designation, unless and until a *final map* has been recorded. (Italics added.)

The question thus presented is whether or not a parcel map, defined and described in [NRS 278.500](#) to [278.560](#), inclusive, is a “final map” within the meaning of [NRS 278.440](#). A “final map” is defined in [NRS 278.010](#), subsection 1(d), as follows:

(d) “Final Map” means a map prepared in accordance with the provisions of [NRS 278.010](#) to [278.630](#), inclusive, and those of any applicable local ordinance, which map is designed to be placed on record in the office of the county recorder of the county in which any part of the subdivision is located or the recorder of Carson City.

A “parcel map” is defined in [NRS 28.010](#), subsection 1(h):

“Parcel Map” means a map prepared as provided in [NRS 278.500](#) to [278.560](#), inclusive, and conforming to the provisions therein.

It is clear that the Legislature intended to create two separate and distinct forms of recorded subdivision maps. Although, necessarily, there are some similarities between the statutory requirements for parcel maps and final maps, the requirements and contents of final maps as set forth in [NRS 278.410](#) are substantially more extensive, including the

requirement set forth in paragraph (6) thereof, that each lot be numbered and each block be numbered or lettered. There is no such requirement for parcel maps. The Legislature, therefore, must be understood to mean what it has plainly expressed. *Thompson v. Hancock*, [49 Nev. 336](#), 245 P. 941 (1926).

But for the language in [NRS 278.440](#), a conveyance of real property by reference to a recorded parcel map would otherwise meet legal requirements, *Weill v. Lucerne Mining Co.*, [11 Nev. 200](#) (1876). If it was intended that final maps and parcel maps were to be considered synonymous for purpose of conveyancing, it would have been a simple matter for the Legislature to have inserted appropriate language in [NRS 278.440](#). The Legislature, however, did not see fit to do so. Such omission must be considered deliberate for the purpose of effecting the change which is effected in the law, *Crane & Co. v. Gloster*, [13 Nev. 279](#) (1878), *Camino et al. v. Lewis*, [52 Nev. 202](#), 284 P. 766 (1930). The language of [NRS 278.440](#) is explicit and unambiguous, and is controlling, *Brooks v. Dewar et al.*, [60 Nev. 219](#), 106 P.2d 755 (1940).

Ruling as we do that such parcels may not be conveyed utilizing a legal description referring only to a recorded parcel map, the question arises as to what method of description would suffice. The object of the legal description is to define what the grantor intended to convey and the grantee to receive. *Weill v. Lucerne Mining Co.*, *supra*. Descriptions utilizing monuments, metes and bounds, courses and distances, government surveys as well as actual survey data have been traditionally recognized methods of describing real property and are equally valid today. Further, [NRS 361.215](#) specifically authorizes description of land in deeds by reference to a county assessor's recorded map under certain conditions.

CONCLUSION

Under [NRS 278.440](#), legal descriptions which refer to a lot number or letter on a recorded parcel map may not be utilized in instruments of conveyance of subdivision parcels which are the subject of the parcel map.

Respectfully submitted,

ROBERT LIST
Attorney General

By: E. Williams Hanmer
Deputy Attorney General

OPINION NO. 73-157 SUBDIVISIONS—FINAL MAPS—After July 1, 1973, a county recorder may not accept for record a final subdivision map which is not in full compliance with Chapter 278 of Nevada Revised Statutes, as amended.

Carson City, December 10, 1973

Kay L. Adams, Clark County Surveyor, 2209 Paradise Road, Las Vegas, Nevada 89109

Dear Mr. Adams:

You have requested an opinion from this office regarding whether a county recorder may lawfully accept for recording a final subdivision map which no longer meets the requirements of Chapter 278 of Nevada Revised Statutes due to the extensive amendments thereto adopted by the 1973 Legislature. Specifically, the question presented is as follows:

QUESTION

After July 1, 1973, is a county recorder authorized to accept for record a “final” subdivision map which does not meet the formal requirements of Chapter 278 of Nevada Revised Statutes, as amended by the 1973 Nevada Legislature, when the tentative map thereof, on which the final subdivision map is based, had been approved in all respects by the governing body prior to the effective date of such amendments?

ANALYSIS

[NRS 278.360](#), subsection 1, provides that the subdivider must prepare and record a final map in accordance with an approved tentative subdivision map within one (1) year from the date of approval. Subsection 2 of [NRS 278.360](#) provides in part as follows:

2. No final map of a subdivision as defined in [NRS 2789.010](#) to [278.630](#), inclusive, shall be accepted by the county recorder for record unless all provisions of [NRS 278.010](#) to [278.630](#), inclusive, and of any local ordinance have been complied with. * * *

There can be no question that on and after July 1, 1973, the effective date fixed by the Legislature, the amendments to Chapter 278 of Nevada Revised Statutes effected by 1973 Statutes of Nevada, Chapter 793 (Senate Bill No. 120); Chapter 86 (Senate Bill No. 123); Chapter 704 (Senate Bill No. 124); Chapter 664 (Senate Bill No. 442); Chapter 800 (Senate Bill No. 481); Chapter 675 (Senate Bill No. 516); Chapter 567 (assembly Bill No. 454); and Chapter 360 (Assembly Bill No. 652) are the law of the State and must be complied with; *Ex Parte Ah Pah*, [34 Nev. 283](#), 119 P. 770 (1911).

The language of [NRS 278.360](#), subsection 2, is plain and unambiguous; and in such situation there is no room for statutory construction or interpretation, *Brown v. Davis*, [1 Nev. 409](#) (1865); *Ex Parte Rickey*, [31 Nev. 82](#), 100 P. 134 (1909). Statutory construction and interpretation may be resorted to only where doubt exists as to the idea sought to be expressed by the Legislature, *Dahlquist v. Nevada Industrial Commission*, [46 Nev. 107](#), 206 P. 197 (1922). Here, no such doubt exists, and therefore a final subdivision map must be in full compliance with the provisions of Chapter 278 of NRS as of the date it is submitted for record.

Although this very section was amended by Section 9 of Chapter 793, 1973 Statutes of Nevada (Senate Bill No. 120), no transitory provisions were inserted by the Legislature to “grandfather in” final maps based on tentative maps approved prior to July 1, 1973. Such omission must therefore be considered deliberate, for the purpose of effecting the change which is effected in the law, *Crane & Co. v. Gloster*, [13 Nev. 279](#) (1878); *Camino v. Lewis*, [52 Nev. 202](#), 284 P. 766 (1930).

CONCLUSION

After July 1, 1973, a county recorder may not accept for record a final subdivision map, which is not in full compliance with Chapter 278 of Nevada Revised Statutes, as amended, even though the tentative map on which said final map is based had been approved in all respects by the governing body prior to the effective date of the amendment.

Respectfully submitted,

ROBERT LIST
Attorney General

By: E. Williams Hanmer
Deputy Attorney General