

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1977

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

209 Construction Management for Local Government Public Works Projects—A local government, otherwise authorized to engage in public works projects, is not prohibited by state law from utilizing construction management services for public works projects. If a construction manager is used solely for consulting or coordinating purposes, public bidding is not necessary to contract for such services. However, if a construction manager is made responsible for guaranteeing the cost and construction of the project, public bidding is necessary to contract for such services.

CARSON CITY, January 3, 1977

THE HONORABLE MICHAEL FONDI, *District Attorney*, 208 North Carson Street, Carson City, Nevada 89701

Attention: MICHAEL GRIFFIN, ESQ., *Deputy District Attorney*

DEAR MR. FONDI:

You have asked several questions relating to the legality of a local government entity using the services of a construction manager for a public works project.

FACTS

The Carson-Tahoe Hospital is a public hospital organized under Chapter 450 of NRS. Recently, the voters of Carson City approved a bond issue for the construction of an addition to the present hospital. The Board of Trustees of the hospital is considering using a construction management system to build the new addition. You have stated that it is contemplated that the hospital would contract with a construction manager to do the following:

1. Make investigations and consult with the architect regarding the availability and suitability and cost of materials and equipment;
2. Prepare estimates of the cost of alternate designs for the various elements of the project, and review drawings and specifications from the standpoint of cost effectiveness;
3. Upon completion of the architect's drawings, prepare an estimate of the cost of the project and a schedule of construction;
4. Submit a guaranteed and bonded maximum price for the project;
5. Subject to the approval of the hospital, prepare appropriate bid and contract documents and solicit and receive competitive bid proposals from contractors and material vendors for the portions of the work;
6. Prepare budget reports and other reports as required for the work;
7. Supervise accounting of the project;

8. Aid in assisting the architect and owner with the approval of invoices;
9. Provide field supervision in connection with the performance of the various contracts to see that all parts of the work are completed in accordance with plans and specifications; and
10. Make periodic inspections and the final inspection of the project.

You have further stated that the construction manager would not perform any work on the project, other than general supervision of the work. The construction manager would be hired before any bids are prepared for open competitive bidding by persons or firms intending to do the actual construction. In fact, the persons bidding to do the actual construction would be considered the prime contractors on their portions of the construction, rather than as subcontractors to a general contractor who would also do construction work under more traditional construction procedures.

QUESTION ONE

May the Board of Trustees of Carson-Tahoe Hospital retain a construction manager and thereafter solicit bids from individuals or firms, who normally act as subcontractors, to act as prime contractors for their portions of the overall project?

ANALYSIS—QUESTION ONE

The construction management system was summarized in the case of City of Inglewood-Los Angeles County Civic Center Authority, et al. v. Superior Court, 7 Cal.3d 861, 103 Cal.Rptr. 689, 500 P.2d 601 (1972):

Under the traditional lump sum method of bidding, contractors enter the project process upon the completion of working drawings. At this point in time they have little opportunity or incentive to contribute to cost reduction.

The Management Contracting Method * * * differs from this traditional lump sum method in that the contractor is brought into the building project through competitive bidding at or shortly after the completion of preliminary plans, rather than working drawings. He is then called upon to contribute his practical expertise during the development of the working drawings, and subsequently apply this expertise during construction, in order to achieve maximum economies. He is expected to provide cost estimates from time to time during development of working drawings to determine that the project is within budget so that some of the early phases of construction can proceed prior to completion of all of the drawings. This makes it possible to save a significant amount of time in the total building process. City of Inglewood, supra, at 500 P.2d 603.

The construction management system is thus another means of carrying out a public works construction project. So long as a public entity has the authority to construct public works projects, and there are no statutes prohibiting a particular means for doing so, there is nothing to prevent a public entity from using any otherwise lawful method of engaging in such projects. 64 Am.Jur.2d Public Works And Contracts, § 8. In the case of a county hospital, such as the Carson-Tahoe Hospital, the general authority to construct a hospital public works project is found in [NRS 450.150](#) and [450.210](#). As for prohibitions of specific means, our examination of the relevant statutes pertaining to public works projects—Chapters 332 and 338 through 342 of Nevada Revised Statutes—reveals no prohibition against using a construction management system for the construction of a public works project. With regard to a similar question and for a similar reason, the California Attorney General advised several years ago that construction management procedures were legal in that state. 57 Opinions of the Attorney General of California, 417 (1974).

It is true that the State Public Works Board obtained specific enabling legislation in the last Legislature in order to set up its own construction management system. However, the Public Works Board envisions a system of competitive bidding among a select group of prequalified construction managers. Without specific enabling legislation permitting such a procedure, this system would be in violation of [NRS 338.140](#), subsection 1(a), which forbids bidding specifications to be drawn in such a way as to limit bidding to any specific persons or entities.

The plan envisioned by the Carson-Tahoe Hospital, however, does not contemplate limiting the contract offer to specific, prequalified construction managers and, therefore, enabling legislation, similar to [NRS 341.270](#), is unnecessary.

CONCLUSION—QUESTION ONE

It is our opinion that a local government, otherwise authorized to engage in public works projects, is not prohibited by state law from utilizing construction management services for public works projects.

QUESTION TWO

Would the retention of a construction manager with the powers contemplated by the Carson-Tahoe Hospital Board of Trustees violate the competitive bidding requirements of Nevada law?

ANALYSIS—QUESTION TWO

This question really is very similar to Question No. 1 above. For that reason, our answer to this question is the same as for Question No. 1. Our review of the relevant public works statutes in Nevada law, relating to competitive bidding, reveals no prohibition against a local government entity from utilizing construction management services and thereby entering into a series of contracts to do the work with various contractors. Obviously, where competitive bidding is used, the provisions of Chapter 332 of Nevada Revised Statutes, the Local Government Purchasing Act, must be followed. As Chapter 332 makes clear, competitive bidding must be used in the case of the various contractors who would contract through the construction manager to actually build the project. Whether it is necessary to put construction management services out to bid is the subject of the next question.

CONCLUSION—QUESTION TWO

It is our opinion that the retention of a construction manager with the powers contemplated by the Carson-Tahoe Hospital Board of Trustees would not violate the competitive bidding requirements of Nevada law.

QUESTION THREE

Would the hospital Board of Trustees be required to solicit bids from qualified individuals or companies to act as a construction manager for the project?

ANALYSIS—QUESTION THREE

County hospitals are included within the provisions of the Local Government Purchasing Act. See [NRS 332.015](#). In this connection, [NRS 332.045](#) provides:

Except as otherwise provided by law, the governing body or its authorized representative shall advertise *all contracts* where the estimated aggregate amount required to perform the contract exceeds \$2,500 at least once and not less than 7 days prior to opening of bids. (Italics added.)

However, [NRS 332.115](#) in part provides:

1. Contracts which by their nature are not adapted to award by competitive bidding, including but not limited to:

* * *

(b) Contracts for professional services;

* * *

may not be subject to the competitive bidding requirements of this chapter as determined by the governing body or its authorized representative.

* * *

3. Nothing in this section prohibits a governing body or its authorized representative from advertising for or requesting bids.

It is said that “professional services” involves labor, skill, education, special knowledge and compensation or profit. The labor or skill, however, is predominately mental or intellectual rather than physical or manual. *Maryland Casualty Co. v. Crazy Water Co.*, 160 S.W.2d 102, 104 (Tex. 1942). For the most part, the activities contemplated by the Carson-Tahoe Hospital Board of Trustees for its construction manager involves merely consultations and coordination of functions between various contractors who are actually building the project. Therefore, the construction manager’s labor would be predominantly mental or intellectual. However, the hospital Board of Trustees is also requiring the construction manager to guarantee, and obtain a bond for, a maximum price for the facility. The manager, therefore, will not be limited to mere consultations with the contractors. He is actually guaranteeing to the hospital that a completed facility will be built at a particular price. This contemplates something more than just intellectual labor on his part. He must also provide the building to be constructed.

This matter was considered in the *City of Inglewood* case, *supra*. In that case, one of the parties argued that the construction manager contract did not have to be let out for competitive bidding because the manager was only a consultant and supervisor. The court disagreed, holding that the guarantee by the contract manager in that case of the maximum price of the project was closely related to the duties of a general contractor under the “traditional lump sum” method of contracting. As such, the law requiring competitive bidding had to be followed or else the door would be opened to possible favoritism, fraud or corruption in the letting of public contracts. *City of Inglewood, supra*, at 500 P.2d 604.

On the other hand, where the construction manager did not guarantee the maximum price for the project, he was not made responsible for the actual construction of the building and he merely engaged in consulting and coordinating activities. Therefore, competitive bidding was not necessary. 57 Opinions of the Attorney General of California, 417, 420.

It should be noted that the Public Works Board recommends holding a construction manager to a guaranteed price for the project as the most efficient way of administering the project. Such a requirement serves to hold down the cost of the project to the government entity involved since the manager must absorb any costs over the maximum guaranteed cost of the project. When the manager acts only as a coordinator, the government entity must pay all costs over the original estimate.

At any rate, since the Carson-Tahoe Hospital Board of Trustees intends to require a construction manager to guarantee a maximum price for their project, the manager would act as more than a consultant. He would be guaranteeing to do more than render professional services. Therefore, the board should advertise for competitive bids for the position of construction manager for its public works project, as required by [NRS 332.045](#).

CONCLUSION—QUESTION THREE

It is the opinion of this office that if a construction manager is used solely for consulting or coordinating purposes, public bidding is not necessary to contract for such services. However, if a construction manager is made responsible for guaranteeing the cost and construction of the project, public bidding is necessary to contract for such services. Since the Carson-Tahoe Hospital Board of Trustees intends to impose the latter condition on potential construction managers, it is our opinion that such a construction management contract should be advertised and awarded by competitive bidding.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

210 Local Government: Applicability of the “One Man, One Vote” Principle—The “one man, one vote” principle of the Equal Protection Clause of the 14th Amendment to the United States Constitution does not apply to the Washoe Council of Governments, as its powers are presently formulated, nor to appointive boards and commissions established by locally elected governing bodies.

CARSON CITY, January 3, 1977

THE HONORABLE LARRY R. HICKS, *Washoe County District Attorney*, P.O. Box 11130,
Reno, Nevada 89510

Attention: LARRY D. STRUVE, ESQ., *Chief Civil Deputy District Attorney*

DEAR MR. HICKS:

You have requested advice as to whether the “one man, one vote” decisions of the United States Supreme Court apply to the Washoe Council of Governments or to appointive boards and commissions.

QUESTION ONE

Specifically, you have asked the question:

Does the Baker v. Carr opinion of the U.S. Supreme Court (and subsequent decisions) apply to the Washoe Council of Governments (WCOG), which is a coordinating body in Washoe County composed of all of the elected officials of the three local governments in Washoe County?

ANALYSIS—QUESTION ONE

In the case of Gray v. Sanders, 372 U.S. 368 (1963), the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution required that once a geographical unit is designated for which an elected representative of the people is to be chosen all persons participating in the election of the representative are to have an equal vote. In other words, the conception of political equality means just one thing—“one person, one vote.” Gray, *supra*, at 381. Subsequently, in the case of Reynolds v. Sims, 377 U.S. 533 (1964), the United States Supreme Court stated that the weight of a citizen’s vote should not depend on where he lives.

The fact situation in both of these cases was immediately applicable only to state legislative office. However, in Avery v. Midland County, 390 U.S. 474 (1968), the United

States Supreme Court applied the one man, one vote decisions to local governments as well. The court noted that the Fourteenth Amendment was applicable to state action and when a state delegated *law-making* power to local governments, the actions of the local governments become the actions of the state. Therefore, when officials are elected to local government offices, the state must insure that all qualified voters shall have an equally effective voice in the election process. Avery, supra, at 480.

The court then concluded:

* * * We hold today only that the Constitution permits no substantial variation from equal population in drawing districts for units of local government *having general governmental powers over the entire geographic area served by the body.* (Italics added.) Avery, supra, at 484.

The critical question, then, as to whether the one man, one vote decisions apply to a local governmental entity, is whether it exercises general governmental powers or performs governmental functions. If it does not, then the one man, one vote decisions are not applicable. *Slisz v. Western Regional Off-Track Betting Corp.*, 382 F.Supp. 1231 (D. N.Y. 1974); *Bates v. Edwards*, 294 So.2d 532 (La. 1974); *Community College v. School District*, 4 Pa. Comwlth. 483, 287 A.2d 844 (1972).

The case which best embodies this rule and which is particularly pertinent to your question is *Education/Instruction, Inc., et al. v. Moore*, 379 F.Supp. 1160 (D. Conn. 1973); *aff'd.*, 503 F.2d 1187 (CCA A.2d 1974), cert. denied, 419 U.S. 1109 (1975). The federal district court held that a regional council of governments, which was made up of the chief elected officials of cities within the region, whose populations ranged from 2,000 to 160,000 and which had the power merely to be informed about common problems, to advise, to comment, to give technical assistance, and to propose municipal programs, zoning changes and regional compacts was not subject to the one man, one vote decisions of the Supreme Court. The court held that the method used to choose members of the regional council did not deny equal protection despite population variances between the cities involved and despite the fact that one city had over 80 percent of the black and minority populations in the area.

The court noted that the key factors in its decision were that the regional council was voluntary in membership and that its functions were advisory in nature. Therefore, its membership need not be apportioned on a numerical basis pursuant to the one man, one vote decisions. *Education/Instruction, Inc.*, supra, at 1166-1167.

An analysis of the Articles of Association of the Washoe Council of Governments, adopted December 18, 1975, and entered into pursuant to [NRS 277.080 to 277.180](#), inclusive, reveals that the council is also advisory in nature only and that it is a voluntary organization. Implementation of recommendations are carried out by each local governmental body and not by the council itself. Thus a local government, finding itself outvoted in the council, can still refuse to implement the council's recommendations. All this is pointed out by the first paragraph of the Preamble of the Articles of Association which states:

We, the elected representatives of Washoe County and the Cities of Reno and Sparks, Nevada, hereby join together in a voluntary organization to be known as the Washoe Council of Governments, for the purpose of meeting at regular intervals to discuss and study community challenges of mutual interest and concern, and to develop policy and action recommendation for ratification and implementation by the governments in the region served by the Washoe Council of Governments.

A more detailed analysis of the enumerated functions of the council in Article II of the Articles of Association reveals that the council only discusses, coordinates, reviews

and recommends matters of mutual concern. It promotes intergovernmental cooperation, serves as a conduit of federal funds to local governments and gives technical assistance to members as requested. These powers are similar to those carried out by the entity considered by the court in *Education/Instruction, Inc.*, supra, and as the court did in that case, this office concludes that, “Such powers and functions are neither qualitatively nor quantitatively comparable to those considered by the Supreme Court in *Avery*.” *Education/Instruction, Inc.*, supra, at 1166. The Washoe Council of Governments, as presently formulated, does not exercise general governmental powers.

CONCLUSION—QUESTION ONE

It is the opinion of this office that the “one man, one vote” principle of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution does not apply to the Washoe Council of Governments, as its powers are presently described by the council’s Articles of Association of December 18, 1975.

QUESTION TWO

You also asked the question:

Generally, does the *Baker v. Carr* rule—one man, one vote—operate for the appointive boards and commissions established by locally elected governing bodies?

ANALYSIS—QUESTION TWO

This question was considered in the case of *State ex rel. List v. Douglas County*, [90 Nev. 272](#), 524 P.2d 1271 (1974), in which the Nevada Supreme Court stated:

* * * It is asserted that equal protection is denied because the method of selecting the governing body of the Tahoe Regional Planning Agency violates the “one man, one vote” rule. The members of the governing board are appointed. The principle of “one man, one vote” has no relevancy to appointive boards. *Sailors v. Board of Education*, 387 U.S. 105 (1967); *Hadley v. Junior College District*, 397 U.S. 50, 58 (1970); *People ex rel. Younger v. County of El Dorado*, 487 P.2d 1193, 1208, 1209 (Cal. 1971). *State ex rel. List*, supra, at 281.

CONCLUSION—QUESTION TWO

It is the opinion of this office that the “one man, one vote” principle of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution does not apply to appointive boards and commissions established by locally elected governing bodies.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

211 Released Time From Public School for Sectarian Purposes—At the written request of a pupil’s parent(s) a local school board of trustees may permit a pupil to be released from school for limited periods of time for sectarian instruction or devotional exercises at a religious center off school property at the end of a class session or at some other convenient time as determined by the school board of trustees. Weekly reporting of the pupil’s attendance by the sectarian group sponsoring such instruction or exercises is a condition for continued release of the pupils.

CARSON CITY, February 14, 1977

ROBERT L. PETRONI, *Legal Counsel, Clark County School District*, 2832 East Flamingo Road, Las Vegas, Nevada 89121

DEAR MR. PETRONI:

You have requested a clarification of Attorney General's Opinion No. 320, dated March 3, 1954, regarding release time from school attendance for purposes of religious instruction. Attorney General's Opinion No. 320 dealt with a factual situation involving Moapa and Virgin Valley schools of Clark County wherein students were released for seminary class instruction sponsored by the Church of Jesus Christ of Latter-Day Saints. The opinion of this office was that a plan, known as the "Utah Plan," calling for daily release time of 45 minutes for each class receiving sectarian instruction, such classes being staggered throughout the entire school day, breaches the constitutional wall of separation between church and state.

We note at the outset, however, that not all released time programs for religious instruction are prohibited under either the United States or Nevada Constitutions or under Nevada law.

ANALYSIS

The First Amendment to the Constitution of the United States requires that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The First Amendment religion provisions have been made wholly applicable to the states by the Fourteenth Amendment. *Abington School District v. Schempp and Murray v. Curlett*, 374 U.S. 203, 205 (1963); see also *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The interrelationship between the Establishment Clause and the Free Exercise Clause of the First Amendment was summarized by the Court of Appeals of South Carolina and quoted with approval by the U.S. Supreme Court in *Watson v. Jones*, 13 Wall. 679, 730 (1871):

The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.

Released time questions generally involve the Establishment Clause provision. Among the religion-education precedents decided by the Supreme Court, two released time cases have been heard by the court:

McCullum v. Board of Education, 333 U.S. 203 (1948), a case where public school classrooms which had been turned over to religious instructors for sectarian instruction was held to violate the Establishment Clause; and *Zorach v. Clauson*, 343 U.S. 306 (1952), a case where a released time program for religious instruction outside New York's public schools was upheld as a neutral "accommodation" to "the religious needs of the people" despite the majority's recognition that the program in fact encouraged religious education. Released time questions seldom involve the Free Exercise Clause. Justice Douglas in *Zorach v. Clauson*, *supra*, noted at 311 that:

It takes obtuse reasoning to inject any issue of the "free exercise" of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools.

An analysis of possible infringement of the First Amendment by state accommodation of released time for religious purposes must focus upon the Establishment Clause. In searching for Establishment Clause standards, the United States Supreme Court stated a strict position in *Everson v. Board of Education*, 330 U.S. 1, 16 (1947):

Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”

The court qualified the concept of a “wall of separation between Church and State” in *Gillette v. United States*, 401 U.S. 437, 450 (1971), as follows:

The metaphor of a “wall” or impassable barrier between Church and State, taken to literally, may mislead constitutional analysis, * * * but the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact. (Citations omitted.)

The degree of separation between church and state was discussed by Chief Justice Burger in *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971):

Our prior holdings do not call for a total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. (Citations omitted.)

As to the degree of relationship which may be constitutionally permissible, Chief Justice Burger stated that “Every analysis in this area must begin with consideration of the cumulative criteria developed by the court over many years.” He spoke of “three * * * tests * * * gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; * * * finally, the statute must not foster “an excessive government entanglement with religion.” *Lemon v. Kurtzman*, *supra*, at 612-613. As to the last test the Chief Justice elaborated at 615 as follows:

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.

The three part test set forth above was reaffirmed in *Meek v. Pittenger*, 421 U.S. 349, 358 (1975), wherein the Supreme Court stated, at 359:

Primary among the evils against which the Establishment Clause protects “have been sponsorship, financial support and active involvement of the sovereign in religious activity; [Citations omitted.]” The court has broadly stated that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.” *Everson v. Board of Education*, 330 U.S. 1, 16. But it is clear that not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution. See *Zorach v. Clauson*, 343 U.S. 306, 312; *Lemon v. Kurtzman*, *supra*, at 614. “The problem,

like many problems in constitutional law, is one of degree.” *Zorach v. Clauson*, supra, at 314.

Although *Zorach v. Clauson*, supra, was decided many years before the court fashioned the tripartite test, the Meek citation indicates that *Zorach* is not inconsistent with the tripartite test. See *Smith v. Smith*, 523 F.2d 121, 124 (C.A. 4th 1975). In *Zorach*, the nature of the state’s aid and involvement in the released time program was clearly not so entangling so as to be excessive. It was more in the nature of a neutral accommodation. Mr. Justice Douglas, writing for the court, stated at 313-14:

When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. * * * But it can close its doors or suspend operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.

In *Zorach*, public schools were permitted to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. The churches made weekly reports to the schools, sending a list of children who had been released from public schools but who had not reported for religious instruction. A student was released upon written request from his parents for one hour per week at the end of a class session. See *Zorach v. Clauson*, supra, at 308. In *Zorach*, the government-religion entanglement was not excessive; however, variation in similar programs may result in an excessive entanglement. The warning by Mr. Justice Harlan is against “* * * programs whose very nature is apt to entangle the state in details of administration and planning, * * * [.]” *Waltz v. Tax Commission*, 397 U.S. 664, at 695 (1970).

The Nevada state constitutional delegates were very concerned about the relationship between religious or sectarian instruction and the educational process of the public schools. Sections 2, 9, and 10 of Article 11 of the Nevada Constitution reflect this anxiety. Pertinent excerpts from these sections are as follows:

Article 11, Section 2. [A]ny school district which shall allow instruction of a sectarian character therein [in a public school] may be deprived of its proportion of the interest of the public school fund * * * [.]

Article 11, Section 9. No sectarian instruction shall be imparted or tolerated in any school or University that may be established under this Constitution.

Article 11, Section 10. No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.

Other provisions reflect the protective concern for religious freedom. The Second Ordinance of the Nevada Constitution provides:

That perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested, in person or property, on account of his or her mode of religious worship.

Nevada Constitution, Article I, Section 4, recognizes that the “free exercise” of religion shall forever be allowed in this State. As a general statement, the foregoing provisions confirm the commitment to the concept of separation of church and state.

Based upon the foregoing analysis, this office is of the opinion that released time programs similar to the program found in *Zorach v. Clauson*, supra, would be upheld as constitutional in Nevada courts. Such programs should be examined on a case by case basis to insure constitutionality as tested by the “cumulative criteria developed by the Supreme Court over many years.” Released time programs patterned after the *Zorach* program were held constitutional in *Smith v. Smith*, supra, and *State ex rel. Holt v. Thompson*, 66 Wis.2d 659, 225 N.W.2d 678 (1975).

The board of trustees may set up a limited released time program pursuant to the authority conferred upon it by [NRS 386.350](#), which reads as follows:

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

In Attorney General’s Opinion No. 158, dated January 24, 1974, “shared time,” a situation in which a student receives part of his education at a public school, and part at a nonpublic school, was deemed permissible at the option of the local boards of school trustees. Since released time for sectarian instruction has a lesser impact upon the compulsory attendance statute, [NRS 392.040](#), than “shared time,” it follows that released time is permissible based upon the authority of Attorney General’s Opinion No. 158, supra.

CONCLUSION

At the written request of a pupil’s parent(s), a local school board of trustees may permit pupils to be released from school for limited periods of time for sectarian instruction or devotional exercises at a religious center off school property at the end of a class session or at some other convenient time as determined by the school board of trustees. Weekly reporting of the pupil’s attendance by the sectarian group sponsoring such instruction or exercises is a condition for continued release of the pupils.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By HARRY W. SWAINSTON, *Deputy Attorney General*

212 County Commissioners and Juvenile Probation Officers—Boards of county commissioners have no authority over the hiring, firing or reprimanding of juvenile department employees, including the chief juvenile department probation officer.

CARSON CITY, June 16, 1977

THE HONORABLE PETE L. BENGOCHEA, *Chairman, Humboldt County Board of Commissioners*, P.O. Box 352, Winnemucca, Nevada 89445

DEAR MR. BENGOCHEA:

You have requested an opinion regarding the authority of the county commissioners to hire, fire or reprimand juvenile department employees, including the chief juvenile department probation officer. [NRS 228.150](#) provides that the Attorney General, when requested, shall give his opinion upon any question of law to any district attorney and to any city attorney relating to their respective offices, departments, agencies, boards or commissions. Although this office has taken the position that the Attorney General is not precluded by this statute from, in his discretion, giving opinions to local government officials without going through local district attorneys or city attorneys, nevertheless, it is the general policy of this office to give opinions to local government officials only after the local district attorney or city attorney has been consulted. We, therefore, advised the Humboldt County District Attorney of your request and he agreed that this office should offer its opinion on your question.

QUESTION

Do boards of county commissioners have any authority in the hiring, firing or reprimanding of juvenile department employees, including the chief juvenile department probation officer?

ANALYSIS

[NRS 62.040](#) provides that the district court has exclusive jurisdiction concerning any child committing a delinquent act in a county. [NRS 62.100](#) provides for the appointment, by the judge or judges of each district court, of a juvenile probation committee. [NRS 62.100](#), subsection 2, specifically provides, in part, as follows:

(e) *The judge or judges* shall, in cooperation with the probation committee, set up policies and procedures, establish standards for the proper performance of duties and responsibilities of probation officers and all employees of any detention home or other commitment facilities administered or financed by the county.

* * *

(g) The probation committee shall advise and recommend the appointment of such employees as it deems necessary for the operation and management of the detention home or other commitment facilities administered or financed by the county. *Any employees are subject to discharge by the judge or judges.* (Italics added.)

In addition, [NRS 62.110](#), subsection 1, provides as follows:

The judge or judges of each judicial district which does not include a county having a population of 200,000 or more, as determined by the last preceding national census of the Bureau of the Census of the United States Department of Commerce, *shall appoint one or more probation officers and such other employees as may be required to carry on the work of the probation department and detention home.* If more than one probation officer is appointed, one of them shall be designated as chief probation officer. All probation officers and detention personnel shall be appointed from lists of eligible persons established through competitive examinations conducted by the probation committee. Probation officers and employees may be removed, discharged or reduced in position only after having been given the reasons therefor in writing *and being afforded an opportunity to be heard before the judge in answer thereto.* (Italics added.)

These statutes, in particular [NRS 62.100](#), subsection 2(g) and [NRS 62.110](#), subsection 1, give the juvenile judge the power to hire and fire juvenile department employees. *Hampton v. Wartman*, [85 Nev. 408](#), 455 P.2d 921 (1969).

As was stated in the case of *Young v. Board of County Commissioners*, [91 Nev. 52](#), 54, 530 P.2d 1203 (1975):

* * * Pursuant to legislative enactment of the Juvenile Court Act, [NRS Chapter 62](#), the district courts are specifically empowered to administer juvenile justice. Juvenile probation services were made a part of the duties assumed by the district courts under [NRS Chapter 62](#). The district judge enjoys the power to choose the probation committee for the county, which in turn advises him in his choice of probation officers. [NRS 62.100](#) and [NRS 62.110](#). *The judge supervises*, and the probation committee advises the probation officers in their work, including their financial and clerical work. [NRS 62.120](#). (Italics added.)

In addition to the specific provisions of Chapter 62 of Nevada Revised Statutes which vest sole authority in the judicial system for the hiring and firing of probation officers, there is also a constitutional prohibition against county commissioners interfering in such authority by the judicial branch. This lies in Article 3 of the Nevada Constitution which provides for the separation of power of the various branches of government. Indeed, this constitutional separation of powers is recognized in Chapter 62 of Nevada Revised Statutes, in particular [NRS 62.120](#), subsection 3. As was noted in the *Young* case, supra:

[NRS 62.120](#), subsection 3, provides: “Every effort shall be made by the various counties throughout the state to provide sufficient personnel for the probation department to uphold the concept of separation of powers in the court process.” This statute is a clear expression by the legislature of its intent that the district courts enjoy preeminent authority over juvenile probation services. *Young*, supra, at 54.

The sole authority which boards of county commissioners have regarding employees of the juvenile departments of the various counties is found in [NRS 62.110](#), subsection 3, which provides as follows:

The salaries of the probation officers, detention home personnel and other employees shall be fixed by the judge with the advice of the probation committee and *consent of the board or boards of county commissioners*. (Italics added.)

However, this authority has been severely limited by the Nevada Supreme Court in its interpretation of the statute. As the Nevada Supreme Court stated:

The “consent” function of a board of commissioners under [NRS 62.110](#) is limited to determining whether, in light of the current fiscal status of the county, the salary request of a district judge is unreasonable or arbitrary. *Young*, supra, at 55.

This limited authority of the board of county commissioners over the fixing of salaries has no connection whatever with the question of hiring, firing or reprimanding the employees of the juvenile department. As indicated above, these functions rest exclusively with the district court.

CONCLUSION

The boards of county commissioners have no authority for the hiring, firing or reprimanding of juvenile department employees, including the chief juvenile department probation officer. This authority rests exclusively with the district court.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

213 [NRS 612.265](#) does not prohibit the Department of Employment Security from disclosing information to the Department of Economic Development which is in the public realm and has no specific relevancy in determining the benefit rights of any individual pursuant to Nevada's Unemployment Compensation Law, [NRS Chapter 612](#).

CARSON CITY, July 8, 1977

MR. R. E. GOODMAN, *Director, Department of Economic Development*, State Capitol Building, Carson City, Nevada 89710

DEAR MR. GOODMAN:

Your letter of May 16, 1977, states that the Department of Economic Development desires to obtain certain information from the Employment Security Department, which has refused to furnish the information. The Employment Security Department has this information stored in its computer banks and a portion of it is published in a weekly pamphlet entitled, "New and Re-Opened Accounts."

QUESTION

Does [NRS 612.265](#) prohibit the Employment Security Department from disclosing certain information to the Department of Economic Development when that information is public knowledge and not specifically relevant to a determination of an individual's benefit rights under the Unemployment Compensation Act?

ANALYSIS

[NRS 612.265](#), in relevant part, states:

1. Except as hereinafter otherwise provided, information obtained from any employing unit or individual pursuant to the administration of this chapter and determination as to the benefit rights of any individual shall be held confidential and shall not be disclosed or be open to public inspection in any manner revealing the individual's or employing unit's identity.

There appears to be no case law construing the statute's exact meaning. Therefore, to determine the statute's meaning for purposes of the question you pose, it is necessary to apply the rules of statutory construction.

The purpose of all rules or maxims as to the construction or interpretation of statutes is to discover the true intention of the law and to act as aids in ascertaining legislative intent. *Ronnow v. City of Las Vegas*, [57 Nev. 332](#), 65 P.2d 133 (1937). *Thorpe v. Schooling*, [7 Nev. 15](#), 17, 18 (1871).

When a specific statute such as [NRS 612.265](#) is construed, it should be construed in its entire context. *U.S. v. Alpers*, 338 U.S. 680 (1950). [NRS 612.265](#) is a part of Nevada Revised Statutes, Chapter 612, "Unemployment Compensation Law." As the title and a reading of the entire chapter reveals, the chapter was enacted by the Nevada State Legislature to provide unemployment benefits to qualifying individuals. [NRS 612.035](#) defines "benefits" to mean:

* * * the money payments payable to an individual, as provided in this chapter, with respect to his unemployment.

As stated in Ex Parte Douglass, [53 Nev. 188](#), 191, 295 P. 447, 448 (1931):

It is a cardinal rule of construction that the purpose of a law is to be kept in view and the statute given a fair and reasonable construction with a view to effecting its purpose and object. * * *

Chapter 612 of Nevada Revised Statutes is specifically concerned with the payment of unemployment “benefit rights” to qualified individuals. Moreover, the relevant operative words of [NRS 612.265](#), subsection 1, take the following form:

* * * *information obtained* * * * pursuant to the administration of this chapter *and determination as to the benefit rights of any individual* shall be held confidential. * * * (Italics added.)

Therefore, only information which is concerned with the determination of benefit rights of an employee is confidential under the act.

The Department of Economic Development seeks the following specific information from the Department of Employment Security: manufacturer’s name, address, SIC code, number of employees and product. This information is public and may be purchased by the Department of Economic Development from such firms as Dun and Bradstreet. Moreover, the Nevada Employment Security Department publishes the above-listed material, with the exception of the manufacturer’s product, in a weekly pamphlet entitled “New and Re-Opened Accounts.”

A similar question was answered in Attorney General’s Opinion No. 136, dated April 27, 1964. Therein this office declared that [NRS 612.265](#) prohibits the Employment Security Department from disclosing confidential information to the Department of Health and Welfare. In reaching this conclusion, this office stated:

While the statute, [NRS 612.265](#), does not disclose the object of legislation, it undoubtedly was to prevent exposure to the public of the names of applicants who are receiving benefits under the auspices of the statute, * * *.

Finally, the Nevada Supreme Court, in the case of Welfare Division of Nevada State Department of Health, Welfare and Rehabilitation v. Washoe County Welfare Department, [88 Nev. 635](#), 637, 503 P.2d 457, 458 (1972), set forth several rules for interpreting the construction of Nevada statutes. Therein, the court states:

“The leading rule for the construction of statutes is to ascertain the intention of the legislature in enacting the statute, and the intent, when ascertained will prevail over the literal sense.” State ex rel. O’Meare v. Ross, [20 Nev. 61](#), 63, 14 P. 827, 828 (1887); State ex rel. Huckley v. District Court, [53 Nev. 343](#), 352, 1 P.2d 105, 106 (1931); Western Pacific Railroad v. State, [69 Nev. 66](#), 69, 241 P.2d 846 (1952). “The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to enact it. The entire subject matter and the policy of the law may also be involved to aid in its interpretation, and it should always be construed so as to avoid absurd results.” Ex Parte Siebenhauer, [14 Nev. 365](#), 368 (1879); Western Pacific R.R. v. State, supra, at 69.

See also *Sierra Pacific Power Co. v. Public Service Commission*, 554 P.2d 263 (1976); *Harris v. United States*, 215 F.2d 69 (4th Cir. 1954); and *Otoe and Missouri Tribe of Indians v. United States*, 131 F.Supp. 265 (D.C. Mo. 1955).

CONCLUSION

Therefore, it is the opinion of this office that [NRS 612.265](#) does not prohibit the Department of Employment Security from disclosing information to the Department of Economic Development which is in the public realm and has no specific relevancy in determining the benefit rights of any individual and which does not reveal the identity of a person as an employee of a named employing unit.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD C. HILL, JR., *Deputy Attorney General*

214 Retirement, Public Employees—A board of county commissioners may not vote to pay the employee retirement contributions of elected county officials.

CARSON CITY, July 12, 1977

GARY E. DIGRAZIA, ESQ., *Special Deputy District Attorney to the Elko County Commissioners*, P.O. Box 1358, Elko, Nevada 89801

DEAR MR. DIGRAZIA:

In your letter of June 14, 1977, you requested the opinion of this office on the following:

QUESTION

May a board of county commissioners legally vote to pay the employee retirement contributions of all elected county officers pursuant to the provisions of [NRS 286.421](#)?

ANALYSIS

Ever since enactment of the “employer-pay-all” provisions of the Public Employees Retirement Act in 1975, this office has taken the position that the option granted by [NRS 286.421](#) to any participating public employer to pay the employee contribution to the Retirement System does not apply to elected public officers whose salaries are set and controlled by the Legislature.

As you know, [NRS 286.421](#) authorizes payment of employee contributions only if (1) made in lieu of basic salary increases or cost of living increases, or both; or (2) counterbalanced by equivalent reductions in employee salaries. It is our opinion that such adjustments cannot legally be made to the salaries of elected county officers by a board of commissioners because Article 4, Section 32, of the Nevada Constitution specifically grants to the Legislature the sole authority to fix by law the compensation of certain elected county officers. Cf. *Cawley v. Pershing County*, [50 Nev. 237](#), 255 P. 1073 (1927). And with respect to those county officers not named in the Constitution, the Legislature has nonetheless clearly reserved unto itself the power of fixing their compensation. See [NRS 244.045](#), [249.035](#) and 250.050 regarding the compensation of county commissioners, treasurers and assessors.

Acting pursuant to that authority, the Legislature at [NRS 245.043](#) has established the salaries of the various elected county officers for all 17 Nevada counties and the same

statute has declared that these salaries “shall be in full payment for all services required by law to be performed by such officers. * * *” Power over these salaries has not been delegated by the Legislature to anyone else and, indeed, could not constitutionally be delegated. See *Moore v. Humboldt County*, [48 Nev. 397](#), 232 P. 1078 (1925); *State v. Hallock*, [14 Nev. 202](#), 35 Am.R. 559 (1879).

Legislation to exempt all elected public officers from the provisions of paragraph 2, [NRS 286.421](#), was introduced at the 1977 Session of the Legislature, but the bill died in committee with adjournment.

CONCLUSION

A board of county commissioners may not legally vote to pay the employee retirement contributions of elected county officers, notwithstanding the provisions of [NRS 286.421](#).

Respectfully submitted,

ROBERT LIST, *Attorney General*

By WILLIAM E. ISAEFF, *Deputy Attorney General*

215 Constitutionality of a State Statute Directing Clark County to Issue Bonds—Chapter 582, Statutes of Nevada 1977 (A.B. 363), does not regulate county business and, therefore, does not violate Article 4, Section 20 of the Nevada Constitution. Chapter 582 also does not violate Article 4, Section 21 of the Nevada Constitution since the legislative finding that a general law cannot be made applicable must be presumed valid. The validity of local legislation is not limited to emergencies, nor is the validity of Chapter 582 affected by its mandatory provisions.

CARSON CITY, July 12, 1977

GEORGE M. DICKERSON, ESQ., *Authority Counsel, Las Vegas Convention/Visitors Authority*, P.O. Box 14006, Las Vegas, Nevada 89114

DEAR MR. DICKERSON:

You requested advice concerning the validity of Chapter 582, Statutes of Nevada 1977 (A.B. 363), which directs Clark County, acting through the Las Vegas Convention and Visitors Authority, to issue bonds to support the construction of a sports complex and convention facility in downtown Las Vegas.

FACTS

[NRS 244.700](#) et seq. is a general law applicable to all counties and county fair and recreation boards throughout the State. It provides the authority and procedures for the issuance of county general obligation bonds for the support of recreational facilities. However, on May 16, 1977, the Legislature enacted Chapter 582, Statutes of Nevada 1977 (A.B. 363). This law, which became effective upon passage and approval, contained this legislative declaration in its preamble:

Whereas, the legislature by this act determines, finds and declares that a general law cannot be made applicable to the acquisition of the additional facilities hereby authorized because of the number of atypical factors and special conditions concerning such acquisitions; now, therefore,

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows: * * *

Section 1 of the act specifically makes the law applicable to Clark County only. Section 2 of the act *directs* Clark County, acting by and through the Las Vegas Convention and Visitors Authority, to issue \$26,000,000 in general obligation bonds for the construction of a sports complex and convention facility. The sports complex and convention facility are to be located, under the terms of Section 2, “* * * in or adjacent to the central business district of the City of Las Vegas.” Section 3 of the act requires that the bond issue be ratified by county ordinance and Section 4 provides that the bond issue be payable from *ad valorem* taxes.

Section 8 of the act provides in part:

* * * Insofar as the provisions of this act are inconsistent with the provisions of any other law, general or special, the provisions of this act are controlling.

QUESTION

Does Chapter 582, Statutes of Nevada 1977 (A.B. 363) violate Article 4, Sections 20 and 21 of the Nevada Constitution?

ANALYSIS

Article 4, Section 20 of the Nevada Constitution forbids the Legislature from enacting local or special laws in 16 enumerated instances. Among these prohibited instances, Article 4, Section 20 forbids the enactment of a local or special law, “Regulating county and township business.” Article 4, Section 21 of the Nevada Constitution provides:

In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State.

It is first necessary to distinguish between special laws and local laws. A special law applies only to certain individuals or classes of individuals. It means private, as opposed to public, law. A local law, however, is applicable only to a certain territory. A local law, unlike a special law, applies to all persons within the jurisdiction of the act and is public in nature. It differs from a general law in that it can be made applicable to only a specified territory and to no others similarly situated. *State ex rel. Clarke v. Irwin*, [5 Nev. 111](#), 120-121 (1869); *Youngs v. Hall*, [9 Nev. 212](#), 222 (1874); *Clark County v. City of Las Vegas*, [92 Nev. 323](#), 550 P.2d 779 (1976).

It is apparent that Chapter 582 is local legislation because, although public in its purpose and applicable to all taxpayers in Clark County, it is effective only in Clark County. See *Cauble v. Beemer*, [64 Nev. 77](#), 177 P.2d 677 (1947). The statute cannot be made applicable to any other county similarly situated now or in the future. *Fairbanks v. Pavlikowski*, [83 Nev. 80](#), 83, 423 P.2d 401 (1967); *County of Clark*, *supra*.

However, the fact that a statute is a local law does not necessarily mean that it is unconstitutional. Thus the Nevada Supreme Court stated, with respect to Article 4, Section 20:

It is evident to our mind that the framers of the constitution recognized the fact that cases would arise in the ordinary course of legislation requiring local or special laws to be passed, in cases where in their opinion a general law might be applicable to the general subject but not applicable to the particular case. In other words, that a general law could not always be so moulded as to meet the

exigencies of every case not enumerated in section 20. Without this right of discrimination the wheels of legislation would often be materially clogged and the wants and necessities of the people liable to be hampered, and the relief to which they were otherwise entitled oftentimes necessarily delayed. *Evans v. Job*, [8 Nev. 322](#), 333-334 (1873).

With respect to Article 4, Section 21, the Nevada Supreme Court quoted an Indiana case with approval in an even earlier statement:

It is clearly implied by that section (23 Ind.; 21 Nev.), and we know it to be true in fact, that in many cases local laws are necessary, because general ones cannot properly and justly be made applicable. There are cases where a law would be both proper and necessary in a given locality or part of the state, where its subject is local, or where from local facts it is rendered necessary; but which, if made general, would be either inoperative in portions of the state, or from its inapplicability to such portions, would be injurious and unjust: *Gentile v. State*, 29 Ind. 409. *Hess v. Pegg*, [7 Nev. 23](#) (1871).

The rule to be followed in determining whether a local law violates Article 4, Sections 20 and 21 was succinctly summed up by the Nevada Supreme Court as follows:

It is a general rule, under such provisions as those of sections 20 and 21 of article 4 of the state constitution, that if a statute be either a special or local law, or both, and comes within any one or more of the cases enumerated in section 20, such statute is unconstitutional; if the statute be special or local, or both, but does not come within any of the cases enumerated in section 20, then its constitutionality depends upon whether a general law can be made applicable. *Washoe County Water Conservation District v. Beemer*, [56 Nev. 104](#), 116, 45 P.2d 779 (1935). See also *Evans v. Job*, supra, at 336.

In determining the constitutionality of Chapter 582, therefore, we must follow a two-step process. First, we must determine whether Chapter 582 violates Article 4, Section 20 because it regulates county business. Second, if it does not fall into that enumerated prohibition, we must determine whether Chapter 582 violates Article 4, Section 21 because it could otherwise be made applicable by a general law instead of a local law.

A. Article 4, Section 20.

Of the sixteen prohibited special and local laws listed in Article 4, Section 20, the one which comes closest to covering Chapter 582 is the prohibition against special or local legislation “regulating” county business. In the latter part of the last century, the Nevada Supreme Court took a broad view of this term. Thus in a case involving a special law where a particular county was required by statute to pay a claim to an individual, the court stated:

Any law prescribing a rule to govern business, or an order or direction for its management, is a regulation of that business, whether it be a limited and temporary law intended to secure a particular end or object, or a general and permanent law according to the provisions of which all county affairs are to be conducted. *Williams v. Bidleman*, [7 Nev. 68](#) (1871).

Singleton v. Eureka County, [22 Nev. 91](#), 35 P. 833 (1894), concerned a statute which authorized a county to hire and pay a town watchman. In a concurring opinion, Justice Bigelow said, “ ‘County business’ may be defined as covering almost everything

that concerns the administration of county government.” He noted that the statute regulated the county’s business by making it responsible for the watchman’s salary and paying money from the county treasury to a person who otherwise would have no claim upon the treasury. “This,” he concluded, “is regulation of county business concerning which local laws are forbidden.” *Singleton v. Eureka County*, supra, at 101.

Forty to fifty years later, however, the Nevada Supreme Court relaxed its definition of the “regulation” of county business, at least with regard to local, as distinguished from special, laws. This result came in two cases dealing with local legislation most directly similar to Chapter 582.

In 1935 the Legislature passed a local law authorizing Washoe County to issue bonds for the creation of a water conservation district to control the waters of the Truckee River. In response to the contention that this was a local law regulating county business in violation of Article 4, Section 20, the Nevada Supreme Court said:

* * * It will be observed that the constitutional provision (section 20, art. 4) reads “regulating” county business, not “relating to,” “pertaining to,” or “concerning” county business. To regulate is (a) to govern or direct according to rule (Webster); (b) to adjust, order or govern by rule, method, or established mode (Funk & Wagnall); (c) to control, govern, or direct by rule or regulations (Oxford). These are not the only definitions of this word in the dictionaries cited, but they predominate there, as elsewhere, and conform to the etymology of the word. * * * *Washoe County Water Conservation District v. Beemer*, supra, at 117.

The court then pointed out that the local law under consideration did not attempt to lay down a general rule for the issuance of bonds in Washoe County thereafter. It applied only to a “particular and peculiar situation.” *Washoe County Water Conservation District v. Beemer*, supra, at 117.

This construction of Article 4, Section 20, was expanded upon by the Nevada Supreme Court in *Cauble v. Beemer*, supra. In 1945, the Legislature passed another local law authorizing Washoe County to issue bonds for the construction of a county hospital. Again, it was contended the act violated Article 4, Section 20. The court, after quoting the language from *Washoe County Water Conservation District v. Beemer*, supra, stated above, went on to say:

The same may be said in regard to the act in question in the instant case, the statute of March 27, 1945. In the latter, there is no attempt to formulate or apply any rule or regulation. The provisions of the act relate entirely to the particular bond issue for the single hospital construction and reconstruction project. They provide for the issuance of bonds, and their execution, negotiations for their sale, for the tax levy, and the bond redemptions.

It is manifest the framers of the constitutional provision prohibiting any local or special act regulating county business had in mind maintaining essential uniformity in the laws enacted to govern county business, *in general*, and its administration. * * * It was such laws of general application as, for illustration, laws creating the offices of the various county officers and defining their duties, which the framers of the constitution intended should not be interfered with by local or special laws. It was not, manifestly, such an act as the statute of March 27, 1945, an act without any general application whatever, which they intended to prohibit. That statute relates and pertains to, and concerns, only a single item, or project, of county business, and cannot be reasonably construed to be a rule or regulation “regulating county business,” because it has no general application.” (Italics added.) *Cauble v. Beemer*, supra, at 90-91.

In both of these cases, the Nevada Supreme Court concluded that the local bond issue laws did not constitute the regulation of county business and, therefore, were not violations of Article 4, Section 20. *Washoe County Water Conservation District v. Beemer*, supra, at 120; *Cauble v. Beemer*, supra, at 91.

Philosophically, *Williams v. Bidleman*, supra, might be distinguished from these two cases by the fact that *Williams* dealt with a special law in which public funds were being transferred to private purposes, *Williams v. Bidleman*, supra, at 71, whereas the bond issues in contention in the cases involving Washoe County were local laws which were public in nature. *Singleton v. Eureka County*, supra, might also be distinguished by the fact that *Singleton* dealt with an on-going, continuing concern; the employment of a watchman for an indefinite period. The Washoe County bond issue cases, however, were one-time concerns.

Chapter 582 is also a one-time concern. Like the bond issue in *Cauble v. Beemer*, supra, the provisions of the act relate entirely to the particular bond issue for the single sports complex and convention facility construction project. It provides for the issuance of bonds for this one project, and their execution, negotiations for their sale, the tax levy and their redemptions. *Cauble v. Beemer*, supra, at 90. Chapter 582 relates and pertains to, and concerns, only a single item or project of county business and has no general application. *Cauble v. Beemer*, supra, at 91.

Accordingly, under the case authority of *Washoe County Water Conservation District v. Beemer*, supra, and *Cauble v. Beemer*, supra, this office concludes that Chapter 582, Statutes of Nevada 1977 does not constitute a local law regulating county business and, therefore, does not violate Article 4, Section 20 of the Nevada Constitution. We must now consider whether Chapter 582 is a violation of Article 4, Section 21.

B. Article 4, Section 21.

“That the legislature may, in a proper case, pass a law either local or special, is undoubted * * *.” *Hess v. Pegg*, supra, at 29. The difficulty lies in determining what constitutes a proper case. The criteria for determining whether a general law can be made applicable in a situation where a local law has been passed, and therefore constitutes a violation of Article 4, Section 21, was stated by the Nevada Supreme Court as follows:

Could a general law be made applicable? * * * [H]ardly any case could be found or imagined where a general law could not be framed which would, in default of one special, answer some part of the purpose intended to be accomplished by legislation. But would such a general law be applicable is always the question. A law, to be applicable in the sense in which the words are evidently used, and their only proper sense in such connection, must answer the just purposes of legislation; that is, best subserve the interests of the people of the state, or such class or portion as the particular legislation is intended to affect * * *. *State ex rel. Clarke v. Irwin*, supra, at 122. See also *Quilici v. Strosnider*, [34 Nev. 9](#), 23, 115 P. 177 (1911).

It is the Legislature which makes the determination of whether a matter best subserves the interests of a portion of the people rather than all of the people of the State, and therefore that a local law is necessary instead of a general law. Of course, the Legislature’s findings are reviewable by the courts. However, every presumption is in favor of the constitutionality of statutes and the legislative findings are presumed correct. *State ex rel. Clarke v. Irwin*, supra, at 124; *Hess v. Pegg*, supra, at 28; *Quilici v. Strosnider*, supra, at 24; *Washoe County Water Conservation District v. Beemer*, supra, at 121; *Cauble v. Beemer*, supra, at 101.

This is a heavy presumption. In the cases closet to the fact situation presented by this opinion, the Nevada Supreme Court stated:

Whether or not a general law is or would be applicable is for this court to decide; but in the absence of a showing to the contrary, the court seldom goes contra to the very strong presumption that the legislature has good reason for determining that a general law is not or would not be applicable in some particular cases. Upon this subject the court in *Hess v. Pegg*, supra, had this to say: “For this court to oppose its judgment to that of the legislature, excepting in a case admitting of no reasonable doubt, would not only be contrary to all well-considered precedent, but would be an [a] usurpation of legislative functions * * *. No court should, and this court will not, step out of the proper sphere to undo a legislative act; and therein, no court should, and this court will not, declare any statute void because unconstitutional, without clear warrant therefor.” *Washoe County Water Conservation District v. Beemer*, supra at 121.

In this case, the Nevada Supreme Court was unable to say that a general law could have been made applicable for the purposes of the bond issue sought in Washoe County. A similar holding was reached in *Cauble v. Beemer*, supra, where the Nevada Supreme Court held that it could not rule that the general law authorizing counties to issue bonds could have been made applicable to Washoe County in its hospital construction project:

To so hold, we would have to be convinced, beyond a reasonable doubt, of the applicability of the said general act and the unconstitutionality of the said special act, and we are not so convinced. *Cauble v. Beemer*, supra at 101.¹

In effect, these cases stated that the presumption of the validity of the legislative findings was not rebutted by any clear, convincing, undoubted evidence. Indeed, a reading of the cases shows that the court was aware of evidence which supported the presumption of validity.

The Office of the Attorney General, being an executive agency and

¹The fact that a general law, [NRS 244.700](#) et seq., is already in existence for the purpose of authorizing counties in general to raise bonds for recreational facilities does not mean that Chapter 582 is necessarily in violation of Article 4, Section 21. The very fact that a local law was enacted in the face of an already existing general law raises the presumption that the general law could not be made applicable for the particular purpose covered by the local legislation. *Hess v. Pegg*, supra, at 27.

not a court of law, has also consistently taken the position that it is reluctant to give its opinion that a state statute is unconstitutional. It will do so only where there is clear and convincing evidence that a court of competent jurisdiction would do likewise. Attorney General’s Opinion No. 203, dated April 20, 1976; Attorney General’s Opinion No. 131, dated May 9, 1973; Attorney General’s Opinion No. 93, dated August 21, 1972; Attorney General’s Opinion No. 85, dated June 19, 1972. The cases cited above indicate that there is no such evidence that a Nevada court would definitely declare Chapter 582 unconstitutional. Indeed, in light of *Washoe County Water Conservation District v. Beemer*, supra, and *Cauble v. Beemer*, supra, the evidence is just the opposite.

In fact, the legislative record indicates that the finding of the Legislature that there are atypical factors justifying a local law, as opposed to a general law, is amply justified. This is because Clark County, unlike the remainder of the State, has two tourist areas—downtown Las Vegas and the “Strip.” The present Convention Center is located on the “Strip,” thus giving a boost to hotels and casinos located near the center. Furthermore,

one Senator noted that businesses in downtown Las Vegas pay 20 percent of the room tax used to support the Convention Center. Thus, he stated, the downtown Las Vegas businessmen have indirectly supported businesses on the “Strip” for years. Minutes of the Senate Committee on Taxation on A.B. 363, dated April 30, 1977. Therefore, to close this inequity and to revitalize downtown Las Vegas, it was felt essential that the complex be located in downtown Las Vegas. Minutes of the Senate Committee on Taxation on A.B. 363, dated April 26, 1977.

Theoretically, a general law could have been written providing that in the counties of over 200,000 population, a sports complex, to be located in the downtown area of the counties’ largest cities, was directed to be constructed. However, it is apparent that in a comparatively few years, Washoe County’s population will reach that size. Washoe County does not have the downtown—“Strip” dichotomy that exists in Clark County and to require a sports complex to be built in downtown Reno may present insuperable problems of congestion, traffic and the resulting air pollution which may not be faced in Las Vegas.

In short, there are peculiar and particular facts existing with relation to the construction of a sports complex in Clark County that do not exist elsewhere in Nevada. Chapter 582 is designed to meet a particular and peculiar problem unique to Clark County. *Washoe County Water Conservation District v. Beemer*, supra, at 117; *Evans v. Job*, supra, at 336-337. A general law on this subject would not necessarily subserve the interests of all the people of the State, but Chapter 582 would subserve the interests of the people of Clark County for a problem unique to them.

Accordingly, this office concludes that the legislative declaration that a general law could not be made applicable for the purposes of Chapter 582 must be presumed valid in the absence of any clear, convincing, undoubted evidence to the contrary. Indeed, the evidence reviewed by this office supports the presumption of validity. Therefore, it is the opinion of this office that Chapter 582, Statutes of Nevada 1977, does not violate Article 4, Section 21 of the Nevada Constitution.

C. Collateral Issues.

In your opinion request, you indicated that you researched many of the same cases which we referred to in this opinion to reach these conclusions, and you suggested that Chapter 582 could be distinguished from the holdings of those cases because Chapter 582 *mandated*, rather than *authorized*, the issuance of county bonds and that Chapter 582 did not involve an emergency situation.

Your first distinction is based upon the case of *McDermott v. County Commissioners*, [48 Nev. 93](#), 227 P. 1014 (1924), in which the Nevada Supreme Court stated:

* * * If, on the other hand, the legislature intended to make it mandatory upon the board of county commissioners to allow the claim, the query arises if it was not an attempt on the part of the legislature to impose upon a legal subdivision of the state, by a *special act*, a liability to pay a disputed claim without the right of being heard in a court of competent jurisdiction, and a deprivation of property by a judicial determination, on the part of the legislature, without due process of law.” (Italics added.) *McDermott v. County Commissioners*, supra, at 97.

However, this case dealt with a special act in which the legislature directed that public tax money be used to pay a private claim. It was this mandatory action which threatened to deprive taxpayer of their property without due process of law. Chapter 582, on the other hand, is a public measure and therefore is a local law only and not special legislation.

With respect to mandatory local legislation, in 1913 the Legislature passed a law which “authorized, empowered and *directed*” (italics supplied) the Elko County Commissioners to issue bonds for the construction of a school to be specifically located in Wells, Nevada. The statute also directed that a tax be levied to support the issue. Chapter 157, Statutes of Nevada 1913. In a case challenging this statute as a violation of Article 4, Section 21, the Nevada Supreme Court upheld the validity of the statute. *Dotta v. Hesson*, [30 Nev. 1](#), 143 P. 305 (1914). Local laws directing that county seats be removed from one city to another have also been upheld by the Nevada Supreme Court. *Hess v. Pegg*, *supra*; *Evans v. Job*, *supra*; *Quilici v. Strosnider*, *supra*. Therefore, it is the opinion of this office that the mandatory provisions of Chapter 582, Statutes of Nevada 1977, do not present a distinction recognized by the Nevada Supreme Court from the cases which have upheld local laws in Nevada.

Your second distinction is based upon *Cauble v. Beemer*, *supra*, in which the court based its action upholding a local law for the construction of a hospital in Washoe County upon the existence of an emergency pertaining to the lack of adequate health care facilities in the county. Certainly, emergencies have been routinely recognized as particular and peculiar situations permitting the enactment of local legislation. *Quilici v. Strosnider*, *supra*, at 25; *Washoe County Water Conservation District v. Beemer*, *supra*, at 117; *Cauble v. Beemer*, *supra*, at 94-95.

But local laws have not necessarily been restricted by the Nevada Supreme Court to emergencies. Thus, *State ex rel. Clarke v. Irwin*, *supra*, at 122, speaks in broad terms of laws meeting the just purposes of legislation, that is, they must best subserve the interests of the portion of the people local legislation is intended to affect. This is a view endorsed by *Quilici v. Strosnider*, *supra*, at 23. *Evans v. Job*, *supra*, at 333-334, spoke in terms of meeting the “exigencies” of the particular local situation. “Exigency” is defined broadly as “such need or necessity as belongs to the occasion.” Webster’s New International Dictionary of the English Language (2d ed. 1952). In other words, an emergency is one element that will support the validity of local legislation, but it is not the only one. This is brought out in *Cauble v. Beemer* itself:

This court has repeatedly upheld the constitutionality of special or local acts of the legislature, passed, *in some instances, because the general legislation existing was insufficient to meet the peculiar needs of a particular situation*, and, *in other instances*, for the reason that facts and circumstances existed, in relation to a particular situation, *amounting to an emergency* which required more speedy action and relief than could be had by proceeding under the existing general law. * * * (Italics added.) *Cauble v. Beemer*, *supra*, at 96.

Therefore, it is the opinion of this office that the validity of local legislation does not always depend upon the finding of an emergency.

CONCLUSION

It is the opinion of this office that Chapter 582, Statutes of Nevada 1977 (A.B. 363), does not regulate county business and, therefore, does not violate Article 4, Section 20 of the Nevada Constitution. The statute relates and pertains to, and concerns, only a single item or project of county business and has no general application for the administration of the county.

It is also the opinion of this office that the Legislature’s finding that there are atypical and special conditions present in Clark County which prohibit the application of a general law on this subject must be presumed valid in the absence of clear, convincing and undoubted evidence to the contrary. Indeed, the evidence reviewed by this office supports the presumption of validity. Therefore, it is our opinion that Chapter 582, Statutes of Nevada 1977, does not violate Article 4, Section 21 of the Nevada Constitution.

It is also the opinion of this office that the validity of local laws is not confined only to emergencies and that the mandatory requirements of Chapter 582, Statutes of Nevada 1977, do not affect the statute's validity.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

216 Resignation of Public Officers and the Applicability of the Ethics in Government Law—Public officers who resign their offices prior to the last 6 months of their terms need not file financial disclosure statements under the Ethics in Government Law.

CARSON CITY, July 12, 1977

THE HONORABLE WILLIAM MACDONALD, *District Attorney*, Humboldt County
Courthouse, Winnemucca, Nevada 89445

DEAR MR. MACDONALD:

You have requested advice relative to Section 14, Chapter 528, Statutes of Nevada 1977, known as the Nevada Ethics in Government Law.

QUESTION

Must persons in public office after the July 1, 1977, effective date of the Nevada Ethics in Government Law file their financial disclosure statements if they resign their public offices prior to the sixth month before the end of their terms?

ANALYSIS

The newly enacted Nevada Ethics in Government Law went into effect on July 1, 1977. Persons in public office after that date will be required to file financial disclosure statements pursuant to Section 14 of the Act. Specifically, Section 14, Chapter 528, Statutes of Nevada 1977, after providing when public officers shall file financial disclosure statements at the beginning of their terms, goes on to read, in part, as follows:

3. A public officer who holds an elective office shall file a statement of financial disclosure with the commission established for the branch in which he holds office within *6 months before the expiration of his term*.

4. A public officer who holds an appointive office shall file statements of financial disclosure with the commission established for the branch in which he holds office:

* * *

(b) Within *6 months before the expiration of his term*, or if he serves at the pleasure of the appointing authority, within *6 months before the expiration of the term* of the appointing authority, or if the appointing authority has no fixed term, within such period as the appropriate commission prescribes. (Italics added.)

The word "term" does not relate to tenure, incumbency or actual length of service. It relates to the fixed period of time set by law for the holding of an office. The term of an office fixed by law cannot be reduced by a voluntary resignation. The term of an office is affixed to the office itself and not the incumbent. *Barber v. Blue*, 65 C.2d 185, 417 P.2d

401 (1966); *Rowe v. Tuck*, 149 Ga. 88, 99 S.E. 303 (1919); *Chenowith v. Chambers*, 33 Cal.App. 104, 164 P. 428 (1917); 67 C.J.S., *Officers*, § 42; 63 Am.Jur.2d, *Public Officers and Employees*, § 145.

Section 14, Chapter 528, Statutes of Nevada 1977, is clear and unambiguous in its terms. Public officers are required to file financial disclosure statements within 6 months before the expirations of their terms of office. The act and time of filing depends upon the term of the office fixed by law. A filing cannot take place, unless on a purely voluntary basis, prior to the last 6 months of a fixed period of time set for holding of a public office.

Therefore, if a public officer hold office at any time during the last 6 months of the term of the office, he must file a financial disclosure statement under the provisions of Section 14 of the Ethics in Government Law. On the other hand, if a public officer resigns his office prior to the last 6 months of his term, then under the plain words of Section 14, he need not file a financial disclosure statement. He is no longer serving the term for which filing is required. Where the language of a statute is plain and unambiguous, legislative intent must be ascertained from the language itself and one should not go beyond such language. *Seaborn v. First Judicial District Court*, [55 Nev. 206](#), 29 P. 500 (1934).

It has been suggested that even if an officer resigns prior to the last 6 months of his term, he still must file a financial disclosure statement during the last 6 months of what would have been his term of office if he had remained in office. That is, for example, if an officer was elected or appointed to a 4-year term, then resigned in his second year, he still would have to file a disclosure statement in the last 6 months of what would have been his fourth year in office had he not resigned.

This, however, could lead to absurd results in light of the other provisions of the Ethics in Government Law relating to financial disclosure. Section 15, subsection 2, Chapter 528, Statutes of Nevada 1977, requires persons filing financial disclosure statements to reveal each source of income constituting 10 percent or more of that person's gross income for the *preceding taxable year*. Under the example used above, this would mean that an officer who resigned in his second year of office would, under the suggested interpretation, have to file a financial disclosure statement in the last 6 months of what would have been his fourth year in office had he not resigned. However, since such a filing would cover the taxable year preceding his filing, the disclosure statement would cover a year in which he did not serve in public office, i.e., what would have been his third year in office had he not resigned. Whatever income he received in that third year would have no relevance to his service as a public officer since he would no longer be serving as a public officer for that time period.

Again, Section 15, subsections 3 and 4, requires an officer to disclose real estate that he "owns" in the State and certain debts in excess of \$5,000 which he "owes." Both statutes are stated in the present tense, thus referring to property and debts in existence at the time the financial disclosure statement would be filed in the fourth and final year of the term. However, in the case of the above example there again would be no relevance to this disclosure since the officer would no longer be in public service for the applicable period. This lack of relevance could be considered an unacceptable invasion of privacy. *Dunphy v. Sheehan*, [92 Nev. 259](#), 549 P.2d 332 (1976); *City of Carmel-By-The-Sea v. Young*, 466 P.2d 225 (Cal. 1970). It certainly would lead to the absurd result of requiring a former public officer to reveal financial interests acquired or held during a period of time when he was not serving as a public officer. Statutes should be construed so as to avoid absurd results. *Western Pac. R.R. v. State*, [69 Nev. 66](#), 241 P.2d 846 (1952). The unreasonableness of a result produced by one among alternative interpretations of a statute is reason for rejecting that interpretation in favor of another which will produce a reasonable result. *Sheriff of Washoe County v. Smith*, [91 Nev. 729](#), 542 P.2d 440 (1975).

This office wishes to take note that the conclusion reached by this opinion is the result of what was apparently a legislative oversight in drafting the statute. During the hectic, concluding days of the legislative session, when Chapter 528 was enacted,

apparently not enough consideration was given to the thought that public officers may not serve out their full terms, but may resign or be removed in midterm instead. It is a general rule of statutory construction that while a court has the power to construe an uncertain or ambiguous statute, it cannot substitute a different statute for the one under consideration, no matter how unwise or unreasonable the statute under consideration may seem to be. *School Trustees v. Bray*, [60 Nev. 345](#), 354, 109 P.2d 274 (1941). In other words, a court cannot legislate. It cannot substitute missing language. *Seaborn*, *supra*, at 219. What is true of the courts is equally true for an executive agency such as the Attorney General's Office. The legislature language of Chapter 528 must be taken as it is found.

The resolution of this problem, if it is perceived as one, is legislative action at the next session of the Legislature to cure the defect. Indeed, since Section 8 of Chapter 528 authorizes the two ethics commissions created by the Act to recommend legislation pertaining to ethics, this is a matter which the two commissions may wish to draw to the attention of the Legislature.

CONCLUSION

It is the opinion of this office that public officers who resign their offices prior to the last 6 months of their terms need not file financial disclosure statements under the Ethics in Government Law.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

217 Claims for Refund of Property Taxes Filed Pursuant to [NRS 354.220](#) to [354.250](#) and [353.110](#) to [353.120](#)—Boards of county commissioners and the State Board of Examiners should grant an application for refund of property taxes pursuant to [NRS 354.220](#) to [354.250](#) and [353.110](#) to [353.120](#) only if the basis for the claimed refund involves a question of mistake, inadvertence, duplicity of assessment, property located outside of a taxing jurisdiction or other similar factual circumstance, and if the refund would be just and equitable. The boards should not grant refunds of property taxes if the basis for the claimed refund involves a question of valuation judgment on the part of a county assessor or a challenge to his assessment procedures.

CARSON CITY, July 27, 1977

THE HONORABLE DAVID SMALL, *District Attorney of Carson City*, 208 North Carson Street, Carson City, Nevada 89701

DEAR MR. SMALL:

You have inquired of this office concerning the propriety of the Carson City Board of Supervisors or the State Board of Examiners, authorizing a refund of a portion of property taxes in response to appropriate claims filed under [NRS 353.110](#) to [353.120](#) and [354.220](#) to [354.250](#). The letter from your office specifically outlined the factual background of your inquiry as follows:

A property owner in Carson City was over-assessed for fiscal 1975-76. This over-assessment was *not a clerical error*, but was due to a *mistaken* and therefore *incorrect valuation* being made by the Carson City Assessor's Office.

The incorrect assessment was adjusted downward for fiscal 1976-77. The over-assessment of \$4,385.00 was not discovered by the Assessor's Office and the property owner did not file before the Carson City Board of Equalization or the State Board of Equalization a protest challenging the high assessment on the parcel of property. The first two quarterly installments were paid without protest to Carson City and distributed by Carson City according to applicable law. (Italics added.)

Subsequent to the discovery of the over-assessment by a newly hired employee of the property owner and the concurrence of the assessor's office that an incorrect valuation had been made, claims were filed against Carson City pursuant to [NRS 354.220](#) to [354.250](#) for a refund of the excess portion of property taxes previously paid for 1975-76 resulting directly from the incorrect valuation. We assume the claim was timely filed under [NRS 354.230](#) which imposes a 3-year limitations period from the date the claim was incurred.

QUESTION

May the Carson City Supervisors or the State Board of Examiners properly authorize a refund of property taxes pursuant to [NRS 354.220](#) to [354.250](#) or 353.110 to 353.120; or is the property owner now barred from seeking relief due to his failure to timely seek review before the Carson City and Nevada State Boards of Equalization in 1976?

ANALYSIS

You have noted in your letter that the Nevada Supreme Court has interpreted [NRS 361.410](#), ruling that property taxpayers desiring to challenge the assessed valuation of their property before the courts must first seek and be denied relief before the County and State Boards of Equalization. First American Title Company v. State of Nevada, [91 Nev. 804](#) (1975). On the other hand, [NRS 361.760](#) states:

Taxes may be refunded in the manner provided in [NRS 353.110](#) to [353.120](#), inclusive, and 354.220 to 354.250, inclusive.

It appears that [NRS 361.760](#) may partially conflict with the standard imposed by [NRS 361.410](#) and the First American Title case, supra. The standards for possible refunds under the above referenced refund statutes are as follows:

[NRS 354.220](#) states in part:

[NRS 354.220](#) to [354.250](#), inclusive, shall apply in making applications for refund of moneys which have been paid into the county treasuries in cases where:

* * *

4. In the opinion of the boards of county commissioners, the applicant for refund has a *just cause* for making such application and the granting of such a refund would be *equitable*. (Italics added.)

[NRS 353.120](#) states in part:

1. If the state board of examiners is satisfied of the *correctness* and *justice* of a claim for refund of money paid into a county treasury and deposited in the state treasury, it shall order the state controller to draw his warrant for the amount of the overpayment so deposited in favor of the person entitled to the refund. (Italics added.)

The statutory refund provisions quoted above authorize a refund of taxes, including property taxes, if the claimant has a “just cause” and it would be “equitable” to order a refund, and the appropriate authorities are satisfied with the “correctness and justice” of a claim. There is no specification in either of the refund statutes as to specifically what grounds for a claimed refund could be considered just and equitable. The Attorney General has previously issued opinions concluding that a refund of excess taxes paid by a widow as a result of her failure to make a timely claim for widows exemption may be proper (but see [NRS 361.155](#)), and that the refund provisions may not be given retroactive effect to authorize a refund of taxes to a claimant which were paid prior to obtaining eligibility for an exemption. See Attorney General’s Opinion No. 568, dated January 30, 1948, Attorney General’s Opinion No. 173, dated June 2, 1952.

We believe that the refund provisions quoted above, which are included by reference in the Property Tax Act, must, if possible, be read compatibly with the standards imposed by [NRS 361.410](#) as interpreted by the Nevada Supreme Court in *First American Title, supra. Raggio v. Campbell*, [80 Nev. 418](#) (1964). On the one hand, it is “* * * the well established rule that administrative remedies must be exhausted prior to seeking judicial relief,” since “(i)f administrative remedies are pursued to their fullest, judicial intervention may become unnecessary.” *First American Title, supra*, at 806. On the other hand, it is the apparent legislative policy behind [NRS 353.110](#) to [353.120](#) and [354.220](#) to [354.250](#) that an application for refund of taxes is “* * * to be premised upon an inadvertent or improper assessment of the taxes.” Attorney General’s Opinion No. 173, *supra*.

The factual background of the *First American Title* case, *supra*, involved a landowner who wished to seek judicial relief from an alleged over-assessment of land without having first sought administrative relief from the appropriate boards of equalization. The Nevada Supreme Court concluded that [NRS 361.410](#) and the “exhaustion doctrine” prohibit such an action. However, the legislature has also provided in [NRS 361.760](#) that property tax refunds, in proper cases, may be applied for and granted pursuant to the terms of the above quoted refund statutes. We believe that it is reasonable to limit the scope of the *First American Title* standard to cases which involve valuation questions, as opposed to questions of mistake, clerical error, double taxation, property outside taxing jurisdiction, unconstitutionality or other similar administrative errors.

A board of county commissioners before granting an application for refund of property taxes pursuant to [NRS 354.220](#) to [354.250](#) must conclude that the basis for the claimed refund involves a question of mistake, inadvertence, duplicity of assessment or other similar factual circumstance resulting in an over-assessment of taxes. For example, a clerical error on the part of government officials resulting in an over-assessment of taxes, the duplicate assessment of one property to more than one property taxpayer, the failure to properly reflect a change in ownership of property which was known to the assessor’s office prior to the date for closing the tax rolls, and similar matters could justify a refund of the excess property taxes. However, if the board concludes that the basis for the claimed refund involves a question of valuation judgment on the part of the assessor including the estimation of inventory valuations, or a challenge to his assessment procedures, the question should properly be referred to the appropriate boards of equalization and should not be the basis for granting relief under the refund statutes quoted above.

You have stated in your letter, quoted above, that the particular claim now pending in Carson City was not a “clerical error” but was due to a “mistaken” and therefore “incorrect valuation” by the Assessor’s Office. We are unclear as to the exact basis for this claimed refund. We believe, as stated above, that the board should analyze the particular factual circumstances underlying the claim and determine whether the “mistake” which apparently was made by the Assessor’s Office was in the nature of a matter of judgment or appraisal/assessment procedure, and therefore a proper matter for

the boards of equalization, or was in the nature of an administrative error or duplicity of taxation not directly related to the judgmental aspects of the valuation process.

By the application of the standards outlined above, the apparent conflict between [NRS 361.760](#) and [361.410](#) may be avoided by reading the statutes compatibly. The Nevada Supreme Court has strongly stated the general proposition that property tax valuation questions have been validly and properly included within the scope of the “exhaustion doctrine” by the Nevada Legislature. The public policy behind such a position is apparent, since, were the refund provisions quoted above to be read broadly enough to include valuation questions, the whole purpose of the boards of equalization would be undermined and the property tax base for all counties and school districts in this State would be left in jeopardy for periods up to 3 years after the original assessment. We do not believe the Nevada Legislature intended such a potentially chaotic result by enacting [NRS 361.760](#).

CONCLUSION

It is the opinion of this office that a board of county commissioners or the State Board of Examiners should grant an application for refund of property taxes pursuant to [NRS 354.220](#) to [354.250](#) and 353.110 to 353.120 only if the basis for the claimed refund involves a question of mistake, inadvertence, duplicity of assessment, property located outside of a taxing jurisdiction or other similar factual circumstance resulting in an over-assessment of taxes, and the boards feel that justice and equity dictate the granting of a refund. The boards should not grant any refunds of property taxes pursuant to the aforementioned statutes if the basis for the claimed refund involves a question of valuation judgment on the part of the assessor or a challenge to his assessment procedures. Questions of valuation and assessment procedures for property tax purposes are exclusively within the jurisdiction of the appropriate boards of equalization.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By JAMES D. SALO, *Deputy Attorney General*

218 State Officers and Contracts With the State—Non-legislative state officers, with the exception of those officers serving on state occupational licensing boards established by Title 54 of Nevada Revised Statutes, are prohibited by law from contracting or being interested as principals in any contract with the State or any of its agencies. Non-legislative state officers are those who receive their commissions from the Governor. A member of the Local Government Employee-Management Relations Board is included in this prohibition.

CARSON CITY, September 20, 1977

SALLY S. DAVIS, *Commissioner, Local Government Employee-Management Relations Board*, Bradley Building, 2501 E. Sahara Avenue, Suite 301, Las Vegas, Nevada 89158

DEAR MS. DAVIS:

You have requested an interpretation of Section 18, Chapter 528, Statutes of Nevada 1977.

FACTS

You have stated that a member of the Local Government Employee-Management Relations Board is a licensed contractor whose business is primarily related to the construction and repair of streets and roadways. As such, he deals with both state government and local government agencies, bidding for, and frequently obtaining, contracts with such agencies.

Chapter 528, Statutes of Nevada 1977, took effect on July 1, 1977. Sections 2 to 17, inclusive, concern themselves with the newly enacted Nevada Ethics in Government Law. Sections 18 to 42 concern themselves with specific conflict of interest statutes scattered throughout the Nevada Revised Statutes. Section 18 provides as follows:

1. Except as otherwise provided in subsection 2, it is unlawful for *any officer who is not a member of the legislature* to:
 - (a) Become a *contractor* under any contract or order for supplies or *other kind of contract* authorized by or for the state or any of its departments, or the legislature or either of its houses, or to be interested, directly or indirectly, *as principal*, in *any kind of contract* so authorized.
 - (b) Be interested in any contract made by him or to be a purchaser or interested in any purchase under a sale made by him in the discharge of his official duties.
2. Any member of any board or commission created under the provisions of Title 54 of NRS who is engaged in the profession, occupation or business regulated by such board or commission may supply or contract to supply, in the ordinary course of his business, goods, materials or services to any state or local agency except the board or commission of which he is a member.
3. Any contract made in violation of this section may be declared void at the instance of the state or of any other person interested in the contract except an officer prohibited from making or being interested in the contract.
4. Any person violating this section is guilty of a gross misdemeanor and shall forfeit his office. (Italics added.)

QUESTION

Is a member of the Local Government Employee-Management Relations Board prohibited from participating in open competitive bidding on contracts with the State or its agencies?

ANALYSIS

Section 18 is not a new statute. Prior to 1975 it was codified in the statutes as [NRS 281.220](#) and [281.235](#). When the Nevada Ethics in Government Law was originally enacted, these statutes were repealed. Section 47, Chapter 540, Statutes of Nevada 1975. A year later, however, the Ethics in Government Law was declared unconstitutional. *Dunphy v. Sheehan*, [92 Nev. 259](#), 549 P.2d 332 (1976). When the new Ethics in Government Law was enacted by the 1977 Legislature, the statutes formerly known as [NRS 281.220](#) and [281.235](#) were re-enacted into law as Section 18, Chapter 528, Statutes of Nevada 1977. There exist, therefore, some prior interpretations of the provisions of Section 18, primarily in the form of Attorney General's opinions.

It is apparent from the terms of the statute and from previous Attorney General's opinions on a similar statute that state officers who are not members of the Legislature¹ are prohibited from entering into *any* contract as a contractor or principal interested in such contract with *any* state agency. See Attorney General's Opinion No. 174, dated August 5, 1960; Attorney General's Opinion No. 64, dated May 19, 1965; Attorney General's Opinion No. 16, dated March 2, 1971. On the other hand, state officers would not be prohibited from contracting with local government agencies in their personal capacities. Letter Opinion of April 14, 1972, Attorney General's Compilation of Conflict

of Interest Opinions and Laws, p. 65 (1975). In view of the re-enactment of the provisions of [NRS 281.220](#) and [281.235](#) in Section 18, Chapter 528, Statutes of Nevada 1977, this office wishes to reiterate its opinions on these points.

By the terms of the statute, however, an exception to this prohibition exists with regard to those non-legislative state officers serving on occupational licensing boards established by Title 54 of Nevada Revised Statutes. Such state officers may contract with any state agency except the occupational licensing boards upon which they serve. Section 18, subsection 3, Chapter 528, Statutes of Nevada 1977.

It should be noted, as an expression of legislative intent, that the Legislature went out of its way to specifically provide that state officers serving on occupational licensing boards could contract with other state agencies. It did not extend this exemption to any other non-legislative state officers.

A member of the Local Government Employee-Management Relations Board is a state officer. Members of the board are appointed by the Governor ([NRS 288.090](#)), receive commissions from the Governor ([NRS 281.020](#)), receive expenses and allowances allowed to state officers ([NRS 288.100](#) and [NRS 281.160](#)), receive salaries from the State Treasury (Chapter 551, Statutes of Nevada 1977), and the board receives appropriations for its support from the Legislature (Chapter 574, Statutes of Nevada 1977). These are the elements which demonstrate that board members function as state officers. Attorney General's Opinion No. 174, *supra*; Attorney General's Opinion No. 64, *supra*; Attorney General's Opinion No. 16, *supra*. The fact that the Local Government Employee-Management Relations Board deals solely with labor disputes in *local* governments does not change the fact that it is a state agency, established by state law, supported by state finances and whose members are appointed by the Governor. Its members, therefore, are state officers.

Accordingly, it is our opinion that a board member would be prohibited from acting as a contractor, or being interested directly or indirectly as a principal, in *any* contract with *any* state agency. On this

¹Legislators are prohibited from entering into state contracts authorized by the Legislature of which they are members or being interested as principals in such contracts by Section 20, Chapter 528, Statutes of Nevada 1977. Prior to its repeal in 1975, a statute similar to Section 20 existed as [NRS 218.580](#).

point, Attorney General's Opinion No. 16, *supra*, states with respect to a state officer involved in a previous conflict of interest question:

It must be emphasized that subsection 1 makes it unlawful for any state officer to become a *contractor* or to be in any manner *interested as a principal* in a contract so authorized. A contractor is one "who, for a fixed price undertakes to procure the performance of works on a large scale, or the furnishing of goods in large quantities (or) * * * undertakes to perform a job or piece of work, retaining in himself control of means, method, and manner of accomplishing the desired result," Blacks Law Dictionary 4th ed., citing cases. Obviously, he did not act as a "contractor." Furthermore, he was not interested as a "principal" because he neither negotiated nor executed the contract. A principal is defined in the law as being "the source of authority or right." Blacks Law Dictionary, *supra*. * * * (Italics in opinion.)

Where, as in the fact situation involved in Attorney General's Opinion No. 16, *supra*, a state officer is not involved in a contract as a *contractor* or a *principal* interested in the contract, the state officer would not violate Section 18. In this instance, it would appear that the state officer belonging to the Local Government Employee-Management Relations Board would be a contractor or interested as a principal in contracts with state agencies.

However, an existing contract made between a state agency and a contractor *before* the contractor became a state officer would not constitute a violation of Section 18, Chapter 528, Statutes of Nevada 1977. The contract would be valid and the state officer would be entitled to exercise his rights under the contract. Cf. *Worrell v. Jurden*, [36 Nev. 85](#) (1913); *Berney v. Alexander*, [42 Nev. 423](#), 178 P. 978 (1919). In addition, a state officer would not be prohibited from being a subcontractor to a person who has contracted with a state agency, provided the state officer has not arranged with the prime contractor to influence the award of the contract to the prime contractor in return for the subcontract. Cf. *Worrell v. Jurden*, *supra*.

As is indicated by Section 18, only non-legislative state officers are affected by the prohibition of the statute. Public employees of the State are not covered by Section 18. Nor are all public officers necessarily embraced by the statute. While all state officers are considered public officers, not all public officers are necessarily considered *state* officers.

The term "public officer" is defined by [NRS 281.005](#) in part as follows:

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

The term "state officer" is distinguished from the above definition by [NRS 281.020](#), subsection 1:

All state officers shall receive their commissions from the governor.

Section 18, Chapter 528, Statutes of Nevada 1977, therefore, applies only to non-legislative officers of the State who receive their commissions from the Governor. Attorney General's Opinion No. 16, *supra*.

As a final point of information, it should be pointed out that the ability of public employees and *all* public officers to enter into public contracts is covered by [NRS 281.230](#), as amended by Section 19, Chapter 528, Statutes of Nevada 1977. This statute prohibits public employees and public officers of the State, counties, municipalities, townships, districts or quasi-municipal corporations from receiving any compensation or profit of any kind which is "inconsistent with loyal service to the people," resulting from any contract in which the governmental employers are interested. Violation of this statute is a felony crime when the compensation received is in excess of \$100 and is a misdemeanor crime when the compensation received is less than \$100. Forfeiture of office may also result.

This statute applies a less rigorous standard than is imposed by Section 18, Chapter 528, Statutes of Nevada 1977. While public employees and public officers would clearly be prohibited from contracting with the government agency which employs them, they would not necessarily be prohibited from contracting with other government agencies so long as those contracts were not "inconsistent with loyal service to the people." Attorney General's Opinion No. 16, *supra*.

The interest at which the prohibition is leveled is that which prevents or tends to prevent the official from giving faithful and impartial service to the public or that which may interfere with an officer's unqualified devotion to public duty. [Citation omitted.] If the official's personal interest in the contract is such that it tends in any degree to influence him *in the making of a contract in his official capacity* then the contract is void. This is based on the policy that the contract should be free from any influence which may directly grow out of obligations that he owes to the public at large. * * * (Italics added.) Attorney General's Opinion No. 16, supra.

Therefore, unlike Section 18 which is applicable to all state public contracts made by a non-legislative state officer regardless of whether he has any influence over the state agency involved in the contract, [NRS 281.230](#), as amended by Section 19, applies only to public contracts made by public employees and public officers in which they have some influence over the decision of the public agency involved to enter into the contract. Each instance, of course, would have to be considered on a case by case basis. For this purpose, the ethics commissions established by Chapter 528 are authorized to give assistance to public employees and public officers on the propriety of their future ethical conduct by giving advisory opinions.

CONCLUSION

It is the opinion of this office that non-legislative state officers, with the exception of those officers serving on state occupational licensing boards established by Title 54 of Nevada Revised Statutes, are prohibited by law from contracting or being interested in any contract with the State or any of its agencies. Non-legislative state officers are those who receive their commissions from the Governor.

A member of the Local Government Employee-Management Relations Board is a non-legislative state officer and is therefore included in this prohibition.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By DONALD KLASIC, *Deputy Attorney General*

219 Physicians and Surgeons—Corporate practice of medicine legal only under Chapter 89 of Nevada Revised Statutes. Illegal if done by a Chapter 78 corporation. A corporate health maintenance organization is a special, exempt entity under Chapter 695C.

CARSON CITY, October 3, 1977

BRYCE RHODES, ESQ., *Legal Counsel, Nevada State Board of Medical Examiners*, P.O. Box 750, Reno, Nevada 89504

DEAR MR. RHODES:

In your letter of July 1, 1977, you requested an opinion from this office as to the following:

QUESTION

To what extent may the practice of medicine for profit be engaged in under corporate form under Nevada Law?

ANALYSIS
[NRS Chapter 78](#)

In Nevada, our general, for profit, corporation statute, [NRS 78.030](#), empowers any number of persons, not less than three, to establish a corporation for the transaction of any lawful business. However, a general corporation statute of this type has not generally been interpreted by the courts as authorizing the corporate practice of a profession.

In a case involving the practice of law, the California Supreme Court in *People ex rel. Lawyers Institute of San Diego v. Merchants Protection Association*, 209 P. 363 (1922), rejected just such an argument:

The appellant argues that, since individuals may lawfully associate themselves for the practice of law, it may also do so in its corporate capacity, under the specific terms of the foregoing section of the Civil Code. The vice of this contention consists in its assumption that individuals may generally, and as a matter of right, associate themselves together for the practice of law; but this assumption is fallacious, since, under the laws of California, individuals may not, either singly or in association, engage in the practice of the law without having a special license so to do, and hence the individuals forming this corporation could not, under the section of the Code relied upon, gain any other or further right by the act of incorporation than that lawfully possessed by them, either singly or in the aggregate, without incorporation. Its contention in this respect is therefore without merit.

The Court of Appeals of New York in *In re Cooperative Law Company*, 92 N.E. 15 (1910), has similarly opined:

We agree with the learned counsel for the appellant that the vital question is whether prior to the act of 1909 a corporation could be lawfully organized to practice law. He claims that authority may be found in that part of the business corporations law which provides that “three or more persons may become a stock corporation for any lawful business.” Business Corporations Law, § 2. This means a business lawful to all who wish to engage in it. The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. The right to practice law is in the nature of a franchise from the state conferred only for merit.

* * *

It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate.

* * *

The Legislature in authorizing the formation of corporations to carry on “any lawful business” did not intend to include the work of the learned professions.

A corporation composed of non-licensed persons which hired licensees and received the fees paid for their services was held to be illegally practicing dentistry in *State Board of Dental Examiners v. Savelle*, 8 P.2d 693 (Colo. 1932); *State ex rel.*

Indiana State Board of Dental Examiners v. Boston System Dentists, 19 N.E.2d 949 (Ind. 1939); and State v. Bailey Dental Company, 234 N.W. 260 (Iowa 1931).

In our opinion, the above-named courts and others have correctly reasoned that:

From the very nature of this statutory requirement a corporation could not bring itself within the terms of the statute. It could not pass an examination and could not therefore obtain a license. To say nothing now of the relationship of dentistry to the public health and to the scope of police power in reference thereto, there are still other reasons of public policy why mere corporations might be barred from entering this field. There are certain fields of occupation, which are universally recognized as "learned professions." Proficiency in these occupations requires long years of special study and of special research and training and of learning in the broad field of general education. Without such preparation proficiency in these professions is impossible. The law recognizes them as a part of the public weal and protects them against debasement and encourages the maintenance therein of high standards of education, of ethics and of ideals. It is for this purpose that rigid examinations are required and conducted as preliminary to the granting of a license. The statutes could be completely avoided and rendered nugatory, if one or more persons, who failed to have the requisite learning to pass the examination, might nevertheless incorporate themselves formally into a corporation in whose name they could practice lawfully the profession which was forbidden to them as individuals. A corporation, as such, has neither education, nor skills, nor ethics. These are *sine qua non* to a learned profession. State v. Bailey Dental Co., supra.

Or as was said by the court in Doctor Allison, Inc., Dentist v. Allison, 196 N.E. 799 (Ill. 1935):

To practice a profession requires something more than the financial ability to hire competent persons to do the actual work. It can be done only by a duly qualified human being, and to qualify something more than mere knowledge or skill is essential. The qualifications include personal characteristics, such as honesty, guided by an upright conscience and a sense of loyalty to clients or patients, even to the extent of sacrificing pecuniary profit, if necessary. These requirements are spoken of generically as that good moral character which is a prerequisite to the licensing of any professional man. No corporation can qualify. It can have neither honesty nor conscience, and its loyalty must, in the very nature of its being, be yielded to its managing officers, its directors, and its stockholders. Its employees must owe their first allegiance to their corporate employer and cannot give the patient anything better than a secondary or divided loyalty.

In the case of Parker v. State Board of Dental Examiners, 14 P.2d 67 (Cal. 1932), it was held that neither a corporation nor an unlicensed person may manage, conduct or control the business side of the practice of dentistry. The court there said:

If the contention of appellant be sound, then the proprietor of the business may be guilty of gross misconduct in its management and violate all standards which a licensed dentist would be required to respect and stand immune from any regulatory supervision whatsoever. His employee, the licensed dentist, would also be immune from discipline upon the ground that he was but a mere employee and was not responsible for his employer's misconduct, whether the employer be a corporation or a natural person.

The above-quoted law and dentistry cases have their counterparts in the field of medicine. In *Iterman v. Baker*, 15 N.E.2d 365 (Ind. 1938), the Indiana Supreme Court held that a corporation may not engage in the practice of medicine directly or indirectly by employing licensed persons for that purpose.

A recent federal case from Texas is perhaps the definitive one in this area. In *Garcia v. Texas State Board of Medical Examiners*, 384 F.Supp. 434 (W.D. Tex. 1974), the district court recognized that the police power of the state includes the power to enact comprehensive, detailed and rigid regulations for the practice of medicine, surgery and dentistry. Also, there is no right to practice medicine which is not subordinate to the police power. The court then upheld as constitutional those portions of Texas law requiring a license to practice medicine after examination, a qualification which the court noted no corporation can meet.

Licensed professionals who have assisted a corporation to illegally practice medicine have had their professional licenses revoked by the appropriate licensing boards and such action has been upheld by the courts in *State Board of Dental Examiners v. Miller*, 8 P.2d 699 (Colo. 1932), and *Rockett v. Texas State Board of Medical Examiners*, 287 S.W.2d 190 (Tex.Civ.App. 1956). In Nevada, such conduct would probably constitute “unprofessional conduct” for “fee splitting” and “aiding any unlicensed person to practice medicine,” as those terms are used in [NRS 630.030](#), subsection 1(c) and (d).

Although in each of the cases cited above, the incorporators or officers of the corporation were unlicensed laymen, we fail to see any legal significance or change in the legal rules in the event of a situation where some of the incorporators were professionally licensed while the remainder were laymen, particularly in view of the provisions of Chapter 89 of Nevada Revised Statutes, discussed more fully below, and in particular the language of [NRS 89.030](#) which declares that the provisions of Chapter 89 prevail over any provisions of Chapter 78 which are in conflict or inconsistent with Chapter 89.

Based upon the foregoing medical and dental practice cases, it is the opinion of the Attorney General that no corporation organized under the General Corporation Law of Nevada, Chapter 78 of Nevada Revised Statutes, may lawfully engage in the practice of medicine, as that term is defined at [NRS 630.020](#), subsection 1:

(a) To diagnose, treat, correct or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, by any means or instrumentality.

(b) To apply principles or techniques of medical science in the diagnosis or the prevention of any of the conditions listed in paragraph (a).

(c) To offer, undertake, attempt to do or hold oneself out as able to do any of the acts described in paragraphs (a) and (b).

[NRS CHAPTER 89](#)

In recent years the legislatures of the various states have created by specific statute certain new corporate forms which are generally seen as exceptions to the rulings in the cases cited above. These statutes contain provisions designed to eliminate or minimize the concerns expressed by these and other cases concerning the corporate practice of the learned professions.

Nevada, like many other states, has adopted the Professional Corporations and Associations Act at [NRS 89.010](#) to [89.270](#), inclusive. This statute, in part, authorizes one or more individuals, each of whom is authorized to perform the same professional service, to organize a professional corporation for the practice of the particular profession for which each organizer is licensed. [NRS 89.040](#), subsection 1. A Nevada professional corporation may render professional services only through its officers and “employees,” as specially defined by [NRS 89.020](#), subsection 1,¹ all of whom must be duly licensed to render such professional services. [NRS 89.050](#), subsection 3. No capital stock may be issued in a Nevada professional corporation to anyone not duly licensed to render the

same professional services for which the corporation was formed. [NRS 89.070](#), subsection 1.

In brief, the Professional Corporations Act authorizes Nevada physicians licensed by the State Board of Medical Examiners under Chapter 630 of the Nevada Revised Statutes to incorporate individually or in a group for the purpose of practicing medicine; however, all the incorporators and all the corporate officers and “employees” must be licensed Nevada doctors. In addition, all the stockholders must likewise be licensed Nevada physicians.

Incorporation under Chapter 89 of the Nevada Revised Statutes is deemed by law to have no effect on any law applicable to the nature of the relationship existing between a person furnishing professional services and a person receiving such services, including any liability arising out of such services. [NRS 89.060](#). This provision of the statute is designed to insure the continuance of the long recognized personal, fiduciary and confidential relationship which attaches to the practice of medicine or of the other learned professions, notwithstanding the existence of an impersonal corporate form.

Likewise, the existence of a professional corporation does not in any way bar the appropriate regulating board of any profession from taking any action otherwise within its power, nor does it affect the rules of ethics or practice of any such profession. [NRS 89.100](#).

Also, although the corporation still cannot sit for and pass a professional licensing examination, under Chapter 89 all the incorporators, officers and “employees” of the corporation must have satisfied these requirements beforehand.

The reasons behind the enactment of the Professional Corporations and Associations Act are succinctly set forth by the Supreme Court of Florida in *In re Florida Bar*, 133 So.2d 554, 4 A.L.R.3rd 375 (1961):

The basic purpose of the state professional service corporation statutes is to enable those engaged in various professions, particularly the so-called “learned professions,” traditionally prohibited from practicing as corporate entities because of the essentially personal relationship existing between the lawyer and his client or the doctor and his patient, to form corporations or associations for the

¹“Employee” means a person duly licensed or otherwise legally authorized to render professional service within this state who renders such service through a professional corporation or a professional association, but does not include clerks, bookkeepers, technicians or other individuals who are not usually considered by custom and practice of the profession to be rendering professional services to the public.

practice of their professions, in order to qualify under federal statutes and regulations for income tax privileges in regard to tax-deferred pension plans; such legislation is a frank and forthright effort to adapt certain business and professional relationships in order that the members thereof may be placed on an equal footing with other taxpayers, and neither the legislation nor those who seek to meet its requirements are to be catalogued as devious or evasive. (A.L.R. Headnote 4.)

Therefore, in view of the special statutory scheme found in the Professional Corporations Act, it is the Attorney General’s opinion that medicine may be practiced in this State by one or more physicians in corporate form provided, however, that they strictly comply with the provisions of Chapter 89 of Nevada Revised Statutes.

[NRS Chapter 695C](#)

Any person, partnership, association or corporation may provide or arrange through the employment of others for the provision of any form of medical, dental, or hospital care to persons who have enrolled in a duly authorized Health Maintenance Organization (HMO) under the terms of Chapter 695C of Nevada Revised Statutes.

Normally these activities would constitute the practice of medicine, but [NRS 695C.050](#), subsection 3, specifically exempts all HMOs from the provisions of Chapter 630, the Medical Practice Act, and declares their activities shall not be deemed to constitute the practice of medicine.

Thus, this chapter of our laws may also be said to authorize corporations to do things which would ordinarily constitute the practice of medicine, save and except for the exemption language noted above. However, any corporation acting as an HMO must strictly comply with the provisions of Chapter 695C of Nevada Revised Statutes in order to enjoy such an exempt status.

CONCLUSION

Under Nevada law, one or more physicians may practice medicine in the corporate form so long as they strictly comply with the provisions of the Professional Corporations and Associations Act, including organization, membership, corporate name, etc. The practice of medicine by a general corporation organized under Chapter 78 of Nevada Revised Statutes is illegal. Nevada licensed physicians who aid or abet a corporation to illegally practice medicine may be charged with unprofessional conduct and have their licenses suspended or revoked. A corporation acting as a Health Maintenance Organization may lawfully perform acts ordinarily constituting the practice of medicine, but is exempt from the provisions of Chapter 630 if the corporation is duly authorized by the Insurance Commissioner as an HMO.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By WILLIAM E. ISAEFF, *Deputy Attorney General*

220 Gaming ([NRS Chapter 463](#))—A unanimous vote of the members of the Nevada Gaming Commission is necessary in order to approve an application recommended for denial by the State Gaming Control Board.

CARSON CITY, December 1, 1977

MR. ROGER TROUNDAY, *Chairman, State Gaming Control Board*, 1150 East William Street, Carson City, Nevada 89710

DEAR MR. TROUNDAY:

On behalf of the State Gaming Control Board, you have requested the opinion of this office as to the procedural voting requirements to be followed by the board and the Nevada Gaming Commission upon the application of an unlicensed person for permission to participate, in both financial and managerial positions, in the operation of an existing licensed gaming establishment prior to licensing. The Nevada Gaming Commission has also requested the opinion of the Attorney General in this matter.

FACTS

At the end of August 1977, an individual named Jack L. Urich filed an application with the board for a finding of suitability as a stockholder of Innernational, Inc., the holding company of all of the stock of Hotel Conquistador, Inc., a corporation licensed to conduct business as the Tropicana Hotel and Casino in Las Vegas. By way of his application with the board, Mr. Urich sought to acquire 40 percent of the stock of Innernational, Inc. in a transaction wherein Mr. Urich would pay a nominal amount for the stock and loan up to \$6 million to the corporate licensee. Shortly after filing his application for licensing, Mr. Urich filed an "Application for Emergency Participation in a Licensed Gaming Establishment," wherein Mr. Urich proposed to make \$1.5 million of the \$6 million loan immediately available to the corporate licensee, to acquire 10 percent of the outstanding stock of the holding company, Innernational, Inc., and to participate in management of the Tropicana prior to action by the board and commission upon his primary application. Representations were made to the board and commission that such action, that is, the infusion of funds and management skills prior to Mr. Urich's licensing, was absolutely necessary because of the emergency financial situation which was alleged to have existed at the Tropicana.

Consequently, on September 14, 1977, the State Gaming Control Board met to consider the "Application for Emergency Participation in a Licensed Gaming Establishment" as filed by Mr. Urich. Following an evidentiary hearing wherein the confidential financial affairs of the licensee were discussed, the State Gaming Control Board recommended denial of Mr. Urich's emergency request. On the following day, after receiving the board's recommendation and having conducted its own evidentiary hearing, the Nevada Gaming Commission ordered, by a vote of three to two, "* * * that a decision of the Control Board be rejected; that Jack Urich be approved for emergency participation in the Tropicana." Transcript, Nevada Gaming Commission special meeting, September 15, 1977, at page 38. Against the foregoing factual background, the following question is raised:

QUESTION

What type of vote is required by the Nevada Gaming Commission to approve an "Application for Emergency Participation in a Licensed Gaming Operation" after a recommendation of denial has been made by the State Gaming Control Board on the application?

ANALYSIS

The Nevada Gaming Control Act ([NRS 463.010](#) et seq.) and the regulations promulgated thereunder contain several provisions which are relevant to analysis of the procedural question jointly raised by the board and commission. The substantive question, that is, whether an emergency situation existed at the Tropicana which required an immediate infusion of funds, is not a subject of this opinion.

[NRS 463.595](#), subsection 1, requires stockholders and officers of privately held holding companies who are to be engaged in the administration or supervision of gaming activities of a corporate licensee to be found suitable or to be licensed by the commission, prior to such engagement.

Similarly, [NRS 463.300](#) grants to the commission the authority to adopt regulations controlling the transfers of ownership of and the lending of money to gaming licensees. In furtherance of this statute, the commission has enacted Regulation 8 which deals extensively with transfer of ownership interests in licensed gaming establishments and loans to such establishments. Nevada Gaming Commission Regulation 8.050 requires that any person attempting to acquire an interest in a holding company of a licensee must place in escrow any money or other thing of value constituting the consideration for the acquisition of such an interest until the applicant is fully approved or licensed. See also [NRS 463.345](#). Regulation 8.050 further provides that:

Any loan, pledge or other transaction between the parties or with other parties may be deemed an attempt to evade the requirements of this regulation and, as such, violation of this regulation.

Additionally, Regulation 8.060 prohibits participation in the management in a licensed gaming establishment by any person seeking an interest therein until that person is approved or licensed.

In the instant case, Mr. Urich sought to provide \$1.5 million of the proposed loan of \$6 million to the corporate licensee, as well as a nominal amount of money for 10 percent of the stock of the holding company, prior to the time such transfers would ordinarily be permitted under Regulation 8.050. Consequently, in order for Mr. Urich to infuse the funds and to participate immediately in management, it became necessary for him to file his corollary application, the “Application for Emergency Participation in a Licensed Gaming Establishment,” for a partial waiver of Nevada Gaming Commission Regulations 8.050 and 8.060. Regulations 8.050 and 8.060 provide that such waivers may be obtained “to the extent provided in these regulations pertaining to emergency situations.”

Emergency situations requiring the infusion of funds into a licensed gaming operation prior to full licensing are addressed in Nevada Gaming Commission Regulation 8.070. This regulation provides as follows:

If a transfer of an interest in a licensed gaming operation, in a licensee or in a holding company, is contemplated *and, in the opinion of the board*, the exigencies of the situation require that the proposed transferee or transferees be permitted to take part in the conduct of gaming operations or in the operation of the establishment wherein such gaming operations are conducted, or to make available funds or credit for use in connection with such licensed gaming operation or establishment during the pendency of an application for license or to be permitted to acquire such interest, the commission or any 3 members thereof may waive the requirements of Regulations 8.050 and 8.060, or either of them, in accordance with the procedures hereinafter set forth. (Italics added.)

Of particular significance to the inquiry at hand is the language “If * * *, *in the opinion of the board*, the exigencies of the situation require that the proposed transferee * * * make available funds or credit for use in connection with such licensed gaming operation * * * the commission or any 3 members thereof may waive the requirements of Regulations 8.050 and 8.060, * * *.” Thus, the regulation expressly requires that, as a condition precedent to the commission authorizing such a waiver of the escrow provisions, the board be of the opinion that the exigencies of the situation require the immediate infusion of funds. Of course, the board was not of such an opinion in the instant case and, therefore, the requisite condition precedent to an approval action by a simple majority of the commission was nonexistent.

This result under the Nevada Gaming Commission regulations is consistent with the procedure required by statute in such matters. The question raised by the board and commission concerns the proper procedural vehicle by which Mr. Urich’s request for the waiver of the provisions of Regulations 8.050 and 8.060, as well as the provisions of [NRS 463.595](#), subsection 1, could be carried before the board and commission for action. [NRS 463.0103](#) defines “application” as:

* * * a request for the issuance of a state gaming license, * * * or *for approval of any act or transaction for which commission approval is required or permitted* under the provisions of this chapter or chapter 464 of NRS. (Italics added.)

It is to be noted that the language “or for approval of any act or transaction for which commission approval is required or permitted * * *” was added to [NRS 463.0103](#) by the Legislature in 1975. (Statutes of Nevada 1975, Chapter 452, at p. 674.) Prior to 1975, the definition of “application” included only requests for the issuance of gaming licenses, manufacturer’s or distributor’s licenses, or pari-mutuel licenses. A similar amendment to [NRS 463.0102](#) was enacted in the same chapter wherein an “applicant” was additionally defined as one seeking “* * * approval of any act or transaction for which commission approval is required or permitted * * *.” Related changes were additionally made by the 1975 Legislature to [NRS 463.200](#). In conformity to the statute, the Nevada Gaming Commission has, by regulation, defined “application” as meaning “* * * the request made by an applicant required or permitted by the Act and regulations.” Nevada Gaming Commission Regulation 4.001.

The voting procedure upon an application which has been recommended for denial by the board is prescribed by [NRS 463.220](#), subsection 4, as follows:

After final order of the state gaming control board recommending denial of an application, the commission, after considering the recommendation of the board, may:

- (a) Deny the application;
- (b) Remand the matter to the board for such further investigation and reconsideration as the commission may order; or
- (c) By unanimous vote of the members present, grant the application for a license, *registration, finding of suitability or approval.* (Italics added.)

A review of the legislative amendments enacted by the State Legislature in 1975 additionally reveals that the language of [NRS 463.220](#), subsection 4(c), was purposely broadened by the addition of the underlined language, which includes, of course, applications for “approval.” In the instant case, the commission, in ordering “that Jack Urich be approved for emergency participation” (Nevada Gaming Commission transcript, supra), has ostensibly authorized noncompliance with the regulatory prohibitions contained within Nevada Gaming Commission Regulations 8.050 and 8.060, thereby approving the transfer of funds constituting a part of the consideration for his acquisition of an interest in the holding company of the subsidiary corporate licensee.

The Legislature’s intent regarding the procedural voting requirements of [NRS 463.220](#), subsection 4, may be further discerned by the rejection of Assembly Bill No. 398 during the 1977 legislative session. If adopted, amendments proposed in A.B. 398 would have deleted the language “By unanimous vote of the commission members present * * *” from [NRS 463.220](#), subsection 4, so that a simple majority of the commission could override an adverse board recommendation on an application. Following hearings before the combined judiciary committees of the Assembly and Senate, A.B. 398 was thereafter not voted out of committee; although, at the same time, A.B. 355, a bill containing numerous amendments to [NRS Chapter 463](#), was passed out of both committees without any reference to the provisions of [NRS 463.220](#), subsection 4. A.B. 355 was subsequently adopted by the Legislature as Chapter 571 of the Statutes of Nevada, Fifty-Ninth Session (1977), and was signed into law by the Governor on May 16, 1977.

There is no question that the portion of Mr. Urich’s “Emergency Application” which sought transfer of 10 percent of International, Inc. was an “application” within the meaning of [NRS 463.0103](#) and thus subject to the provisions of [NRS 463.220](#), subsection 4. Although the motion approved by the commission was to reject the recommendation of the board and “* * * that Jack Urich be approved for emergency participation” without qualification as to whether the commission authorized both the infusion of funds by Mr. Urich and the transfer of 10 percent of the International, Inc. stock, it is the

understanding of this office that the applicant and the corporations involved subsequently acknowledged that no transfer of International, Inc. stock was authorized.

It has been suggested that Nevada Gaming Commission Regulations 8.060 and 8.090 would, as an alternative to Nevada Gaming Commission Regulation 8.070, authorize the commission to grant permission to participate in such a situation by a simple majority vote. Regulation 8.090 does not contain language similar to the language of Regulation 8.070 which establishes the condition precedent to commission action under either Regulation 8.060 or 8.070 that the board be of the opinion that the exigencies of the situation require such emergency action. Regulation 8.060 provides as follows:

Except as and to the extent provided in these regulations pertaining to emergency situations, or on written approval of the commission, no person who proposes to acquire an interest in any licensed gaming operation, in a licensee or in a holding company shall in connection therewith take any part or be permitted to take any part whatever, as an employee or otherwise, in the conduct of such gaming operations or in the operation of the establishment wherein such gaming operations are conducted during the dependency of his application for license or to be permitted to acquire such interest.

Similarly, Nevada Gaming Commission Regulation 8.090 provides:

After receipt of a proper application for permission to participate and such additional information as the board or the commission may require, and after such investigation as the board or the commission deems necessary, the commission or any 3 members thereof may grant emergency permission for a proposed transferee to participate in the operation of the licensed games or establishment, licensee or holding company, subject to joint management with the existing licensee or licensees or managing officers of a corporate licensee or holding company.

It is apparent from the language of Regulations 8.060 and 8.090 that neither regulation is addressed toward the infusion of funds or credit into a financially troubled licensed gaming operation as Regulation 8.070 provides. Instead, both regulations limit the participation involved to participation in the conduct of gaming operations or in the management of the gaming establishment. Consequently, the action sought in the case at hand necessarily involved Regulation 8.070, which is the only authority under which the commission could have authorized the infusion of funds or credit into the gaming operation by a proposed investor prior to full licensing by the commission.

Nor can it be said that Regulations 8.060 and 8.090 either invalidate Regulation 8.070 or are otherwise inconsistent with Regulation 8.070. It has been recognized that the regulations of the Nevada Gaming Commission and the provisions of the Nevada Gaming Control Act “form a unified legislative plan; particular sections cannot be fully understood without relating them to the entire statutory scheme.” *United States v. Polizzi*, 500 F.2d 856, 875 (9th Cir. 1974); *State v. Rosenthal*, 93 Nev., Advance Opinion 18 (February 3, 1977).

All of the provisions of Regulation 8, most particularly 8.060, 8.070, and 8.090, can be construed in harmony with one another and with the statutory provisions of [NRS 463.0102](#), [463.0103](#), and 463.220. It has been recently reiterated in *State v. Rosenthal*, *supra*, that gaming regulations which are inconsistent with statutes cannot stand. See also *Cashman Photo Concessions and Labs, Inc. v. Nevada Gaming Commission*, [91 Nev. 424](#) (1975). However, rather than finding regulations or statutes as inconsistent with one another, it is the duty of the courts to construe such provisions in a compatible manner if at all possible. *State v. Rosenthal*, *supra*; *Bodine v. Stinson*, [85 Nev. 657](#) (1969).

It is apparent that Regulation 8.070, under which the emergency infusion of funds into a gaming operation may be authorized, and Regulation 8.060, which is referenced in

Regulation 8.070, are by their own terms consistent with [NRS 463.220](#), subsection 4. Regulation 8.090 can also be construed as compatible with Regulation 8.070 and [NRS 463.220](#), subsection 4; upon an affirmative recommendation by the board on an application to participate in gaming operations, the commission may, by a simple majority, approve the application. Upon a recommendation of denial of an application filed solely under Regulations 8.060 and 8.090, the commission must obey the statutory mandate of [NRS 463.220](#), subsection 4, and can, therefore, only approve the application by a unanimous vote of the commission members present. Thus construed, Regulation 8.090 is compatible with the statute. A contrary interpretation of the commission's authority under Regulation 8.090 would render this regulatory provision invalid as inconsistent with and in excess of the authority conferred upon the commission by the enabling legislation contained within [NRS Chapter 463](#). *Cashman Photo Concessions and Labs, Inc. v. Nevada Gaming Commission*, supra.

CONCLUSION

The Legislature of the State of Nevada has created a system of gaming control which has been lauded nationally (see *Gambling in America*; the report of the Commission on the Review of the National Policy Toward Gambling) and which has just recently been used as a model by another state which has legalized casino gambling. Within Nevada's unique system, the Legislature has created two distinct regulatory bodies which share the responsibility of gaming control in this State. This responsibility is reflected in the language of [NRS 463.220](#) and related statutory provisions wherein it is established that the board, in addition to fulfilling the investigative function, shares a vital role in the decision-making process with the commission. Through establishment of a system of checks and balances between the gaming regulatory agencies, as reflected in the procedural voting requirements of [NRS 463.220](#), subsection 4, the Legislature has recognized the necessity of involving the full-time state employees who comprise the membership of the board ([NRS 463.060](#)) in the decision-making process with the members of the Nevada Gaming Commission who serve the State on a part-time basis ([NRS 463.025](#)). It is the blending of the expertise and knowledge of the board members with the sensitivities reflected by the commission members which permits a decision relating to gaming matters represented in an application to be jointly made. Until the Legislature chooses to abandon this delicate system of checks and balances for some other unified scheme, applications for matters defined within [NRS 463.0103](#) will have to be passed upon by both the board and commission in the manner prescribed by law.

In view of the foregoing analysis, it is the opinion of this office that a unanimous vote of the commission members present is necessary in order to grant an approval sought pursuant to Regulations 8.060, 8.090, or 8.070 following a recommendation of denial of the application by the State Gaming Control Board.

Respectfully submitted,

ROBERT LIST, *Attorney General*

221 Retirement, Public Employees—No dual coverage or credit allowed under the Nevada Public Employees Retirement Act; except as provided in [NRS 286.300](#), subsection 1.

CARSON CITY, December 27, 1977

GEORGE CHAVEZ, *Director of Personnel and Services, City of Sparks*, 431 Prater Way, Sparks, Nevada 89431

DEAR MR. CHAVEZ:

In your recent letter, you requested this office to review and update, if necessary, Attorney General's Opinion No. 59, issued by Attorney General Harvey Dickerson on August 8, 1963. Our review of the opinion, the statutes cited therein and the subsequent amendments to those and other statutes has been conducted with reference to the following:

QUESTION

Under what circumstances, if any, may a member of the Nevada Public Employees Retirement System receive credit in said system for public service which is also credited in another federal, state or local retirement system or plan?

ANALYSIS

Attorney General's Opinion No. 59, dated August 8, 1963, concluded that Nevada law prohibited a public employee from receiving credit in the Public Employees Retirement System (PERS) for time served with the same public employer before that employer joined the PERS where such time remained credited under the OASI program of the Social Security Administration.

To a large extent this opinion was negated by a subsequent amendment to [NRS 286.300](#) which authorized a member of the PERS to purchase all previous creditable service performed with his present employing agency if such service was performed prior to enrollment of his agency in the system, even if the service is still creditable in some other system where it cannot be cancelled. Section 30, Chapter 575, Statutes of Nevada 1975. Now, a member of the PERS may purchase such service even though he does not, indeed cannot, cancel such service in the OASI program.

The same 1975 amendment also authorized a member who has at least 5 years service credit in the Nevada Public Employees Retirement System to purchase up to 5 years credit for out-of-state service performed with another governmental entity, but only if such service is no longer credited in another retirement system. Such a member may also purchase up to 5 years military service credit so long as such services is no longer credited in the military retirement system. [NRS 286.300](#), subsections 2 and 3.

As can be seen from the 1975 amendments, the general intent of the statutes is to prohibit dual or simultaneous credit in our system and some other. This intent is also reflected in [NRS 286.310](#), subsection 2, which declares that employees of the State of Nevada or any other political subdivision thereof who are required by federal law to participate in a federal retirement system may not become or remain member of the Nevada Public Employees Retirement System.

Finally, [NRS 286.486](#) makes quite clear the fact that, unless otherwise specifically provided in Chapter 286, a member of our system shall not receive credit for service which entitles such member to service credit in any other retirement system operated by the federal or a state or local government.

The present Public Employees Retirement Act, as periodically amended, also contains some sections which govern certain specific categories of members. For instance, [NRS 286.365](#), subsection 3, prohibits any civilian employee of the Nevada National Guard from becoming or remaining a member of our system if he has or obtains retirement credit under a federal retirement system, to the end that no dual coverage shall result. [NRS 286.305](#), subsection 3, limits Supreme Court Justices and District Court Judges to the receipt of retirement benefits under either [NRS 2.060](#) or [NRS 3.090](#), respectively, or [NRS 286.305](#), but not under both.

CONCLUSION

With the limited exception provided for in [NRS 286.300](#), subsection 1, the Nevada Public Employees Retirement Act continues to prohibit dual credit or coverage in

our system and the retirement system of some other governmental entity. Attorney General's Opinion No. 59, dated August 8, 1963, is hereby overruled to the extent that said opinion is in conflict with present Nevada law and this opinion.

Respectfully submitted,

ROBERT LIST, *Attorney General*

By WILLIAM E. ISAEFF, *Deputy Attorney General*
