PROBLEMS INVOLVED
IN
FINANCING PUBLIC BUILDINGS
WITH
LEASE–PURCHASE AGREEMENTS

BULLETIN NO. 55

NEVADA LEGISLATIVE COUNSEL BUREAU

OCTOBER 1962

Carson City, Nevada

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The Nevada Legislative Counsel Bureau is a fact-finding organization designed to assist legislators, state officers, and citizens in obtaining the facts concerning the government of the state, proposed legislation, and matters vital to the welfare of the people. The staff will always be non-partisan and non-political; it will not deal in propaganda, take part in any political campaign, nor endorse or oppose any candidates for public office.

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PROBLEMS INVOLVED IN FINANCING PUBLIC BUILDINGS WITH LEASE-PURCHASE AGREEMENTS

INTRODUCTION

Public works projects constitute a major financing problem in the present economy of the State of Nevada, as well as in most other states. In many states, fear of the growth of oppressive taxation at the state level has fathered many a constitutional prohibition or limitation on the incurring of state indebtedness and on similar enactments by local political subdivisions. Such prohibitions and limitations have circumscribed the borrowing or bonding power and capacity of all the government entities. However, they have not prevented government entities from resorting to every conceivable strategy to circumvent these primary defenses in the light of what appear to be urgent and pressing needs.

Public works projects are either self-liquidating or non-self-liquidating; no fixed listing of projects in either classification is possible, as any given facility may be self-liquidating in one locality or a given set of circumstances, while in other areas or conditions the same project might fail to be self-sustaining even in the face of a more critical need. Other variations of this question are involved in the inherent probability of change in revenue productivity which might occur over a period of 10, 20 or 40 years, and which might result in, or require a change in the method of financing. There has been a tendency among the states and their many political subdivisions to give piecemeal treatment to the individual need or demand for a given project in a particular locality. Specifically, most of the legislative enactments in this field appear to have been attempts to satisify a particular segment of the state economy asserting itself in the attainment of specific public projects.

National surveys show that the states support the theory of legislative control over money expended for non-self-liquidating projects. There is almost total approval of the basic tenent that since the legislature bears the responsibility for imposition of the tax structure, any disbursements for projects incapable of self-liquidation must rightly secure the same consent, once it has been established that there is a state interest therein. Legislative appropriations, grants or subsidies from current revenues, surpluses or special reserves are frequently made with legislative stipulations that any return on the investments made in such projects revert to the general fund.

In the case of apparent self-liquidating projects there appears to be no widespread tendency or attempt to hold such facilities under the thumb of legislatures or special agencies created by law. It appears that there is a disposition to place stewardship in the most experienced hands available, and as responsive to the will of the people as possible. However, in undertaking the financing for many of these investment projects, prohibitions against the use of, or a limitation on, taxing rates, borrowing and bonding capacities have presented themselves. Many other difficulties have arisen to impede the erection of new facilities, replacement of the obsolete, or the modernization and extension of present facilities and equipment. The concept of a "pay-as-you-go" policy often fails in its ability to provide requisite facilities at

the moment of need. Orthodox methods of financing encounter reluctance on the part of investors in the bond market to purchase issues where there is no history of earnings, or where current earnings may not be further pledged for added facilities. The lease-purchase plan has failed to attract wide support; in fact, the plan or device has virtually been abandoned for financing the construction of public buildings. It has proven far too costly as this report will clearly demonstrate.

NEVADA STATUTES

For a proper understanding of the lease-purchase agreement pertaining to the new Employment Security Building and the proposed amendments thereto, it is necessary to consider in chronological sequence all events from the first proposal--which was December 8, 1958--to the date of this report. It is important to note the dates on which statutory authority to do certain things was granted in connection with the Employment Security Building, for much was done and considerable money expended before any statutory authority existed therefor.

It seems only fair and proper at the outset to state clearly that a thorough and exhaustive study has not revealed any improper conduct on the part of anyone, except as herein expressly set forth, and that is in connection with the entering of agreements and payment of public funds prior to any statutory authority therefor. In this connection, however, by legislative enactment an attempt has made to ratify all such prior unauthorized acts.

Prior to March 14, 1960, there was no authority whatever for the Executive Director of the Nevada Employment Security Department to enter any lease-purchase agreement whatever. On that date, Assembly Bill No. 226, which became Chapter 191, Statutes of 1960 (p. 348) became effective; a copy of that chapter is set forth as Exhibit A at the end of this report in order to show the status of the law and the legislative intent at the outset.

It is also necessary to note in connection with this report that on the same day, March 14, 1960, Chapter 190, Statutes of 1960 (p. 348) became effective, which was Assembly Bill No. 207. That bill authorized the State Planning Board to convey to a nominee of the Employment Security Department, for a consideration not less than the total cost to the state, all of Block 20 of the Sears, Thompson & Sears Division of Carson City, which is the property upon which the Employment Security Building is constructed. The provisions of Chapter 190 are set forth as Exhibit B at the end of this report.

To understand the full effect of Senate Bill No. 38, which was enacted into law during the 1961 Session of the Legislature and became Chapter 11, Statutes of Nevada, 1961 (p. 9) (see Exhibit C), it is necessary to consider the provisions of subsection 1 of Chapter 191 of the Statutes of 1960, which was the act authorizing the Executive Director of the Employment Security Department to enter lease-purchase agreements. The last sentence of Paragraph 1 of that chapter reads as follows:

> Rentals to the lessor shall be paid by the Employment Security Department, or any agency which may hereafter absorb the employment security program, from grants received by the Employment Security Department or state agency for such purpose, to the extent that funds are made available by the Congress of the United States. (Underscoring added)

It must be recognized and admitted that, as a matter of law, the authority of the Executive Director of the Employment Security Department of Nevada was limited by the provision of Chapter 191 of the Statutes of 1960, and that his authority to enter into any lease-purchase agreement was limited so that the

rental payments under any such agreement could only be paid from funds made available by the Congress of the United States. In other words, the Executive Director had no authority whatever under that statute to bind the State of Nevada for any sum whatsoever in connection with the construction and the lease and purchase of any such building. It is to be noted that Chapter 11 of the Statutes of 1961 did not become effective until February 15, 1961. So that from March 14, 1960, to February 15, 1961, the authority of the Executive Director was delineated and limited by the provisions of Chapter 191, Statutes of 1960. Among other things the provisions of that chapter authorized the Executive Director to take title in the name of the State of Nevada to the premises on which the Employment Security Building is built "upon fulfillment of the terms of such agreement" (i.e., the lease-purchase agreement). The next paragraph of that chapter, which is subsection 3, is also interesting and important. It reads as follows:

> 3. All such lease purchase agreements heretofore entered into by the executive director are hereby ratified, confirmed and adopted.

It is difficult to understand why such all-extensive authority should have been granted or asked without all information concerning the lease-purchase agreements entered prior to the statutory authority in question. In connection with this provision--and, in fact, all other provisions of this entire complex matter--it is important to note that no public officer, from the Governor to the lowest employee or officer of the state, has any right whatsoever to bind the state by any contract to pay any sum, no matter how large or small, and no matter for what laudable public purpose, unless there is statutory authority to enter the contract and to bind the state, whether for the expenditure of money or to impose any other obligation; any contracts or agreements entered without legislative authority are absolutely void. The Legislature, it must be remembered, has plenary, absolute and exclusive authority over the funds of the state. By the term, "the funds of the state," it is not meant to limit these funds to the General Fund monies. Any funds belonging to the state, no matter from what source received, are public monies under the exclusive control and jurisdiction as to appropriations and authorization for expenditure by the Legislature, except those given in trust for specific purposes, and no official without proper statutory appropriation and authorization may expend one dollar or any sume whatever of such monies, even for the most laudable public purpose. (State vs. North Miami (Fla.) 59 So. 2nd 779)

Returning to a consideration of the main question, we are not unmindful of the NRS provisions found in Chapter 612, particularly NRS Section 612.615 concerning the creation of the Employment Security Fund and providing the source and use of such a fund. Subsection 5 of that NRS section provides as follows:

> 5. The moneys in this fund shall be used by the executive director for the payment of costs of administration which are found not to have been properly and validly chargeable against federal grants received for or in the unemployment compensation administration fund.

It may be of interest to note that subsection 2 of the section in question shows the source of monies in that administrative fund. The monies making up the fund come from interest and penalty payments by way of forfeit for failure to pay on the part of employers into the employment insurance funds as required by the federal acts.

Further, the rule is repeatedly stated by courts that:

> All officers, from the highest to the lowest, are but agents with delegated powers and that no public official may bind the state or any of its subdivisions beyond the extent of actual authority.

It has occasionally been contended, by way of defense, by some public officials that if the act complained of has not been prohibited expressly or impliedly by constitutional or statutory provision, such act is within the authority of the officer to do or perform. Courts invariably brush aside such erroneous contentions. For the law is squarely the opposite of this postulate.

A more correct statement of the law applicable to public office and officers is that where the office is one created by legislative act, and there are no constitutional provisions relating thereto, the authority of the officer appointed or elected to such office is measured by the statute creating such office and defining the duties of such officer. If the creating statute or some other relevant statute does not contain authority to do a particular act, it cannot be done legally. If such act be done without authority, it is a void act and may subject the wrongdoer to civil damages and criminal prosecution.

Furthermore, if the act done is without legislative authority, it cannot bind the state or any subdivision thereof, and it cannot be subsequently ratified. For if there be no authority to do the act originally, it is illegal and void, and it cannot be given subsequent legal sanction any more than life can be breathed into a corpse.

The concept or theory of some that silence gives assent to acts of the executive branch (i.e., if an act is not prohibited, it is permitted) has come into being undoubtedly because of confusing legislative power and authority with that of the executive branch.

The distinction between the power and authority of these two branches of government is clear and distinct and should be ever kept in mind. It is stated simply as follows:

> Legislative power and authority: State constitutions, unlike the federal constitution, contain not grants of legislative power, but limitations upon legislative power.
>
> Executive power and authority: Statutes creating executive departments, are grants of power and authority. The power and authority of any executive department created by statute is measured by the provisions of the statute.

When any question of legislative power and authority is raised, the deciding authority, usually the court, looks to the constitution, both federal and state, and if the act questioned is not prohibited, it may be done.

On the other hand, when any question of the power and authority of an executive department is raised, the deciding authority looks to the statutes and any relevant constitutional provision, and if the act in question is not authorized, it may not be done.

It is to be noted that in all state constitutions some departments are therein provided for. In such cases, there are sometimes grants of authority to such departments so created. So we are obliged, when the power and authority of such departments is in issue, to look to both constitutional and statutory provisions to determine the answer to the question. If the search does not reveal a grant of authority, either in the constitution or statutes, the challenged or questioned act is prohibited.

This rule applies to all executive departments from the highest to the lowest; and no one in the executive branch, not even the Governor, has any power or authority that is not granted to such officer either by constitutional provision or by statute. If the grant of authority is not present, no such authority exists.

As we pointed out, by way of citations, on page 3, above:

> No public officer from the Governor to the lowest employee or officer of the state has any right whatsoever to bind the state by any contract to pay any sum no matter how large or small and no matter for what laudable public purpose unless there is statutory authority to enter such contract and to bind the state. Any contracts entered without legislative authority are absolutely void and cannot be subsequently ratified.

Prior to the execution of the lease-purchase agreement under consideration, the Employment Security Department entered two other such lease-purchase agreements. One provided for the construction and lease of a building in Reno, the other provided for a building in Las Vegas. At the time these agreements were entered, there was not a vestige of authority therefor.

The contract for the Reno building was entered on the 24th day of October 1957. The contract for the Las Vegas building was entered on the 17th day of April 1958. There was no statutory provision authorizing the lease-purchase method for financing construction of public buildings until 1960. It must, therefore, follow with irresistible force that the two said lease-purchase agreements were entered without any legal authority, and, under the unquestioned law, did not impose any obligation on the state. Furthermore, the doctrine of estoppel in such cases is not applicable against the state. For all persons who contract or deal with a public official are presumed to know the limits of his authority, and they deal with him at their peril. (Patten vs. Pers. Bd., 234 Pac. 2nd 987; Bear River S & G Co. vs. Placer Co., 258 Pac. 2nd 543)

The latter case also holds that a void act cannot be subsequently ratified. The cases also clearly hold that the doctrine of implied contract, because of unjust enrichment, cannot be applied against the state; and even though the state is benefitted and enriched, it cannot be made to pay, nor can it willingly pay for a benefit that it received by way of an unauthorized contract. (In Re City and County of San Francisco, 195 Calif., p. 426)

It is submitted that because of the law, as above stated, the blanket ratification attempted by Section 3 of Chapter 191, Statutes of 1960, to the effect that

> All lease-purchase agreements heretofore entered into by the executive director are hereby ratified, confirmed and adopted.

was abortive and of no legal force or effect.

We have noted also the other subsections of NRS 612.615 to the effect that there shall be no reversion of any monies in such fund, but the fund shall remain continuously available to the Executive Director "for expenditure consistent with this chapter." It is also to be noted that subsection 8, being the last subsection of that section, provides that: "monies in this fund shall not be comingled with other state funds, but shall be maintained in a separate account on the books of the depositary."

We are concerned, however, with the extent of the meaning of the phrase, "costs of administration." In other words, can that phrase possibly be expanded or extended to include the purchase of real property upon which to build an office building for the Department, and the payment of the engineering fees and the architectural fees in connection with the construction of the building by a private owner, and then the payment over a period of 20 years of the rentals for the building under the lease-purchase agreement, which, in the aggregate, amount to almost $2 million? That matter will be discussed in detail shortly hereafter.

The writer has had the use of all attorney general's opinions on this entire matter. In this connection, however, we respectfully reserve the right to disagree with certain of those opinions, and to explain the reasons for such disagreement. It is not unusual for legally trained persons of considerable experience to differ in the interpretation of statutes and constitutional provisions, and in the construction thereof. Courts daily prove this statement by their decisions. This fact becomes readily apparent when the several attorney general's opinions on this matter are read and considered; copies of each one of these opinions--there being five in all--are attached hereto. It is sufficient to say here, however, that the opinions--or at least two of them--hold squarely contra to the three others, both in the interpretation of the legal liability of the state and the legal authority of public officials to incur state indebtedness, as well as the legal effect of the lease-purchase agreement.

It is perhaps best at this stage of the report to deal generally with the subject of lease-purchase agreements. In this connection, however, we wish to emphasize that until we state otherwise, we will deal generally with an explanation of lease-purchase agreements, the legal effect thereof, and generally

discuss the various legal and constitutional questions presented in any such discussion. At the outset of this portion of the discussion, it is important to ask and answer the question: Why is there a need for lease-purchase financing? The answer to that question is clear and pertinent, and it is in substance that lease-purchase financing came about and was used originally when first conceived, and presently, in an attempt to circumvent or avoid constitutional debt limitations. It is interesting to note, too, that lease-purchase financing is nothing new. It is one of a series of devices that has been used for decades in an attempt to escape or circumvent constitutional debt limitations.

DEBT LIMITATION HISTORY

Constitutional debt limitations now found in virtually all state constitutions were originally motivated by financial crashes and panics that occurred during the nineteenth century. The first severe panic occurred between 1837 and 1843, and continued for a period of 72 months and resulted in tremendous state defalcations and debt repudiation. Immediately after that financial panic there came the first constitutional state debt limitation. Rhode Island enacted the first in 1843, New Jersey in 1844, Louisiana in 1845, Iowa in 1846, Illinois and Wisconsin in 1848.

These first debt limitations did not restrict counties or cities, or let us say, any local governments, in the debt-incurring power. As the states incurred debts that approximated the constitutional limitation, there were continued demands for more money for continued improvements, and these demands have continued from that time to the present day. Because of the state limitations, local governments were called upon to furnish certain services or functions that had theretofore been furnished by the state. As a result, debts of local political subdivisions in the several states increased at an alarming rate and finally resulted in the financial crash and panic of 1873 which lasted for 66 months. As a result, or as a corollary of the financial panic brought about by excessive local debt, many municipalities defaulted and repudiated huge debts including bonded indebtedness, the aggregate of which amounted to many hundreds of millions of dollars.

The only possible solution for this irresponsibility was further imposition of debt limitations upon local political subdivisions. These limitations began in 1851, and continued until almost the turn of the century. Because of the terrific financial crash in the early 1870's, local debt limitation between 1872 and 1879 was imposed on great numbers of municipalities.

Many local governments had improperly incurred heavy indebtedness in an attempt to finance railroads and other enterprises that required profit for their success and the ultimate repayment of the municipal indebtedness. The crash of 1873 showed clearly the financial weakness of most of such financing. As a result of this experience, or rather these experiences of the 1830's to the 1870's, most all states and local governmental subdivisions now have limitations on the power to incur binding indebtedness.

Most of the limitations are based upon a percentage of the total taxable property in the state or the subdivision of local government. And those limitations run from a low of 1 percent taxable property in Nevada to a high of 18 percent in Virginia.

At first, debt limitations were fixed in amounts of dollars. For example, in Rhode Island, the first debt limitation established in 1843 was that the debt could not exceed $50,000. In other states, as presently in the State of California, the debt limit was in a greater sum, California's presently being in the amount of $300,000 without a vote of the people. Certainly the amount of limitation based upon a percentage of total taxable property is the more realistic and wiser provision, for the reason that the assessed values of the state and the political subdivisions increase as the entity grows.

The purpose of and reason for these constitutional debt limitations is simply to protect the future generations from the improvidence of present generations; that is to say, to prevent the burdens of undue extravagance that might be cast upon future generations because of an improvident fiscal policy by present generations.

ATTEMPTS TO EVADE DEBT LIMITATION

As the debt limitations in the several states and the municipalities were reached, the demands of pressure groups and other well-meaning citizens for expanded functions of government continued. Whether the needs were real or fancied, the officials in charge of the various agencies of government were called upon to furnish such functions; these functions included the construction of new buildings and other structures such as bridges, roads, canals and other projects that required funds that could no longer be raised because of the debt limitation provisions. The search for these wanted funds has continually been blocked or impeded by the constitutional debt limitation on the power of incurring state or municipal indebtedness. Because of increasing demands for local improvements as well as additional buildings for use in the various states to carry out the state functions, there have been continuing studies and search for financing plans in order to find some way around the debt limitation provisions. Lease-purchase financing was one of the plans seized upon as possibly acceptable to the courts, and not in conflict with debt limitations. The argument being that although the contract is just what it is termed, "a lease-purchase agreement," such agreements do not constitute a present debt within the purview of constitutional debt limitations. As in most such cases, there was no unanimity of opinion among the various courts that were called upon to rule as to the legality of such plans.

COURT DECISIONS

Prior to the advent of the lease-purchase scheme, there had been cases upholding the power of municipalities to contract for services to be rendered over an extended period, but payable only periodically as the services were rendered. Those who sought to circumvent the debt limitation provisions by the use of the lease-purchase scheme for the construction and acquisition of public buildings tried the same arguments as in contracts for the rendering of services, to wit: that although the contract was for a period of years during which it was agreed that monthly payment should be made each month, the aggregate amount was considered not to constitute a present indebtedness for the whole period of time, but rather only constituted an indebtedness for each month or period of time for which the so-called rental charges must be paid. This contention and holding in accordance therewith is attempted to be sustained upon the basis or argument that if an indebtedness is paid when it becomes due, then it is truly a cash proposition and not an indebtedness.

In an early Nevada case, State vs. Parkinson 5 Nev. 17, our Supreme Court held that in the computation of aggregate amount of debt to determine whether or not it exceeds the debt limitation provision, accounts or charges that were paid when they became due were not to be taken into consideration in such computation, because the state in that instance was operating upon a cash basis and not upon a term indebtedness basis within the provision of the constitutional debt limitation. The case did not involve a lease or lease-purchase agreement.

Many courts have rejected the contention that lease-purchase agreements do not constitute a debt, and have struck down statutes and ordinances which attempted to use them as devices to circumvent the debt limitation provisions. On the other hand, there were numerous decisions, and their number seems to exceed those to the contrary, that held that such agreements did not constitute a present indebtedness for the whole sum and that, therefore, neither the total nor any part of it should be taken into consideration within the debt limitation provisions.

A series of these cases developed during the last half of the nineteenth century which made a distinction between present indebtedness for the full amount that became due under a contract, and a short-term debt for the amount due for a year or a single appropriation period. As a matter of fact, there were several cases that even involving contracts over a long period of time such as 10, 20 or 30 years, held that such a contract did not create a present indebtedness for the full amount for the entire term, if it were a lease, or for the entire purchase price, or if it were for the purchase of a utility, but held rather than it was merely an agreement by which monthly or annual payments became due, and that as a result there was not a present existing indebtedness for the total amount, and therefore that the contract was not within the terms or purview of the constitutional debt limitation.

The legal precedents furnished by the cases sustaining long-term contracts for services were used by those who desired to extend the device to the acquisition of property. For example, water systems and the pipes and hydrants for the furnishing of water for domestic use as well as for fire department use, and electricity and gas for domestic use as well as for street lighting, or rather the systems to furnish such services, were obtained by municipalities by the use of long-term lease-purchase contracts. Also, when a state or municipality wished

to acquire certain production facilities to furnish light, power or water to the state or area of government which was desiring the utility, the lease-purchase scheme was tried. Such contracts were sustained by some courts on the basis that the commodities furnished by such systems were really services rendered. The agencies of government involved were sometimes able to circumvent the difficulty by calling the contract a lease of the system, or for so many hydrants if it were water, or so many power poles if it were light, and to pay the rent for such hydrants and power poles and similar fixtures at a fixed rate per unit per month. These leases usually provided for the acquisition of the entire utility system when the aggregate payments reached a specified amount, and upon the payment of a stipulated sum, which, when added to the rents would aggregate the cost of the entire utility. Some sympathetic courts held in many cases that the annual payment rule, as in the case of a monthly or annual payment for services, could sustain the rental transaction. By such fictional schemes cities were able to build city halls, courthouses, jails, bridges and other structures, and thus circumvent the debt limitation provisions.

The court decisions during the period of developing such a legal fiction, both as to contracts for services and as to lease-purchase of utilities, were replete with contradictions as they are at the present time. One writer pointed out that by 1914 the courts were in a hopeless conflict over the constitutionality of lease financing plans within the debt limitations. Another writer points out that within a five-year period--from 1895 to 1900--Indiana and Missouri upheld the lease-purchase agreement, and Kentucky, Maine, Michigan, New York, Pennsylvania and West Virginia refused to sustain such attempts to circumvent the constitutional debt limitation. During that same five-year period, at least one state emphasized the hopeless confusion by deciding both ways. As a matter of fact, several states have decided the issue both ways, and such decisions have come within just a few years of each other. Both Indiana and Wisconsin have decisions squarely holding both ways.

In recent years at least seven states have enacted statutes providing for the lease-purchase method of paying for schools. In five of these states the statutes were sustained against attacks on their constitutionality as being in conflict with the debt limitation provisions. In two states, the courts held these statutes to be contrary to the debt limitation provisions, and, therefore, unconstitutional. In ten other states, statutes permitting the acquisition of state buildings by the lease-purchase plan have been enacted. Six states held the acts to be invalid as being in contravention of the debt limitation provisions, and in four other states the courts held the statutes not to be in conflict with the constitutional provisions. Of course, in all such cases one has to read the decisions within the light of constitutional provisions of the state involved; for, although in most instances the verbiage is very similar, there are differences which make it impossible to establish any uniform rule to apply throughout all the states. It is well, therefore, in view of the variety of decisions to consider here our own constitutional provision as to debt limitation.

NEVADA DEBT LIMITATION PROVISIONS

Our debt limitation provision is found in Article IX, Section 3, which reads as follows:

> The state may contract public debts; but such debts shall never, in the aggregate, exclusive of interest, exceed the sum of one percent of the assessed valuation of the state, as shown by the reports of the county assessors to the state controller, except for the purpose of defraying extraordinary expenses, as hereinafter mentioned. Every such debt shall be authorized by law for some purpose of purposes, to be distinctly specified therein; and every such law shall provide for levying an annual tax sufficient to pay the interest semi-annually, and the principal within 20 years from the passage of such law, and shall specially appropriate the proceeds of said taxes to the payment of said principal and interest; and such appropriation shall not be repealed nor the taxes postponed or diminished until the principal and interest of said debt shall have been fully paid. Every contract of indebtedness entered into or assumed by or on behalf of the state, when all its debts and liabilities amount to said sum before mentioned, shall be void and of no effect, except in cases of money borrowed to repel invasion, to suppress insurrection, defend the state in time of war, or, if hostilities be threatened, provide for the public defense.

What we are concerned with in this report and in the section just quoted, is the provision that the state may not contract debts which in the aggregate, exclusive of the interest, exceed the sum of one percent of the assessed valuation of the state; also, the provision that any indebtedness incurred by the state, when all its debts and liabilities amount to one percent of the total assessed valuation of the state is absolutely void and of no effect.

It becomes important, therefore, to determine what is the maximum debt which the state may presently incur under Article IX, Section 3. That figure is supposed to be determined by a consideration of the total assessed value of the state as shown by the reports of the <u>county assessors</u> to the State Controller. We use the term "supposed to be determined" because the constitutional requirement is a <u>valuation based upon assessors' reports</u>. As hereafter explained, assessors are not required by law to make, and do not make, such reports. The State Controller, because of this, is forced to use other sources of information for his determination of total assessed value; namely, <u>auditors'</u> reports; this presents a real problem, the nature of which, and the remedy therefor will be hereafter explained.

At the beginning of the 1961 Session of the Legislature, the state had already incurred an indebtedness of $2,434,000.00, excluding Reno and Las Vegas Employment Security Buildings. During the 1961 Session, the Legislature authorized general obligation bonds to be issued as of January 1, 1962, in the amount of $1,410,000.00 for the construction of a minimum security prison; a further general obligation bond issue was authorized as of March 1, 1963, in the amount of $1,456,000.00 for a social science building at the University of Nevada. The aggregate of the indebtedness <u>incurred prior</u> to the 1961 Session

and authorized by the 1961 Session would be $5,300,000.00.

In view of these figures, it becomes extremely important to determine whether or not the aggregate amount of money due under the lease-purchase agreements of the Employment Security Buildings must be taken into consideration in computing the total state debt. In other words, do these lease-purchase agreements impose a debt upon the state in such a manner that it must be considered a debt within Article IX, Section 3, of the Constitution, which is our debt limitation provision? In order to answer that question, a careful study and analysis of the lease-purchase agreement and of all documents leading up to the execution of the agreement and the purported amendments to that agreement has been made. A copy of all such documents is annexed to this report.

THE LEASE-PURCHASE AGREEMENT BETWEEN BRUNZELL CONSTRUCTION CO., INC., OF NEVADA, LESSOR, AND EMPLOYMENT SECURITY DEPARTMENT, LESSEE

For the purpose of completeness and to permit a consideration of all of the documents including the lease and amendments thereto with which this report is concerned, each of the documents mentioned are attached hereto as an exhibit. The first exhibit attached hereto is marked Exhibit D, and that is the lease-purchase agreement itself.

The next document attached contains the purported amendments to the lease-purchase agreement is marked Exhibit E. Subsequently in this report we will make note that other documents are attached as their relative importance occurs in the discourse hereinafter contained.

ANALYSIS OF THE LEASE-PURCHASE AGREEMENT

At the outset of this portion of the discussion, it is well to point out that in view of the lack of uniformity of decisions, as mentioned above in the several states, it is wise to consider not only the constitutional provisions pertaining to the debt limitation, but also the form of the agreement or document by which an obligation is incurred or imposed. At this stage of the discussion we are concerned only with the lease-purchase agreement, the wording thereof, and the legal meaning or effect of that wording.

On page 1 of the lease-purchase agreement beginning immediately after the word "witnesseth" it is to be noted that the lessor, who is the Brunzell Construction Co., agrees to purchase from the state the property upon which the building was to be constructed; immediately thereafter the lessor agrees to construct or cause a building to be constructed upon such property in accordance with specific plans and specifications. Then comes the important portion with regard to any indication of intent. That part is as follows:

> . . . and to lease said building and property to the lessee (Employment Security Department) for the term hereinafter set forth, and at the end of said term to sell said building together with the aforesaid Block 20 as hereinafter set forth, upon the terms and conditions set forth herein . . .

The next provision of importance is found on page 3 in paragraph 3 which is entitled "term of lease and rental period." The term of this lease shall be for a period of 20 years, and shall commence 300 calendar days after the lessor shall receive from lessee notice to proceed with the construction of the improvements which must be erected and placed upon the demised premises, or at such time after said 300 calendar days when lessor has completed all improvements required to be made by him "hereunder" and has the premises ready for the complete occupancy by lessee. The next provision is found in the same paragraph immediately after the last quoted phraseology and is as follows: "The total rental for the term of this lease $1,987,488.00 payable at the rate of $8,281.20 per month."

In pursuance of the agreement of the lessor to purchase the real property upon which the building was to be constructed, he agrees in paragraph 4 of page 4 to purchase the said property immediately upon the execution of this contract and his nomination by the lessee as purchaser, and agrees to purchase the same in accordance with the terms of Chapter 190 of the Statutes of 1960, which was Assembly Bill No. 207 hereinabove mentioned, which provided that the property was to be conveyed for "not less than the total cost to the state."

An interesting provision is found immediately after that agreement to purchase, and it is that the lessor agrees to proceed with the purchase and that "within 30 days after lessor purchases and acquires title to said real property, lessee shall reimburse said lessor the amount of the purchase price less $1."

It may seem strange that after the lessor acquires title to the property by paying the purchase price thereof to the State of Nevada, that the lessee will reimburse the lessor for the amount of the purchase price; that matter will be discussed in detail later, as there was no authority to make that reimbursement. What is to be noted here is the retention by the lessee of the sum of $1; the importance of this will be noted later.

It is to be noted that in addition to the rent reserved and agreed to be paid by the lessee for the term of 20 years, the lessee agrees in paragraph 7, page 6, at its sole expense to perform "all necessary maintenance and repair to and on the demised premises." In addition, by paragraph 9, page 6, the lessee agrees to reimburse the lessor for any and all insurance premiums which the lessor pays for the insurance which he agrees to place upon the building constructed upon the demised premises. The amount of insurance is agreed to be the "full amount of the replacement value of the improvements and shall insure the lessor and the lessee against the hazards of fire with extended coverage endorsement including (but not necessarily limited to) the hazards of flood, windstorm and tornado."

It is agreed a little later in the same paragraph by the lessee that the lessor may have the insurance policy provide a standard mortgage endorsement in favor of the holder of the deed of trust which the lessor was to execute as security for the payment of the promissory note by which he was to obtain the building costs. The consent thereby given was conditioned upon the holder agreeing to make the proceeds of such insurance, in the event of loss, available to the lessor for the purpose of rebuilding, or reconstruction in the case of partial destruction of the building.

It is of extreme interest to note in connection with the insurance provisions and the disposition of proceeds thereof in the event of loss, that in paragraph 11 on page 8, it is agreed that in the event of full or partial destruction of the improvements upon the demised premises during the term of the lease, that lessor agrees that he will repair or replace such damaged or destroyed improvements, and place them in as good condition as they were prior to any such damage or destruction, and that he will do so without any unnecessary delay.

It is also further agreed in that paragraph that the proceeds from any insurance policy or policies because of such damage to or destruction of the premises shall be held by the holder of the first deed of trust in an escrow

account for the purpose of defraying the cost of re-building and repairing.

Now comes another important provision of the lease, and that is in the same paragraph, but on page 9 to the effect that:

> . . . during any period of time that all or part of the premises are not usable by the lessee because of any damage or destruction thereto, rent payable by the lessee to the lessor shall be reduced pro rata on the basis of proportion of floor space usable and that which is not usable.

It is further provided that "as soon as all of the premises are repaired and usable, full monthly payments by the lessee to the lessor shall be restored."

Major changes have been made or purported to have been made by the agreement containing the proposed amendments to the lease, which proposed amendments were made and executed on January 6, 1961. A discussion of these purported amendments will be made hereafter in order to show the major changes that have been attempted with regard to the original liability of the lessor, and the purported changes therein made by the proposed amendment.

A discussion will hereafter be contained in this discourse as to whether or not there is any legality to the proposed amendments, because a serious question is presented as to whether or not there was any consideration for the agreement containing the purported amendments.

A further provision of interest is found in paragraph 14, page 11, in which it is provided that in the event lessee fails to pay the rental installments required by the agreement at the time and in the amount required, the remedy of the lessor shall be by legal action against the lessee for such rent. The paragraph contains the provision that the rent installment when not paid shall bear interest at the legal rate as fixed by law, and then the last sentence of that paragraph reads as follows:

> In no event shall non-payment of rent grant a legal right of recision (sic) of this contract to the lessor.

The final provisions of interest in the lease are to be found in paragraph 16, beginning on page 12, and they refer to the right of the lessee to purchase the property. The option provision reads as follows:

> Upon payment by the lessee of all the rent pursuant to this contract, and upon the reimbursement by lessee of the sums to be reimbursed pursuant to this contract, lessee shall have the right to purchase the demised premises from the lessor for $1.

In connection with the option provision, in the same paragraph, but on page 13, it is provided:

> . . . to secure this option to lessee, lessor has simultaneously made and executed a grant, bargain and sale deed to lessee and placed the same in escrow with the Washoe Title Division of the Pioneer Title Insurance Company of Nevada with instructions that said deed shall be delivered to lessee upon showing that all payments of rent required to be paid hereunder have been paid and by paying the additional sum of $1.

A further provision is made in the same paragraph that the lessor will deliver to the lessee a policy of title insurance not later than the beginning of the term of the lease. It is further provided that the policy shall show a good marketable title in the lessor and insurance of said title in a sum equivalent to the appraised value of the property and the improvements which are the subject matter of the lease.

It is further provided that at such time that the lessee decides to exercise the option to purchase provided in said agreement, that lessor will furnish lessee with a title insurance policy insuring the title in the lessee in a sum equivalent to the appraised value of the property. This is to be fully discussed herein under another subheading. The important provisions mentioned in the lease with regard to the intent of the parties are:

1. That it was a <u>lease and agreement to sell</u>.

2. That the aggregate payments of rent by lessee provided for in the agreement, when made, plus the sum of $1, would give the lessee title to the property and the lessor would be obligated to convey the same to the lessee.

3. The deposit by the lessor of a deed in escrow with the title company, together with the delivery of a policy of title insurance.

4. The terminology used, such as "amortize."

These items will be discussed in connection with the analysis of the legal effect of the lease and the legal incidents thereof. These provisions in the lease-purchase agreement certainly are conclusive in determining what the document really is: whether it is a lease with an option to purchase, which option may or may not be exercised, or whether it is a conditional sale, or, rather, an agreement of purchase and sale conditioned upon the paying of so many installments on the purchase price, plus the nominal sum of $1, to complete the total obligation of the purchaser under the agreement, which was the State of Nevada.

PURPORTED AMENDMENTS TO LEASE

As mentioned above, on January 6, 1961, the lessor and lessee named in the lease made and entered another agreement which is entitled "Amendment of Lease" of the Employment Security Building, dated September 16, 1960.

There is no explanation and no preamble containing any explanatory matter or giving any reasons for these proposed amendments. All that is said in this regard is merely one paragraph of the preamble which reads: "Whereas lessor and lessee entered into a contract of lease on September 16, 1960, and mutually desire to make certain amendments as hereinafter set forth."

Whether or not this document has any validity or any legal force is a serious question. As has been mentioned above, the whole question turns on whether or not there was consideration for such an agreement. In this connection, it must be remembered that the lease itself, heretofore discussed, and entered on the 16th of September, 1960, if valid, established certain legal rights and obligations. In other words, in that agreement the mutual promises of the parties to it were sufficient consideration for its legal existence. In such a case, when the parties to such an agreement desire to change that agreement by shifting certain obligations from one party to the other, or freeing one party from certain obligations which were imposed by the original agreement, there must be a new, valid, legal consideration in order to make the agreement binding. It is submitted that the proposed amendments to the lease were of such a nature that there could be no benefit whatsoever flow to the State of Nevada by the amendments. As a matter of fact, every single amendment cast an additional burden, and in some cases an unbelievable burden upon the state with no accompanying benefit. In other words, there was not an exchange of benefits and obligations. All the benefits flowed to the lessor, the Brunzell Construction Co., and all the burdens were imposed upon the State of Nevada. For example, paragraph 1 of the proposed amendment on page 1 provides that, except as amended, the lease of September 16, 1960, shall remain in full force and effect.

Next, paragraph 2 of the first amendment provides that the part of paragraph 9 on page 8 under clause (a) shall be rewritten so as to provide that the insurance shall be available to the lessee under its new obligation to repair or rebuild as set forth in paragraph 11, as amended, it being the understanding of the parties that paragraph 11, as amended, shall place the duty of repair and reconstruction after full or partial loss from fire or other catastrophe upon the lessee in the place and stead of the lessor.

It is to be noted that in the original agreement in paragraph 9, the proceeds of the insurance were to be made available to the lessor for the performance of the lessor's obligation to rebuild or repair after any damage to the building.

Critically speaking, it must be noted, that although the amendment purported to be contained in paragraph 2, merely states that the part of paragraph 9, under clause (a), "shall be rewritten so as to provide that the proceeds of the insurance shall be available to the lessee rather than to the lessor." It was not rewritten. It was just a general statement that it was to be rewritten, and it was the understanding of the parties that the duty of repair or total rebuilding in the case of loss was to be taken from the lessor and placed with the lessee, another cogent indication of the intent of the parties.

In this connection, it is to be noted that all during the period of the lease until the exercise of the option to purchase, title remains in the lessor. The lessor owns the building subject to a deed of trust to the agency which loaned the money for the construction of the building. In this connection, it must also be understood and remembered that the policy of insurance was to name the holder of the deed of trust as one of the beneficiaries of the policy, so that in the case of loss, the proceeds of the policy were to be paid to the holder of the first deed of trust.

Now here, by way of an attempted amendment, it is said the insurance shall be available to the lessee under its purported obligation to rebuild, but it is to be noted that the policy of insurance is in the hands of the holder of the first deed of trust and by the wording of the insurance policy, as provided in the original agreement, the proceeds are to be paid to the holder of the first deed of trust. It is also to be noted that the holder of the first deed of trust is no party to the lease, and that therefore any agreement between the Brunzell Construction Co., as lessor, and the Employment Security Department, as lessee, certainly can have no binding effect whatsoever on the holder of the first deed of trust. In the event of loss, the holder of the first deed of trust could say to both the lessor and lessee, "We elect to apply the proceeds of this policy to the payment of the promissory note rather than to pay it to anybody." There is no binding agreement which would require the holder of the first deed of trust to turn the money over to the State of Nevada or to the lessor. Yet, here is a purported amendment to the original agreement which completely reverses the original intention. The accepted procedure in most every lease similar to this is that, in the event of loss, the lessor, who is the owner of the building, is charged with the duty of repairing or restoring the building to a condition permitting occupancy and use. Why should the lessee, who, up to this time at least, is a tenant, or at least called a tenant, assume the obligation to rebuild or repair? Here again is a very cogent piece of evidence to indicate the intent of the parties from the very beginning. That intent was that this agreement was an agreement of purchase and sale and that from the time the Employment Security Department occupied the building, it was considered to be the owner of the building in truth and in fact, subject only to the payment of the monthly payments on account of the purchase price, plus $1. Otherwise, why would any lessee assume the obligation to repair or rebuild a building which may cost in excess of $1 million in case of a total or almost total loss? It is submitted that this, together with the other factors above enumerated, are more indicative of the intent of the parties than any title given the document. Cases will hereafter be cited to show the action or attitude of courts when such factors or provisions are found in contracts such as this.

Next in the purported amendments comes what, at first blush, appears to be an amazing provision; but when the intent of the parties is determined, the provision is explainable. Reference is made to the provision on page 2 of the purported amendments (Exhibit E), which is a part of paragraph 3; it reads as follows:

> During any period of repair or rebuilding caused from any catastrophe, the rent herein shall in no event abate, but shall continue to be due and payable in the same manner and form, without delay or deduction.

As previously stated, at the first reading, this appears to be an amazing provision for a lessee to agree to. However, it is submitted that such a provision is strongly indicative of the intent of the parties; i.e., that what is called a lease was intended to be, and in truth was, and is, an agreement to purchase.

Continuing with the amendments: the next one of importance is found in paragraph 5 on page 2, in which it is provided that the option of the lessee to purchase shall not be exercised in any event until after 10 years and 30 days from the date of occupancy of the completed building. It will be recalled that in the original lease there was no provision whatever granting the lessee the right to exercise the option before the end of 20 years, which was the full term of the so-called lease. Here, however, in peculiar wording, is a provision that indirectly purports to advance the rights of the lessee to purchase by 10 years, lacking 30 days. However, by subsection B of paragraph 5, it is provided:

> . . . the rights of the lessee under this paragraph shall at all times be subject and subordinate to the lien of any deed of trust made by the lessor to secure the repayment of money borrowed by the lessor for the construction of the office building.

By paragraph 6 of the amendment, a new and additional paragraph known as 18 is added to the original document. That provides that the lessee agrees to pay the rental provided in the lease in the amount and at the time and in the manner as set forth in the original lease:

> . . . during the full term of 20 years, without deduction or delay and subject to all of the rights and conditions as set forth in favor of the lessor and the owner and holder of the first deed of trust or mortgage. Lessee promises and agrees to pay the rental from monies out of the Employment Security Department, without limitation, including funds made available by the United States but not limited to said funds.

It is to be seen that, particularly the latter part of that paragraph is entered into pursuant to the authority of Senate Bill No. 38 (Chapter 11, Stats. 1961), which is heretofore mentioned. It is submitted that without Senate Bill No. 38, no such provision could have been entered into legally by the Executive Director of the Employment Security Department because, without that bill, he would have been devoid of authority to obligate the payment of any funds except such funds as would be made available by the Congress of the United States.

In addition, by paragraph 17, there is a paragraph 19 added which provides that in the event of default by the lessee in making the rental payments as agreed, and such default extending for a period of 90 days after the grace period, the lessor would be entitled to bring an action at law or in equity as provided by the laws of Nevada to repossess the premises for non-payment of rent as in other cases provided. Now, it is to be noted here, that in paragraph 14 of the original document, the remedy of the lessor was limited to legal action for the collection of rent. By this attempted amendment the right is purported to be given to the lessor to bring possessory action for the purpose of repossessing

the premises. In this connection, it is well to note that by an amendment or purported amendment to paragraph 14 of the original lease, which amendment is found in paragraph 4 on page 2 of the amendments, there is an attempt to delete entirely the last sentence of paragraph 14 which reads as follows:

> In no event shall non-payment of rent grant a legal right of recision of this contract to the lessor.

The purpose of this particular amendment is somewhat difficult to see, unless reference is made to the provisions set forth in the last part of paragraph 7 of the amendments, which provide that the provisions of the paragraph shall in no way prevent action on the part of the holder of the first deed of trust from proceeding with foreclosure in the event of default of the lessor. It is a most peculiar provision, because how in reason or common sense could any provision in this purported amendment to the lease between the Employment Security Department and the lessor have to do with the rights given by a deed of trust executed by Brunzell to General Electric Pension Trust, wholly separate, distinct and apart from anything in this provision, the amendments, or the original lease? However, after the provision just quoted, there is a provision that the lessee shall be entitled to prevent such foreclosure by curing the lessor's default and taking credit for any sums expended against the rental that the lease provided. This may be the reason for the amendment; as a matter of fact, it is the only possible reason that can be seen for such a peculiar provision.

At this point, someone may well ask why the state should ever subscribe to such a series of onerous provisions imposed by this purported amendment document. For example, why should the state agree to assume the complete duty and burden to repair or rebuild the entire building after a full or partial loss from fire or other catastrophe, when that burden was placed by the original lease on the lessor? It may well be asked, also, why the state would agree that, in no event, during any period after loss, either total or partial, by fire or other catastrophe and before the building was rebuilt to the point where it could be occupied again by the state, should there be an abatement of rent? In other words, why should the state agree to continue to pay rent for a destroyed building, which might not be rebuilt?

It appears that the answer to this becomes clearer when we look at the true intent of the parties to the original agreement of the lease. We must realize or agree that in spite of the fact that this was called a lease and was referred to as a lease-purchase, it is nothing more nor less than an agreement to sell on a deferred payment basis. By this, it is meant that although the document executed the 16th of September, 1960, between the Brunzell Construction Co., and the Employment Security Department was called a lease, it was really an agreement for the sale of the building in question. In this connection, let it be noted that at the early part of this discussion when quoting from the very first part of the original lease, we mentioned the provision in the agreement of the Brunzell Construction Co., to construct and lease the building and that at the end of said term Brunzell would sell the building together with the real property as further provided upon the terms and conditions set forth in that agreement. Those terms were that the Employment Security Department would pay $8,281.20 per month for 240 months, which payments would make an aggregate of $1,987,488.00. After paying this sum in monthly installments as set forth, the state would only need to pay $1 more and would acquire title to the building.

It is to be noted that in the purported amendments, the state agrees to pay the rentals in the amount provided and at the times provided during the full term of 20 years without deduction or delay, subject to all rights and conditions as set forth in favor of the lessor and the holder of the first deed of trust. Here, it may be pointed out, is something in the nature of a third party beneficiary contract. In other words, the state, in this particular paragraph says, "We will make the payments agreed to be paid every month and continue to do so for 20 years, and not only from funds furnished by the federal government, but from funds of the Employment Security Department, without limitation." It is submitted also that the reason the state would be willing to agree that there would be no abatement of rent was that the state was merely making these monthly payments not as rent, but as payments for the purchase of the building, and that when the state had made the required number of payments and then paid an additional dollar, the building would belong to the state and Brunzell would be obligated to convey it to the state. In this connection, it is to be noted that the deed from Brunzell to the state has been executed and deposited with the title company for recordation when the total agreed payments have been made. It didn't make any difference whether the state had the rent abated, it had an aggregate of $1,987,488.00 to pay. What difference does it make if they paid it monthly or intermittently, if there happened to be some partial or total destruction of the building? It is submitted that this point is most cogent and probative evidence to show that this was no month-to-month tenancy; this was no lease, this was an agreement to buy and sell a building.

Now, referring to the lease-purchase agreement, we are here considering and its genesis, we have already seen that at the time it was executed, there was no statutory authority to make state funds liable for any payments required by said lease-purchase agreement. It must follow, therefore, that as to casting or attempt to cast any financial burdens on the state, the agreement was void and of no legal effect.

See, also, the attempted amendments of January 6, 1961; they, too, were of no legal force or effect as far as the State of Nevada is concerned; for, on that date, the law prohibited the expenditure of any state funds under that lease-purchase agreement. Even without such a limitation, the amendments would probably have not been effective under the law of contracts, because of a lack of consideration.

The question of greater concern and difficulty is whether, by the enactment of Senate Bill No. 38, Chapter 11, Statutes of 1961, the three lease-purchase agreements and the proposed amendments to the Carson City agreement were ratified? For reasons heretofore stated and hereafter set forth, we submit that there was no ratification so as to make the funds of the State of Nevada legally or morally liable for any payments required by the terms of the lease-purchase agreement or by reason of the attempted amendments thereto. In order to better explain the two complex subjects, "ratification" and "consideration," or, rather, the legal bar to both as they relate to our problem, we hereafter briefly discuss both.

RATIFICATION

This is a legal act or process by which impediments that prevent an agreement or an act from becoming legally binding on the parties involved are removed.

For example, an agent purports to act so as to bind his principal, but the act done is not within the agent's authority. The principal may, by proper action, ratify the agent's action and make himself legally liable for the act of his agent.

This rule applies to private persons acting as individuals, corporations, partnerships or other private entities. It does not apply when public officers are concerned, except in rare cases not involved in our problem. Generally, if the act done is performed by a public official without authority, it may not be subsequently ratified.

In a leading case on this subject, Stowe vs. Maxey, 84 Cal. App. 532, a private non-profit corporation had for several years conducted a county fair on grounds owned by the county. During these years of use, the association, at its own expense, made substantial improvements to the county fair building. In 1924, the association operated at a $15,000 loss. The county supervisors, in a resolution with an extensive preamble in which all the facts were recited, resolved that all acts done by the association were done for and on behalf of the county and all unpaid bills were proper and legal charges against the county. In the resolution, the supervisors ordered the county treasurer to pay the bills.

It is to be noted that the county supervisors could have conducted the fairs, and all the charges in question would have been valid legal claims against the county. They did not, however, have legal authority to delegate their powers to the private county fair association. The court held that the county could not use its funds as payment of the association's bills and, in so ruling, stated:

> It is a canon of law, as well as of common sense, that a subsequent ratification cannot give validity to an act or conduct, which in the first instance and in its inception, was without validity.

The court, in support of its holding, also quoted from a law text as follows:

> It is generally recognized that ultra vires contracts of a municipal corporation are absolutely void, and cannot be the subject of ratification or estoppel in pais, and the decided weight of authority is to the effect that when by statute or charter, the mode in which contracts . . . may be entered is prescribed . . . no contract will be binding unless made in the specific mode; the mode in such cases constitutes the measure of the power. (18 Cal. Jur. p. 1002, Sec. 273)

In an earlier and often-quoted California case, Molineux vs. the State, 109 Cal. 378, the plaintiff held certain war bonds issued by the state which the state was legally liable to redeem. At the time the bonds were issued,

however, the state was not liable for any interest on such bonds.

Long after the bonds were issued and obtained by plaintiff, the legislature authorized the payment of interest thereon, and in the action, the plaintiff sought both principal and interest. The court denied the interest, saying:

> Inasmuch as prior to the passage of the act, there was no liability for interest on the part of the state, it was not competent for the legislature to create such liability . . . If it be conceded that the state was under a moral obligation to pay the interest, such moral obligation does not render the statute constitutional or make the interest so authorized other than a gift. (Citing Bourn vs. Hart, 93 Cal. 321; Conlin vs. Board of Supervisors, 99 Cal. 17)

In McLain vs. Okla. Cotton Growers Assn., 258 Pac. 269, it was held that:

> Some curative legislation is valid to cure defects not inhering therein, when a given transaction is void by reason of its being in violation of law, the legislature is without power of validation.

In several Alabama cases, one of which is Wood vs. Armstrong, 54 Ala. 150, the rule was stated:

> The legality of a contract must be tested by the law as it stood when the contract was made.

See also: 12 Am. Jur. 659, and cases there cited.

In an early Ohio case, Johnson vs. Bentley, 16 Ohio 97, the rule was stated:

> The legislature has no power to make valid a void contract or create a right where none existed; and, an act of the parties which created no right and imposed no obligation at the time of execution, cannot be converted by subsequent legislative authority into a legal right or binding obligation.

The rule that has just been stated applies as well to the proposed amendments as to the original lease-purchase agreement.

CONSIDERATION QUESTION

It is submitted that even if the original agreement was a valid agreement, binding upon the state, the purported amendments would have no validity because there was no legal consideration to support them. In discussing this phase of the problem, it must be remembered that the subject of consideration, as that term is used in the law of contracts, is a very complex and baffling field of law.

It may be confusing to persons not legally trained to learn that mere mutual promises are sufficient legal consideration to support contracts involving great amounts of money or property, but are usually not legal consideration to support amendments to such contracts.

The reasoning of courts in such cases is that by the original contract the legal rights and obligations of the parties were fixed and determined, and all parties were legally bound to perform as agreed. If one or all parties wish to change their rights or obligations, it must be done by a new agreement, supported by a new legal consideration; the mutual promises of the parties are not sufficient consideration.

The reason for this rule is ably stated in a New Jersey case (Gallicchio vs. Jarzla, 86 Atl. 2nd 820):

> It is a principle almost universally accepted that an act or forbearance required by a legal duty that is neither doubtful nor the subject of honest and reasonable dispute is not a sufficient consideration.

In a federal case, Ochs vs. Equitable Life Assurance Soc., 111 F. 2nd 848, the court quoted the great authority on contracts, Professor Williston:

> Performance or the promise to perform any obligation previously existing under a contract with the promisee is not sufficient consideration to support another contract.

Also in Pool vs. 1st Nat. Bank (Ky.) 155 S.W. 2nd 4, the court stated the rule as follows:

> Neither the promise to perform an obligation nor the actual performance of it will be a good consideration for a new contract, if the obligation promised or performed, is an obligation which the party is bound to do by a subsisting contract with the other party, at least unless there is a compromise of a bona fide dispute with reference to the obligation or rights of the parties under the contract.

Also in a West Virginia case, Bischoff vs. Francesa, 133 W. Va. 474, the court said:

> The modification of a contract requires consideration, and a promise by one party to perform what he previously contracted for is not sufficient to support a promise to be chargeable with the additional item.

In some few cases where a right of rescission existed, courts have sustained a new agreement on the theory that by making a new contract two things are done: (1) the rescinding of the original agreement, and (2) the making of the new one.

However, in our case, the parties in paragraph 14 of the original agreement expressly excluded the right of rescission. True, it was limited to nonpayment of rent, but in no other provision was a right of rescission granted.

In the purported amendments, there is no mention of consideration other than the statement of mutual agreement, preceded by a two-line preamble stating the execution of the original agreement and a mutual desire to "make certain amendments."

As was stated in a Pennsylvania case, Kirkpatrick vs. Munhead, 17 Pa. 126:

> Consideration is not merely that one profits and another suffers a loss, but like every other part of a contract must be the result of an agreement.

The rule is also stated:

> A claimed consideration must be regarded as such by both parties, and the fortuitous presence in a promise of some detriment is insufficient unless the promissor and promissee have dealt with it as the inducement to the promise. (U.S. Trust Co. vs. Frelinghuysen, 28 N.Y.S. 2nd 448)

In a Utah case, Shell Oil Co. vs. Stiffler, 48 Pac. 2nd 509, in discussing the consideration necessary to support a change in an existing contract, the court stated:

> The alleged modification or supplemental agreement expressly continued in force the original contract, but attempted to make it inapplicable to third structure gasoline; (which the court found was included in the original contract).

Continuing the court said:

> There was no creation of a new legal relationship between the parties; no destruction of the legal relationship presently existing, and no modification in the sense of a changed legal status, no promise to do or refrain from doing anything which the plaintiff was not already bound to do.

The court after discussing the well-established rule where the parties had entered a binding agreement supported by adequate legal consideration, which fixed the rights and obligations of the parties thereto, said:

> Any modification of the agreement or change had to be accomplished by a new agreement supported by some legal consideration which was not part of the original agreement.

The court, after discussing the consideration necessary to modify an existing agreement, including a quotation from the Restatement of the Law of Contracts, made this analysis:

> Applying the definition of consideration, as above quoted . . ., as rigidly as may be, can it be said that the plaintiff promised anything? Can there be found an act, a promised act, a forbearance? Can there be discovered the creation, the modification, or destruction of a legal relation: No additional act, not even a promise to act, other than or different from that found in the original agreement can be found in the alleged modification agreement not found in the original agreement.

The court then exemplified the problem in a hypothetical case as follows:

> If a first party under an agreement is to do X act in exchange for the doing by the second party of Y act, a modification which permits the first party to do less than X act when the second party must still do Y act, has no consideration.

In our case, Brunzell, the first party, under the agreement is bound to do X act in exchange for the doing of Y act by the Employment Security Department. The modification attempted in the lease-purchase agreement presents a case even worse than the court's hypothetical case just mentioned. For not only does Brunzell seek to do less than X act he agreed to do in the original agreement, but he attempts to shift to the second party (Employment Security Department) a great portion of X act with no consideration whatever for second party assuming any part of Brunzell's obligations.

Finally on this subject, an Indiana court succinctly stated the court rule, thus:

> Nothing is consideration that is not regarded as such by both parties. (Standley vs. N.W. Life Ins. Co., 95 Ind. 254)

As further evidence of this legal conclusion, or fact, whichever it is considered, we wish to point out now certain other features or considerations which we believe to be conclusive as to the determination of the nature of the document in question. By this term "determination of the nature of the document," we mean determination as to whether or not the aggregate sum therein must be considered as a debt in light of the constitutional provisions of Article IX, Section 3 of the Constitution of the State of Nevada.

ACCOUNTING FACTORS

If we, for the purpose of this particular section, ignore the fact that a state agency is involved as lessee, and assume for the sake of argument or for demonstration that the lessee is a private person, a private corporation, or a partnership, that had need for a building such as constructed for the Employment Security Department, the accounting factors are revealing.

Let us assume that such a private person or firm had negotiated with the Brunzell Construction Co., and the same results were had, and that the building was constructed for such private person or firm by Brunzell, and that the same documents we are here concerned with had been made and entered by such parties. Now let us ask this question: As a matter of accounting procedure, or setting the matter up on the books of the supposed private firm, would such a firm be permitted by the Internal Revenue Service of the United States Government to set this up as a lease or rental arrangement? If so, then the lessee, the private firm, or person who would be subject to income taxes, would be able to enter into their records each monthly rental payment when made, as an operating expense and deduct the entire amount thereof from its income which would have to be reported for the purposes of income taxes. In other words, each month the private firm would be able to enter as an operational expense the sum of $8,281.20, and each year it would be able to deduct from its income the aggregate total of 12 times the monthly payment, or an aggregate sum of $99,374.40. If, on the other hand, the courts would not consider this a pure rental or lease agreement, but, as a purchase and sale, such private firm would not be permitted to make such a deduction, but would be required to capitalize its investment, and set it up on the books as a capital investment, and be limited solely to depreciation rather than a total deduction for operating expense.

A search of the cases has revealed that the courts take the latter course invariably. It matters not what the terminology is, if in truth and in fact it is a purchase and sale, then the courts refuse to permit tax deductions of rental payments. It is not always easy to tell what is a purchase and sale and what is a lease. However, the courts set up certain rules for determining, for the purposes of taxation, what is a lease and what is a purchase and sale.

LEGAL AUTHORITIES

In the service known as Commerce Clearing House Federal Tax Guide it is provided:

> Where there is a lease with an option to purchase, the lessee is entitled to deduct the rental payments, and the lessor is entitled to take depreciation deductions based on the leased property. In some instances, however, an arrangement called a lease is in fact a conditional sale of the property. The lessee, under such circumstances, could not deduct any payments as rent, but he would be entitled to depreciation deductions from the time he takes possession even though he does not have title and in fact may never exercise the option to acquire title. Where none of the rent is allowed as a deduction, the lessee's basis for depreciation is the aggregate amount of rent to be paid plus the option price, including any amount paid for the option.

In the next paragraph, the author of that service continues:

> The Commissioner considers an agreement to be a sale, rather than a lease, if one or more of the following conditions are present: 1. Portions of the periodic payments are made specifically applicable to an equity to be acquired by the taxpayer; 2. The taxpayer will acquire title upon payment of a stated amount of rentals required to be made under the contract; 3. The taxpayer acquires the property under a purchase option at a price which is nominal in relation to the value of the property at the time when the option may be exercised, as determined at the time of entering into the original agreement, or which is a relatively small amount when compared to the total payments required to be made; 4. The taxpayer will acquire title upon payment of an aggregate amount, that is the total of the rental payments plus the option price, if any, which approximates the price at which the taxpayer could have purchased the equipment when he entered into the agreement, plus interest and carrying charges.

The author then continues as follows:

> The tax court seems to apply what can be termed an "economic reality" or "intent to purchase" test. In other words, if the rental payments cover a substantial part of what the purchase price would be, the tax court is likely to hold that a sale and purchase were actually intended. The problem has always been to keep the option price high enough, or the rental payments low enough, so that, for tax purposes, the rent will not be treated as a payment on the purchase price. The court of appeals has applied a test which could make a lease with an option

> to purchase much more attractive and effective for income tax purposes than the Internal Revenue Service's position would indicate. Basically, that court looks to the substantial payment required in order to take title even though the pre-purchase rental is larger than ordinary, necessary or reasonable rental might be.

In the citation of cases by the author of the article just quoted, is found a number of cases from which we will make certain statements of the facts and quotations from the holding thereof.

It is well to point out that in the cases about to be cited and quoted from, the court (with one exception) is concerned with lease-purchase agreements affecting personal property and not real property. However, it is submitted that there is no basis of distinction, and the rule enunciated by the courts in these cases and by provision of the Internal Revenue Code, whether or not it is real or personal property, is equally controlling. For example, Section 23a of the Internal Revenue Code, pertaining to deductions of expenses in a trade or business, authorizes deductions for rent as follows:

> Rentals or other payments required to be made as a condition to the continued use or possession, for the purpose of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

In the case of Chicago Stoker Corporation, 14 Tax Court, page 441, the taxpayer, therein called petitioner, had entered into an agreement which provided that when the petitioner had paid a total sum of $70,000 by way of royalties on a patented article of machinery it could obtain title thereto. There was no requirement that he continue to make the payments regularly until the aggregate sum agreed upon, which was $70,000, would be paid. The Commissioner disallowed the claimed deductions on the grounds that they were not rental payments, but were in fact payments on account of the purchase or acquisition of title to the machinery in question. The court sustained the Commissioner, saying:

> Cases like this, where payments at the time they are made have dual potentialities; i.e., they turn out to be payments of purchase price or rent for use of the property, have always been difficult to catalogue for income tax purposes. A fixed rule for guidance of taxpayers and the commissioner is highly desirable, and it is also desirable that the rule, whatever it is, be as fair as possible, both to the taxpayer and to the tax collector. If payments are large enough to exceed the depreciation and value of the property and thus give the payor an equity in the property, it is less of a distortion of income to regard the payments as purchase price and allow depreciation on the property than to offset the entire payment against the income of one year.

The court continues then:

> That is the rule laid down in the Judson case and finds support in Section 23a (of the Revenue Code). The payee, meanwhile, is not reporting the payments, since they are purchase price rather than rent, and his gain or loss can be determined only at the time of the final outcome of the transaction.

Now, if we consider the position of the Brunzell Construction Co., in connection with the lease-purchase agreement, the latter statement of the court becomes meaningful. That is, the payee (Brunzell) is not reporting the payments. What the court means is, not reporting the payments as income, since they are not income but payments on the purchase price of the machinery involved in that purchase and sale or that transaction. And naturally, whether there is a gain or loss can be determined only at the time of the final outcome of the transaction. So also in the instant case; certainly Brunzell is not going to report the rental payments in the aggregate sum or $1,987,000 or at the rate of $8,281.20 a month as income. If he did report in such a manner, he would certainly make himself liable to a tremendous income tax that would without question make the entire project of the Employment Security Building, as far as Brunzell was concerned, a losing venture from the start.

In a case almost on all fours with the present problem, the title of the case being Helser Machine and Marine Works, Inc., vs. Commissioner of Internal Revenue, there was a document entered into called an agreement of lease or a lease. In the statement of facts by the court there are quotations from the agreement which was called a lease. The court points out the following:

> The last paragraphs of the lease are as follows:
>
> 'And whereas, the lessors, in consideration of the entering into this lease by the lessee and of the payments to be made thereunder, have granted to the lessee the right and privilege to purchase the said premises during the term of the lease; and the payments of rental to be made hereunder are also to apply as payments on the purchase price: Now, therefore, this witnesseth that it is covenanted by and between the parties that whenever prior to May 1, 1945, the lessee has paid to the lessors or their successors in ownership the total rental for said 10 year term, to-wit, $19,200, and has fully and faithfully performed and observed the terms and conditions of said lease, thereupon the lessors will convey to the lessee herein the said premises hereinabove described free and clear from encumbrances and with general warranty except as against the taxes assessed in year 1944, payable in the year 1945 and except as such assessments as are assumed by the lessee hereunder.'

The court then goes on as follows:

> Contemporaneously with the lease a letter was written by the lessors to the petitioner, as follows:

'We, the undersigned, hereby agree that whenever prior to May 1, 1945, you have paid us the full sum of $19,200. as a total rental involved in the 10 year lease covering lots 1 and 2, block 24, Sherlocks addition to Portland, and have fully and faithfully performed and observed the terms and conditions of said lease, then, and in that event, we will deed you the aforementioned property, free and clear of encumbrances, except the taxes assessed in 1944 and payable in 1945.'

The Commissioner of Internal Revenue disallowed the deduction of the aggregate payments for the year 1935 upon the ground that under Section 23a of the Revenue Act, such payments were not rentals. The court in sustaining the Commissioner stated as follows:

From this statutory language (the language of Section 23a of the Revenue Act of 1934) it is clear that a taxpayer does not establish a deduction merely by showing that the amount paid is called a rental, or that, regardless of nomenclature, it is rental in that the consideration for its payment is to some extent the possession, use and occupancy of the property. The only rental which may be deducted is that 'of property to which the taxpayer has not taken or is not taking title or in which he has no equity.' Since deductions are only available within the limit of the terms in which they are expressed in the statute, the taxpayer must prove the statutory negatives. This we think the petitioner is unable to do. One of the expressed terms of the agreement is the lessors' promise to convey the premises whenever the lessee pays $19,200, which is the total rental for the 10 year term period. The lessee, 'by paying the remaining rental,' could at any time get title without waiting for the expiration of the 10 years. Each monthly payment lessens the remainder and eases the petitioner's burden. Clearly a lump sum so paid would be the price of a conveyance and we think that the monthly sums have the same character. It is not necessary to hold that by payment of the rental, petitioner acquires an equity, but that word is not easy to define; it is enough that the lease provides a right in petitioner to take title to the property for which rental is paid.

See also Haggard vs. Commissioner of Internal Revenue, 241 Fed. 2nd, page 288; also Judson Mills, 11 Tax Court, page 25.

See also the case of Truman Boan vs. the Commissioner, found in 12 Tax Court, in which, on page 459, the court quotes from the case of In Re Raney 31, Fed. 2nd, 197, as follows:

The distinction between an ordinary lease and a conditional sale is obvious. A lease contemplates only the use of the property for a limited time and the return of it to the lessor at the expiration of that time;

> whereas, a conditional sale contemplates the ultimate ownership of the property by the buyer, together with the use of it in the meantime.

Later, on the same page, the court in the Truman Boan case quotes from the Uniform Conditional Sales Act in explaining the difference between a lease and an agreement to buy as follows:

> A lease-purchase is substantially equivalent to a conditional sale and the buyer is bound to pay rent substantially equal to the value of the goods and has the option of becoming the owner, and thus a sale is not sure to take place, is of but small importance, for, as a practical matter, the buyer will always be willing to accept ownership when he has paid the value.

It is submitted that the lease-purchase agreement with which we are here concerned comes squarely within the definition of a sale or agreement to sell rather than a lease; that it is in accordance with the decisions above quoted and which must be considered conclusive as to the determination herein to be made. The document has all the elements of a sale because the lessee, the Employment Security Department, is bound to pay the total sum set forth in the so-called lease which aggregates $1,987,488; this sum is a fair approximation of the total costs of the building, together with the incidental charges for interest which Brunzell had to pay to procure the construction costs; and finally the state, without question, is to become the owner of the building at the end of the 20 year period. This is clear because of that fact that at the end of the 20th year the state will only be required to pay $1 to acquire a building which cost originally approximately $900,000. It is beyond the powers of rational thinking to believe that the state would pay approximately $2 million as rentals and as rentals alone, and then refuse or decline to accept title to a building which would be worth somewhere between $1 million and $2 million. It is, therefore, patent to the writer and clear beyond possibility of doubt that the state from the beginning of the plan intended that this was to be a purchase and sale, and that by the occupancy of the building the state took over as virtual owner, subject only to the requirement that it pay monthly for the period of the term set forth in the lease the rentals which the lessee was required to pay by the lease-purchase agreement.

The intent becomes even more readily apparent when some of the preliminary documents or letters leading up to the execution of the so-called lease are studied. As long ago as December 8, 1958, there was a letter from Mr. Harry A. Depaoli, then the Executive Director of the Employment Security Department, which was addressed to Mr. H. D. Huxley, the Regional Director of the Bureau of Employment Security in San Francisco, requesting the tentative approval of Mr. Huxley, for the Nevada Employment Security Building, now located in Carson City.

The second paragraph of that letter reads as follows:

> It is further understood that title to the building, when the land purchased and construction costs are <u>amortized</u> through monthly payments in lieu of rent from

> Title III funds, will be vested in the State of Nevada to be used for unemployment security purposes only and that the only cost to the Department would be for operating costs and maintenance.

In an answer to the letter just quoted from, which answer is dated December 10, 1958, Mr. Huxley in reply to Mr. Depaoli, granted the tentative approval for the construction and lease-purchase of the building. In paragraph 2, Mr. Huxley stated the understanding to be as follows:

> It is understood that the premises (that is the building) will be rent free to the agency after amortization. To be agreed upon by your office and the Bureau of Employment Security is completed. (sic)

The terms "amortized" and "amortization" are never used in connection with leases.

The "rent free" proposal presents an interesting and difficult legal problem; not only because the proposal was made by the federal officials and agreed to by state officials, but because it was also incorporated in the statute of 1960 authorizing the lease-purchase method of financing. See Stats. 1960, Chapter 191, p. 348.

The agreement by a state official with a federal official that as to a state agency administering a federal law, such an agency may have free rent forever is unquestionably a nullity. The legislative action presents a different problem.

It is a cardinal principal of law applicable to legislatures that no legislature may bind its successor, except where the legislative action results in a contractual right. If a contractual right is created, then no subsequent legislation may impair the obligations imposed by such an agreement.

However, it becomes apparent from a study of all factors that the statute did not create any contractual rights, but was simply a gratuitous grant not supported by any consideration. It is submitted that the statute may be repealed by any subsequent legislature, and certainly should be. So also should the statutory authority to acquire buildings by means of the lease-purchase plan be repealed. For it is far too costly a plan of financing for a state to use.

Further considering the reasons why the statute (Chapter 191, Stats. 1960, p. 348) does not create any contractual rights, at common law, as now, "certainty as to the term was a requisite to a valid lease." Norman vs. Morehouse, (Tex.) 243 S.W. 1104.

Even "an agreement for a term ending on a contingency" was not sufficient for certainty.

See also Hill vs. Hunter (Tex.) 157 S.W. 252; Idalia Realty Co., vs. Norman (Mo.) 135 S.W. 47.

In this latter case, the lessee was granted a term lasting "until the mill shall be removed."

The court, in holding the lease one from year to year and terminable as such, stated:

> In our case nothing could be more uncertain than the end of the term.

Then later, in showing the hopelessness of the problem, the court said:

> But it is idle to speculate, when it is out of the question for speculation to result in any sensible working hypothesis. The parties voluntarily left the matter in impenetrable obscurity and uncertainty.

In Tiffany, "Law of Real Property" (3rd Ed.) Vol. 1, Sect. 85, it is said:

> The duration of the term must appear with certainty from the lease creating it.

Also, in Volume 16 of Ruling Case Law, p. 606, the rule of certainty is stated as follows:

> It is a cardinal principle in the creation of terms for years, that the term must be certain; that is, there must be certainty as to the commencement and duration of the term.

It is also a well established rule of law that: "A thing is certain which is capable of being made certain," and this rule is applicable to leases where the term is set to end on the happening of an event, and reference is made to such an event as the terminus of the lease. However, the reference must be made to a thing or event that "has express certainty at the time the lease is made, and not to a possible or casual certainty."

In agreements other than leases, and often in leases with regard to performance of conditions, where no time of performance is provided, courts hold that performance must be in a reasonable time. However, in the instant question, that rule is of no avail.

In the present problem confronting us, the beginning date is easy to determine, but the ending date is not "some period short of infinity" but conceivably the end of the world. Certainty that is a date that has no express certainty. It is unquestionably the most uncertain of all dates.

In many older cases where a leasing or a hiring was involved and no provision made for certainty as to the termination of the agreement, courts considered the term as one from year to year. However, the recent and more modern cases hold such an agreement as one "at sufferance" or "at will" and terminable by either party at will. (Davis vs. Fidelity F. Ins. Co. (Ill.) 70 N.E. 359; Restatement - Contracts, Sect. 32) Where, however, this failure to set a terminal date, or it is so incompletely or imperfectly defined as to be impossible to

determine, no court is free to attach its own conception as to the intent of the parties, and the contract or lease is void for uncertainty.

It is submitted that the attempted grant here is a nullity for all the reasons stated, and also for the reason that it is contrary to public policy.

It may be well to point out here that a state has power generally to make and enter contracts to carry out its proper functions. (49 Am. Jur., p. 274.) When the state does enter the contractual field, it must necessarily lay aside its cloak of sovereignty and be bound and governed by the law applicable to private persons. (Hall vs. Wisconsin, 103 U.S. 5)

> As to a state's contracts the state should be held to the same rules and principles of construction and application of contract provisions as govern private persons and corporations contracting with each other. (49 Am. Jur., p. 275; Murray vs. Charleston, 96 U.S. 432; Newton vs. Mahoning County, 101 U.S. 548)

In the last case cited, the court held that a contract by the state is subject to the law of contracts applicable to consideration and such a contract must be supported by sufficient consideration.

It is apparent from the very inception of negotiations in this matter that the document which was finally to be executed would provide that the building would be constructed and sold to the Employment Security Department, or through it to the State of Nevada, and that the purchase price was to be paid in monthly installments for a period of 20 years, but the document would be entitled a lease. However, as the courts repeatedly point out, the law looks through form to substance, and irrespective of the terminology used, if the document is a vehicle through which a purchase and sale is effected, it will be considered so in court, whether it is called a lease, a lease-purchase, or any other title.

It is glaringly apparent from all the factors with which we are concerned in this report, that from the beginning to the end of this transaction, this was no lease to effectuate a month-to-month tenancy, but was, and is in fact an agreement to sell and an agreement to purchase.

OPTION PROVISIONS

At this point, it is well to consider what purports to be the part of the proposed amendments of January 6, 1961, permitting the state to exercise its option to purchase at the end of 10 years and 30 days. It will be recalled that in the original document, the first paragraph contained the following provision after the agreement to lease the building to the lessee:

> And at the end of said term to sell said building together with the aforesaid block 20, as hereinafter set forth, upon the terms, conditions set forth herein.

On page 12 in paragraph 16 of the original lease, this provision is found:

> Upon payment by the lessee of all the rent pursuant to this contract, and upon the reimbursement by lessee of the sums to be reimbursed pursuant to this contract, lessee shall have the right to purchase the demised premises from the lessor for $1.00, provided further, however, that as a condition precedent to keeping lessee's right to purchase the demised premises subordinate and subject to the said deed of trust, the holder of such deed of trust shall give a written notice to lessee of a default of the mortgage payments to be paid by lessor to such holder which default has continued without payment for 90 days.

A little later in the same paragraph on page 13, it is provided that:

> To secure this option to lessee, lessor has simultaneously made and executed a grant, bargain and sale deed to lessee and placed the same in escrow with the Washoe Title Division of the Pioneer Title Insurance Company of Nevada with instructions that said deed shall be delivered to lessee upon the showing that all payments of rent required to be paid hereunder have been paid and by paying the additional sum of $1.00.

In addition, the lessor also agreed that he would not later than the beginning of the term of the lease deliver to lessee a policy of title insurance, which policy would show good and marketable title in the lessor and insurance of the title in a sum equivalent to the appraised value of the property and improvements which were subject to the lease. In addition, the lessor further agrees that at the time the lessee decides to exercise the option to purchase, that lessor will furnish another policy of title insurance which will insure the title in the lessee in a sum equivalent to the full appraised value of the improvements and the property which is the subject matter of the option to purchase. Lessee is given no right to exercise the option to purchase prior to the end of the 20 year term.

Now, directing attention to the purported amendments to the lease, it is provided on page 2, paragraph 5 therein, that, in connection with the option:

> The option of the lessee to purchase shall not be exercised in any event until the lapse of 10 years and 30 days from the date of occupancy of the building.

That provision is listed under "a" of paragraph 5.

There is another important section which follows immediately thereafter and is entitled "b" which reads:

> The rights of the lessee under this paragraph shall at all times be subject and subordinate to the lien of any deed of trust made by the lessor to secure the repayment of money borrowed by the lessor for the construction of the office building.

This latter provision and its legal effect add nothing to the legal rights and obligations of the parties; for, naturally, any transferee of property takes it subject to recorded liens or the other encumbrances. It becomes important, however, to consider the financial factors the state would face if it elected to and could exercise its option at the end of 10 years and 30 days rather than the end of the twentieth year. The new provision sounds somewhat attractive if the state would have the option and ability to purchase the building at the end of 10 years rather than waiting for 20; in this connection, it is submitted that no such accelerated right is granted, for reasons hereafter set forth. However, when we consider the financial factors and payments involved over the first 10 years, interesting economic factors appear.

If the option could be exercised in 10 years and 30 days, we find that in the period of 10 years, the state will have paid in monthly payments a total of $993,744. This amount is the aggregate of 120 payments at $8,281.20 per payment.

During this same period of time, Brunzell, if there had been no assignment of rents, will have paid on the promissory note evidencing the amount borrowed to construct the building, which was in the principal sum of $1,200,000, a total of $986,038.80; $442,857.26 of this sum will represent principal payments, and $543,181.54 will be paid as interest. It is thus seen that at the end of the tenth year Brunzell would still owe a principal balance of $757,142.74 upon his promissory note. However, that is not the entire story, for in the Brunzell agreement with the loaning agency, it is provided that if Brunzell, after the end of the tenth year, wished to prepay the balance due upon his promissory note, he would be required to pay a penalty of 10 percent of the amount remaining due, or the sum of $75,714.27.

It is to be remembered that in the attempted amendment to the lease, purporting to give the right to the state to exercise the option in 10 years and 30 days, the state had to take the property subject and subordinate to the lien of any deed of trust made by the lessor to secure the repayment of money borrowed by the lessor for the construction of the office building. In this connection, it is to be noted that in the promissory note and the deed of trust the penalty for prepayment is provided. That sum, therefore, becomes a part of the lien, and if the state wished to exercise its option, it would not only have to pay the sum of $757,142.74 (being the principal balance due from Brunzell to the

holder of the first deed of trust), but in addition would have to pay the prepayment penalty of $75,714.27, making a total the state would be required to pay, if it legally could exercise the option at the end of 10 years, of $832,857.01.

Now, to consider the savings to the state, if possible, by availing itself of the attempted 10 year option, it appears that if the state waits the full period of 20 years or 240 months, it would be obliged to pay $1,987,488. The total money paid under the 10 year option plan, including the previous rentals, would be $1,826,601, or a saving of $160,887. This, however, does not take into consideration the saving of taxes, which the state is obligated to pay by the terms of the so-called lease. There could also be a considerable saving on insurance premiums if proper purchasing procedures were followed.

In a letter from Mr. Ham to Mr. Brockway under date of September 1, 1960, it is stated that "insurance is to be provided by the lessor." The cost of the insurance has been estimated for the Employment Security Department at $3,900 per year. However, under the agreement, the state will reimburse the lessor for whatever he pays for the insurance premiums. In addition, it is set forth in that letter that taxes are estimated at $16,400 per year.

By computation, therefore, it would be seen that the insurance premium for the 10 years would be $39,000, assuming the estimate to be correct and that there would be no great change during the 10 year term. During that 10 year term, the state would have paid $164,000 for taxes. The aggregate of the 10 year payment for taxes and insurance is $203,000. If we add this to the 10 year aggregate of the payments for so-called rent in the amount of $993,744, we find that at the end of the tenth year the state would have paid $1,196,744 for so-called rental payments and for insurance and taxes.

If we assume that insurance and taxes will remain fairly constant at the figures given, and we must bear in mind that these are mere estimates, in the ensuing 10 years or the remainder of the term of the so-called lease, the state would have to pay an additional sum of $1,196,744. Thus, it can be readily seen that if the state cannot exercise the 10 year option, and must pay for the full term at the rate of $8,281.20 per month, the total of the so-called rental payments and payments for insurance and taxes for the 20 year term would aggregate $2,393,488, plus approximately $500,000 for maintenance.

Nor is this the total of the expense which the state would be required to pay. For, by the terms of paragraph 7, found on page 6 of the original lease, it is provided that:

> Lessee, at its sole cost and expense, agrees at all times during the term of this lease to perform all necessary maintenance and repair to and on the demised premises.

In this connection, this is an onerous provision, to which no prudent lessee would agree, and it is further evidence that from the beginning of occupancy, the lessee considered itself the owner of the premises. For, in most all such provisions for maintenance in ordinary leases without any purchase, or option to purchase provisions, the lessee is required only to maintain the interior of the building and the lessor or owner is to maintain and to keep in good repair the floors, exterior walls, roof and foundation.

There is one other factor that has heretofore been discussed in detail. We refer to the provisions for "free rent forever" proposal set forth in the letter from Mr. Huxley to Mr. Depaoli, dated the 10th of December, 1958, which was in answer to a letter from Mr. Depaoli to Mr. Huxley on December 8. In the last mentioned letter, it will be recalled that it was contended that when the planned purchase and construction costs were amortized through the monthly payments in lieu of rent, title would be vested in the State of Nevada and that the building would be used "for employment security purposes only" and that it was to be agreed that the only costs to the department would be for operating cost and maintenance.

Now referring to the December 10th letter from Mr. Huxley to Mr. Depaoli, the second paragraph states, "It is understood the premises would be rent free to the agency after an 'amortization period' to be agreed upon by your office and the Bureau of Employment Security."

It is fortunate that in the drafting of the so-called lease, this provision was omitted; there is no mention whatsoever in the lease of such a provision. Nor was there any attempt made to incorporate by reference any of the documents or letters in which such a proposal was contained or any such understanding or agreement was contained. We have already discussed the "free rent forever" proposal as contained in Chapter 191, Statutes of 1960, and the legal reasons for its being a nullity.

ATTORNEY GENERAL'S OPINIONS

During the course of negotiations and legislative activity leading up to the execution of the so-called lease agreement and the enactment of certain legislation heretofore mentioned, there were five opinions issued by the office of the Attorney General on this particular matter. Four of them dealt specifically with the matter we are here concerned with. One other dealt with lease-purchase agreements, but in connection with the construction and acquisition of school buildings. With exception of the opinion last mentioned and Opinion No. 3, issued on January 29, 1959, we respectfully disagree with the legal conclusions contained in all the others, for the reasons hereinafter set forth.

For the sake of having all relevant matters included, we have attached hereto copies of each of the opinions dealing specifically with the so-called lease-purchase agreement between the Employment Security Department and the Brunzell Corporation.

We will discuss each of these opinions in the chronological sequence in which they were issued in order to attempt a clarification of the law as expressed in court decisions.

At the outset, it is well to point out that research has failed to disclose any decision of the Nevada Supreme Court construing the Nevada constitutional provisions as to debt limitation in which a lease-purchase agreement is involved. We, therefore, are limited to decisions of other states construing constitutional provisions similar to ours in order to determine the legal meaning of the so-called lease-purchase agreement with which we are here concerned in order to decide whether or not it must be construed or considered as a debt.

We do have the assistance of one Attorney General's opinion, Opinion No. 3, issued on January 29, 1959, to Mr. Russell MacDonald, Director of the Statute Revision Commission, at his request at a time when his office was considering the drafting of the lease-purchase statute now in force.

The question posed was "Would a lease-purchase statute be in violation of Section 3 of Article IX of the Constitution of the State of Nevada?"

The author of that opinion cited several authorities, among them the Nevada Constitution and statutory provisions, and the provisions of other states. In discussing the California debt limitation, the author of the opinion, Mr. Priest, stated:

> Despite this very restrictive provision of the California Constitution, the Supreme Court of that great and very wealthy state has promulgated the rule that to term the contract a lease, when in truth and in fact it is a conditional sales contract, will not lift it from the restrictive provisions of the Constitution.

Mr. Priest then cites a leading California case entitled City of Los Angeles vs. Offner, a 1942 case found in 122 Pac. 2nd at page 14. The quote was as follows:

> It has been generally held in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for, but, on the contrary, confines liability to each installment as it falls due in each year's payment, as for the consideration actually furnished that year, no violence is done to the constitutional provision. (Citing authorities) If, however, the instrument creates a full and complete liability upon its execution, or if its designation as a 'lease' is a subterfuge and it is actually a conditional sales contract in which the 'rentals' are installment payments on the purchase price for the aggregate of which an immediate and present indebtedness or liability exceeding the constitutional limitation arises against the public entity, the contract is void. (Emphasis added)

On the fourth page of the opinion now being discussed, in the last paragraph, the author of the opinion makes a summation as follows:

> Under the decisions, a great deal of variety and ingenuity is displayed and evidenced on the part of those who seek to avoid or evade the constitutional or statutory limitations and safeguards.

Continuing with quotation from the opinion, Mr. Priest later states:

> No useful purpose would be served in attempting to distinguish the cases and the statutory and constitutional provisions under which the rulings of the high courts in each case has depended. Sufficient to say that in each case the true nature of the transaction is determined, and if the payments, although termed rents, are in fact installments upon principal, and if from the beginning of the contract, the full amount of the contract is a present existing obligation, the constitutional safeguards will prevail.

Later, the author of the opinion mentions the so-called "special fund" doctrine under which, when payments are to be made from special funds and not from a general fund, the contract is held not to create a present and existing obligation. He, however, closes the opinion with:

> . . . such a statute (authorizing the Brunzell contract) would be for the avowed purpose of circumventing the provisions of the Constitution, we are clearly of the opinion that such a statute would be in violation of the meaning and spirit of the constitutional provisions and therefore void.

This last statement is made in connection with certain other factors and therefore taken out of context. However, the author, Mr. Priest, minces no words with regard to the proposed statute which Mr. MacDonald's office was then considering.

A prior opinion was also issued by Mr. Priest under date of February 6, 1959, and addressed to Mr. Ham, the Executive Director of the Employment Security Department. The opinion was in answer to a request from Mr. Depaoli who was Mr. Ham's predecessor in office. The question asked by Mr. Depaoli was: "May the Executive Director of the Employment Security Department expend monies from its Employment Security Fund for the purchase of a lot in Carson City upon which to erect a building for the said Department, under the authority of the provisions of NRS 612.614?"

It is interesting to note that Mr. Priest refers to discussions between himself and Mr. Depaoli as well as Mr. Ham, from which discussions Mr. Priest stated:

> That the overall plan would be to obtain the advancement of private capital to construct a building upon said land, suitable for the purposes of the Department, with a view of payment and title acquisition through a lease-purchase agreement.

Mr. Priest states that the question and advice relevant thereto would encompass the statutory law regulating the acquisition and disposal of the particular fund and the law respecting lease-purchase agreements, and then this revealing sentence:

> . . . and the constitutional provisions that they are designed to circumvent. (Emphasis added)

Although Mr. Priest answered the question in the affirmative, and was of the opinion that the monies from such fund could be expended for the purpose mentioned, he did state as follows:

> However, for reasons that will hereafter appear, and, by way of advice, we doubt that such procedure should be followed. (Emphasis added)

On the second page of the opinion, the author states in the last paragraph of page 2 as follows:

> If the contract between the Department and the private capital be one of conditional sale, it will be an obligation of the state for the full unpaid balance thereunder. We concluded this, for, although you would have money to acquire the lot from this special fund, you would not have money to go further and complete the project and acquire also the building. Under this state of facts, it would be difficult to evolve a plan for the acquisition of title to a building through lease-purchase contract, which had been constructed upon land owned by the state.

In the same paragraph near the end thereof, the author stated that the plan under discussion was undesirable because, among other things, he stated:

> From the nature of things it resembles more a conditional sales agreement than a lease.

We wish to point out that the opinion just quoted from applied only to one small phase of the whole problem. But from the outset, as early as the day of the opinion and even a few days earlier than that, Mr. Priest was of the opinion that the procedure was inadvisable, and he had serious misgivings about the legality of the lease-purchase agreement, because it had all the appearances of a conditional sales contract rather than a lease. We have heretofore pointed out and emphasized by legal opinions that the courts have considered the same agreements as conditional sales agreements and not as leases.

In this connection, however, it may well be pointed out here that there is nothing illegal about a lease-purchase agreement, unless such an agreement imposes an obligation which is in excess of the debt limitation or when the amount of the obligation brings the total debt up to the constitutional limit.

DEBT LIMITATION PROVISIONS

It is well to indicate here a peculiar situation with regard to the debt limitation to which reference has heretofore been made. As previously stated, the debt limitation is found in Article IX, Section 3, of the Nevada Constitution, and is worded as follows:

> Such debt shall never in the aggregate exclusive of interest exceed the sum of 1 percent of the assessed valuation of the state as shown by the reports of the county assessors to the State Controller.

In this connection, it is interesting to note that there is no provision of law that requires county assessors to make reports to the State Controller; and, as a matter of fact, no such reports have been made, at least in the memory of those now in the Controller's office. There is a requirement in NRS 354.320, Subsection 2, which requires the county auditors to report to the Controller the aggregate value of real and personal property in each county as shown by the last assessment roll. However, the auditors of three counties refuse to make this report. The Constitution makes no mention of value based upon the auditor's report.

It becomes important as a legal question to determine whether or not the report of the Controller based upon county auditors' reports would be admissible in evidence and be acceptable to the court, when the constitutional requirement is valuation as shown by the county assessors' reports to the State Controller. This may seem specious or picayune to some; nevertheless, courts feel themselves bound by the phraseology of the Constitution, and although it may seem archaic, and it may seem unrealistic, nevertheless the courts feel themselves bound so as not to indulge in judicial legislation or judicial amendment of the Constitution.

It would seem extremely advisable to clarify this by a statute requiring the county assessors to make such a report. The statute could require the assessors to report the total assessed value of each county, including the valuation of public utility property as certified by the Tax Commission for tax purposes.

For the purpose of this report, we are taking the value of the state as shown by the report of the State Controller for the fiscal year ending June 30, 1961. As shown by that report, the total assessed value of the state is $736,521,676.75. Therefore, the total maximum debt permitted would be $7,365,217.

As of the date of adjournment of the 1961 Legislative Session, not including lease-purchase contracts, the total state debt contracted amounted to $2,434,000. The 1961 Legislature authorized two issues of general obligation bonds; one issue for construction of a minimum security prison was authorized in the amount of $1,410,000; another issue for the construction of a social science building at Nevada University was authorized in the amount of $1,456,000. The two issues, if all bonds authorized are sold, will amount to $2,866,000.

The bonds for the prison were authorized to be issued January 1, 1962, and the bonds for University construction were authorized for March 1, 1963.

There are three lease-purchase contracts now in existence:

1. For the Reno building, the total original cost was $612,000, payable at $2,255 per month beginning July 1, 1957, and ending June 1, 1977. As of June 1, 1962, there remains to be paid a total of $459,000.

2. The Las Vegas building cost set forth in the lease-purchase agreement was $962,400, payable for 20 years at $4,113.70 per month. Rent for the first three months and last six months was paid in advance, the total of which was $37,203.30. The first payment after the prepayment was made in February, 1959, and payments have been made each month since then; the building was occupied in November 1958, and the three months for which rent was prepaid were November and December of 1958, and January of 1959. There has been paid as of May 1, 1962, rent for 43 months from November 1958 to and including May 1962. As stated above, rent for the last six months was also paid in advance; so, the advance and regular payments made to date are for 49 months of a 240 month term. The amount remaining due under the lease-purchase contract is for 191 months at $4,113.70 per month, or a total of $785,716.70.

3. The Carson City building has just been occupied and the first monthly payment will be made at the end of May; the whole amount of the contract price is, therefore, still due and owing in the amount of $1,987,488, at the monthly rate of $8,280.20 for 240 months.

As of May 15, 1962, the aggregate debt imposed by the three lease-purchase agreements, and remaining due is in the amount of $3,232,204.70.

If this sum must be considered as a debt within the constitutional sense, and we submit that it must be so considered, then, exclusive of the two authorized bond issues, the known state debt is a total of $5,666,204.70. When this amount is subtracted from the total permissable debt, it is seen that there remains for further indebtedness only the sum of $1,698,912.30.

However, under the authority of the statute authorizing the $1,410,000 issue of bonds for the minimum security prison, a request has been made that the bonds be sold.

The amount of the issue must be considered as part of the aggregate debt, as it soon will be; if the amount thereof is deducted from the amount for further indebtedness, it is seen that there remains only the sum of $289,013.30 for further possible state debt. This amount is $1,167,987.70 less than is needed for the University building authorized for March 1, 1963.

It is possible, however not very probable, that the assessed value of the state might increase to an amount that would permit the issue of bonds for

construction of the University building. We use the words "not probable," because the increase would need to be about $150 million.

It becomes necessary, and really imperative that a decision of the Nevada Supreme Court be obtained as soon as is reasonably possible on whether or not these lease-purchase agreements create debts in the constitutional sense. It is the considered opinion of the staff of the Legislative Counsel Bureau that the agreements do create a present and existing indebtedness for the full amount of the lease-purchase price. A member of the Attorney General's staff holds a contrary opinion, although two members of the Attorney General's staff concur in the opinion of the staff of the Legislative Counsel Bureau as to the legal incidents of the lease-purchase contracts and the constitutional debt limitation provision. Hence, the urgent need for a Supreme Court decision that will authoritatively decide the question.

There is also the serious question of the validity of all of the three lease-purchase contracts and amendments thereto insofar as they impose an obligation on state funds.

FURTHER ATTORNEY GENERAL'S OPINIONS

The next Attorney General's opinion was issued by a special deputy for the Employment Security Department, and is Opinion No. 200, issued January 11, 1961, to Mr. Ham, Executive Director of the Employment Security Department. The opinion was in response to the following questions:

1. Is a lease-purchase agreement for purchase of office buildings and land entered into pursuant to NRS 612.227 enforceable by the lessor against the State of Nevada?

2. In the event of non-payment of rent by the lessee pursuant to the agreement can lessor file suit against the State of Nevada for the collection of past due rents?

3. Are there funds available for the payment of said rent by lessee other than funds appropriated by the Congress of the United States?

The answer to all three questions was in the affirmative.

In other words, the answer was that the lease-purchase agreement was enforceable by the lessor against the State of Nevada. In this connection, it is to be noted that the question posed by Mr. Ham to the author of the opinion was whether or not a lease-purchase agreement for the purchase of an office building and land not the rental thereof, but for the purchase thereof, was enforceable against the state. This is further evidence of the fact that from the inception of this whole program it was intended as a sale and purchase and not a lease.

The second question answered affirmatively was: In the event of non-payment by the lessee, could the lessor sue the state; and the third: Were there funds available to pay the rent for the building other than funds appropriated by the Congress of the United States?

To summarize: The opinion states that as of January 11, 1961, the State of Nevada was bound by the agreement and could be sued for a breach thereof; that the lessor could have enforced the judgment against the state, and that there were funds, other than appropriated by the Congress, available to pay lessor's judgment.

As to the answer to questions 1 and 2, it is submitted, that at the time of the opinion there was no liability whatsoever on the part of the state as regards state funds to pay anything under any such lease-purchase agreement. It will be recalled that at that time, the applicable statutes of Nevada provided only that the Executive Director might enter a lease-purchase agreement with a private individual, corporation or partnership for the purchase of an office building and land; however, the rentals that were authorized were expressly limited to be paid only "to the extent that funds are made available by the Congress of the United States."

It is to be noted in this connection that in Chapter 191 of the Statutes of 1960, heretofore quoted, paragraph 3 provides "all such lease-purchase agreements heretofore entered into by the Executive Director are hereby ratified, confirmed and adopted." On that date, which is March 14, 1960, there were two lease-purchase agreements that had theretofore been executed or entered by the Executive Director. This attempt to ratify has been heretofore discussed and will be further discussed later.

Further, in this connection, it is too well established for argument, and the Constitution of Nevada so provides that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law." Hence, it must appear certain that: 1. The lease-purchase agreement for the purchase of the building and the land on which it was located was not enforceable by the lessor or by anyone else against the State of Nevada on January 11, 1961, the date of the opinion next above set forth. Furthermore, the idea of the lessor filing suit against the State of Nevada for collection of past due rents under such a contract is certainly not within the law. For, how could the State of Nevada be sued upon a contract that was not binding upon the state?

In this connection, it may be well to again reiterate what has been said heretofore repeatedly, and which is the unquestioned law of all English-speaking jurisdictions, that the legislative body or the Legislature has plenary, absolute and exclusive jurisdiction and authority over the expenditure of public monies. Further, with regard to the definition of public money, the courts are uniform, and there is a unanimity of opinion and expression that public funds, as that term is used, are not limited to funds collected by general taxation or are deposited in the general fund. Public funds as used in this sense means all monies from whatever source derived, whether by general taxation, from license fees, special taxes, gifts, donations, grants, bequests or any other way. If the fund belongs to the state, the Legislature alone has authority to expend it, and no agency nor any official has any authority whatsoever to spend one penny or more of those funds for the most laudable public purpose without express appropriation by the Legislature and express authorization to expend the money for the purpose set forth in the statute.

It follows, therefore, that the state at the time of that opinion was not liable under the lease-purchase agreement and that the state could not be sued for the collection of so-called rents if they were not paid.

As to whether there were funds available for the payment of the rent "other than funds appropriated by the Congress of the United States," the answer to the question is not as clear as the author would appear to believe.

For example, the statement by the author that "the contract of the Employment Security Department for acquisition of useful office space is a service authorized by law" is not a correct statement. The contract, which has heretofore been referred to as a lease or as a lease-purchase contract was for the acquisition of a building and the ground upon which the building was to be constructed. By no false semasiology could the acquisition of a building be deemed the purchase of a service.

The statement at the bottom of page 2 of the opinion that "Section 612.227 has specifically authorized the lease-purchase agreement hereinbefore referred

to" is correct, but the next statement on the following page that "a continuing appropriation has been made for the payment of this contract under Section 612.605" is not correct. We need only to refer to the provision of Chapter 191 of that page 348 and 349 of the Statutes of 1960 to see the error of this statement. And we have repeatedly quoted from that chapter, but to emphasize the error of the statement, we need only to quote again that the authority given the Executive Director to enter or execute a contract for lease-purchase of an office building was limited to the extent that the rentals (which is no more and no less than payments on the purchase price) were made available by the Congress of the United States.

The special Employment Security Fund of the Department created by NRS 612.615 does not contain monies or funds made available by the Congress of the United States. This fund was created by the Legislature of the State of Nevada and termed "a special fund to be known as the Employment Security Fund," to be used only for costs of administration. It is submitted that the expenditure of funds for the acquisition of real property and improvements constructed thereon in the form of an office building are not funds expended "for costs of administration."

Further, in this connection, no subsection of the NRS section under discussion mentions that any monies made available by the Congress of the United States are deposited in that fund. True, the phrase in subsection 5b "all monies received from the United States of America or any agency thereof," might be contended to be monies made available by the Congress. A study of the section makes it clear that monies in this fund do not come within the intent of the Legislature in the enactment of Chapter 191 in which the phrase rentals shall be paid "to the extent that funds are made available by the Congress of the United States." It is submitted that by that phrase is meant monies expressly appropriated by the Congress. The monies making up the fund created by NRS 612.615 are more in the nature of penalties and similar monies. It is true that our Legislature has made a continuing appropriation of those monies in the Employment Security Fund to the Executive Director for the administration of the unemployment compensation law. It is submitted, however, that the words "costs of administration" do not encompass the payment for the purchase of real property no matter what terminology is used; whether they are called rentals or payments on account of lease-purchase or any other words. Those payments are on account of the purchase price of real property, and cannot be considered administrative expenses.

In connection with the statement in the large paragraph on the top of page 2 of the opinion: "that fund consists of all monies appropriated by this state," the phrase is misleading, as it would tend to mean that the Legislature has appropriated certain monies from the General Fund of the state to such fund. This, however, is not true. From the beginning of this agency to the present date, the Legislature has never appropriated $1 from the General Fund for its use. What is meant by the statement is that the money in that fund was appropriated as a continuing appropriation, without any reversion, to the Executive Director; again, however, attention is called to the fact that it is an administrative fund.

Even if a true rental or lease agreement were made for office space to be used by the Department, whether the furnishing of such office space would be a

"service" that expenditure from the fund would be an administrative expenditure is itself a difficult question.

At the bottom of the second page in the last incomplete paragraph of the opinion being discussed, the author makes the statement that a previous NRS section, 612.610, "makes it mandatory on the State of Nevada as a matter of policy to supply the unemployment compensation administration with monies for the proper administration of this chapter whenever the fund is insufficient." This simply is not a correct statement of law if the author means that it is incumbent upon the Legislature to appropriate money for the monthly payments to Brunzell under the lease-purchase agreement.

The final conclusion of the author of the opinion that the lessor upon obtaining judgment would have a judgment valid and collectable against the State of Nevada cannot be supported. It would be interesting to have the author point out how such a judgment could be satisfied without an appropriation by the Legislature. As has been pointed out, no money may be withdrawn from the Treasury without an appropriation by the Legislature. There is no money whatsoever appropriated by the Legislature for payment of the installment purchase price; it is submitted that though a judgment be obtained, the Legislature would be under no obligation whatever to appropriate funds for the payment thereof.

The next opinion with which we are concerned was issued under date of February 2, 1961, and entitled Opinion No. 206; it was issued at the request of Mr. Byron Stetler, Superintendent of Public Instruction, and issued in response to the following question:

> Are lease-purchase agreements for the construction and acquisition of school buildings and other school facilities authorized and valid under presently-existing law?

The answer given by the author of the opinion to Mr. Stetler was negative. In other words, lease-purchase agreements for the construction and acquisition of school buildings and other school facilities were held to be not valid. As a matter of fact, the last paragraph in the opinion is as follows:

> We are of the opinion, therefore, that lease-purchase agreements for the construction and acquisition of school buildings and other facilities of a capital nature would be violative of both constitutional and statutory restrictions and limitations.

It is to be noted that in the analysis on page 2, the author quotes from Attorney General's Opinion No. 704 issued November 29, 1948, as follows:

> State may not incur a debt in excess of the sum of 1 percent of assessed valuation for new construction - this amount cannot be exceeded with legislative approval.

The author also quoted from Attorney General's Opinion No. 3 on the date of January 29, 1959, previously discussed at length, as follows:

> Lease-purchase contracts by state agencies in light of restrictive limitations of Section 3, Article 9, State Constitution, except under special fund doctrine, are of doubtful validity.

It may be pointed out that the opinion just quoted from is the opinion written by Mr. Priest, which correctly states the law in the matter now under consideration.

Mr. Priest, in his opinion, cites an article, heretofore mentioned, in 25 George Washington Law Review, beginning at page 377, and prefaces a quotation by saying that the article points out that the questioned "leases" are in practice non-terminable; that the annual "rent" payments are indistinguishable from debt service on bonds and that, since "the fiction exists only in the courtroom" this practice of lease financing, therefore, is borrowing and not renting.

The author of the George Washington Law Review article is credited as concluding that:

> Though a great deal of ingenuity and dexterity has been displayed in the various attempts made to avoid the constitutional limitations and prohibitions, present debt limitations are too inflexible, that there is considerable doubt concerning the validity of such attempts. Moreover, it should also be noted that circumventions of the law by such means and procedures can certainly not be held to comply with the intent of the framers as held at the time of the adoption of the constitutional limitations.

The Law Review writer further adds:

> If existing conditions and needs warrant, such constitutional limitations should be amended with the sanction of popular support. In short, "the best way to insure repeal of a bad law is to enforce it strictly."

It is well to remember here that at the last general election a proposal was made to the people of Nevada to amend Section 3 of Article IX, increasing the permitted debt from 1 percent of the total assessed valuation to 2 percent thereof and that the proposal was soundly defeated. As a matter of fact, the vote on the proposition was "Yes," 21,895, and "No," 58,978. It is thus seen that 37,083 people over and above the "Yes" votes voted against amending the constitutional section. So with 58,978 voting "No" and only 21,895 voting "Yes," it is clearly apparent that the people of Nevada do not consider the debt limitation as provided in Article IX, Section 3, a bad law as mentioned in the Law Review article here under discussion. As a matter of fact, history and governmental financial experience of states and municipalities, as pointed out near the beginning of this discourse, demonstrates that unless restrained by a constitutional debt limitation, authorities may be inclined to improvident spending to the extent that some states and municipalities may virtually bankrupt themselves. Witness the historic financial collapses of the early 1840's and late 1860's which has heretofore been mentioned. The debt limitation act is a

positive injunction from the people of the state who possess all the sovereignty and authority not expressly granted to the Legislature, to conduct the business, particularly the financial affairs of the state, within the bounds therein provided. These provisions should be strictly followed to the end that the injunction of the people as placed in the Constitution will be complied with.

RATIFICATION BY SUBSEQUENT LEGISLATION

The question of ratification of the previously entered lease-purchase agreement by the enactment of Senate Bill No. 38 becomes important, and presents serious legal problems. At the time the contract was entered, as we have pointed out above, there was no authority whatsoever for the Executive Director to bind the state, or rather bind state funds. We have repeatedly pointed out that the payments were limited solely from funds made available by the Congress. However, with the enactment of Senate Bill No. 38, the legal question arose as to whether or not the attempted ratification by the Legislature in the enactment of Senate Bill No. 38 made the state liable legally to appropriate monies for such payments; that is, payments under the lease-purchase agreement, if the monies in the fund were not available or if the Congress of the United States did not appropriate or make available any federal funds. The question is not easily answered, for we must necessarily ask: May the Legislature by an enactment ratify a wholly void agreement? We say "wholly void" because at the time of the execution of the agreement it was wholly void as a vehicle for obligating the state to pay any of the payments with state funds.

The Legislature cannot be censored for the enactment of Senate Bill No. 38 of the 1961 Session, even though it be held that the enactment did ratify the previous lease-purchase agreement, particularly so in view of the next Attorney General's opinion on the subject. Although we have pointed out the opinion given to Mr. Byron Stetler which we have last been discussing, held that a lease-purchase agreement for the construction and acquisition of school buildings and other facilities of a capital nature would be violative of both the Constitution and the statutory restrictions, the same author just eight days later rendered an opinion in letter form to Assemblyman Gibson, Chairman of the Committee on Ways and Means, on the very same subject. In this latter opinion, the author completely reversed his position and advised Mr. Gibson of the legality and constitutionality of Senate Bill No. 38 and ruled that the lease-purchase agreement obligations imposed by that agreement were not prohibited by the Constitution as the obligation fell within the "special fund" doctrine and was therefore an exception to the constitutional prohibition relative to such agreements. It was also ruled that the lease-purchase agreement in question was terminable under certain contingencies, and did not impose upon the state any entire or absolute obligation or liability, nor did such agreement create a present indebtedness for the entire amount involved in the agreement so as to impair or limit the future debt capacity of the state. In other words, the author held that the indebtedness created by the lease-purchase agreement did not have to be considered in connection with the debt limitation.

There is no need to further prolong this discourse to answer any contention made in the opinion that the payments are rentals rather than purchase installments, for such a statement is contrary to both facts and law. It is difficult to understand why the lease-purchase method of financing was held to be unconstitutional insofar as school construction, yet valid for use in the construction and acquisition of the Employment Security Building.

We wish to answer the contention made in paragraph 2 of the latter opinion that the agreement is terminable; for there is no provision whatsoever in the agreement which gives either the lessee or the lessor any right under any condition to terminate the contract. Furthermore, the statement beginning at the

bottom of page 2 and continuing on the top of page 3 to the extent that:

> It must be noted that the lessor would be under a positive legal duty to rent the premises to a new tenant and to secure a rental consistent with prevailing rates and conditions at the time of repossession of the premises.

(i.e., to act in such a manner as to mitigate or minimize the damages) is not a correct statement as far as the law is concerned.

The law is expressly and patently clear that in the case of a lessor-lessee obligation, both parties are bound and that in the event the lessee breaches the lease by failing to pay or make any rental payments as agreed, the lessor has a choice: he may either abide by the lease and insist on its performance to the extent that he may sue for each payment as it falls due and is not paid, or he may await the end of the term and sue for the whole amount remaining due at that time; in the alternative, he may accept the premises <u>on behalf of the lessee</u> (it would be foolhardy to accept it otherwise) and he then must attempt to rent the premises. If he is able to do so, and obtain a rent equal to that reserved in the lease, then the lessee is free from further obligation because the lessor is made whole. If, however, the lessor is unable to rent the premises for the full amount agreed to be paid in the lease, the lessee may be held for the difference; or, in the event the lessor may not rent the premises for any sum, the lessee is still obligated for the full amount of the lease.

There is absolutely no obligation on the part of any lessor to accept a willful or other breach on the part of the lessee as imposing an obligation on the lessor to retake the premises and assume an obligation to re-rent. A moment's reflection on such a contention will readily show the fallacy thereof. For example, "A" rents a building to "B" in a perfectly valid and binding lease; does the law of contracts or the law of landlord and tenant give the lessee a right, by a willful breach and a refusal to pay rent, of casting the premises back on the lessor and requiring him to do any other thing whatever? No, certainly not.

The law in this particular case has been enunciated for years and years by courts. One of the leading cases is to be found in a California Supreme Court decision entitled Welcome vs. Hess, 90 Cal. 507, 27 Pac. 369. Two other cases in the same field are Bradbury vs. Higginson, 162 Cal. 602, 140, p. 254; and Respini vs. Porta, 89 Cal. 464, 26 Pac. 967.

In the latter case, the rule as to the matter being discussed is succinctly stated by the court on page 466 as follows:

> A landlord upon a wrongful abandonment by his tenant may, if he chooses, decline to meddle with the property at all, and at the end of the term, sue for the rent. He is not, however, driven to this course, and run the risk of damage to his property or the insolvency of his tenant.

On the same subject, in the case of Welcome vs. Hess, supra, page 513, the court discussed the rule as follows:

> The term is an estate in lands. The tenant, subject to the covenants of his lease, is the owner for the term. If he leaves the demised premises vacant, and avows his intention not to be bound by his lease, his title still continues, unless the landlord has accepted the offer of surrender. The landlord has not more right to the possession or to the lease than a stranger. Admit that he may take such care of the property as will prevent waste, still he must not interfere with the right of the tenant to the absolute dominion and control. If he does so interfere, it is an eviction, and the tenant would be released.
>
> The tenant cannot abandon his title; and notwithstanding he has gone out, unless the surrender is accepted, that title continues. It is his right to resume possession at any time during his term.

In the third case cited, Bradbury vs. Higginson, the court quotes from a written decision of the trial court which is adopted as the opinion of the court as follows:

> It is claimed by plaintiff that immediately upon the repudiation of the lease contract by defendant, a cause of action for damages arose in her favor, and she might at once sue for the full amount which would become due had the contract run its full term and recover it as damages. That a landlord may have an action for damages for breach of contract when a tenant abandons his lease is not questioned by any of the authorities. His damages, however, in that event are to be ascertained in a particular way. Where a lease is repudiated and the premises abandoned, the landlord may assume one of two courses: He may rest upon his contract and sue his tenant as each installment of rent, or the whole thereof, becomes due; or, he may take possession of the premises and recover damages, which damages will be the difference between what he may be able to rent the premises for and the price agreed to be paid under the lease.

The court a little later cites Jones on Landlord and Tenant, Section 140, as sustaining the court's statement; also cited is the landlord and tenant work of Gear, from which the court quotes as follows:

> If the premises are abandoned without cause, the landlord may elect to leave them vacant and recover or enter and determine the tenancy; but he cannot both enter and treat the contract as subsisting.

It is apparent, therefore, that the statement on page 4 in the third paragraph of the opinion as follows:

> In the event that the Employment Security Department defaulted in payment of rent under the agreement in question, the lessor, Brunzell, for all intents and purposes, would be confined to its remedy of repossessing the building and leasing it to a new tenant on such terms as it might be able to secure in the then prevailing conditions.

is simply not the law. The law is squarely to the contrary, and, as stated, if the Employment Security Department failed to make the payments as agreed, even though it were a lease and not a lease-purchase agreement, or an agreement to purchase which in truth and in fact it is, Brunzell would be under no obligation whatever to repossess the building or to do anything. The state being the lessee complicates matters, but if the lessee were an individual, he could sit idly by and sue for the entire amount. Certainly he cannot sue as if for an anticipatory breach, as is permitted in Louisiana and a very few other jurisdictions, and sue for the whole sum, until the whole sum became due. One thing is certain, the lessor is not legally obligated to do anything if the tenant defaults, even in payment for rent. It must be apparent, however, to anyone who gives the lease-purchase agreement a thorough study, that it is not a lease but plainly and simply an agreement to sell and an agreement to buy on the installment plan, and each monthly payment is a payment on account of the purchase price and not for rent.

Of course, in the instant case, the judgment creditor would be faced with the problem of getting his judgment paid, which would involve a legislative appropriation therefor.

It, therefore, is clear that if the lease-purchase agreement imposes a valid obligation on the state, the obligation imposed is a present, existing indebtedness for the full amount set forth in the agreement to wit, $1,987,488, the full purchase price of the property, on the deferred-payment basis and possibly for the taxes and insurance premiums. It must be apparent to anyone who would study or approach the problem objectively that this is an existing indebtedness that must be considered in determining the total indebtedness of the state in accordance with the debt limitation provision of Nevada's Constitution.

In this connection, however, it must be borne in mind that attorneys' opinions, whether they be opinions of an attorney general, a deputy attorney general, or any other attorney are mere opinions of no binding or controlling force. For it is well established in law that an erroneous attorney general's opinion which leads a public official into error to his damage, is no defense whatsoever in an action against the official. In a suit to require the repayment of public funds illegally spent by an official, it is no defense for the official to say that he had an attorney general's opinion to the effect that his action was legal.

It therefore appears most advisable in this particular case that a proper action be taken before the courts of Nevada to determine this very important question. For, unless that decision be made prior to the time for the issuance of the general obligation bonds by the University of Nevada on March 1, 1963, a bond buyer would be taking an undue risk in buying the bonds that might subsequently be held to be void because the issue was in excess of the debt

limitation. It is respectfully but strongly urged that proper action be instituted by some agency of government to determine whether or not the contract in question imposes a debt that must be taken into consideration in computation of the total permitted debt under our debt limitation, and, if so, what is the amount of our total debt.

THE SO-CALLED "SPECIAL FUND" DOCTRINE

In the opinion just criticized, it is stated--in addition to what has previously been quoted--and this is found on page 3 of the opinion in paragraph 4:

> A generally established and accepted exception to the inhibitions and limitations constitutionally imposed upon lease-purchase agreements may be stated as follows: It is generally held that where funds, with which payment of installments of 'rent' are derived from a 'special operation,' rather than from general tax levies, the restrictive constitutional limitations and safeguards are not considered to be involved or violated, since no burden therefor devolves upon the taxpayers as such.

It is respectfully submitted that this statement is not correct, and that there is no such a doctrine as is called "special operation." What is often used as a device by some courts subservient to the desire of those who would violate the constitutional debt limitation is often referred to as the "special fund doctrine." This, however, is not strictly correct.

For the purpose of explaining the divergence of opinion in this field, it is well if we burden this discourse a little further with citations and quotations from the authorities on the so-called special fund doctrine. It is well to point out at the outset, that the courts of Nevada have never taken a position thus far in this particular field. Our sister state to the north, Idaho, holds squarely that the so-called special fund doctrine is a fiction and that it has no standing or reason in law, and that state refuses to apply the doctrine. We will quote a little later from one or two Idaho cases to emphasize this point. There are several other states which we will mention which do not subscribe to the doctrine.

The special fund doctrine is more correctly stated as follows:

> A state, municipality or other political subdivision does not create an indebtedness or liability, within the meaning of a constitutional or statutory debt limitation, by purchasing property <u>to be paid for wholly out of the income or revenue to be derived from the property purchased</u>.

This doctrine is often erroneously called the majority view; in other words, that the majority of courts adhere to the doctrine and hold that if the property being purchased is <u>to be paid for wholly out of the income or the revenue to be derived from the property purchased</u>, then it is not to be considered in computing the maximum amount of debt possible under the constitutional debt limitation. It is to be borne in mind, however, that this doctrine is assailed by numerous court decisions, and it is submitted that in no case is the doctrine applied where the purchase price of the property being acquired is obtained from such sources as are being contemplated in the instant case. In all such decisions, the emphasis is upon the fact that payment for the property is made wholly out of income or revenue to be derived therefrom.

The doctrine is applied generally to the acquisition of power plants, gas works, water supply systems, for which a charge is made for the services rendered by the utility. It has also, however, been applied to the construction of certain buildings, including city halls, school buildings and otherwise; but, in each instance in which the court has applied this so-called special fund doctrine, there has been a special assessment or certificates of indebtedness or bonds issued and revenue received from the property purchased to retire the bonds or amortize the investment. The doctrine has also been applied to the construction and acquisition of toll bridges, toll canals, university dormitories and street and railway systems. It can be readily seen that in all cases supporting the special fund doctrines the property to be acquired produces revenue that is used to retire the indebtedness.

In all such cases, however, in which the doctrine is applied, it is invariably stated, or is a rule that:

> If the creditor can compel the governmental entity to pay the indebtedness in some way other than by the income or the special fund created from the revenue of the property acquired, there is an indebtedness within the meaning of the constitutional debt limitation provision.

See Bowling Green vs. Kirby (Ky.) 295 S.W. 1004.

See also: Jones vs. Rutherford, 10 S.W. 2nd 296, in which the court said:

> If the city is primarily liable on the contract, this vice is not cured by the mode of payment, and it is immaterial whether it is paid out of revenues derived from an enterprise owned and controlled entirely by the city and which it is bound to maintain, or revenues derived from other sources. The city assumes this indebtedness, it is obligated to pay it at all hazards, and the fact that it may in the future derive revenues from a source other than by direct taxation in no wise militates against the fact that it has directly assumed an obligation in excess of the constitutional provision.

As stated above, there are numerous cases holding that such a plan or scheme as the so-called special fund doctrine is a pure fiction and a device to circumvent or escape the provisions of the constitutional debt limitation.

One of the leading cases is Feil vs. Coeur d'Alene, an Idaho case found in 129 Pac. at page 643. There, bonds were issued by the City of Coeur d'Alene for the payment of a water system. The ordinance provided that the city should not be liable for the payment of any of the purchase price in any manner or form. However, the city did agree to maintain water rates sufficient to pay the interest on the bonds and retire the principal from revenues of the system, but it was expressly provided that the city was in no way to become liable and that the bonds and the interest which should accrue thereon were to be retired entirely from the revenues of the water system.

The court in the Feil case quotes from an Illinois case, Joliet vs. Alexander, 62 N.E. 863, as follows:

> It does not make any difference that the certificates (bonds) are payable out of the special fund, if the city is owner of the fund. All its obligations are payable out of some particular fund. The section of the constitution limiting indebtedness provides that, at the time of incurring any indebtedness, the city shall provide for the collection of a direct annual tax sufficient to pay the interest on the debt as it falls due, and to pay and discharge the principal within 20 years from the time of the contract of the debt, and every indebtedness is payable from some particular fund.

The court then goes on in the Feil case as follows:

> After it owns that property, the receipts from water rents would clearly be an income or revenue within the purview and meaning of the constitution; but, in advance of the purchase, it undertakes to appropriate and hypothecate that income for a period of 20 years, so that it may not be an income after the purchase is made. This is mere jugglery of words. This revenue will be no less an income after this transaction is consummated than it would have been had the city bought and paid for the property at the time. If this method can be pursued in purchasing an electric light and power plant, then a similar method might be adopted for the purchase of a telephone system within the municipality, and so, also, a street railway, and there will be no limit, either for the power of purchase and the acquisition, or to the power of the city council to incur indebtedness upon the prospective consumers or patrons, as the case may be. The consumer, not the taxpayer, may well sigh at the mere statement of the possibilities of such a proposition, carried to its natural conclusion, and lose himself in contemplating the cost of water, light, telephone, and transportation, when the consumer alone is paying those public utilities.

Further, in the Feil case, the court quotes from an Iowa case, Ottumwa vs. City Water Supply Company on the same subject and in which the court bitterly criticized a previous Iowa decision and the special fund doctrine as follows:

> Its citations (that is the citations in the case just mentioned) exhibit the unceasing attempts in that state and some others to nullify and evade wholesome constitutional limitations upon the power of municipalities to create indebtedness, and thus place intolerable burdens on the taxpayer; and its reasoning but adopts the ingenious, but obviously intenable, arguments by which such attempts have ever been supported.

The court in the Feil case concluded with a quotation from the Ottumwa case (which was a federal case found in 119 Fed. 315, and 59 L.R.A. 604) as follows:

> This contention of the appellant (that is, the special fund doctrine) is based upon a palpable jugglery of phrases, and cannot be maintained. If it can, the constitutional provision above quoted, which prohibits any municipality from becoming indebted beyond the specified limit in any manner or for any purpose, is delusive, and of no avail to protect taxpayers.

It is to be noted in connection with the Idaho decisions that in addition to the word "indebtedness," the Idaho constitution also adds the word "liability" and the phrase "in any manner or for any purpose." It is submitted that these words should add little or nothing to the inhibition contained in our constitutional provision which provides that no debt may exceed 1 percent of the assessed value of the state, and that if any debt, when taken into consideration with other existing indebtedness does exceed that indebtedness, it is void. The Nevada provision seems to be all conclusive, and any attempt to get around it by any reasoning or argument of doctrines is purely a specious form of reasoning and an attempt to circumvent the wholesome requirements that the state may not obligate itself over a certain amount.

In another Idaho case, Miller vs. Buell, 284 Pac. 843, there was an attempt to acquire a power plant distribution system, and the proponents of the situation urged upon the court that the Feil case was wrong and urged the cases holding somewhat to the special fund doctrine. The court brushed the argument aside saying:

> I am of the opinion that the constitution is as applicable to an obligation, and an indebtedness, or a liability of the city payable solely from such special fund as to an obligation, indebtedness, or liability payable out of a fund made up from municipal taxes.

In a Maine case, Reynolds vs. Waterville, an 1898 case found in 42 Atl. 553, the city was attempting to build a city hall by the issuance of bonds which would be retired by money in a sinking fund which would be created by the payment of rental by the city for the city hall into such fund. The court refused to approve such a plan and held that it was a mere device to buy property on the installment plan, and stated that the plan was:

> . . . to be a mere device to evade the constitutional limitation of indebtedness, and amount to a purchase on the installment plan, rather than a lease, and hence to give rise to a present indebtedness within the meaning of the constitutional limitation.

It is to be noted how nearly the facts of that case approximate the facts of the matter we are discussing in this discourse. In a note to the Buell case found in 71 A.L.R., at page 1323, the author makes this statement:

> The weight of authority holds that such a scheme of financing (that is, the special fund doctrine) creates an indebtedness, where the so-called rentals are sufficient to cover the entire purchase price and to enable the municipality to acquire the property without the payment of any sum other than such rentals.

Without unduly prolonging this discussion, I believe it would be helpful to point to two or three other cases, which show the fallacy of the so-called special fund doctrine. In another Kentucky case, Billings vs. Bankers & Bonds Co., 251 S.W. 653, the Board of Education agreed to convey a building site to a contractor, who agreed to erect thereon a school building according to plans and specifications provided by the school board and to cost a specified sum. It was agreed that the board of education would rent the building at a certain annual rental for a term of years, at the end of which term the contractor would convey the property to the board of education, the board agreeing to pay all taxes on the land and improvements, and to keep the building insured in a sum sufficient to cover the unpaid installments. The Kentucky court held this to be clearly an attempt to create an indebtedness beyond the constitutional limitation by agreeing to pay the cost of the school building in installments in a number of years, and hence to give rise to an indebtedness for the price of the building within the meaning of the constitutional limitation.

To similar effect see Mahoney vs. San Francisco, 201 Cal. 248, in which the court held that a purported lease for a term of years of a tract of land to be used for a public park, was a mere device to avoid the constitutional debt limitation, and was a contract of purchase and sale rather than a lease. To the same effect see an Illinois case, Baltimore and O.S.W.R. Co. vs. The People, 66 N.E. 148; see also a Wisconsin case, Earls vs. Wells found in 68 N.W. 964.

In a West Virginia case, Spilman vs. Parkersburg, 14 S.E. 279, a contract was entered between the city and an electric company whereby the company agreed to install a light plant in accordance with agreed specifications, the city agreeing to provide the site, to pay all taxes and to keep the same in repair and to lease it from the electric company for a term of years and to pay a sum quarterly for the use thereof, the city having the right at the expiration of the term of the lease to buy the plant for $1, which is exactly the facts of our problem. The court held this device to be clearly a contract of purchase in legal effect, and hence, that the contract created an indebtedness within the meaning of the constitutional limitation. The court pointed out that in the contract it was twice designated a contract of purchase.

In the present contract we are here dealing with, we have seen several times the provision that it was an agreement to purchase the building by the device or in the manner provided in the agreement.

In a 1925 California case, 195 Cal. 426, entitled, "In Re San Francisco," there is an interesting factor present as in the lease-purchase agreement we are here concerned with, and which the court held to be important. That is that the so-called lease would not terminate nor the city be relieved of its obligation to make the payments provided for, by reason of the loss or damage

of the building by fire; but that the city in such an event should cause the building to be restored, using for that purpose the proceeds of the insurance thereon. The court held that this provision, together with the other matters established the character of the agreement, and that it was an agreement to purchase and sell and not a lease.

In the George Washington Law Review article, cited above, volume 25, page 390, the author stated:

> It seems apparent that lease financing is actually borrowing by another name. To contend that the method of payment alters the fact of payments strains a ratiocination. Unlike ordinary leases, these leases are in practice, non-terminable, nor do the parties ever intend to terminate them. The amounts paid as "rent" are not for the use of the property as true rent would be, but for equal debt amortization charges on the full cost of the facility financed. Moreover, security analysts would probably treat these charges not as current expenses, which rent would be, but as payment of a long-term debt. Nor are these leases aimed at temporary use, as is the ordinary lease, but as acquisition of title. The only variation between these rents and debt service is the legal web woven around the transaction.

It is submitted that the present agreement comes within the term of these inhibited debts, and is a debt without question within our constitutional debt limitation, and if it remains such, it will prevent the issuance of the University of Nevada's Social Science Building bonds on March 1, 1963.

In this connection, however, the 1963 Controller's report may show an increase in valuation sufficient to warrant the issue of the bonds by the University. The public utility evaluation recently made by the Tax Commission is $13 million greater than in 1961; but as pointed out the increase would have to approximate $150 million.

ATTORNEY GENERAL'S OPINIONS

The need for uniformity of decision and continuity of decision on a given question of law has long been expressed by both the bench and bar of all the states. This uniformity and continuity is essential and necessary in order that the general public may know, and counsel may advise their clients, as to what the law is or appears to be from judicial decision. So also, there should be uniformity of opinion and continuity of opinion on matters affecting public officials or matters directing their activity. It is most important that there be uniformity of opinion when public administrators are advised by the state's legal counsel as to what they can and cannot do and what they must do in order to conform to and abide by the statutes under which they work. It is, therefore, just as important that there be uniformity and continuity of opinion on given matters whenever requests for Attorney General's opinions are made, in order that public administrators and particularly the Legislature may act accordingly or at least according to what the law appears to be and what the law has been.

It can be readily seen from the variety of opinions issued by several members of the Attorney General's staff in this particular case how confusion can exist and how confusion did exist, and how the members of the Legislature acted when improperly advised by such opinions. For example, in the first opinion written on this subject by Mr. Priest, as heretofore mentioned, the law was correctly stated and supported by numerous citations of applicable authorities. On the other hand, the other opinions issued to Mr. Ham and to Mr. Gibson were incorrect statements of the law and completely contrary to the ruling made by Mr. Priest in his opinion, which is listed as No. 200. There should be some method devised by which, on such controversial issues, or on any issue, that there would not be such a variety of opinions issued by a variety of authors; for, in such a situation, no public officer nor the Legislature may be blamed or criticized for acting in a manner that may be contrary to law and in violation of the Constitution, and for which the officer acting may be held criminally and civilly liable.

This should in no way be considered any unfair criticism of the authors of the opinions; however, when one author of an opinion cites a previous opinion which is squarely contrary to the one he is then issuing, certainly a conference should be held among the various deputies who have been writing opinions on the same subject in order to determine a correct statement of the law.

Certainly in any abstract field, it is normal that different people will have different views on the same subject. We see repeatedly the highest courts in the land, including the Supreme Court of the United States, almost equally divided many times 5 to 4, or 6 to 3 on a subject of vital importance. Certainly, there can be no abstract proposition arise on which there will be complete and total unanimity of opinion. By nature, lawyers differ in their economic approach, in their political approach, and in financial concept; hence, the multiplicity of litigation that is found and recorded in the books reporting the various decisions of the courts of our land.

However, there should be some attempt made to bring about a uniform, continuity of advice and opinions in any given field or subject of law so that

the public administrators and legislators may be properly advised as to what the law has been and appears to be. Certainly where our court has taken no stand on a given subject, such as the so-called special fund doctrine hereinabove discussed, it may be difficult to reach some conclusion. In such a case, it is difficult to prophesy or even speculate as to what the Nevada Supreme Court will do when that issue is presented to it for decision. It may well follow the course of our sister state to the north, Idaho, or as in many of the cases in Oregon, California, Illinois, Iowa, Indiana, Kentucky, and Wisconsin, all of which refused to follow the so-called special fund doctrine because they considered it merely a device or a plan to circumvent the positive injunction of the Constitution in the matter of debt limitation. Certainly, where our court has taken no such position, there should be no didactic statements made as if it were a closed matter or a closed question--a question decided without any doubt. There is a great doubt as to what our court would do, and until it does make such a decision, then there can be no certainty as to what their decision will be. We should be guided more by the language of the Constitution rather than the specious contentions and arguments made by those who would circumvent the law, and who would by this so-called special fund doctrine circumvent the positive injunctions of the debt limitation provision in the Nevada Constitution.

FINANCIAL CONSIDERATIONS

It would seem wise before the close of this discourse to give consideration to what might have been by financing construction of the building in some other manner.

Upon request, the Secretary-Manager of the State Planning Board made a computation of what the building would cost on the basis of 36,800 square feet. The building, however, has only a total of 33,400 square feet. A copy of his analysis is attached hereto. It is given under the date of September 18, 1961, and it should be noted that he stated that the square foot cost of the building varies between $22.46 and $25.83 a square foot. He has also attached a theoretical budget, as if the project were still in the planning stage. That budget shows the cost of the building to be $875,764. The topographic and soil surveys, architectural fees, engineering fees and necessary advertising and other miscellaneous charges brings the total to $916,252.

Also, we have computed or made an estimate based upon existing costs or contemporaneous cost of bonds, which shows that if the building had been constructed by the sale of general obligation bonds on a 10 year basis, the cost of the interest on the bonds at existing rates would be $165,000. So, one would take the cost of the building and add $165,000 to get the cost to the state at the end of 10 years, if general obligation bonds had been issued.

If the bonds were to be retired in 20 years instead of 10 years, the total interest on bonds would be $315,000; so, if we add that figure to the total cost of the building, we would get the cost of the building to the state at the end of 20 years.

It must be further considered that if the building had been constructed by the state upon its own land, there would be no obligation to pay any municipal charges or any taxes. Furthermore, the state could have purchased its own insurance or insured the building in any manner the state thought advisable and have escaped the excessive costs of conventional insurance.

The state could have acquired title to the building upon its completion and thus have avoided 20 years of taxes and municipal assessments.

This could have been done by the execution of a note or contract to pay the Brunzell Company the $1,987,488 agreed upon, and secure the payment of the same by a deed of trust. Brunzell and his lender could have agreed upon an assignment of payments as has been done, and if the lender insisted, the deed of trust could have been drafted so as to insure payment to the lender.

Such a plan would have saved an amount in excess of $328,000.

In correspondence with the other states that have used this type of so-called lease-purchase financing, none considered it any longer advisable; and most all of these with whom the matter was discussed consider this type of financing excessively expensive and, therefore, not advisable.

This whole problem and the excessive cost to the state demonstrate conclusively that the state should carefully go into this matter thoroughly before permitting any further such financing of public buildings. In any event, the construction of all buildings, whether privately financed or financed by cash appropriations or by general obligation bonds, control should be handled by our State Planning Board and not by some private agency over which the state exercises no control whatever.

COMPARISON OF COSTS FOR THE THREE EMPLOYMENT SECURITY BUILDINGS FINANCED THROUGH USE OF LEASE-PURCHASE PLANS

As we have stated in the foregoing report, there have been three Employment Security buildings constructed with funds obtained by the use of the lease-purchase method of financing. The first, was begun in Reno in 1957; a second one, in Las Vegas, was commenced in 1958; and the third and last, here in Carson City, which was begun last year and which has just been occupied during the week of May 15th.

It will be readily seen from a cursory examination of the cost to the state that the lease-purchase method of financing public buildings has no attractive or economic features that should induce its further use.

In accordance with the legislative instructions authorizing this study, we have analyzed the cost factors in the case of each of the three buildings, and immediately hereafter set forth the financial facts connected with each building.

Reno Building

Building: Two stories, 10,250 square feet, and 10 car parking lot.

Term: 20 years from July 1, 1957 to June 30, 1977.

Rental: $612,000 for entire term payable $2,550 per month; $21,300 paid in advance for first three and last six months of the term.

Lessor: Pays annual taxes up to $2,002.25; maintains heating and air conditioning (original) and plumbing, electrical installations, roof, floors, walls, paving and sidewalks; lessor also repaints interior once every three years, pays for all insurance (title insurance included) and pays for all costs of escrow and recording fees; he must also plant lawn and shrubs. Lessor must rebuild after any loss with proceeds of insurance or new financing with an abatement of rent for partial or non-occupancy.

Lessee: Given option to purchase building for $1 at beginning of last month of the term if not in default; lessor guarantees title free and clear of all encumbrances. Lessee given right to accelerate execution of option by accelerating rental payments and terminate the lease sooner than 20 years and acquire title to the property and get the benefits lessor would gain by reason of early payment.

Las Vegas Building

Building: To contain 13,366 square feet as minimum with right to increase total to 13,966 square feet.

Term: 20 years from occupancy.

Rental: "Not less than $962,400 payable at the rate of $4,010 per month"; this was finally increased to $4,133.70 per month for excess footage over agreed minimum at the monthly rate of 30 cents per square foot over the minimum. The total rent for the entire term was $992,088.

Lessor: Pays taxes up to $3,000 per year, and rent to be adjusted if taxes are increased or decreased. Other obligations are exactly the same as in the Reno agreement.

Option Provisions: Lessee may purchase the building any time after the 121st month of the term by paying the rent for the entire term if lessee is not in default.

Lessor agrees that the property shall be free and clear of all encumbrances when lessee exercises the option. This is a most important provision, and is not in the Carson City building agreement; in fact that agreement provides that the lessee's right to buy the building is subordinate and subject to the deed of trust. In the purported amendments to the lease-purchase agreement, paragraph 5(b) provides:

> The rights of the lessee under this paragraph (re: the option) shall at all times be subject and subordinate to the lien of any deed of trust made by the lessor to secure the repayment of money borrowed by lessor for the construction of the office building.

Lessor to pay all escrow charges, recording fees and title insurance premium for a $350,000 policy.

Lessee to have the benefit of any saving to lessor because of early exercise of option.

Carson City Building

Building: 33,000 square feet gross.

Term: 20 years, which term was to begin 300 days after notice to lessor by lessee to proceed. The first month of the term, however, is May, 1962.

Rental: $1,987,488 payable at $8,281.20 per month.

Building lot was purchased from state for $25,737, but the purchase price was refunded to Brunzell; I can find no authority for this refund. The authority to sell the site is found in Chapter 190, Stats. 1960, and that was "for a consideration not less than the total cost to the state," and the money was required

to be deposited in the general fund. This was done, then the refund was made from Employment Security Department funds.

All maintenance costs, taxes, municipal assessments, landscaping and insurance were to be borne by the lessee. By some purported amendments, Brunzell attempted to shift the duty to rebuild in case of loss to the lessee.

In a financial comparison of the three buildings, these factors add materially to the cost to the state over the term of the lease. According to accepted figures of real estate consultants, the maintenance costs, which in the two other buildings are borne by the lessor, will aggregate $690,000 during the term of the lease. Costs for the first few years are low, but as time passes, wear and tear increases the maintenance costs.

COST COMPARISONS

	Reno	Las Vegas	Carson City
Sq. Ft.:	10,250	13,950	33,000
Rent:	$612,000	$962,400	$1,987,488
Taxes:	Only in excess of $2,002.25 per year	Only in excess of $3,000 per year	$328,000
Insurance:	None	None	$78,000
Land Cost:	None	None	$25,737
Maintenance:	Janitorial Only $4,612.50 per year or a total of $92,250 for the term	Janitorial Only $6,217.50 per year or a total of $124,350 for the term	Lessee pays all, for a total of $1,092,960 for the term

It should be noted that we have included "cleaning" or janitorial service as a cost factor in determining the total ultimate cost of each building to the state.

This item could very well be eliminated; however, since the lessee in all three cases has to furnish such services; however, it was felt they were better included than omitted.

The cleaning cost factor over a 10 year term varies somewhat in different localities. For example, in Reno, experts now accept a figure of $.478 per square foot per year. The State of California at present used the figure of $.450 per square foot per annum. The Builders' Exchange has recently adopted a figure of $.5 as more realistic for a Western building of less than 50,000 square feet and under ten stores in height. In this connection, all our maintenance cost figures are taken from the same class of buildings.

To determine the ultimate cost to the state of each building, and for a proper comparison, we have computed the square foot cost to the state of each building for the entire term of 20 years. This method appears to be the only fair means of determining a comparative cost of the three buildings.

1. The total cost of the Reno building was $704,250 and the total usable square feet is 10,250. The per square foot cost to the state for the 20 year term would therefore be $68.067.

2. The Las Vegas building total cost was $1,086.750, and there are 13,950 usable square feet in the building. Thus, it is shown by dividing the cost by the square feet that the ultimate total cost to the state for the Las Vegas building will be $77.90 per square foot.

Lastly, the total cost of the Carson City building will be $3,291,385, and the usable square feet therein will approximate 25,000. By dividing the former with the latter, it is seen that the ultimate square foot cost to the state for the Carson City building is $128.58.

It should be noted that the figure, $1,092,960 for the maintenance cost for the lease term of the new Carson City building includes janitorial and cleaning service in addition to all maintenance of the building, the electronic equipment, heating equipment, elevators and periodic painting.

Also, that this figure is based upon maintenance experience costs of Western buildings of less than 50,000 square feet and under ten stores in height.

The type and quality of construction may, over the years, mean less maintenance costs than indicated by the experience table.

CONCLUSION

It is most important to note that in the Carson City building agreement there is no provision requiring the owner-lessor to remove the incumbrance imposed by the deed of trust before or at the time the state exercises its option to purchase. In fact there is an express provision that the state's right to purchase is subordinate to the lien of the deed of trust.

In this connection, there is another amazing financial factor which may require legal action to resolve and which has just come to light.

For weeks we have been endeavoring, without success, to procure the exact cost of the building. We do have some information and data all of which indicate that the building cost less than $900,000. We recently received a letter from General Electric Pension Trust in which it was stated that they had loaned to Brunzell the full sum of $1,200,000. In this connection, the Employment Security Building and the ground upon which it stands, is security for the repayment of the entire sum of $1,200,000 by Brunzell to General Electric Pension Trust, although that sum is approximately $300,000 more than the cost of the building. This appears to be improper, for, why should the state agree that the building should be security for a purely personal obligation of Brunzell's in the approximate amount of $300,000?

However, this factor may not be a hazard, because the Employment Security Department, pursuant to an assignment by Brunzell is paying the monthly payments directly to the General Electric Pension Trust. A computation of the interest and principal payments which will be credited to Brunzell's indebtedness from the monthly payments made by the state to General Electric Trust reveals that such payments will pay all principal due and the interest which shall have accrued thereon, in 19 years and 11 months. Thus, there appears little or no possibility of the state being required to pay any more than the aggregate of rentals agreed upon in the lease-purchase agreement.

However, it must be noted, that the state should only have been liable for the cost of the building plus a reasonable charge for obtaining the construction loan. Certainly that charge should not have approximated one-third of the amount of the loan.

ACCELERATED OPTION FACTORS

We have discussed this phase of the study previously in the report. However, we think it helpful to include here a reiteration of certain financial factors connected therewith.

If we assume as a fact that the state does have an accelerated right to exercise the option to purchase, although this is very doubtful, the following financial facts face us: at the end of 10 years and one month, when the state first has any right to buy the building, there will remain due from Brunzell to General Electric Pension Trust the principal sum of $753,378.98. If the monthly payments are continued to be made by the state to General Electric Pension Trust on account of Brunzell's obligation, each payment must first be credited to interest. Such interest for the balance of the term will aggregate $223,684.62, which sum can be avoided if the state were able to pay the entire sum at the end of 10 years and one month of the term.

In addition, the sum of $164,000 in taxes would also be saved for the period of the last nine years and 11 months of the term.

The aggregate savings of interest and taxes would amount to $387,684.62 if the state could exercise its option at the end of 10 years and one month of the term. It would certainly seem wise to conclude the purchase as soon as possible.

These same factors do not appear in the Reno and Las Vegas buildings, as the contracts for their construction and acquisition make the owner-lessor liable for taxes (at a fixed figure) and for maintenance.

RECOMMENDATIONS

1. That financial arrangements be made in order that the option to buy the Employment Security Building may be exercised at the earliest possible date.

2. That the authority to finance the acquisition of Employment Security Buildings by the lease-purchase method found in Chapter 190, Statutes of 1960, page 348, be repealed in its entirety.

(SB 38)

3. That Chapter 11, of the 1961 Nevada Statutes/be repealed in its entirety.

4. That legislation be enacted requiring that construction of any building built by or for the state shall, from the planning stage to final completion, be under the management and control of the State Planning Board.

5. That legal action be instituted seeking a decision by the Supreme Court of Nevada as to whether or not the obligations, if any there be, imposed by the lease-purchase agreements constitute a state debt within the constitutional debt limitation provisions of Section 3 of Article IX of the Nevada Constitution.

6. That Chapter 358, Statutes of 1961, be amended to authorize the issuance of the bonds for University of Nevada History Building at once, rather than on March 1, in order to speed up the determination of the debt limitation question by the Supreme Court.

Exhibit A

Assembly Bill No. 226 -- Messrs. Waters, Pozzi, Knisley and Bastian

Chapter 191, Stats. 1960

AN ACT to amend chapter 612 of NRS, relating to unemployment compensation, by adding a new section authorizing the executive director of the employment security department to enter into lease-purchase agreements for the acquisition of office buildings and the land on which such buildings are located; providing for payment of rentals and acquisition of title to such premises; ratifying existing agreements; giving assurances to the Bureau of Employment Security of the United States Department of Labor; and providing other matters properly relating thereto.

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

SECTION 1. Chapter 612 of NRS is hereby amended by adding thereto a new section which shall read as follows:

1. The executive director, subject to the provisions of this section, may enter into lease-purchase agreements with any individuals, corporations, associations or partnerships for the purchase of office buildings and the land upon which such buildings are located. Rentals to the lessor shall be paid by the employment security department, or any agency which may hereafter absorb the employment security program from grants received by the employment security department or state agency for such purposes, to the extent that funds are made available by the Congress of the United States.

2. The executive director may take title in the name of the State of Nevada to premises which are the subject of such a lease-purchase agreement upon fulfillment of the terms of such agreement.

3. All such lease-purchase agreements heretofore entered into by the executive director are hereby ratified, confirmed and adopted.

4. The State of Nevada hereby assures the Bureau of Employment Security of the United States Department of Labor that upon the amortization of the costs of any building and premises heretofore or hereafter purchased or agreed to be purchased for the use of the employment security department pursuant to such lease-purchase agreement, the employment security department may continue to occupy such building without the payment of rent, and shall be assessed only the reasonable cost of operation and maintenance of such building.

5. If it becomes necessary for the employment security department to be moved from any such building after it has been purchased through the amortization of the cost thereof, the State of Nevada hereby gives assurance that other substantially similar space shall be furnished to the employment security department without further payments by such department or the Bureau of Employment Security of the United States Department of Labor, other than payment of the reasonable cost of operation and maintenance thereof.

6. If it becomes necessary for the employment security department to be moved from any such building before the cost thereof has been completely amortized, the State of Nevada hereby gives assurance that credit will be allowed for the amount of funds granted to the employment security department by the Bureau of Employment Security of the United States Department of Labor for the partial amortization of such building to the end that funds granted by such bureau for the use of substantially similar space will not exceed the amount which the employment security department would have been obligated to pay if it had remained in such premises.

SEC. 2. This act shall become effective upon passage and approval.

Exhibit B

Assembly Bill No. 207 -- Messrs. Waters, Pozzi, Knisley and Bastian

Chapter 190, Stats. 1960

AN ACT authorizing the conveyance of certain land of the State of Nevada for the construction of a building thereon for the use of the employment security department under a lease-purchase agreement with the purchaser; and providing other matters properly relating thereto.

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

SECTION 1. The state planning board is hereby authorized to convey to a nominee of the employment security department, for a consideration not less than the total cost to the state for the acquisition of such property, all of block 20, Sears, Thompson and Sears Division, Carson City, Nevada. All moneys received for such property shall be deposited in the general fund in the state treasury.

SEC. 2. Such property shall be conveyed only in conjunction with a lease-purchase agreement entered into pursuant to law whereby such nominee agrees to cause to be constructed thereon a building for the use of the employment security department, and to lease such premises to the employment security department pursuant to the terms of such agreement.

SEC. 3. Any conveyance executed under the authority granted by this act shall be subject to the approval of the attorney general.

SEC. 4. This act shall become effective upon passage and approval and shall expire by limitation 1 year from its effective date.

Exhibit C

Senate Bill No. 38 -- Committee on Judiciary

Chapter 11, Stats. 1961

AN ACT to amend NRS section 612.227, relating to lease-purchase agreements of the employment security department, by deleting a provision relating to payment of rentals by such department under such agreements from federal grants.

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

SECTION 1. NRS 612.227 is hereby amended to read as follows:

612.227 1. The executive director, subject to the provisions of this section, may enter into lease-purchase agreements with any individuals, corporations, associations or partnerships for the purchase of office buildings and the land upon which such buildings are located. Rentals to the lessor shall be paid by the employment security department, or any agency which may hereafter absorb the employment security program. (, from grants received by the employment security department or state agency for such purposes, to the extent that funds are made available by the Congress of the United States.)

2. The executive director may take title in the name of the State of Nevada to premises which are the subject of such a lease-purchase agreement upon fulfillment of the terms of such agreement.

3. All such lease-purchase agreements heretofore entered into by the executive director are hereby ratified, confirmed and adopted.

4. The State of Nevada hereby assures the Bureau of Employment Security of the United States Department of Labor that upon the amortization of the costs of any building and premises heretofore or hereafter purchased or agreed to be purchased for the use of the employment security department pursuant to such lease-purchase agreement, the employment security department may continue to occupy such building without the payment of rent, and shall be assessed only the reasonable cost of operation and maintenance of such building.

5. If it becomes necessary for the employment security department to be moved from any such building after it has been purchased through the amortization of the cost thereof, the State of Nevada hereby gives assurance that other substantially similar space shall be furnished to the employment security department without further payments by such department or the Bureau of Employment Security of the United States Department of Labor, other than payment of the reasonable cost of operation and maintenance therof.

6. If it becomes necessary for the employment security department to be moved from any such building before the cost thereof has been completely amortized, the State of Nevada hereby gives assurance that credit will be allowed for the amount of funds granted to the employment security department by the Bureau of Employment Security of the United States Department of Labor for the partial amortization of such building to the end that funds granted by such bureau for the use of substantially similar space will not exceed the amount which the employment security department would have been obligated to pay if it had remained in such premises.

SEC. 2. This act shall become effective upon passage and approval.

Exhibit D

LEASE OF EMPLOYMENT SECURITY BUILDING AT CARSON CITY, NEVADA, BETWEEN BRUNZELL CONSTRUCTION CO., INC. OF NEVADA, LESSOR, AND EMPLOYMENT SECURITY DEPARTMENT, LESSEE.

This contract made and entered into this 16th day of September 1960, between BRUNZELL CONSTRUCTION CO., INC. OF NEVADA, a Nevada corporation, hereinafter referred to as LESSOR, and the STATE OF NEVADA, by and through the EMPLOYMENT SECURITY DEPARTMENT thereof, hereinafter referred to as LESSEE,

W I T N E S S E T H:

That the LESSOR hereby agrees to purchase from the STATE OF NEVADA, all of Block 20 in Sears, Thompson and Sears Division of Carson City, Ormsby County, Nevada, to construct thereon an office building for the use of the Employment Security Department for the State of Nevada in full compliance with all of the terms and conditions herein set forth or made a part hereof, and in strict accordance with the plans and specifications dated May 4, 1960, entitled "Building for the Department of Employment Security, State of Nevada", Addendum No. 1 dated May 31, 1960, Addendum No. 2 dated June 15, 1960, which plans, specifications and Addenda were prepared by the architectural firm of Ferris & Erskine, and to lease said building and property to the LESSEE for the time hereinafter set forth, and at the end of said term to sell said building together with the aforesaid Block 20, as hereinafter set forth, upon the terms and conditions set forth herein, to wit:

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1. DEFINITIONS AND DESCRIPTION OF INSTRUMENTS: The documents which make up this contract are as follows:

a. This Lease-Purchase Agreement;

b. Specifications prepared by the architectural firm of Ferris & Erskine, including extruded Kawneer members around perimeter window frames.

c. Plans prepared by the architectural firm of Ferris & Erskine, including extruded Kawneer members around perimeter window frames.

d. Addenda thereto prepared by the architectural firm of Ferris & Erskine,

e. General Conditions - these being the same as A.I.A. Document No. A-201, 1958 Edition Revised Printing 1959,

f. Supplementary General Conditions - prepared by the architectural firm of Ferris & Erskine.

All documents making up this contract are dated May 4, 1960, except Addendum No. 1, Addendum No. 2, the Lease-Purchase Proposal and this Lease-Purchase Agreement.

All contents, specifications, conditions and covenants, and all documents listed herein, whether or not set forth herein, are made a part of this contract by reference the same as if fully set forth herein.

The definitions controlling all the words and phrases in this contract are the definitions contained in Article I of the General Conditions, except where definitions are specifically set forth in other documents herein in which cases the specific definition set forth shall govern.

2. DEMISED PREMISES. The demised premises shall consist of Block 20 of Sears, Thompson and Sears Division of the City of Carson City, County of Ormsby, State of

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Nevada, together with the improvements to be constructed thereon. The improvements are to consist of an office building built by or on behalf of the LESSOR from the plans, specifications and addenda thereto and any and all modifications thereof, all of which are incorporated in this agreement by paragraph 1 herein, and are entitled "Building for the Department of Employment Security, State of Nevada". The other improvements consist of such landscaping and appurtenances as are provided for in any of the documents making up this contract.

3. TERM OF LEASE AND RENTAL. The term of this lease shall be for a period of twenty (20) years, and shall commence three hundred (300) calendar days after the LESSOR shall receive from LESSEE notice to proceed with the construction of the improvements which must be erected and placed upon the demised premises, or at such time before or after said three hundred (300) calendar days when LESSOR has completed all improvements required to be made by him hereunder and has the premises ready for complete occupancy by LESSEE. This lease shall expire on the day which is the twentieth (20th) anniversary date from the day of its commencement, unless extended beyond that date because of application of paragraph 11 of this Lease-Purchase Agreement.

The total rental for the term of this lease is $1,987,488.00 payable at the rate of $8,281.30 per month. The first monthly rental payment is due on the thirtieth (30th) day following the commencement of the term hereof, and is payable on the same day of each and every consecutive month thereafter throughout the term of this lease. Approximately fifteen (15) days prior to the time each payment falls due, LESSOR shall prepare a statement, or

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claim in triplicate, for the LESSEE, and mail the same to the LESSEE in a stamped envelope, addressed as follows:

Executive Director
State of Nevada
Employment Security Department
Carson City, Nevada

4. PURCHASE OF REAL PROPERTY. Immediately upon the execution of this contract the LESSEE agrees to nominate the LESSOR as purchaser for the aforesaid Block 20 of Sears, Thompson and Sears Division of Carson City, Ormsby County, Nevada, in accordance with the terms of Chapter 190 of the 1960 Statutes of Nevada, the same having been Assembly Bill No. 207 of the 1960 Session of the Nevada State Legislature.

The LESSOR agrees that he will forthwith after being nominated proceed with the purchase of said real property for the purpose of expediting and effectuating this Lease Purchase Agreement. Within 30 days after LESSOR purchases and acquires title to said real property LESSEE shall reimburse LESSOR the amount of the purchase price less $1.00.

5. NOTICE TO PROCEED WITH CONSTRUCTION. The LESSEE upon nominating the LESSOR as purchaser of the herein described real property shall allow the LESSOR such time as the Executive Director of the State of Nevada Employment Security Department deems reasonably necessary for the consummation of the purchase of said property.

At the expiration of the time allowed the LESSOR to effectuate the purchase of said property, the LESSEE shall notify the LESSOR in writing to proceed with the construction of the improvements required to be placed and erected upon the demised premises.

6. THE CONSTRUCTION CONTRACT. LESSOR covenants and agrees that upon the execution of this contract he will

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proceed with the construction of the improvements required by this contract as soon as possible and without any unnecessary delay. Said construction may be performed by the LESSOR himself, or by some licensed and qualified contractor for whose performance LESSOR shall be completely responsible.

In addition to all other covenants, conditions and terms of this contract, the LESSOR is strictly bound by the following requirements:

a. The general form of any construction contract made pursuant to this agreement shall be the current A.I.A. Standard Form of Agreement.

b. LESSOR must complete the construction of all buildings and improvements required to be made and erected by this contract and have them ready for complete occupancy by the LESSEE within three hundred (300) calendar days after LESSOR receives written notice from the Executive Director of the State of Nevada Employment Security Department to proceed with the construction. All Saturdays, Sundays, and Holidays are included in said three hundred (300) days, but all extensions of time granted to construction contractor pursuant to the A.I.A. Standard Form of Agreement shall be excluded from said three hundred (300) days.

It is mutually agreed that a fair and reasonable compensation in damages to the LESSEE by the LESSOR for failure of the LESSOR to keep this covenant is the sum of TWO HUNDRED ($200.00) DOLLARS per day for each and every day of such failure, including

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Saturdays, Sundays and Holidays. LESSOR specifically agrees to pay the LESSEE the agreed damages for any default pursuant to this covenant, or LESSOR agrees in the alternative that LESSEE may credit all damages due hereunder against rent owed to the LESSOR.

c. It is specifically understood that the architect represents both the LESSOR and the LESSEE in dealing with the contractor, and the architect represents the LESSEE in his dealings with the LESSOR. This covenant shall not, however, be construed to limit in any way the responsibility of the LESSOR to repay to the LESSEE all fees incurred by the LESSEE for architectural services in connection with the construction of the improvements upon the demised premises.

Architectural fees have been paid by the LESSEE to the firm of Ferris and Erskine of Reno, Nevada, pursuant to a written agreement entered into between LESSEE and said firm whereby it was agreed that said firm would receive a fee of six (6%) percent of the construction cost of all improvements erected upon said demised premises.

7. MAINTENANCE OF PREMISES. LESSEE, at its sole cost and expense, agrees at all times during the term of this lease to perform all necessary maintenance and repair to and on the demised premises.

8. UTILITIES. All expenses and bills for fuel, electric power, water, and any other usual utility services will be paid by the LESSEE.

9. INSURANCE. LESSOR agrees to keep the improvements on the demised premises insured at all times during the term

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of this lease. Such insurance must be in the full amount of the replacement value of the improvements, and shall insure the LESSOR and the LESSEE against the hazards of fire, with extended coverage endorsement including (but not necessarily limited to) the hazards of flood, windstorm and tornado. A certified copy of the policy or policies of insurance complying with the provisions of this paragraph, evidencing current compliance herewith must be kept on file with the LESSEE by the LESSOR. The LESSOR agrees that such policy or policies must be approved both as to the insurer and the form, by the LESSEE prior to filing, and a failure to secure such approval shall constitute non-compliance with this paragraph. The appraised value of the improvements upon the demised premises, if in dispute between the parties, shall be fixed at the request of the LESSEE, by the appraisal division of the Nevada Tax Commission, and when so fixed, shall be binding upon the parties hereto for a period of one (1) year thereafter.

Within 30 days after receipt of proof of payment by LESSOR of any such insurance premiums LESSEE shall reimburse LESSOR in full for the amount of such insurance premiums so paid.

LESSEE is responsible for any insurance it desires on its own files, furniture and furnishings.

It is understood by and between LESSOR and LESSEE that LESSOR will obtain a loan from a lending institution to provide funds for the construction of the facility herein described and will secure the payment of said loan by a first deed of trust upon the demised premises of which deed of trust the lending institution will be the holder

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and beneficiary (hereinafter called "holder").

LESSEE hereby consents to the execution and delivery of such deed of trust and hereby agrees that such policy or policies of insurance referred to in this paragraph 9 of this agreement shall provide a standard mortgagee endorsement in favor of such holder and shall be deposited with the holder upon the condition that such holder agrees, (a) provided said loan is in good standing, to make the proceeds of such insurance available to the LESSOR for the performance by LESSOR of LESSOR'S obligations as set forth in Paragraph 11 of this agreement, (b) to notify LESSEE of any default by LESSOR or claimed default at least thirty (30) days prior to the recordation of any notice of default and (c) that, in the event of such a default or a claim of such default LESSEE may at its election, but shall be under no obligation so to do, cure such default. In the event LESSEE so elects, LESSEE may expend any sums which may be reasonably necessary for such purposes for the account of LESSOR and deduct the sums so expended from payments due or to become due to LESSOR under this agreement.

10. TAXES. LESSOR covenants and agrees that he will pay all taxes levied against the leased premises during the term of this lease, including municipal charges and assessments. Within 30 days after receipt of proof of payment by LESSOR of any such taxes, including municipal charges and assessments.

LESSEE shall reimburse LESSOR in full for the amount of such taxes, charges and assessments so paid.

11. DESTRUCTION OF PREMISES. In the event of the full or partial destruction of the improvements upon the

demised premises at any time during the term of this lease, LESSOR agrees that he will repair or replace such damaged or destroyed improvements and place them in as good condition as they were prior to any such damage or destruction, and that he will do so as soon as possible and without any unnecessary delay.

It is further agreed that the proceeds from any insurance policy or policies because of said damage or destruction to the premises shall be held by the holder of the first deed of trust in an Escrow account for the purpose of defraying the costs of said building and repairing.

During any period of time that all or any part of the premises are not usable by the LESSEE because of damage or destruction thereto, rent payable by the LESSEE to the LESSOR shall be reduced pro rata on the basis of proportion of floor space usable and that which is not usable. As soon as all of the premises are rebuilt or repaired and usable full monthly rental payments by the LESSEE to the LESSOR shall be restored.

In the event LESSOR does repair and rebuild any damaged or destroyed premises as soon as possible and without any unnecessary delay, the term of this lease shall be extended such additional time as is necessary to constitute the full twenty (20) years of use as provided herein, and LESSEE shall be liable for the rent for any such extended period of time.

If, in the opinion of the Executive Director of the State of Nevada Employment Security Department, or the equivalent officer of a successor agency, the damaged or destroyed premises were not repaired or rebuilt as soon as

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possible and without unnecessary delay, then the term of this lease shall be extended for a period of time equal to one-half (½) of the period of time that the premises, or any portion thereof, were unusable because of such damage or destruction.

12. NON-CANCELLATION OF AGREEMENT. The parties hereto specifically agree that during the term of this lease it shall not be subject to cancellation or modification in any respect except by agreement in writing properly executed by both the LESSOR and the LESSEE.

13. ASSIGNMENT OF THIS AGREEMENT. This contract may not be assigned by the LESSEE without the written consent of the LESSOR. However, LESSEE may at its option, allow partial occupation of the premises which are subject matter of this lease, by other agencies of Government of the State of Nevada or the United States of America.

During the term of this agreement LESSOR may not sell, assign or transfer his interest, or any part thereof, in or to this contract, or in or to the real property which is subject matter of this contract, without the written consent of the LESSEE first had and obtained. However, should the LESSOR request such consent, LESSEE agrees to give such consent if the assignee proposed by the LESSOR is, in the sole judgment of the Executive Director of the State of Nevada Employment Security Department, or the equivalent officer of any successor agency, believed to be financially, and in all other respects, of equal responsibility to this LESSOR.

This paragraph shall not, however, be construed to limit the right of the LESSOR or any assignee of LESSOR

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accepted by LESSEE, to pledge or otherwise hypothecate any monies due because of rent, or otherwise, from the LESSEE to the LESSOR; LESSEE does hereby bind itself to recognize and honor any such pledge or hypothecation to the extent made.

14. NON-PAYMENT OF RENT. In the event LESSEE shall fail to pay the rental installments required hereby, at the time and in the manner required and within a grace period limited to thirty (30) days, the remedy of the LESSOR shall be by legal action against the LESSEE for such rent. LESSEE agrees that rent installments not paid within the grace period shall bear interest at the legal rate fixed by NEVADA law. In no event shall non-payment of rent grant a legal right of recision of this contract to the LESSOR.

15. ASSIGNMENT FOR BENEFIT OF CREDITORS, INSOLVENCY AND NON-PERFORMANCE BY LESSOR. In the event that the LESSOR, its successors or assigns, shall be declared a bankrupt, or in the event of any other proceeding against the LESSOR under Title 11 of the United States Code, or in the event LESSOR makes any assignment for the benefit of creditors, or if the LESSOR shall have or suffer a receiver or trustee to be appointed for his property, neither this agreement nor possession of the property which is the subject matter of this contract shall become an asset of any such assignment or proceeding. For the purpose of effectuating this paragraph in the event of any such bankruptcy, assignment or proceeding the LESSOR does hereby appoint such person as the Executive Director of the State of Nevada Employment Security Department, or the equivalent

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officer of any successor agency, shall designate as LESSOR'S agent and attorney in fact to facilitate the carrying out of all purposes of this contract. Such person shall receive the rent and perform all of the obligations hereunder of the LESSOR, dealing with the LESSEE in the place and stead of the LESSOR as fully as could the LESSOR in person. And the LESSOR does hereby ratify any and all actions taken hereunder by such person. Such person shall account to the LESSOR for all rents received, and at convenient intervals shall pay over to the LESSOR, or for his account, such rents, and shall be entitled to a reasonable fee for all services performed by him which fees shall be chargeable against the rents. In the event of the non-performance hereof, or any partial non-performance of any of the provisions hereof by the LESSOR, the LESSEE is hereby authorized by the LESSOR to cause complete performance, and may charge the cost thereof to the account of LESSOR and deduct such charge from rents due to the LESSOR.

16. OPTION OF LESSEE TO PURCHASE. Upon payment by the LESSEE of all the rent pursuant to this contract, and upon the reimbursement by LESSEE of the sums to be reimbursed pursuant to this contract, LESSEE shall have the right to purchase the demised premises from the LESSOR for One ($1.00), provided further, however, that as a condition precedent to keeping LESSEE'S right to purchase the demised premises subordinate and subject to the said deed of trust, the holder of such deed of trust shall give written notice to LESSEE of a default in the mortgage payments to be paid by LESSOR to such holder which default has continued without payment

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for ninety (90) days or more; and, further, the holder of such deed of trust shall give written notice to the LESSEE of at least thirty (30) days stating an intention to record a notice of default required to be recorded by statute under the terms of the deed of trust. In the event of such a default or a claim of such default LESSEE may at its election, but shall be under no obligation so to do, cure such default or claimed default. In the event LESSEE so elects, LESSEE may expend any sums which may be reasonably necessary for such purposes for the account of LESSOR and deduct sums so expended from payments due or to become due to LESSOR under this Agreement.

To secure this option to LESSEE, LESSOR has simultaneously made and executed a Grant, Bargain and Sale Deed to LESSEE and placed the same in escrow with the Washoe Title Division of the Pioneer Title Insurance Company of Nevada with instructions that said Deed shall be delivered to LESSEE upon showing that all payments of rent required to be paid hereunder have been paid and by paying the additional sum of One ($1.00) Dollar.

LESSOR also covenants and agrees that he will, not later than the beginning of the term of this lease, deliver to LESSEE a policy of title insurance with some reputable title insurance company in this area, which policy shall show good and marketable title in the LESSOR and insurance of said title in a sum equivalent to the appraised value of the property and improvements which are subject matter of this lease.

LESSOR further covenants and agrees that he will provide the LESSEE with a title insurance contract with a

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reputable title insurance company in this area at such time as LESSEE decides to exercise the option to purchase provided for herein and that said title insurance contract shall insure the title in the LESSEE in a sum equivalent to the full appraised value of the improvements and the property which is subject matter of the option to purchase.

The title insurance policy shall be subject to exceptions only for accruing taxes, recorded rights of way, easements for utilities, and any other exceptions visible from a physical inspection of the premises or by the provisions of this contract. The cost of all title insurance shall be borne by the LESSOR.

Taxes and insurance shall be pro rated between the LESSOR and the LESSEE at the time of the delivery of the Grant, Bargain and Sale Deed to the LESSEE.

17. Time is of the essence of this contract and of all its terms and conditions; strict interpretation of time requirements is intended by both LESSOR and LESSEE.

IN WITNESS WHEREOF the parties hereto set their hands the 16th day of September, 1960, the LESSEE, State of Nevada, acting through the Executive Director of its Department of Employment Security, as thereunto duly authorized by law.

LESSEE: THE STATE OF NEVADA through the NEVADA DEPARTMENT OF EMPLOYMENT SECURITY	LESSOR: BRUNZELL CONSTRUCTION CO., INC. OF NEVADA
/s/ Richard Ham Richard Ham Executive Director	By President

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Exhibit E

AMENDMENT OF LEASE DATED SEPTEMBER 16, 1960 OF EMPLOYMENT SECURITY BUILDING AT CARSON CITY, NEVADA, BETWEEN BRUNZELL CONSTRUCTION CO., INC. OF NEVADA, LESSOR, AND STATE OF NEVADA BY AND THROUGH THE EMPLOYMENT SECURITY DEPARTMENT AS LESSEE

WHEREAS, Lessor and Lessee entered into a contract of lease on September 16, 1960 and mutually desire to make certain amendments as hereinafter set forth,

NOW, THEREFORE, it is hereby mutually agreed, understood and stipulated as follows:

1. Except as hereinafter amended, the contract of lease dated September 16, 1960 between Brunzell Construction Co., Inc. of Nevada, a Nevada corporation, and the State of Nevada by and through the Employment Security Department shall remain in full force and effect.

2. That part of Paragraph 9, on page 8, under clause (a) shall be rewritten so as to provide that the insurance shall be available to the lessee under its obligation as set forth in paragraph 11 as amended, it being the understanding of the parties that paragraph 11, as amended, shall place the duty of repair and reinstatement after full or partial loss from fire or other catastrophe upon the lessee in the place and stead of the lessor.

3. Paragraph 11 shall be deleted and in lieu thereof paragraph 11 shall read as follows:

"11. DESTRUCTION OF PREMISES. In the event of the full or partial destruction of the improvements

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upon the demised premises at any time during the term of this lease, LESSEE agrees that it will repair or replace such damaged or destroyed improvements and place them in as good condition as they were prior to any such damage or destruction, and that it will do so as soon as possible and without any unnecessary delay.

"It is further agreed that the proceeds from any insurance policy or policies because of said damage or destruction to the premises shall be held by the holder of the first deed of trust in an Escrow account for the purpose of defraying the costs of said building and repairing.

"During any period of repair or rebuilding caused from any catastrophe the rent herein shall in no event abate but shall continue to be due and payable in the same manner and form, without delay or deduction."

4. Paragraph 14 shall be amended by deleting from said paragraph, on page 11, the last sentence thereof, which sentence shall be of no force and effect.

5. Paragraph 16, on page 12, shall be amended by adding thereto the following provisions:

"(a) The option of the lessee to purchase shall not be exercised in any event until the lapse of ten (10) years and thirty (30) days from the date of occupancy of the completed building.

(Original Page 2)

"(b) The rights of the lessee under this paragraph shall at all times be subject and subordinate to the lien of any deed of trust made by the lessor to secure the repayment of money borrowed by the lessor for the construction of the Office Building."

6. There shall be added to said lease the following additional paragraph, to be known as paragraph 18.

"18. The lessee promises and agrees to pay the rental herein provided in the amount and at the time and in the manner set forth herein during the full term of twenty (20) years, without deduction or delay, and subject to all of the rights and conditions as set forth in favor of the lessor and the owner and holder of the first deed of trust or mortgagee. Lessee promises and agrees to pay the rentals from funds of the Employment Security Department, without limitation, including funds made available by the United States but not limited to said funds."

7. There shall be added to said lease the following additional paragraph, to be known as paragraph 19.

"19. The lessor and lessee agree that in the event of the default of the lessee in making the payment of rent in the amount, manner and time as required herein, such default, extending for a period of ninety (90) days after the grace period of the first month of default, shall entitle the lessor to have such action at law or in equity as provided by the law of Nevada to repossess the

(Original Page 3)

premises for non-payment of rent as in other cases provided. The provisions of this paragraph shall in no way prevent action on the part of the holder of the first deed of trust or mortgagee from proceeding with foreclosure in the event of default of the lessor, PROVIDING, HOWEVER, that lessee shall be entitled to prevent such foreclosure or sale, as provided in paragraph 9, by curing such default and taking credit for sums expended against the rental herein provided."

IN WITNESS WHEREOF, the parties hereto set their hands the 6th day of January 1961, the LESSEE, State of Nevada, acting through the Executive Director of its Department of Employment Security, as thereunto duly authorized by law.

LESSEE: THE STATE OF NEVADA through the NEVADA DEPARTMENT OF EMPLOYMENT SECURITY

/s/ Richard Ham
Richard Ham
Executive Director

LESSOR: BRUNZELL CONSTRUCTION CO., INC. OF NEVADA

By: /s/ E. M. Brunzell
President

(Original Page 4)

COPY

STATE OF NEVADA
DEPARTMENT OF ATTORNEY GENERAL
Carson City

January 29, 1959

Roger D. Foley
Attorney General

OPINION No. 3

Constitutional Law.
Lease-Purchase contracts by State agencies in light of the restrictive limitations of Section 3, Article IX, State Constitution, except under "special fund" doctrine, are of doubtful validity.

Honorable Russell W. McDonald
Director
Statute Revision Commission
Carson City, Nevada

Dear Mr. McDonald:

We have your letter of December 11, 1958, asking that we render a formal opinion in this department upon a question as stated hereinafter.

Section 3 of Article IX, as hereinafter quoted, places a limitation upon the amount of combined state debt that may be incurred and outstanding, at any given time. This section also makes provision for the maximum time allowed in which a specific state debt may be financed. Section 2 of Article X places an upper limit upon ad valorem taxation for all combined purposes of not to exceed five cents on one dollar of assessed valuation. At the present time our constitutional debt limitation of one percent of all taxable property within the state allows the state to become indebted in the amount of approximately $5,900,000.00. The bonded indebtedness of the state as of January 2, 1959 is $2,856,000.00. It is believed that the constitutional balance of $3,044,000.00 does not provide the necessary cushion needed to launch a building program. You have recited that "a joint resolution proposing a constitutional amendment changing the limit to two percent will be returned to the legislature in 1959."

You have supplied this office with an extensive brief upon this subject, for which we are grateful.

QUESTION

Would a "lease-purchase" statute be in violation of Section 3 of Article IX of the Constitution of the State of Nevada?

OPINION

There is some authority on each side of this proposition, under varying provisions of the organic laws of the states that are concerned and under varying statutes and varying contractual arrangements. To reconcile all of this material is, of course, impossible. The general nature and difficulty of the problem is also apparent when one reflects upon the proposition that nothing is precise and certain in resolving the question, except the content of the constitutional provisions. That is a court in resolving the question of validity or invalidity in a given case would have for its guidance the constitutional provisions, a statute and contractual terms, the latter made presumably in pursuance of the constitutional and statutory provisions. These differences render our treatment of this subject somewhat more general than could and would be the case if an action were presented to a court.

To render our treatment of this question clear and the constitutional limitations that exist more understandable, we first set out the constitutional provisions and, secondly, show the purpose of those provisions and evils sought to be avoided and minimized.

Article IX of the Constitution deals with Finance and State Debt, in part, this article reads as follows:

Section 1. Fiscal year. The fiscal year shall commence on the first day of July of each year.

Section number 2 appears to contain nothing pertinent to this study.

Sec. 3. State indebtedness: Limitations and exceptions. The state may contract public debts; but such debts shall never, in the aggregate, exclusive of interest, exceed the sum of one percent of the assessed valuation of the state, as shown by the reports of the county assessors to the state controller, except for the purpose of defraying extraordinary expenses, as hereinafter mentioned. Every such debt shall be authorized by law for some purpose or purposes, to be distinctly specified therein; and every such law shall provide for levying an annual tax sufficient to pay the interest semiannually, and the principal within twenty years from the passage of such law, and shall specifically appropriate the proceeds of said taxes to the payment of said principal and interest; and such appropriation shall not be repealed nor the taxes postponed or diminished until the principal and interest of said debts shall have been wholly paid. Every contract of indebtedness entered into or assumed by or on behalf of the state, when all its debts and liabilities amount to said sum before mentioned, shall be void and of no effect, except in cases of money borrowed to repeal invasion, suppress insurrection, defend the state in time of war, or, if hostilities be threatened, provide for the public defense.

The state, notwithstanding the foregoing limitations, may, pursuant to authority of the legislature, make and enter into any and all contracts necessary, expedient or advisable for the protection and preservation of any of its property or natural resources, or for the purposes of obtaining the benefits thereof, however arising and whether arising by or through any undertaking or project of the United States or by or through any treaty or compact between the states, or otherwise. The legislature may from time to time make such appropriations as may be necessary to carry out the obligations of the state under such contracts, and shall levy such tax as may be necessary to pay the same or carry them into effect.

Nevada Revised Statutes - Vol. 5, under heading "Nevada constitution."

Sections 4 and 5 of Article IX appear to have no bearing upon the current problem.

Article X of the Constitution entitled "Taxation" is in Section 2 thereof significant in the present problem. Section 2 reads as follows:

> Sec. 2. Total tax levy for public purposes limited. The total tax levy for all public purposes including levies for bonds, within the state, or any subdivision thereof, shall not exceed five cents on one dollar of assessed valuation.

Certain provisions of the constitution as it formerly existed are significant and cast light upon this inquiry. In the original constitution, Article IX thereof, section 1, provides that the fiscal year shall begin January 1st; section 2 provides inter alia that the legislature shall provide for an annual tax sufficient to defray the estimated expenses of state government; section 3 provides that the state shall transact its business on a cash basis, from its organization, and that the state may contract debts which "shall never, in the aggregate, exclusive of interest, exceed the sum of three hundred thousand dollars", with certain exceptions of an emergency nature. The section also provides that all debts with all accumulated interest thereon shall be paid within twenty years, and that debts beyond the specified maximum shall be void, unless contracted for the designated emergencies. See: Constitution at back of book entitled "Nevada Constitutional Debates and Proceedings." Andrew J. March, Official Reporter.

The first amendment to Section 3 of Article IX became effective in 1916. This constitutes the first paragraph of Section 3 of its present form. See: Section 143 N.C.L. 1929.

The amendment of 1934 to Section 3, Article IX, added the second paragraph of this section and left the first paragraph without modification. See: Nevada Constitution - Nevada Revised Statutes, Vol. 5.

A study of the debates of the delegates shows that the delegates were interested in economy of government and sound financial practices. They were also interested in placing certain limits upon the power of the legislative branch, respecting taxation. They were not certain that the territory could afford the costs of statehood, and they wanted an instrument with such just and lenient provisions respecting taxation that they would be able to "sell" the provisions thereof to the electorate, preliminary to the vote.

thereon. See: Nevada Constitutional Debates and Proceedings - Marsh, page 753 et seq.

Upon this background of material then we learn that four inflexible principles of the founders of state government have carried over and limit and regulate the fiscal policies of certain state (and county) officers, viz:

1. Departments of government operate upon a cash (and budgetary) system.

2. The total maximum allowable amount of state debt is proportional to the total of taxable property within the state.

3. The maximum tax rate of ad valorem taxation is established at $5.00 per $100.00 per year.

4. The maximum time allowable for the redemption and settlement of public debts.

Provisions similar to the Section 3 of Article IX of the Constitution of Nevada, limiting the amount of state debt are common to the constitutions of the various states. Some are much more restrictive than that of Nevada. California limits the state debt to $300,000.00, unless a greater sum be approved by the electorate. See: Dissenting opinion of Justice Edmonds, in Dean vs. Kuchel (California 1950), 218 P. 2nd 521 at 525. Such was argued for as the maximum allowable state debt in the Nevada Constitutional Convention. This was not approved however. See: Nevada Constitutional Debates and Proceedings, page 753 et seq.

Despite this very restrictive provision of the California Constitution, the supreme court of that great and very wealthy state has promulgated the rule that to term the contract a lease when in truth and in fact it is a conditional sales contract will not lift it from the restrictive provisions of the constitution. In City of Los Angeles v. Offner (California 1942), 122 P. 2nd 14, the court said:

"It has been generally held in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary, confines liability to each installment as it falls due and each year's payment as for the consideration actually furnished that year, no violence is done to the constitutional provision. (Citing authorities) If, however, the instrument creates a full and complete liability upon its execution, or if its designation as a 'lease' is a subterfuge and it is actually a conditional sales contract in which the 'rentals' are installment payments on the purchase price for the aggregate of which an immediate and present indebtedness or liability exceeding the constitutional limitation arises against the public entity, the contract is void. (Citing authorities).

"The rule as applied to each of these situations is well stated in Garrett v. Swanton, supra, 216 Cal. at 226, 13 P. 2nd at page 728, as follows: 'The law is well settled in this state that installment contracts of any kind, where the installment payments are to be made over a period of years and are to be paid out of the ordinary revenue and income of a city, where each installment is not in payment of the consideration furnished that year, and the total amount of said installments, when coupled with other expenditures, exceeds the yearly income, are violative of the constitutional provisions in question unless approved by a popular vote. This is so whether the contract be denominated a mortgage, lease, or conditional sale'."

In an article entitled "Lease-Financing by Municipal Corporations As A Way Around Debt Limitations," in Volume 25, (1956-1957) The George Washington Law Review, beginning page 377, it is pointed out that the "leases" in practice are non-terminable, and that the annual "rent" payments are indistinguishable from debt service on bonds, and that since "the fiction exists only in the courtroom," this practice of lease-financing is therefore borrowing and not renting. This author points out that the present debt limitations are too inflexible, and that a great deal of ingenuity and dexterity has been displayed in avoiding the constitutional limitations. He doubts that this procedure is proper and closes with the truism that the "best way to insure repeal of a bad law is to enforce it strictly."

This author (25 George Washington Law Review) also makes the point that year to year leases, by reason of a provision of option for renewal, are meaningless as to the office or other space required for most governmental purposes. Jails, courthouses, schools, mental institutions and the like, cannot close down their operation at the end of a year and move to other quarters. Exceptions enumerated (page 392) are few. Of course, if the instrument creates a present obligation upon its execution for the full amount of the "rent", the provisions of the constitution that are by intent to be circumvented, remain to fully block the course. In such cases the instrument creates a "debt" which when added in amount to other debts is beyond the forbidden limit.

It is held in Ash vs. Parkinson, 5 Nev. 15, at 26, that claims against the state that are promptly paid when they fall due, are not "debts" within the constitutional limitation.

In 71 A.L.R. at 1318, this subject is fully treated, under the heading, "Lease of property by municipality or other political subdivision, with option to purchase same, as evasion of constitutional or statutory limitation of indebtedness."

Under the decisions a great deal of variety and ingenuity is displayed and evidenced on the part of those who seek to avoid or evade the constitutional or statutory limitations and safeguards. No useful purpose would be served in attempting to distinguish the cases and the statutory and constitutional provisions under which the rulings of the high courts, in each case, have depended. Sufficient to say that in each case the true nature of the transaction is determined and if the payments although termed "rents" are in fact installments upon principal, and if from the beginning of the contract, the full amount of the contract is a present existing obligation, the constitutional safeguards will prevail. There are cases however in which, through options to renew or other devices it is held that the execution of the contract by itself does not create a present existing obligation for the full amount of the "rent" and hence in such cases the constitutional provisions have not been violated.

We would indeed be naive if we did not recognize that the extreme limitations of a constitutional provision combined with extreme necessity of a political subdivision or body, does not have some effect, in cases such as here under review, upon the judicial tribunal, vested with a duty of determining the validity or invalidity of a contract.

There is one clear cut line of cases, relying upon the "special fund" doctrine, which hold that if the money with which to pay the installments or "rents" is derived from a special operation not from a tax levy, such fund is not a burden upon the taxpayer and therefore not restricted by the constitutional provisions under review. See: Boe vs. Foss, 77 N.W. 2nd 1 and Garrett v. Swanton, 13 P. 2nd 725.

Due to the fact, as formerly stated, that we do not have before us a statutory provision authorizing lease-purchase contracts, and do not have such a contract made or contemplated in pursuance thereof, our opinion hereon is necessarily qualified.

But considering this qualifying feature of the problem and the fact that under the one percent formula the state could expend over $3,000,000.00 by way of further debt, and the further fact that in the Governor's message of January 26, 1959, he advocates the expenditure of $2,928,656.00 in a building program, to be expended this year and be taken from state fund balance, and remembering the fact that the people approve constitutional amendments with alacrity, and the further fact that such a statute would be for the avowed purpose of circumventing the provisions of the constitution, we are clearly of the opinion that such a statute would be in violation of the meaning and spirit of the constitutional provisions and therefore void.

Respectfully submitted,

ROGER D. FOLEY, Attorney General

By:

D. W. Priest
Chief Deputy Attorney General

DWP:g

STATE OF NEVADA
DEPARTMENT OF ATTORNEY GENERAL
Carson City

February 6, 1959

Roger D. Foley
Attorney General

MR. RICHARD HAM
Executive Director
Employment Security Department
Carson City, Nevada

Dear Mr. Ham:

We are in receipt of a request from your predecessor in office, Mr. Harry A. Depaoli, requesting an opinion of this department upon this question:

> May the Executive Director of the Employment Security Department expend moneys from its Employment Security Fund for the purchase of a lot in Carson City upon which to erect a building for said department, under the authority of the provisions of NRS 612.615?

By reason of the non-recurring nature of the problem and the unusual quality of the fund under consideration, we shall deal with the question by letter as distinguished from an official opinion. The distinction is that in this form the advice will not become a part of the printed official opinions.

Although such would constitute an exception to the usual rule, by reason of the unusual qualities of the fund, we are of the opinion that the question may be answered in the affirmative. However, for reasons that will hereafter appear, and, by way of advice, we doubt that such procedure should be followed.

It has been discussed with us both by yourself and by Mr. Depaoli that the overall plan would be to obtain the advancement of private capital to construct a building upon said land, suitable for the purposes of the department, with a view of payment and title acquisition through a lease-purchase agreement.

The question and advice relevant thereto will encompass the statutory law regulating the acquisition and disposal of this particular fund, the law respecting lease-purchase agreements, and the constitutional provisions that they are designed to circumvent, and the pending legislative bill which if enacted may have a bearing upon the conclusions hereof, which at the time of this writing are valid.

We find statutory provisions for the establishment of three separate funds within the department. NRS 612.585, et seq., makes provision for the establishment and disbursal of the Unemployment Compensation Fund, consisting of three separate accounts within the fund, namely, (a) a clearing account, (b) an unemployment trust fund account, and (c) a benefit account. The statute makes clear the purpose of these separate accounts and the manner in which moneys may be drawn therefrom.

Another fund within the department under the control of the Executive Director is the Unemployment Compensation Administration Fund. This, too, is clearly regulated by statute (NRS 612.605, et seq.) both as to the manner in which the fund is composed, its purpose and manner in which withdrawals may be made.

The third fund hereinabove referred to is denominated the Employment Security Fund. The provisions for its creation and the source and use of the fund is outlined in NRS 612.615. The entire section reads as follows:

Creation of fund; source and use of funds.

1. There is hereby created in the state treasury a special fund to be known as the employment security fund.
2. All interest and forfeits collected under NRS 612.620 to 612.675, inclusive, and 612.740 shall be paid into this fund.
3. All moneys which are deposited or paid into this fund are hereby appropriated and made available to the executive director. Such moneys shall not be expended or made available for expenditure in any manner which would permit their substitution for, or a corresponding reduction in, federal funds which would, in the absence of such moneys, be available to finance expenditures for the administration of the employment security laws of the State of Nevada.
4. Nothing in this section shall prevent such moneys from being used as a revolving fund to cover expenditures, necessary and proper under the law, for which federal funds have been duly requested but not yet received, subject to the repayment to the fund of such expenditures when received.
5. The moneys in this fund shall be used by the executive director for the payment of costs of administration which are found not to have been properly and validly chargeable against federal grants received for or in the unemployment compensation administration fund.

6. All moneys in this fund shall be deposited, administered and disbursed in the same manner and under the same conditions and requirements as are provided by law for other special funds in the state treasury.

7. Any balances in this fund shall not lapse at any time, but shall be continuously available to the executive director for expenditure consistent with this chapter.

8. Moneys in this fund shall not be commingled with other state funds, but shall be maintained in a separate account on the books of the depositary.

It will be observed that the fund is made available without further appropriation to the executive director, for costs of administration, not including those costs for which otherwise federal moneys would be available.

You have convinced us by the content of the letter of inquiry that to expend the money in the manner proposed would not be a use for which federal moneys would otherwise be available. We conclude that the fund could be used in the proposed manner by the executive director, if such use may be classified as "cost of administration."

The particular type of "costs of administration" are not circumscribed or limited by the statute. We are advised that the fund has grown for a number of years, and is not required in the normal costs of administration. The statute is remedial and should be liberally construed. 59 C.J. Art. 657, p. 1106.

Under NRS 612.220 the general powers and duties of the executive director are set out and inter alia it is provided that he shall "make such expenditures" as he "deems necessary."

We, therefore, conclude that to expend the money from the Employment Security Fund in the manner under consideration is properly classified as a "cost of administration."

Although the question has been answered in the affirmative, we feel from conversations with you and with Mr. Depaoli, that the overall plan would be to erect a building upon said land for the use of the department under a lease-purchase contract.

The lease-purchase contract manner of financing would be desired because and by reason of the limitations upon the amount of allowable state debt, as set out and limited by the provisions of subsection 3 of Article IX of the Nevada Constitution. We have recently had occasion to pass upon this type of financing in Opinion No. 3 of January 29, 1959. The conclusions there reached are highly significant here and for your reference we enclose a copy of that opinion.

An exception to the rule that the constitutional provision bars such contracts if the contract appears from a full examination of its content to be one of conditional sale, although denominated a "lease," is under the "special fund" doctrine.

In this case even though the payment for the lot as contemplated might be classified as from a "special fund" and we feel that it would be so classified, the contract with a builder to advance private capital to erect a building upon the lot, would, of necessity, meet the requirements to be classified as one of "lease" and not one of conditional sale. For, if the contract between the department and the private capital be one of conditional sale, it would be an obligation of the state for the full unpaid balance thereunder. We conclude this for, although you would have money to acquire the lot from this special fund, you would not have money to go further and complete the project and acquire also the building. Under this state of facts, it would be difficult to evolve a plan for the acquisition of title to a building through lease-purchase contract, which had been constructed upon land owned by the state. It would also be difficult to induce private capital to invest in a building upon land owned by the state. Such contracts have been ingeniously evolved by long term lease from the political subdivision to the private capital and thereafter the construction of the building thereon, designed to meet the purposes of the political subdivision, and thereafter a lease-purchase agreement between the political subdivision, (lessor) and the entity that supplied the private capital (lessee). This plan is undesirable in the matter under consideration for two reasons, viz: (1) From the nature of things it resembles more a conditional sales agreement than a "lease", and (2) If the lot as well as the building is supplied by the private capital, the value of the lot as well as the building (or most of it) may be recovered from the United States in the monthly rents, thereby leaving the state in a better position financially.

For the reasons heretofore given, even if there were no assembly bill number 128 pending, hereinafter referred to, we doubt the wisdom of acquiring a lot at this time, by the use of this fund, and strongly urge that these reasons be considered in determining a course of action.

Assembly bill number 128, of January 27, 1959, however, is to be taken into account in resolving the question and in determining a course of action. Should it become the law, it appears that all departments of state government would require a legislative act of consent to the acquisition of real property.

We conclude as follows: Your department could now acquire land by the use of such fund. But, to acquire the land with purpose of acquiring a building to be constructed thereon through a lease-purchase contract of privately supplied capital would require some legal maneuvering and not easily to be accomplished. That the lease-purchase type of contract would be desirable as distinguished from a conditional sales contract, by reason of the constitutional limitations upon the amount of state debt, and that in any event the legislative bill now pending is to be taken into account in determining a course of action.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By:

D. W. Priest
Chief Deputy Attorney General

DWP:g

STATE OF NEVADA
DEPARTMENT OF ATTORNEY GENERAL
Carson City

February 2, 1961

Roger D. Foley
Attorney General

OPINION NO. 206

Education, State Department of.
County School Districts.
Constitutional Law.

(References: A.G.O. 704, November 29, 1948; A.G.O. 3, January 29, 1959)

Applicable constitutional and statutory provisions construed as prohibiting lease-purchase agreements intended to effect the construction and acquisition of new school buildings and other school facilities of a capital nature by county school districts.

Mr. Byron F. Stetler
Superintendent of Public Instruction
Nevada State Department of Education
Carson City, Nevada

Dear Mr. Stetler:

Statement of Facts

It appears that the Washoe County School Board has inquired concerning the legality of the construction of an administrative building on a lease-purchasing plan of financing. Specifically, it is contemplated that the building would be financed by private capital and the School District would pay rent therefor for an agreed number of years, at the termination of which the building would then become the property of the School District.

We are further informed that the question was previously submitted to the District Attorney of Washoe County for his advice and opinion, and that he indicated that he did not consider it proper that he should rule on the matter since the question was state-wide in application.

Question

Are lease-purchase agreements for the construction and acquisition of school buildings and other school facilities authorized and valid under presently-existing law?

Conclusion

NO

Analysis

The question here involved concerns subordinate public entities of the state, - in the instant case, County School Districts. In previous opinions of this office, substantially involving the same general question in relation to the State, the following determinations and conclusions were reached:

1. "* * * State Cannot Incur Debt in Excess of the Sum of 1 Percent of Assessed Valuation for New Construction - This Amount Cannot Be Exceeded With Legislative Approval." (Attorney General Opinion No. 704, November 29, 1948)

2. "Lease-Purchase contracts by State agencies in light of the restrictive limitations of Section 3, Article IX, State Constitution, except under 'special fund' doctrine, are of doubtful validity." (Attorney General Opinion No. 3, January 29, 1959)

The latter of these two conclusions was in answer to a query by the Director of the Statute Revision Commission who entertained some doubt as to the constitutional validity of proposed legislation, which he was requested to draft, which would have authorized the State of Nevada "* * * by means of so-called 'lease-purchase', to acquire public buildings and certain other capital improvements." The proposed legislation would have expressly authorized lease-purchase agreements on the part of the State Departments and Agencies. If ever introduced, the proposed legislation was never enacted; certainly, it does not constitute part of present Nevada statutory law.

Reference is made to the aforesaid opinions of this office for the detailed analysis of the general problem here involved. In the instant case, it must suffice to set forth only such salient considerations as appear specifically pertinent herein.

A review of the debates of the delegates to the convention which developed the Nevada Constitution shows considerable concern and interest in securing economical government and sound financial practices. (Nevada Constitutional Debates and Proceedings, by Andrew J. March, Official Reporter). In general, the founders of the various State governments, including the State of Nevada, were agreed upon four inflexible principles to regulate and limit the fiscal policies of State and county public officials, namely:

1. That departments and agencies of government operate on a budgeted cash basis.
2. That the total maximum allowable state indebtedness be related to the valuation of the total taxable property within the state in an amount as determined by a fixed percentage of such valuation of total taxable property.
3. That the maximum tax rate of ad valorem taxation be constitutionally established to regulate and limit the tax burden on the people which might legally be imposed or exist at any time; in the case of Nevada, this has been established in the maximum sum of $5.00 per $100.00 per year.
4. That, to the extent that same may be possible, a maximum allowable period of time be prescribed for the redemption and settlement of public debts.

As here relevant, Article IX of the Nevada Constitution, which relates to Finance and State Debt, provides as follows:

* * *

Sec. 3. The state may contract public debts; but such debts shall never, in the aggregate, exclusive of interest, exceed the sum of one percent of the assessed valuation of the state, as shown by the reports of the county assessors to the state controller, except for the purpose of defraying extraordinary expenses, as hereinafter mentioned. Every such debt

> shall be authorized by law for some purpose or purposes, to be distinctly specified therein; and every such law shall provide for levying an annual tax sufficient to pay the interest semiannually, and the principal within twenty years from the passage of such law, and shall specially appropriate the proceeds of said taxes to the payment of said principal and interest; and such appropriation shall not be repealed nor the taxes postponed or diminished until the principal and interest of said debt shall have been wholly paid. Every contract of indebtedness entered into or assumed by or on behalf of the state, when all its debts and liabilities amount to said sum before mentioned, shall be void and of no effect, except in cases of money borrowed to repel invasion, suppress insurrection, defend the state in time of war, or, if hostilities be threatened, provide for the public defense.

As here relevant, Article X of the Nevada Constitution, which relates to "Taxation", provides as follows:

> * * *
> Sec. 2. Total tax levy for public purposes limited. The total tax levy for all public purposes including levies for bonds, within the state, or any subdivision thereof, shall not exceed five cents on one dollar of assessed valuation.

The courts have generally looked to the substance rather than the form of agreements in ruling on the question whether a contract, lease, or conditional sales contract complied with constitutional requirements and limitations. Thus, as quoted in Attorney General Opinion No. 3, dated January 29, 1959, hereinbefore mentioned, the Court, in the California case of In City of Los Angeles v. Offner, 122 P. 2d 14, 16 (1942), made the following observations:

It has been generally held in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary, confines liability to each installment as it falls due and each year's payment as for the consideration actually furnished that year, no violence is done to the constitutional provision. (Citing authorities) If, however, the instrument creates a full and complete liability upon its execution, or if its designation as a "lease" is a subterfuge and it is actually a conditional sales contract in which the "rentals" are installment payments on the purchase price for the aggregate of which an immediate and present indebtedness or liability exceeding the constitutional limitation arises against the public entity, the contract is void. (Citing authorities)

The rule as applied to each of these situations is well stated in Garrett v. Swanton, supra, 216 Cal. at 226, 13 P. 2d at page 728, as follows:

> 'The law is well settled in this state that installment contracts of any kind, where the installment payments are to be made over a period of years and are to be paid out of the ordinary revenue and income of a city, where each installment is not in payment of the consideration furnished that year, and the total amount of said installments, when coupled with other expenditures, exceeds the yearly income, are violative of the constitutional provisions in question unless approved by a popular vote. This is so whether the contract be denominated a mortgage, lease, or conditional sale.'

Attorney General Opinion No. 3, dated January 29, 1959, also makes reference to an article entitled "Lease-Financing By Municipal Corporations as a Way Around Debt Limitations" (Vol. 25, 1956-1957 The George Washington Law Review, beginning at page 377). Said article points out that the questioned "leases" in practice are non-terminable; that the annual "rent" payments are indistinguishable from debt service on bonds;

and that, since "the fiction exists only in the courtroom", this practice of lease-financing, therefore, is borrowing and not renting. The author of said article is credited as concluding that though a great deal of ingenuity and dexterity has been displayed in the various attempts made to avoid the constitutional limitations and prohibitions, present debt limitations are too inflexible, and there is considerable doubt concerning their validity. Moreover, it should also be noted that circumventions of the law by such means and procedures can certainly not be held to comply with legislative intent as held at the time of the adoption of the involved constitutional limitations, and that if existing conditions and needs warrant it, such constitutional limitations should be amended with the sanction of popular support. In short, "the best way to insure repeal of a bad law is to enforce it strictly".

It would serve no useful purpose to review the judicial determinations on the question and to attempt to distinguish the varying statutory and constitutional provisions involved in the rationale of such court decisions. The judicial authorities have been collected to some extent under the heading of "Lease of property by municipality or other political subdivision, with option to purchase same, as evasion of constitutional or statutory limitation of indebtedness", in 71 A.L.R. 1318. The weight of authority and the preferred view of the question is that which we have indicated.

One category of cases which may be considered as an exception to the rule herein outlined relies on the "special fund" doctrine, holding that if the monies with which the payment of installments or "rent" is made are derived from other than State tax levies (e.g., Federal funds, contributions by employers-employees as in N.I.C., or other special operations), and are not a direct burden upon the taxpayer as such, then the constitutional inhibition does not apply. (See: Boe v. Foss, 77 N.W. 2d 1 Garrett v. Swanton, 13 P. 2d 725)

Clearly, such is not the case in the situation embraced within the scope of the question under consideration.

As might be expected, and most properly, the Nevada Supreme Court, in the case of Ash v. Parkinson, 5 Nev. 15, at page 26, has held that claims against the State which are paid when due, are not "debts" within the constitutional limitation. This decision, however, does not reach the crux of the question here involved.

While county school district funds are undoubtedly authorized for rental of schoolhouses when necessary (NRS 387.205, 387.260, 393.080, 393.140), the agreement must, in fact, be nothing more than one for a rental of such facilities.

Our review of applicable statutes amply supports and confirms our conclusion that the approved procedure and established means of constructing or purchasing new school buildings and other capital improvements and facilities is by borrowing money therefor by the issuance and sale of bonds, when so authorized by the electors on the basis of a bond election. (See: NRS 387.160, 387.335-387.735) The Legislature, by enactment of the statutory provisions last mentioned, has plainly and abundantly manifested its desire and intent, and such schematic and complete enunciation of policy excludes any agreement substantially circumventing and nullifying legislative purposes and aims, in addition to constitutional restrictive controls.

We are of the opinion, therefore, that lease-purchase agreements for the construction and acquisition of school buildings and other facilities of a capital nature would be violative of both constitutional and statutory restrictions and limitations.

Respectfully submitted,

ROGER D. FOLEY
Attorney General

By: /s/ John A. Porter
John A. Porter
Chief Deputy
Attorney General

JAP:g

February 10, 1961

Syllabus:

Assembly Ways and Means Committee
Nevada State Legislature - 1961 Session --

Lease-purchase agreement (involving construction of an office building) executed by Director, Nevada State Employment Security Department, principally and substantially dependent upon Federal funds, held to fall within "special fund" doctrine, and to be an exception to constitutional prohibition relative to such agreements by other State departments and agencies supported with State funds.

Questioned lease-purchase agreement reviewed and found to be terminable under certain contingencies; not imposing upon the State any entire or absolute obligation or liability; nor creating a present indebtedness for the entire amount involved in such agreement so as to impair or limit the future bonding capacity of the State.

(References: AGO 704, Nov. 29, 1948; AGO 3, January 29, 1959; AGO 206, February 2, 1961.)

STATE OF NEVADA
DEPARTMENT OF ATTORNEY GENERAL
Carson City

February 10, 1961

Roger D. Foley
Attorney General

Honorable James I. Gibson
Chairman, Ways and Means Committee
Assembly, Nevada State Legislature
State Capitol
Carson City, Nevada

Dear Mr. Gibson:

We understand that some question has arisen concerning the validity of the amendment proposed by Senate Bill No. 38, presently under consideration in the Ways and Means Committee of the Assembly, as said amendment and the lease-purchase agreement pertaining to the proposed new Employment Security Department building might subject the State of Nevada to obligation or indebtedness in excess of Nevada Constitutional restrictive limitations. (Nevada Const., Article IX, Sec. 3.)

Reference is made to AGO 704, November 29, 1948; AGO 3, January 29, 1959; AGO 200, January 11, 1961; and AGO 206, February 2, 1961, copies of which (we have been informed) have been made available to you. These opinions consider various aspects of the general problem involved in, and posed by, your question, as above outlined. We trust that said opinions provide sufficient documentation respecting the nature, scope, and implications of the general problem.

Because of the apparent urgency for our advice and opinion, in connection with legislative action on Senate Bill 38, now pending, it must suffice to enumerate, in categorical fashion, the salient considerations and views on which we base our answer to your question herein.

1. The true nature of every transaction must be determined. If the payments of a lease-purchase agreement, although termed "rents" are in fact installments upon principal, and if, from the beginning of the contract, the full amount of the contract is a present existing obligation, the constitutional safeguards and restrictive limitations must prevail.

2. In the present matter, a private corporation, BRUNZELL, and not the STATE (or the Employment Security Department), is obligated to pay for the construction and erection of the proposed building, to be rented by a State agency. The financing of such construction, secured by a trust deed on the completed building and provision for the assignment and collection of rents, does not change such obligor-obligee relationship as between BRUNZELL and the financing institution. The STATE (and the Employment Security Department) has not assumed any obligation or liability for such construction financing.

The involved agreement between BRUNZELL and the Nevada State Employment Security Department does not create a present indebtedness for the aggregate installments of rent therein provided for, but, on the contrary, confines liability to each installment as it falls due, and each year's payment is for the consideration actually furnished that year to said State agency.

The rental actually provided for in said agreement is not unreasonable for the facilities which are to be furnished; consequently, as a matter of legal substance, the Employment Security Department's payments thereunder may properly be deemed "rental", rather than "purchase installment" payments.

Said agreement provides for possessory proceedings in the event that there is any failure in payment of rent. Moreover, said agreement is terminable in such and other subsequent contingencies, so that the State's (through the Employment Security Department) liability for the term of the agreement is neither entire, nor absolute. In other words, any default or breach for non-payment of rent would entitle Brunzell, as lessor, to repossess the premises (building). As in the case of any other lease agreement, there would, in legal theory at least, be additionally possible as an alternative, legal action for recovery of any damages resulting from such breach of contract or lease agreement. Such damages would be measured by the loss in rent or any differential because of lower rental received from another tenant. In such connection, however, it must be noted that the

lessor (Brunzell) would be under a positive legal duty to rent the premises to a new tenant and to secure a rental consistent with prevailing rates and conditions at the time of breach and repossession of the premises, i.e., to act in such manner as to mitigate or minimize the damages, if any, which are sought to be charged against a prior, defaulting tenant.

In addition, by general law, there is implied in any agreement in which the State is a party, the assumption that the Legislature will appropriate the funds required under the agreement; if the Legislature does not do so, no money may legally be expended or paid under any such agreement, or by reason of any breach thereof.

In practical effect, therefore, in the event that the Employment Security Department defaulted in payment of rent under the agreement in question, the lessor, Brunzell, for all intents and purposes, would be confined to its remedy of repossessing the building, and leasing it to a new tenant on such terms as it might be able to secure in the then prevailing conditions.

3. The option provisions in the said lease-purchase agreement do not, in any manner, affect the foregoing views and conclusions.

4. A generally established and accepted exception to the inhibitions or limitations constitutionally imposed upon lease-purchase agreements may be stated as follows:

> It is generally held that where the funds, with which payment of installments or "rent" are derived from a special operation, rather than from general tax levies, the restrictive constitutional limitations and safeguards are not considered to be involved or violated, since no burden therefor devolves upon the taxpayers as such.

It is our considered opinion that the Employment Security Department, though a State agency, properly falls within this exception, generally referred to as "special fund" agency or operation, because of its primary and substantial dependence on Federal funds.

You have posed the following question:

> Does the lease agreement being prepared by the Employment Security Department, and which will be authorized by passage of SB 38, create an obligation against the credit of the State of Nevada for the full amount of the term of the lease?

Our specific answer and advice to you in respect to said question is:

No. Said agreement is terminable under certain contingencies, and the State's obligation and liability thereunder are neither entire nor absolute. There is, moreover, no present indebtedness assumed by the State of Nevada thereby, in violation of existing statutory or constitutional limitations and safeguards. It follows, therefore, that SB 38, if approved and enacted into law, would be valid, and not violative of existing law.

We trust that the foregoing sufficiently clarifies the matter and proves helpful to your Committee and the Legislature in connection with appropriate action on SB 38.

Very truly yours,

ROGER D. FOLEY
Attorney General

By: /s/ John A. Porter
John A. Porter
Chief Deputy Attorney General

JAP:MN

STATE OF NEVADA
PLANNING BOARD

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Carson City, Nevada
September 18, 1961

Legislative Counsel Bureau
State of Nevada
Carson City, Nevada

Attention: Mr. Harrison W. Call
Senior Research Assistant

Dear Harry:

In regard to your request for a budgetary program for the Employment Security Building in Carson City, indicating the cost if that building had been realized under the State's Capitol Improvement Program, we submit herewith the following information:

We have been advised that the construction bids on the Employment Security Building were as follows:

1. Brunzell Construction Company ----------$827,358.00

2. Wine Construction Company ---------- 918,000.00

3. Gordon Construction Company ---------- 951,570.00

We have computed the area of the building as designed to be approximately 36,800 sq. ft. Based on this calculation and the above figures, the sq. ft. cost of this building varies between $22.46 and $25.83. This square footage unit cost range is reasonable.

Attached you will find a theoretical budget of the type that would have been prepared by this office for submission to the Legislature for appropriations if the building had been within the Capitol Improvement Program of the State

Planning Board. In this budget, you will note that we have not figured any land cost inasmuch as the building was to be built within the Capitol Complex Area. We have also not included any furnishings costs assuming that whatever furnishings necessary could be acquired under the contingency fund if it were not needed during construction. On the basis of this analysis, we come up with a total cost requirement of $916,252.82. In all probability, we would have increased this figure to $925,000.00 to take care of the time lag between appropriation and construction.

It is the opinion of this office that the Employment Security Building, now under construction in Carson City, Nevada, under a leased purchased arrangement, could have been built by the Nevada State Planning Board for an approximate appropriation of $925,000.00.

Very truly yours,

/s/ Bill
William E. Hancock
Manager

WEH/rk
cc: Mr. Gene F. Empey
enc.

State of Nevada Planning Board

PROJECT BUDGET

PHASE I

1.	Land Acquisition	
2.	Surveys and/or Topographic	200.00
3.	Soils Analysis	600.00
4.	Design Fees	
	(a) Advance Planning	
	(b) Design	37,231.10
5.	Plan Checking	
	(a) Structural	1,227.10
	(b) Mechanical	615.00
	(c) Electrical	615.00

Sub Total $40,488.45

PHASE II

1.	Advertising	
	(a) Notice to Contractors	60.00
	(b) Notice of Completion	60.00
2.	Project Contingency	
	(a) Extra Plans and Specifications	500.00
	(b) Travel	
	(c) Postage and Communications	50.00
	(d) Contract Materials	
	(e) Miscellaneous	1,150.00
3.	Project Coordination	
	_____ @ $_____ per month	1,655.00
4.	Inspection	
	12 @ $600.00 per month	7,200.00
5.	Architect/Engineer Supervision	12,410.37
6.	Laboratory Tests	500.00
7.	Construction	
	(a) Construction Contingency	24,821.00
	(b) Furnishings	
	(c) Construction Contract	827,358.00

Sub Total $875,764.37

Total, PHASE I and II $916,252.82

STATE OF NEVADA
DEPARTMENT OF ATTORNEY GENERAL
Carson City

January 11, 1961

Roger D. Foley
Attorney General

OPINION NO. 200

Employment Security Department - Executive Director

Sections 612.605, 612.610, 612.615, 612.227 and 51.010 NRS construed. Funds provided in addition to those granted by Congress for administration of the Employment Security Department of the State of Nevada.

Lease-Purchase Agreement for purchase of land and office buildings by Executive Director of Employment Security Department pursuant to 612.227 NRS may be enforced by legal action against the State of Nevada in the event of default in payment of rents by Lessee.

Mr. Richard Ham
Executive Director
Nevada Employment
Security Department
P. O. Box 602
Carson City, Nevada

Dear Mr. Ham:

Statement of Facts

You have asked this Office for our opinion in connection with the Lease-Purchase Agreement of September 16, 1960 between the State of Nevada, by and through the Employment Security Department, as Lessee, and Brunzell Construction Co., Inc., of Nevada, as Lessor, as amended by Amendment of Lease dated January 5, 1961.

Questions

1. Is a Lease-Purchase Agreement for purchase of office buildings and land entered into pursuant to 612.227 N.R.S. enforceable by the Lessor against the State of Nevada?

2. In the event of non-payment of rent by the

Lessee pursuant to the agreement can Lessor file suit against the State of Nevada for the collection of past due rents?

3. Are there funds available for the payment of said rent by Lessee other than funds appropriated by the Congress of the United States?

Conclusions

To Question No. 1: YES

To Question No. 2: YES

To Question No. 3: YES

Analysis

Suits against the State of Nevada are generally authorized under Section 41.010 N.R.S. which provides that a person who has presented a claim against the state for services or advances authorized by law, and for which an appropriation has been made but of which the amount has not been fixed by law, to the Board of Examiners and which claim the Board or the State Comptroller has refused to allow, may commence an action in Ormsby County for the recovery of the portion of the claim which shall have been rejected. The statute further provides that in such actions against the State, summons is served upon the State and the action proceeds as in other civil actions to final judgment. Should there be a judgment under such action, it is provided under Section 41.030 that upon presentation of a certified copy of the final judgment, the State Comptroller shall draw his warrant for the amount awarded by the judgment.

This statute requires that the claim be made for services authorized by law. The contract of the Employment Security Department for acquisition of useful office space is a service authorized by law. Section 612.227 has specifically authorized the Lease-Purchase Agreement hereinbefore referred to.

A continuing appropriation has been made for the payment of this contract under Section 612.605. Therein it is provided that there is created in the State Treasury a special fund known as the Unemployment Compensation Administration Fund. That statute further provides that all monies which are deposited or paid into that fund are "hereby appropriated and made available to the Executive Director". That fund consists of all monies appropriated by this State as well as all monies received from the United States and all monies from any other source for such purpose. Hence, those funds are appropriated for the use of the Executive Director for lawful services for which he is authorized to contract. Sub-section 3 of Section 612.605 specifically provides that all monies in that fund shall be expended solely for the purpose of defraying the cost of the administration of the Employment Security Department. It is our opinion that rental payments are part of the cost of administration authorized by law as services for which the Executive Director is entitled to contract, and for which an appropriation has been made.

The State is not immune from suit under any Doctrine of Sovereign Immunity precluding suit for the reason that the use of the building is for a service rendered and an appropriation from a fund has been made for that purpose. The amount of expenditure for administration of the Employment Security Department has not been fixed by law but is a general authority to the Executive Director which, in this case, you have fixed by the contract pursuant to your general authority.

As a further supplement to the Unemployment Compensation Administration Fund created and appropriated under Section 612.605,there has been arranged by the Legislature provisions for appropriation from the General Fund. I refer you to Section 612.610 which provides in general that if any monies are found by the Department of Labor because of any action or contingency to have been lost or expended for purposes other than, or in amounts in excess of those found necessary by the Department of Labor for the proper administration of the Employment Security Department "it is the policy of this State that such money shall be replaced by monies appropriated for such purpose from the General Fund of this State to the Unemployment Compensation Administration Fund for expenditure as provided in N.R.S. 612.605.

This latter section, we believe, makes it mandatory on the State of Nevada as a matter of policy to supply the Unemployment Compensation Administration Fund with monies for the proper administration of the chapter whenever the fund is insufficient.

The last section quoted provides that upon receipt of notice of a finding from the Department of Labor the Executive Director shall promptly report the amount required for such replacement to the Governor, and the Governor shall at the earliest opportunity submit to the Legislature a request for the appropriation of such amount. This section for reimbursement of the Unemployment Compensation Administration Fund is an emergency section.

In addition to this there is another fund called the Employment Security Fund created under Section 612.615. This money is appropriated and made available to the Executive Director to be used in the absence of Federal funds. In the event Federal funds are not available to finance expenditures for the administration of the employment security laws of the State of Nevada, resort may be had to that fund. In fact, that section of the law provides that it shall be a revolving fund to cover expenditures when Federal funds have been requested and not yet received and "any balance in this fund shall not lapse at any time but shall be continuously available to the Executive Director for expenditures consistent with this chapter."

Conclusion

Therefore, it is concluded that in the event of non-payment of rent Lessor is entitled to bring suit against the State of Nevada when his claim has been rejected and, upon obtaining judgment, the judgment is a valid collectible judgment against the State of Nevada.

Very truly yours,

ROGER D. FOLEY
Attorney General of Nevada

By /s/ Charles E. Catt
CHARLES E. CATT
Special Deputy Attorney
General for the Employment
Security Department

INTRODUCTION TO THE CHRONOLOGY

This chronology of events was compiled from information made available to the Legislative Counsel Bureau by the Nevada Employment Security Department, Federal Employment Security Agency, Nevada State Planning Board, and the General Electric Pension Trust. In addition to the documents, correspondence, and information made available from these sources, the Counsel Bureau had material in its own files and was also able to trace legislative history through the usual media and transcriptions of the 1961 Session as recorded on the floor of the Assembly.

Unusual delay was experienced toward the end of the report, covering events which occurred after the Brunzell Corporation secured financing through the General Electric Pension Trust. While this Pension Trust was very cooperative in the early phases of the report, information requested later relative to disbursements of funds toward the project and other documents, were not made available to us.

The Legislative Counsel Bureau wishes to emphasize the excellent cooperation of the Nevada Employment Security Department in furnishing to the Counsel Bureau the many documents, letters, and special requests for information directed to that Department. In view of the complexity of the report, without the full cooperation of the Employment Security Department, this presentation would not have been possible.

In view of the incompleteness of documents and correspondence for the latter portion of the report (some of which were apparently of key significance) not only have gaps developed and delays been encountered, but the chronology has had to set forth a variety of uncertainties and highly modified statements in place of logical and definite conclusions. The latter portion of the report is characterized by such inclusions which the Counsel Bureau would have rather cleared and made definite. However, the handicap of incomplete data and unavailable documents are obvious obstacles toward that end.

It is suggested that the forthcoming Session of the Nevada Legislature might consider the difficulties encountered by its research arm and explore the possibilities of making available to the Legislative Counsel Bureau the power of subpoena. The execution of this report, under a directive from the Legislative Commission, brought to light this serious weakness which has contributed directly to an incomplete report. Information which was unavailable from private persons and organizations might well have offered logical explanations for some of the apparently unusual transactions attendant upon the ESD Carson City building project and likewise offered some measure of support to both our Nevada Employment Security Department and the Brunzell Construction Company, Incorporated. Lacking the disclosure of requested data, documents, and information, the report can only draw some modified conclusions and point out uncertainties in several important sections relative to financing.

It is unnecessary to belabor the point that the severe obstacles placed in the path of the progress of our report has contributed to the extensive time delay experienced by the Counsel Bureau in the preparation and issuance of the report.

In conclusion, it should be constantly recognized throughout the entire chronology that although irregularities have been identified, the procedures associated with them were at all times undertaken by the Employment Security Department Director after advice from either the Federal Agency or the Attorney General's Office of the State of Nevada.

CHRONOLOGY OF EVENTS

The following condensed chronology is contained in this report to enable the placing of major events referred to in the discourse within a general time pattern, and to relate them to other events which took place as far back as January of 1957. Although many more documents and papers were examined than those represented by the dates of identified material listed herein, it is felt that those of any special significance and major import are properly contained in the chronology. Only by an understanding of this sequence of events, can the hundreds of separate actions be related and have attached to them the proper contemporary value for correct analysis.

January 30. 1957 Date of Leasehold Contract and Option to Purchase, executed between the ESD and Weil Construction Company of Nevada.

Note: This agreement and lease-purchase type contract covered the project for construction of an Employment Security Department office building in Reno, Nevada.

February 26. 1957 Assemblyman James G. Ryan of Clark County introduced two companion Assembly Bills Nos. 290 and 291. These measures would have made available "Read Act" funds for the acquisitions of building sites and construction of buildings for the Employment Security Department, in the event the Legislature acted favorably. "Read Act" Federal funds were credited to a Federal Unemployment Trust Fund from excess tax collections and credited to the Unemployment Reserve Fund of the State of Nevada in the Federal Treasury.

Note: The amount of money credited to the Nevada account at Washington as of this date was $75,709.52. It was estimated that by June 30, 1958 that an additional $150,000 would be credited to the Nevada account, or a total estimated amount approaching a quarter of a million dollars.

Note: The Federal "Read Act" provided however, that such funds would not be made available to state employment security departments for the purpose of land acquisitions and buildings unless state legislative action authorized their department to employ such funds for those specific purposes.

Note: The withdrawal of any of the Nevada Unemployment Reserve Fund held in the Federal Treasury was limited to "administrative expenses." The federal definition of administrative expenses in the "Read Act" extended to the inclusion of office buildings as an administrative expense.

Note: Assembly Bill No. 291 specifically restricted funds to be appropriated from the Nevada Unemployment Reserve Fund held in Washington, for the purchase of real property and the purchase or to assist in the financing of buildings for the use of the Nevada Employment Security Department.

Note: Assembly Bill No. 291 restricted the withdrawal by appropriation from the Nevada Federal reserve to the $75,709.52 credited to the account as of this date, and a sum not to exceed $150,000.00 from the estimated amount to be credited in the next fiscal year. Any of these moneys not expended for the specific purposes set forth would have reverted to the Nevada Federal reserve account no later than 2 years from date of enactment of the bill.

Note: Assembly Bill No. 290 established the mechanics of how the funds received from the United States, under the authorization granted by the Legislature in A.B. 291, were to be placed in the accounts of the State ESD. The designation was, that such funds would be deposited in the Unemployment Compensation Administrative Fund and withdrawn from that fund by the Nevada Director for building and land acquisition purposes.

Note: Assembly Bill No. 290 would have changed several basic sections of the Unemployment Compensation Law in addition to the building project matter. However, a major feature of six of its sections provided changes in the basic law to accommodate and provide for the mechanics relating to the use of funds which might have been acquired from the Nevada Federal trust fund. A.B. No. 291 was in effect an appropriation bill. Both bills spelled out what the money was to be used for.

Note: It is interesting to observe from the wording contained in Assembly Bill No. 290, some of the provisions as follows:

(a) Reference is made to "term purchase agreement." Assembly Bill No. 291 employs the terminology "to purchase" or "to assist in financing." The latter term is also used in Assembly Bill No. 290.

(b) The exclusion of state liability in any anticipated projects is also made clear by the following provision, ". . . purchase of the premises. . . shall not subject the state to liability for payment of the purchase price or any part or portion thereof except from moneys allocated to the state by the United States Department of Labor . . ."

(c) Provision was also included for the possibility of the Department moving from any buildings constructed under the terms of the bill, by requiring that the Department be furnished substantially similar space, without further payment therefor by the United States.

Note: Reference is made throughout both bills to "lands" and "buildings" in the plural form. We conclude from this, that the ESD had in mind more than one building. Since the date of the introduction was in February of 1957, it is suspected that such a method of financing ESD buildings was envisioned for not only the Carson City Central Office, but perhaps designed more directly for the building built under lease-purchase shortly thereafter by the ESD in Las Vegas.

Note: Perhaps, it would have been wise to have indicated in the bills that the State Planning Board would have full control over the projects and awarding of bids for construction.

Note: Both bills were introduced on February 26, 1957 and referred to the Assembly Committee on Labor. Neither bill left the committee during the Session and they were not reported out by committee. In short, the bills died in committee for lack of favorable action.

Note: The following letter to the Legislative Counsel Bureau is included at this point in the report to identify certain procedures relative to the Carson City building.

MEMORANDUM
State of Nevada
Employment Security Department

To: Mr. Jeff Springmeyer, Legislative Counsel

From: Richard Ham, Executive Director, Nevada Employment Security Department

Date: November 16, 1961

Subject: Employment Security Building, Carson City, Nevada

In a recent conference with you, Mr. Harry Call, and Mr. Arthur Palmer, I was asked why the Employment Security Department chose the Lease-Purchase method of financing the central office building in Carson City. I believe a review of some of the history involved will be beneficial:

In the 1957 Legislative session, at the request of the Employment Security Department, Mr. James G. Ryan, Assemblyman from Clark County introduced AB-190 and AB-291 which provided, respectively as follows:

AB-290: Amends Unemployment Compensation Law relating to claims for benefits, contributions and rates of employers, establishment, control and withdrawals from unemployment compensation fund, use of unemployment compensation administration fund and employment security fund.

AB-291: Appropriates $75,709.52 for the fiscal year ending June 30, 1957, and not to exceed $150,000 for the fiscal year ending June 30, 1958, from the unemployment trust fund pursuant to the provisions of the Employment Security Administrative Financing Act of 1954 for the payment of expenses of employment security administration.

At the time these two bills were introduced, a Lease-Purchase agreement had already been entered into for construction of an office building in Reno. I would assume the proposed legislation was looking toward the construction of a building in Carson City. Both of these bills were killed in Committee.

Upon taking office in January 1959, I discussed with the then Director, Mr. Harry Depaoli, plans he had developed for the new Carson City Building. It was his feeling, based on his own experience, that the Lease-Purchase method would be the most feasible. I was aware at that time that our Department, with Legislative approval, could spend Reed Fund monies for the acquisition or construction of office buildings as has been done in other States. At that time we had to our credit, $289,985.73 in Reed Fund money and $104,628.20 in the Employment Security Fund, or a total of $394,613.93. We were estimating the construction costs for the Carson building - exclusive of financing - as being in the neighborhood of $850,000. The monies available to us would be almost 1/2 million dollars short of that amount.

My recollection is that I appeared before the Senate Finance Committee early in the 1960 session and explained to them what had been done in the case of the Las Vegas and Reno buildings, pointed out to them the need for a building here in Carson City, and discussed the various means of financing. It was the feeling of the Committee members that the Lease-Purchase arrangement would be more feasible. They were aware that the use of Reed Fund monies would lower the Nevada Unemployment Benefit Trust which could, under the test provisions of our law, put the tax rate of Nevada Employers at the maximum of 2.7%. Our subsequent experience shows that this would have been the case. Also they knew that we would be considerably short of the necessary amount and seemed to feel that it would really not be worthwhile to disturb the Reed Fund monies. Whatever their reasons, they were based on all information available at that time.

AB-226 was introduced in the 1960 Legislative session and passed unanimously. The Summary of this bill reads: Authorizes the executive director of the employment security department to enter into lease-purchase agreements for the acquisition of office buildings without cost to the state.

After a Lease-Purchase agreement was entered into with the Brunzell Construction Company of Reno, it became apparent that under the provisions of AB-226, financing would be very difficult to obtain. However, this is the responsibility of the Lessor and not of the Department. At the same time we were anxious to commence construction as soon as possible and worked closely with Mr. Brunzell and his various financing sources in an effort to work out any problems. It became further apparent that in order for Mr. Brunzell to get financing, there would need to be a further amendment. Mr. Frederick L. Hill, of Goldwater, Taber and Hill, attorneys for Brunzell Construction Company asked

if we had any objection to the law being amended to remove from NRS 612.227 1. the phrase ', from grants received by the employment security department or state agency for such purposes, to the extent that funds are made available by the Congress of the United States.' We had no objections and Mr. Hill subsequently contacted members of the Senate, who after conferring with me introduced and passed, unanimously, I believe SB-38 introduced January 25, 1961.

I am transmitting with this Memorandum a memorandum from our Chief of Contributions relative to the use of Reed Act Funds and pertinent bills.

I would like to commend you for the manner in which you have conducted this study and assure you that we will be most happy to supply any further information you may desire.

/s/ Richard Ham
Executive Director
Nevada Employment Sec. Dept.

* * * * * * * * * * * * * * * * * * *

Note: Similar bills were not presented to the following 1959 and 1960 sessions of the Legislature.

During the 1961 Legislative session, after the bill concerning authorization to enter lease-purchase agreements had been re-referred to the Assembly Ways and Means Committee, the Executive Director of the Employment Security Department appeared before the Committee of which Mr. James Gibson was Chairman.

Mr. Ham was asked by the Committee if he felt that the Lease-Purchase Agreement method was the only way the building could be constructed. Mr. Ham stated that he felt construction would be less expensive if the State appropriated the money and that he would be very happy to follow their advice on ways to obtain a building in any manner they felt to be most feasible.

Note: There is a practical reason why the Legislature may have given little consideration to the "Read Act" proposal. Use of funds from the Nevada Unemployment Benefit Trust account could have lowered the fund to a point where, under the test provisions of our law, the tax rate of Nevada employers could have been increased to the maximum 2.7%. Subsequent experience indicates that this would have been the case.

Note: The money available in the Employment Security Fund, and also that which could be appropriated from the Trust Fund at Washington, totaled about $394,613.93 as of January 1959. This amount would have been barely sufficient for financing about half the project which was eventually undertaken at Carson City.

By 1960, at the rate of growth in the Trust Fund, and taking into consideration the Employment Security Fund, there was approximately a half million dollars available for a project. This amount would still be insufficient to have financed much more than half of the Central Office project at Carson.

Note: Had the Legislature authorized appropriations from the Trust Fund at Washington under the provisions of the "Read Act," an unnecessary burden in tax payments to the ESD could have fallen to the employers of the state.

April 16, 1958 Letter from Planning Board to ESD Director Depaoli in regard to request for advice on building site for proposed Carson City building. Letter suggests that ESD consider the direct purchase of one of three blocks to be acquired for the Capitol Complex.

Note: At this time the Planning Board had not purchased the blocks in question.

April 17, 1958 Date of Leasehold Contract and Option to Purchase, executed between Nevada Employment Security Department and Leo Freedman, the lessor.

Note: This agreement and lease-purchase type contract covered the project for construction of an Employment Security Building in Las Vegas.

December 8, 1958 Letter from ESD to U.S. Dept. of Labor requesting tentative approval for a Central Office Building for ESD in Carson City. Building to contain 22,500 sq. ft. of useable space. Initial construction to be open to bids and financed by private interest with a view to ultimate ownership by the state through the lease-purchase process. When land purchase and construction costs are amortized through monthly payments, title to be vested in the State of Nevada to be used by ESD only with no further cost to the Department, operating and maintenance costs excepted.

Note: Matter of bids on project a Federal requirement. Use of term amortization suggests the purchase of a building on rather than a leasing arrangement.

December 10, 1958 U.S. Dept. of Labor granted tentative approval for building of 22,500 sq. ft. of useable space.

December 19, 1958 Planning Board endorsement to the proposal contained in the ESD letter to U.S. Dept. of Labor relative to construction of building and terms.

December 19, 1958 Meeting between Planning Board, ESD, and U.S. Dept. of Labor, relative to building location.

Note: Planning Board at that time had the block finally selected by ESD in probate. One of two methods to follow. Either ESD to act quickly and purchase the block directly, or Planning Board could purchase it along with other properties in the "compound" area and later, by legislative act, turn it over to the ESD.

December 23, 1958 ESD Director Depaoli requests an opinion from the Attorney General as to whether or not the ESD could expend monies from its Employ-Security Fund for the purchase of the block for location of the proposed building, under provisions of NRS 612.615.

Note: NRS 612.615 (Employment Security Fund) is composed of forfeits, interest, fees and assessments collected by the Department. Expenditures from this fund are restricted by Nevada law to costs of administration only.

January 29, 1959 Attorney General Opinion No. 3 (by D. W. Priest) to Statute Revision Director McDonald in regard to lease-purchase agreements and their effect on the Nevada constitutional debt limit. Holds in general the total amount of any lease-purchase agreement would be counted as a present existing obligation, and not as a month to month debt, where in fact the contract was for a purchase and not a lease.

Note: See body of report for analysis of this opinion.

February 6, 1959 Opinion from Attorney General Office (by D. W. Priest) to ESD indicating that possibly the Department could purchase the land with the use of funds from the Employment Security Fund (NRS 612.615). However, it advised against the purchase of the land with these funds for the purpose of erecting a building on the land in connection with a lease-purchase project, which in effect, would be more of the nature of a conditional sale.

Note: At this point, early in 1959, the Employment Security Department had available to its new Director, Mr. Ham, two opinions for examination relative to the tentative plans for a lease-purchase project to build for the Department a central office building in Carson City. Original negotiations for Federal approval of the plan had been initiated by former Director, Mr. Depaoli, who had requested the Attorney General's Opinion issued February 6, 1959. An opinion had also been issued on January 29, 1959 to the Statute Revision Director.

Both of these opinions strongly indicated the doubt expressed by the Attorney General's office with regard to certain legal questions, the acquisition of land, and a lease-purchase agreement in general, as related to constitutional debt limitation.

Note: See the body of report for analysis of this opinion.

February 14, 1959 State Planning Board meeting held at which time ESD representative informed the Board that Director Ham would advise at a later date on his decision to either have the ESD purchase the land directly, or let the Board purchase it and have legislation enacted at a later date to allow the ESD to acquire the land.

Note: No record could be located of any written reply to the Board on the matter of what method the ESD selected. However, as a practical point, the Planning Board did go ahead and purchase the land.

March 31, 1959 Public Notice was to have been issued by ESD which invited proposals for the lease-purchase of an office building in Carson City. All proposals for the construction and subsequent lease with option to purchase to be submitted on the basis of rental cost per square foot of space to be leased.

Note: Notice prepared, never "officially" issued.

Note: The Planning Board furnished the information with reference to purchase of site, type of construction, air conditioning, 22,500 sq. ft. of useable space, etc. Also, the terms of the Request for Proposal. These were requested by the ESD from the Board to be inserted in the March 31, 1959 ESD Public Notice.

Note: At approximately this time (no date appears on the paper) there was a suggested statement to be obtained from the Planning Board by the ESD which read as follows:

"The State of Nevada, by and through its Planning Board, hereby grants assurance and agrees that after the <u>period of amortization of costs</u> for the Las Vegas and Reno local offices and the Carson City administrative office the ES agency will continue to occupy the space but no further payment of rental costs will be required, except for operation and maintenance costs."

There is no indication in the material made available as to what action the Planning Board took in the matter of the request.

Note: The terms of this first proposal provided for the following:

a. The <u>building site</u> was specified by the ESD but <u>must be acquired by the lessor at his cost,</u> from the Winold Reiss Estate through Mr. William J. Crowell, Attorney for the Estate, at a cost of $23,200 plus all fees and incidental costs.

b. Building area: Approximately 22,500 square feet of <u>net useable office space</u>.

c. Plans and specifications to be provided by an architect to be selected by ESD, from among licensed Nevada architects. Plans and specifications to be approved by ESD and State Planning Board.

d. All plans to be checked by registered Nevada engineers for structural, fire, panic, electrical and mechanical code requirements.

e. Selection of the plan checking engineers to be made by the State Planning Board, but the cost of the plan checking to be paid for by the lessor.

f. Occupancy by ESD within 285 calendar days after the date on which the plans and specifications are approved.

g. Lessor to furnish a Corporate Surety Bond in an amount of not less than 100% of the amount of the land and completed building project. Surety furnishing the bond to be approved by ESD.

h. All proposals for the construction and subsequent lease with option to purchase of the building to be submitted in the form of a rental cost per square foot per month of space to be leased.

i. Invitation to be cancelled automatically at 5:00 p.m. DLST, May 18, 1959.

j. ESD reserved the right to reject any or all proposals, or to accept the proposal deemed best for the interest of the State of Nevada.

k. Every proposal to be accompanied by funds in the amount of not less than 5% of the amount of the land and completed building project. This amount to be forfeited if accepted lessor fails to enter into a contract with ESD within 10 days after receipt of notice of award.

l. No proposals to be withdrawn within a period of 30 days from opening date (May 18, 1959) and then only in case the award of the proposal has not been made.

Note: The land for the building was to be purchased by the lessor by direct negotiation with the private party and taken into consideration for estimation of the bid. Cost of the plan check was to be borne by the lessor and considered in bid submitted. As a protection to the ESD, the Planning Board also suggested a performance bond and a bid deposit.

Note: Although a cancellation date was established for submitting bids, no indication was given as to a bid opening date. The ESD reserved the right to reject any or all proposals, or to accept that which they felt best.

April 8, 1959 Planning Board submitted to ESD the Public Notice, and Request for Proposals. Planning Board submitted to ESD an Outline Construction Specifications for an Office Building for the ESD in Carson City.

Note: This is actual date of transmission from Planning Board to ESD of the basic data for the advertising of public notice inviting proposals for the building project.

Note: Research has disclosed that no formal bid advertisements were issued publicly.

May 18, 1959 Closing date for invitations to bid on lease-purchase proposal.

Note: No formal and publicly announced bid invitations were made since the Planning Board material was only a suggestion relative to how such a project might be handled.

Note: It has been suggested that informal figures, which might later have been firmed into official bids, indicated a wide disparity in cost per sq. ft. This was evidently due to the fact that the Planning Board was not in a position to offer a foundation for bid proposals which would extend to completed plans. Naturally those reviewing what had been offered by the Planning Board, selected what they felt to be necessary in the skeleton specifications, the quality of same, and came up with varying figures. ESD felt at this point that accurate bids (as required by the Federal agency) could only be secured after architectural plans could be drawn, a service the Planning Board could obviously not provide with the state staff.

May 26, 1959 Meeting in Reno attended by Director Ham, Mr. Erskine, and Mr. A. J. Miller relative to employment of architectural firm of Ferris & Erskine for the purpose of designing the ESD building in Carson City.

May 28, 1959 Transmittal of a form of Agreement between ESD and the architectural firm of Ferris & Erskine, by ESD to the U.S. Dept. of Labor for their review.

Note: Possible non-compliance with conflict of interest statutes: Ferris member of State Board of Architecture.

June 2, 1959 Department of Labor reply to Agreement form for architectural services. They have reviewed the Agreement and believe it to be in proper form. The Federal office continues by pointing out that it is their understanding that payments to the architect will be made from ESD's Employment Security Fund (penalty and interest fund). Further, that these architecural expenses will become part of the total cost of the new building and

may be repaid to the "special fund" from grants for rental of space.

Note: Federal approval is given to use money from the Employment Security Fund. HOWEVER, our ESD law specifies that these moneys shall be restricted to administrative expenses only. It is possible that architectural fees should not be considered as an administrative expense.

Note: In the final lease-purchase agreement executed for the project, provision is made for the lessor to repay to the ESD for architectural expenditures made from the fund. However, no specified time was set forth indicating when this reimbursement was to be made.

June 3, 1959 ESD notice to Ferris & Erskine that Federal office has approved architectural agreement and enclosed a signed copy for their files.

June 23, 1959 ESD letter to Planning Board advising Board of their selection of the firm of Ferris & Erskine as architects and asking Board to advise ESD of the codes to design to and what plan checking services the Board will require.

July 8, 1959 Ferris & Erskine letter to ESD requesting an engineering survey of the building site in Carson City to cover some dozen items of information. Extra copies of letter sent in the event ESD wishes to ask for bids for the survey.

July 27, 1959 Planning Board to ESD advising that since the building will eventually inure to the State as a part of the State Capitol Complex, the architects must design ESD building to comply with State of Nevada Planning Board Adopted Codes. State Planning Board will need 6 sets of plans and specifications. Plans will be checked at the expense of the ESD.

Note: Expense of the plan check to ESD. Money for plan check was expended from Employment Security Fund, restricted to administrative expenses only.

Note: No mention of reimbursement for this amount in final lease-purchase contract by the lessor, as was made for architectural fees.

Note: Such reimbursement was necessary under terms of the lease-purchase proposal. However, the entire lease-purchase proposal was specifically deleted from final lease-purchase agreement and therefore such reimbursement requirement was never carried through to final lease-purchase contract.

Note: In the final analysis it should be pointed out that Brunzell did make a reimbursement to the ESD for this plan checking cost, although under the terms of the final lease-purchase agreement and final lease-purchase contract, he was not obligated to do so. Only architectural fees were required to be reimbursed by the lessor. An original lease-purchase proposal had contained this necessary requirement, but was not made a part of the agreement or final contract by reference or actual incorporation.

August 18, 1959 Letter from Malone Engineers to ESD indicating that they would complete an engineering survey of the building site including excavation of test hole and soil bearing test for $1,741.84.

August 19, 1959 ESD Director notifies Malone Engineers of acceptance of their offer to conduct the engineering survey required at a cost of $1,741.84.

September 3, 1959 ESD to Planning Board asking for a copy of Preliminary Title Report covering the site of proposed office building.

Note: Planning Board negotiating for purchase of property. However, as of this date title still held by Estate of Winold Reiss.

September 15, 1959 ESD transmittal of 7 copies of preliminary drawings to Federal office for their review.

September 21, 1959 ESD paid out of their Employment Security Fund restricted to administrative expenses only, the sum of $12,000.00 to the firm of Ferris & Erskine for preliminary drawings for the building. (25% x 6% x $800,000.00)

Note: Notation was entered on the claim that this amount would be reimbursed by the lessor at time lease-purchase agreement became effective.

Note: Difficulty was experienced when the ESD presented this claim for architectural payments to be made from their Employment Security Fund. The Budget Office held back authorization for it to be paid pending further information. It was at this time that the "to be reimbursed to the ESD by the lessor" was added to this and subsequent claims.

Note: Lease-purchase agreement finally executed does provide for this reimbursement but fails to indicate when it shall be made. Specifically, does not provide for reimbursement when lease-purchase agreement became effective (as was indicated on claims), or at any other specified time.

Note: Final reimbursement for most architect fees was made by Brunzell April 27, 1962--over a year and a half after execution of the lease-purchase agreement.

September 20-30, 1959 Federal officials meet with ESD relative to Federal proposals of requirements and assurances on the building project to be supported with Federal grants.

October 13, 1959 Preliminary Plans and Specifications for Approval issued by Ferris & Erskine to the Employment Security Department.

October 21, 1959 Memorandum between ESD offices making reference to Paragraph 6 of the architectural agreement pointing out that the lessor is to pay for engineering survey. Addressed to Budget & Procurement Officer.

Note: Lessor not known at this time. Funds had to be advanced from ESD Employment Security Fund (penalty and interest fund), restricted to administrative expenses only.

November 24, 1959 ESD paid out of their Employment Security Fund, restricted to administrative purposes only, the sum of $1,741.84 to Malone Engineers for engineering survey.

Note: Notation was entered on the claim that this amount would be reimbursed by the lessor at time lease-purchase agreement becomes effective.

Note: Lease-purchase contract finally executed fails to mention this reimbursement and restricts reimbursements by lessor to architectural fees only.

Note: Although never provided for in final lease-purchase agreement or lease-purchase contract, reimbursement for this amount was made on April 26, 1961, by the lessor over 7 months after Brunzell executed the lease-purchase contract.

December 3, 1959 Letter from Ferris & Erskine to ESD relative to architects concern over Federal reduction from 36,000 sq. ft. to 30,000 sq. ft. on building.

Note: 30,000 sq. ft. is equal to about 21,625 sq. ft. of net usable space. Original anticipated net usable space was 22,500 sq. ft.

December 4, 1959 Ferris & Erskine to Planning Board transmitting 2 copies of Preliminary Plans & Specifications on Building and asking for a preliminary code check on plans. Cost of plan check to be paid for by Ferris & Erskine if necessary.

December 16, 1959 Federal sub-committee on Labor notifies Senator Bible, who had acted at the request of ESD, that net usable space allotted is more than standard for the present and anticipated expansion of the ESD, in keeping with their Federal formula.

Note: Federal formula calls for 175 sq. ft. per employee. A 36,200 sq. ft. structure would provide 300 sq. ft. per employee. ESD had notified Federal office that 30,000 was adequate. Washington has had no further word on the matter from ESD.

December 30, 1959 International Conference of Building Officials to Planning Board after review of Ferris & Erskine Preliminary Plans & Specifications. Indicates 14 areas of concern and non-conformity to Uniform Building Code. Billed Planning Board in the amount of $60.00. Corrections ultimately made.

January 13, 1960 ESD Director to Senator Bible indicating that a Miss Gwinn of the Federal office will be in Nevada.

Note: Previous wires and letters had pointed out that this person is Acting Head of the Division of State Personnel and Management Standards who analyzes data and advises a Mr. Goodwin, Director of the Federal Bureau of Employment Security. It had been suggested that she be contacted in regard to the matter of the reduction of the size of the building area, made by the Federal office.

January 27, 1960 Wire from Federal office to ESD indicating approval for a building designed to 33,000 sq. ft. of gross area.

Note: The visit indicated by Miss Gwinn, evidently was successful.

January 27, 1960 Ferris & Erskine advises ESD that they will re-work ESD Building plans in the light of recently granted Federal authority for 33,000 sq. ft.

January 29, 1960 ESD paid out of their Employment Security Fund (penalty & interest fund) restricted to administrative purposes only, the sum of $1,365.00 to the firm of Ferris & Erskine for additional drawings due to increased size of building authorized by Federal office and the subsequent re-working of building plans by architect. NOTATION WAS MADE THAT THIS AMOUNT WOULD BE REIMBURSED TO THE ESD BY THE LESSOR.

Note: The sum of $12,000 had been paid previously based on a building cost of $800,000 as a quarterly payment at 6% (25% x 6% x $800,000).

Note: Expanded size of building increased the cost to $891,000. Second payment represents (25% x 6% x $91,000 increase) or $1,365.00.

Note: At this point Ferris & Erskine had been paid for 25% of their architectural fee on the enlarged building.

February 2, 1960 Land acquisition proposal for building site presented to the Senate Finance and Assembly Ways and Means Committees which in effect provided authorization for the Planning Board to sell directly, for not less than the State's expenses in acquiring the land, to a lessor to be nominated by ESD who will provide a building for the ESD.

Note: At this time the State had not yet acquired title to the property, the transaction being in escrow.

February 3, 1960 Federal agency to ESD Director indicating that assumption is made in regard to Federal approval of project placing it in tentative category subject to submittal of information called for by Section 2520 Part IV Manual, paragraphs C and J especially. On receipt of information satisfying these requirements final approval will be granted.

Note: Paragraph "C"- "Annual rental payment to be applied against the cost of the space does not exceed an amount per square foot which ordinarily would be paid for rental of suitable, privately-owned space in the general locality involved."

Paragraph "J"- "If the State agency is required by the State to vacate the premises before or after the cost of the space has been amortized through the application of funds granted for rentals, the amount of granted funds which thereafter may be used for the payment of rental cannot exceed the amount which the State agency would have been required to pay if it had remained in the premises. If the State agency, in the interest of economy or for the more efficient operation of the employment security program, vacates the premises, it must retain an equity in such premises to the extent that granted funds were used to amortize their cost. In determining the amount of equity, primary consideration will be given to the proportion of the original cost amortized through the use of granted funds in relation to the current valuation of the property.

Note: It is of interest to also quote an additional requirement of the Federal agency contained in the same section as follows:

> THAT AN OPINION HAS BEEN OBTAINED FROM THE ATTORNEY GENERAL OF THE STATE INDICATING THAT THE PROPOSED RENTAL-PURCHASE ARRANGEMENT IS PERMITTED UNDER STATE LAW AND SPECIFYING THE STATE OFFICIAL AUTHORIZED TO ENTER INTO SUCH AN ARRANGEMENT.

Note: The following remarks are found following the Federal requirements in the Federal Manual:

It should be understood clearly that the approval of the application of funds granted for rental of space toward the amortization of the cost of such space is limited by law to the current fiscal year and does not constitute a commitment on the part of the Bureau to make grants for future periods.

Note: The Federal Manual Section 2520, paragraph "G" provides for the bid procedure as follows:

In the case of a plan for the acquisition of a new building to be financed and constructed for the State by private interests with title to be obtained by the State after the cost of the building has been amortized, bids for construction and sale of a building under such a plan have been solicited through advertising in newspapers of statewide circulation and the award has been made to the lowest responsible bidder.

Note: Federal Employment Security Manual, Section 2521, entitled Appointment of Building Committee, is of extreme interest with regard to suggested conduct to follow under a lease-purchase project contemplating a building for ESD. The Section reads as follows:

"Since rental-purchase transactions are generally complex and involve the expenditure of large sums of money, the State should take more than ordinary precautions to insure that the public interest is protected. Approval by the governor of a proposed rental-purchase agreement is one possibility. Another and very desirable arrangement would be the appointment by the governor, or other duly constituted authority, of a State building committee, composed of responsible State officials, such as the State treasurer, the State attorney general, the State architect, and the State engineer and/or representatives of the public, unless such or similar governmental organization is already functioning as a unit of the State government. If such a committee were appointed, it would be responsible for advertising, reviewing, and working with the State employment security agency with respect to all negotiations incident to the acquisition or construction of buildings, including selection and acquisition of the site; obtaining and passing upon the adequacy of plans and specifications; advertising for and obtaining bids and awarding contracts; arranging for all necessary financing; determining the cost or fair market value of the building at the time the rental-purchase agreement is entered into by the state; and furnishing the Bureau of Employment Security adequate evidence that the amount necessary to amortize the cost of the space does not exceed the rental for other suitable, privately owned space in the same locality." (underscoring supplied)

Note: It appears that these suggestions were largely disregarded. Evidently, the Federal agency did little to encourage the application of its suggested method and apparently disregarded the intent of their own identified and proper procedure.

February 4, 1960 Wire from ESD Director to Federal agency indicating it is understood that an annual rental payment, not in excess of that which would be ordinarily paid for suitable rental space, is a requirement, and also the provisions for vacating the premises are realized.

February 4, 1960 Planning Board to Ferris & Erskine indicating the Board cannot accept their check of $60.00 for payment of plan check. Requests Ferris & Erskine to pay for plan check directly to International Conference of Building Officials.

February 10, 1960 Federal agency to ESD Director enclosing revised provisions of a proposal which will satisify the Federal Bureau in connection with the building project and Federal grants for rental payments.

Note: One of the paragraphs contained in the explanatory letter sent with the revised provisions pointed out the necessity for formal legislative action which of course led to the introduction of Assembly Bill No. 226 seven days later. The paragraph reads as follows:

> As we have heretofore discussed with you, we believe it is preferable for assurances of a State in connection with a rental-purchase arrangement to be made by action of the State's legislature rather than by written assurances by an appropriate official of the State. Although in a technical sense such assurance may not be enforceable as such, the legislative statement setting forth the considered position of the State is more likely to bind a succeeding State legislature of State government, and certainly will give adequate notice to the State that a failure to observe the assurance will result in the withholding of funds which might otherwise be granted for rent for the Employment Security agency in subsequent years.

Note: The proposed provisions enclosed with the communication are three in number and provide in general the following:

1. Once the cost of construction of a building under a rental-purchase agreement has been fully amortized, no further costs shall be charged against the ESD in connection with the occupancy of the building, other than reasonable costs of operation and maintenance.

2. After a building has been fully amortized, if the ESD is required to be moved from a building which has been purchased

under a rental-purchase agreement, the State of Nevada gives assurance that other substantially similar space will be furnished to the ESD without further payments from such department or from the Bureau of Employment Security of the Department of Labor, other than the reasonable cost of operation and maintenance.

3. If the ESD is required to move from a building prior to amortization of the cost thereof, proper credit shall be allowed to the ESD for the payments already made toward such amortization, so that the total payments by the Bureau of Employment Security of the Department of Labor for substantially similar space will not exceed the amount of such payments which would have been required had the first building been amortized in accordance with the original rental-purchase agreement.

Note: These are basicly the same provisions enacted into law in Assembly Bill No. 226, and existent in Senate Bill No. 38 which amended Assembly Bill No. 226.

Note: Mention is made that the Federal agency understands that a copy of these provisions is to be sent to the Statute Revision Director for proper draft of proposed legislation.

February 15, 1960 Introduction of Assembly Bill No. 207 by Assemblymen Waters, Pozzi, Knisley, and Bastian, authorizing the sale of the building site for the construction of a building thereon for the use of the ESD under a lease-purchase agreement.

Note: At this date, and on the date of passage by the Legislature, and on the date the measure was signed by the Governor (on which date the act became effective), the State of Nevada did not have title to the property defined in the act.

Note: The introduction of this bill occurred two days prior to the introduction of a bill which would provide authorization for the ESD Director to enter into lease-purchase agreement for the building in question.

Note: Although such authorization to sell land not currently owned was awkward procedure, there is no suggestion here in this report that such an act is not binding.

February 17, 1960 Introduction of Assembly Bill No. 226, also by Waters, Pozzi, Knisley, and Bastian, authorizing the Executive Director of the ESD to enter into lease-purchase agreements for the acquisition of office buildings without cost to the state.

Note: The February 10, 1960 communication from the Federal agency to ESD specifically pointed out the desirability of obtaining legislative assurances in connection with the project. The Employment

Security Manual, Part IV, Section 2520, paragraph "B" requires that the proposed rental-purchase arrangement is permitted under state law. Obviously it became highly necessary to obtain legislative action which clearly granted the ESD Director authority to enter a lease-purchase agreement and give assurances required by the Federal agency in connection with such authorization.

Note: Assembly Bill No. 226 incorporated both of these Federal requirements by granting authorization to enter a lease-purchase agreement and to further incorporate the three assurances the Federal agency was concerned about.

Note: A proposed draft of legislation carrying forward the Federal agency's interpretation of what assurances were needed, was enclosed with the February 10, 1960 letter to the ESD. Wording contained in Sections 4, 5 and 6 of Assembly Bill No. 226 is almost identical to Sections 1, 2 and 3 of the Federal draft.

ONE MAJOR CHANGE WAS MADE IN THE WORDING OF THE LEGISLATION INTRODUCED AND PASSED AND APPROVED BY THE GOVERNOR FROM THAT CONTAINED IN THE FEDERAL DRAFT. In place of identifying three specific buildings, at Las Vegas, Reno and Carson City, the wording was written so as to be applicable to the Reno and Las Vegas ESD buildings as follows: ". . . ANY BUILDING AND PREMISES HERETOFORE OR HEREAFTER PURCHASED OR AGREED TO BE PURCHASED. . . ."

The net effect of the passage of this bill, and subsequent incorporation into Senate Bill No. 38 at the following Session, was to EXTEND THE ASSURANCES FOR THE CARSON CITY BUILDING PROJECT TO ENCOMPASS BOTH THE HERETOFORE ERECTED RENO AND LAS VEGAS BUILDINGS ALSO CONSTRUCTED ON A LEASE-PURCHASE BASIS.

At this point the State of Nevada purportedly became liable and guaranteed free rental to the ESD for facilities in the three cities after periods of amortization of their buildings, or rent free facilities if the State moved ESD from any of the buildings, or credit for equity, in the event of removal from any of the buildings prior to their amortizations.

The rent free assurances were required by the Federal agency. The State of Nevada has purportedly bound itself to give rent free privilege to a non-general fund agency, in conflict with current policy. The ESD had been paying a rental per sq. ft. to the Department of Buildings & Grounds for their headquarters in Heroes Memorial Building in Carson City.

Note: However, future sessions of the Nevada Legislature cannot be bound by such an agreement for any of the three buildings. To be a valid contract, there must be a defined period of time, a beginning and ending. Nothing could be more indefinite and without ending than rent free forever. The wording in Sections 4, 5 and 6 is not a contract and can be repealed. In effect it amounts to a gratuitous offer, not binding successive legislatures.

PROGRESS OF ASSEMBLY BILL NO. 226 THROUGH THE LEGISLATURE (1960)

February 17, 1960 Introduction of Bill by Messrs. Waters, Pozzi, Knisley and Bastian:

Mr. Waters moved that the bill be referred to the Committee on Ways and Means. Motion Carried.

February 19, 1960 Chairman Raymond L. Knisley of the Committee on Ways and Means reports the Committee has had the bill under consideration and reports back the recommendation: Do Pass.

February 22, 1960 Bill read second time, ordered engrossed and to third reading.

February 23, 1960 Bill read third time. Remarks by Mr. Pozzi. Roll call on Assembly Bill No. 226: Yeas - (31); Nays - Rowntree, Ryan - (2); Absent - Berrum, Buckingham, Fitz, Giomi, Harmon, Herr, Hunter, Knisley, Monaghan, Nevin, Revert, Schouweiler, Swanson, Young - (14). Bill ordered transmitted to the Senate.

February 24, 1960 In Senate, first reading. Assembly Bill No. 226, Senator Whitacre moved that the bill be referred to the Committee on Finance. Seconded by Senator Slattery. Motion carried.

March 2, 1960 Chairman Fred H. Settelmeyer of the Committee on Finance reports the Committee has had the bill under consideration and reports back the recommendation: Amend, and do pass as amended.

Note: The bill was amended as follows:

Struck out of Section 1 - . . . for the purchase of office buildings and the land upon which such office buildings are located (AFTER A COMMITMENT IN WRITING, BY THE UNITED STATES OR ANY AGENCY OR DEPARTMENT THEREOF, THAT THE UNITED STATES OR ANY AGENCY OR DEPARTMENT THEREOF SHALL PAY THE RENTALS TO THE LESSOR AND THAT THE ESD AND THE STATE OF NEVADA SHALL NOT BE RESPONSIBLE FOR SUCH RENTALS.) (Capitalized material struck out)

Replaced struck material with the following:
(RENTALS TO THE LESSOR SHALL BE PAID BY THE EMPLOYMENT SECURITY DEPARTMENT, OR ANY AGENCY WHICH MAY HEREAFTER ABSORB THE EMPLOYMENT SECURITY PROGRAM, FROM GRANTS RECEIVED BY THE ESD OR STATE AGENCY FOR SUCH PURPOSES, TO THE EXTENT THAT FUNDS ARE MADE AVAILABLE BY THE CONGRESS OF THE UNITED STATES.)

Note: The amendment was made obvious in the light of the following provision set forth in the Employment Security Manual, Part IV, Fiscal Management - Expenditure of Funds, 2520 R-3/11/55, following paragraph "M" which states as follows: IT SHOULD BE UNDERSTOOD CLEARLY THAT THE APPROVAL OF THE APPLICATION OF FUNDS GRANTED FOR RENTAL OF SPACE TOWARD THE AMORTIZATION OF THE COST OF SUCH SPACE IS LIMITED BY LAW TO THE CURRENT FISCAL YEAR AND DOES NOT CONSTITUTE A COMMITMENT ON THE PART OF THE BUREAU (federal) TO MAKE GRANTS FOR FUTURE PERIODS.

Note: It was clearly the intent of the Assembly bill as introduced that the State of Nevada and the State Employment Security Department were to be free from any and all obligations concerned with rental payments to amortize the cost of the Carson City Central Office Building.

Note: The original bill having made mention of no state liability in the project, and the subsequent removal of such language, provides the possibility for future interpretation to conclude that the action taken by the Senate and the amendment which followed, does strongly imply that the State was not now removing itself from liability in the payment of rent for the project.

March 2, 1960 Assembly Bill No. 226 read second time with the proposed amendment by the Committee on Finance. Senator Black moved the adoption of the amendment. Seconded by Senator Slattery. Amendment adopted. Bill ordered reprinted.

March 4, 1960 Bill read third time. Senate roll call on Assembly Bill No. 226: Yeas - 16; Nays - None; Absent - Dial. Bill ordered transmitted to the Assembly.

March 7, 1960 Senate amendment read in the Assembly. Mr. Gibson moved that the Assembly concur in the Senate amendment to Assembly Bill No. 226. Remarks by Mr. Gibson. Motion carried.

March 8, 1960 Enrolled and delivered to the Governor.

March 14, 1960 Approval by the Governor of Assembly Bill No. 207 (land acquisition) and Assembly Bill No. 226 (authorization to enter into a lease-purchase agreement) relative to the ESD building projects. Became Chapters 190 and 191, respectively, Statutes of Nevada 1960.

Note: The ESD had entered negotiations toward the assemblage of a lease-purchase project, and had expended considerable sums of moneys from its Employment Security Funds limited to administrative purposes, PRIOR TO OBTAINING FROM THE LEGISLATURE AUTHORIZATION TO ENTER INTO LEASE-PURCHASE AGREEMENTS.

Note: ALL MONEYS PAID OUT FOR THIS PROJECT PRIOR TO THIS DATE ($15,106.84) WERE MADE WITHOUT LEGISLATIVE AUTHORIZATION.

March 22, 1960 Recording of the deed to the land employed as the building site at the Ormsby County Court House in File 30934, Book 85. At this date the title to the land rested with the State of Nevada through the State Planning Board.

Note: It is of interest to note that when Assembly Bill No. 207 was introduced on February 15, 1960, and during the time it was considered by both houses of the Legislature, and when signed by the Governor, the State did not have ownership of the property, nor had the State moved to condemn such property.

Note: There is no legal effect regarding this peculiarity which would render the act, which provided for the sale of land the State did not own at the time, a null and void act. However, we suspect that the vast majority of persons who passed upon the measure must have thought that at the time, the State had title to that which they were authorizing to be sold to a lessor to be nominated by the ESD.

March 30. 1960 ESD paid out of their Employment Security Fund (penalty & interest fund), restricted to administrative purposes only, the sum of $6,682.50 for a partial payment of working drawings and specifications for the Building under terms of agreement with Ferris & Erskine dated May 28, 1959. NOTATION WAS MADE THAT THIS AMOUNT WOULD BE REIMBURSED TO THE ESD BY THE LESSOR.

Note: Heretofore ESD had paid Ferris & Erskine 25% of the originally estimated $800,000 cost of the building and also 25% of $91,000 which represented an increase in the estimated figure for the building to $891,000.

Note: A balance of 75% of the architectural fees remained to be paid at this time at 6% of the building cost. Evidentally this balance was to be paid to Ferris & Erskine in 6 equal installments, presumably monthly installments, under the terms of the agreement at paragraph #5. There was apparently considerable leeway under the terms of the contract as to when the payments representing this 75% balance would start and for how long they would run, except reference to expenses of the architect and degree of progress. In any event the above amount does represent 75% divided by 6 equaling (12½% x 6% x $891,000). This may also be expressed as follows (25% x 50% x 6% x $891,000) or $6,682.50.

April 14, 1960 ESD to International Conference of Building Officials in regard to $60.00 for the cost of plan checking, and payment of it.

Note: No record found of ESD making payment to International Conference of Building Officials. Possibly made by Ferris & Erskine.

April 20, 1960 ESD paid out of their Employment Security Fund, (penalty & interest fund), restricted to administrative purposes only, the sum of $13,365.00 to Ferris & Erskine for partial payment of working drawings and specifications for the building. NOTATION WAS MADE THAT THIS AMOUNT WOULD BE REIMBURSED TO THE ESD BY THE LESSOR.

Note: Continued reference is made to the fact that the lessor, not as yet selected, would reimburse the ESD for these payments.

Note: This payment apparently represents a double monthly payment made at one time. The amount is exactly twice the amount of that issued on March 14, 1960 and also twice the amounts indicated on subsequent partial payments. The payment may be expressed as follows--2 times 12½% equal to (25% x 6% x $891,000). The claim contained the following formula which is similar, (50% x 50% x 6% x $891,000) or $13,365.00.

April 26, 1960 ESD to Planning Board requesting that plans and specifications being prepared by Ferris & Erskine be checked during the bidding period with the final review forwarded to the architect no later than May 20 so that the modifications required by the check can be inserted into a final addendum issued to persons submitting proposals.

May 2, 1960 Planning Board to ESD in answer to request of April 26, 1960. "Due to the scope and intensity of the Planning Board's plan check, the Board does not authorize State projects to be out to bid during the checking period."

May 2, 1960 Planning Board to ESD advising that the cost of acquiring the building site to the State and the additional cost of transfer to the bidder will total $25,738.00.

Note: State paid $23,200 for the building site. The additional amount is necessary to reimburse the state for its costs in acquiring the property ($2,262.00) plus the costs to transfer again to a selected lessor ($276.00), for a total of $25,738.00.

May 4, 1960 Date on plans and specifications for the ESD building at Carson City.

Note: This date represents approximately the time Ferris & Erskine plans were made available to the ESD and the Planning Board for review.

Note: The plans and specifications included an Invitation for Lease-Purchase Proposal. It is of interest to note the following provisions of this invitation as follows:

a. Sealed proposals to be recieved by ESD until 3:00 p.m. PDST, June 28, 1960.

b. Bid opening date was the same as deadline for receipt of proposals.

c. The right was reserved to reject any or all proposals or to accept any proposal deemed in the best interests of the ESD.

IT IS OF INTEREST TO NOTE THAT THE ENTIRE BID PROCEDURE WAS A SPECIFIC REQUIREMENT CONTAINED IN THE FEDERAL ES MANUAL PART IV, SECTION 2520, PARAGRAPH "G" for this type of project. The paragraph reads as follows: "In the case of a plan for the acquisition of a new building to be financed and constructed for the State by private interests with title to be obtained by the State after the cost of the building has been amortized, bids for construction and sale of a building under such a plan have been solicited through advertising in newspapers of statewide circulation and the award has been made to the lowest responsible bidder."

The language of the Federal requirement and that contained in the Proposal, in regard to who shall be awarded the bid, are far from identical. That contained in the actual Proposal issued is apparently more liberal.

d. Each bidder shall agree in the Proposal to invest sufficient monies in the project to cover the cost of all of the items included in these contract documents, together with the expense of maintaining and operating the building over the period of the contract set forth in detail in the lease-purchase agreement.

e. The ESD did not obligate itself to accept the lowest or any other proposal.

f. All bidders were to send teams or representatives to a pre-bid conference at ESD on May 18, 1960. (Actually held on May 25, 1960)

g. A record of the question-and-answer period at the conference, together with the answers to any questions not resolved at that meeting, formed the body of Addendum No. 1, which was issued to all parties to whom plans had been issued. Sets of plans and specifications were available from Ferris & Erskine upon a returnable deposit of $300.00.

Note: Plans were on file for inspection in three California cities, one in Utah, at Reno in Nevada but not at our largest city, Las Vegas. ESD indicates there was little interest shown in latter city.

Note: The plans and specifications included a lease-purchase proposal form. It is of interest to note the following requirements to be completed on this form:

a. The bid was to be entered as a monthly rental per square foot (gross) on a building to be figured at 33,500 sq. ft. The monthly rental was to extend over a period of 20 years, in strict accordance with the plans and specifications prepared by Ferris & Erskine.

Note: At this point the gross square feet of the building was expanded from the Federal authorization of 33,000 to 33,500 gross square feet. It is understood Washington approved the increase.

b. At termination of the lease, the lessor was to sell the building to the State for $1.00.

c. The bidders were required to enter on bid form the cost of construction for the building in accordance with plans and specifications.

d. The bidder agreed on the form that in the event his proposal was accepted that he would reimburse the ESD for monies it had expended for engineering surveys and tests in the amount of $1,741.84.

Also to agree to reimburse the ESD for architectural services of Ferris & Erskine in the amount of (6%) times the construction cost.

e. The bidder also had to state that he had included in his proposal the amount of $25,738.00 to cover the cost of the land he would have to purchase from the Planning Board, who had acquired the property for the State as a part of the Capitol Complex.

f. The successful bidder was to enter into a contract by execution of a lease-purchase agreement, on a form bound into the specifications, within (10) days after notice of selection.

g. On the lease-purchase proposal form, the date of bid opening was given as June 1, 1960.

Note: On the Invitation for Lease-Purchase Proposal a date of June 28, 1960 was given. Since the Proposal was not made public until May 20, 1960, we suspect this must have been an error. Further evidence is the actual date of bid opening which occurred on June 28, 1960.

Note: Lease-Purchase Agreement Form (Sample) - A sheet was enclosed where the form would have been bound with the plans and specifications indicating the following: "LEASE-PURCHASE AGREEMENT FORMS WILL BE DISTRIBUTED AT THE CONFERENCE ON MAY 18, 1960, AT THE DEPARTMENT OF EMPLOYMENT SECURITY IN CARSON CITY, NEVADA." (Actual date this conference was held May 25, 1960.)

Note: These further provisions were contained under Supplementary General Conditions.

a. The base bid was understood to include the sum of $15,000 to be used as a contingency fund during the course of construction.

b. The time of completion for the construction of the building was 300 calendar days from date of receipt of notice to proceed.

c. The owner was to be entitled to the sum of $300.00 for each calendar day's delay in the completion of the construction of the building as fixed, agreed, and liquidated damages, and not as a penalty.

ANALYSIS AND COMPARISONS MADE BETWEEN THE STATE PLANNING BOARD'S MATERIAL DEVELOPED FOR EMPLOYMENT SECURITY DEPARTMENT EMPLOYED AS A REQUEST FOR PROPOSALS TO BE MADE BY MAY 18, 1959, AND THE PROVISIONS CONTAINED IN THE MAY 4, 1960 PROPOSAL BASED ON FERRIS & ERSKINE PLANS

Major changes were made in the proposal based on Ferris & Erskine plans (made public May 20th, 1960). Several basic and protective provisions were eliminated which had been contained in the State Planning Board proposal of 1959 which was never made public. The provisions which the 1960 proposal failed to cover, which were in the State Planning Board proposal, are as follows:

1. No provision was made for a Bid Bond. The 1959 proposal contained the following protective provision: "Every proposal shall be accompanied by a certified check, cashier's check, or cash made payable to the State of Nevada in an amount of not less than five (5) percent of the amount of the land and completed building project, said amount to be forfeited should the lessor to whom the building lease is awarded fail to enter into a contract in accordance with his proposal, within (10) calendar days after receipt of notice of such award."

2. No provision was made for Completion Bond. The first proposal contained the following protective provisions: "The lessor agrees that before signing the lease and starting the building, he will furnish and make payable to the State of Nevada, through its ESD, a Corporate Surety Bond in an amount of not less than one hundred (100) percent of the amount of the land and completed project, said amount to be forfeited should the lessor fail to provide a building under the terms of the lessor's proposal and lease."

Note: The Surety furnishing the Bond had to be approved by ESD.

Note: In the 1960 Proposal, under supplementary General Conditions, there was contained a $300.00 daily payment for late construction. However, this was not made available to the ESD but to any owner who was having the building constructed. For contractors bidding on the proposal, any completion bond proceeds should go to the ESD.

Note: For some unknown reason these highly desirous protective provisions were not found as a part of the 1960 Proposal for a lease-purchase project, although the General Electric Pension Trust did incorporate the requirement of a performance bond in their 1961 commitment letter to Brunzell Construction Co.

Minor differences were also noted as follows:

(a) The prospective lessor was to purchase the land from the state in the 1960 proposal, whereas in 1959 it was a direct purchase from the private party, the state not having acquired title as yet.

(b) Size of the building was slightly different, from the 1959 proposal to the 1960 proposal.

(c) In the 1959 proposal an architect was yet to be selected. In the 1960 proposal one was already employed who had prepared plans and specifications, the cost for which the lessor was to reimburse to ESD.

(d) In the 1959 proposal the cost of the plan checking was to be paid for by the lessor. This point is not covered in the 1960 proposal.

(e) Construction time was extended from (285) days in the 1959 proposal to (300) days in the 1960 proposal.

(f) Numerous other variations are found between the proposals. The most significant general observation is that under the 1959 proposal no detailed plans and specifications were available to bidders. In the 1960 proposal such plans were available.

May 13, 1960 Planning Board sent out Ferris & Erskine plans and specifications for structural, mechanical, electrical, plumbing, etc., checking and review.

May 18, 1960 Letter from the Equitable Life Assurance Society to a Mr. Warren A. Casey of 155 Montgomery Street, San Francisco, California, and forwarded to Mr. Frank Jackson of the Brunzell Construction Company.

Note: This Mr. Warren A. Casey was the individual entered on the required statement accompanying the lease-purchase proposal submitted by Brunzell to the ESD, as the individual who agreed to provide the Brunzell Construction Company with sufficient funds over and above such funds as are provided by the proposer himself. Said lease-purchase proposal was accepted by the ESD and Brunzell became the successful bidder on the basis of the bid and this financial backer.

Note: The letter from the Equitable Life Assurance Society indicated to Mr. Warren A. Casey in part as follows:

"Should you be successful in your bid for this contract, we would be most pleased to consider the long term financing. As you are aware we are particularly interested in the net aspects of the lease and the Governmental guarantee. We are allowed to loan in the amount of two-thirds of our appraised value. Such appraised value would be based primarily on the net rent from the State."

Several points in this letter of information, hardly to be classed even as a conditional commitment, are of interest:

1. Specific reference is made to long term financing. This lender did not envision any implication with interim financing which is obviously highly necessary to bring a structure to completion unless a proposer himself is well financed and has other arrangements for the short term interim expenses. The Equitable Life Assurance Society was making an offer to provide the "take out" or long term mortgage only.

2. At the date of this communication the lease-purchase agreement was far from a net rental agreement with the proposer since the lessor was responsible for major maintenance of the building, and costs of insurance, taxes, municipal assessments, and in addition, the rental costs abated during periods of time when the building could not be used due to partial or total destruction. Certainly such a lease-purchase proposal offered no clear cut net aspect. As finally revised under the 2nd lease-purchase proposal, the project did come close to a net transaction, and with the amendments made to the final contract, did assume such a status. Other additional provisions in the first lease-purchase proposal had legal implications which likewise removed it from a net rental transaction upon which a lender would be in a position to fund a long term mortgage.

3. The reference to appraised value based primarily on the net rent from the state is interesting. Here we have the foundation for the loan resting not so much on the physical structure but based on anticipated assignment of rentals. Such a consideration would have been essential to any proposer seeking a coverage of most of his interim financing, since the lender in this case was limited to two-thirds of appraised value. If appraised value was considered on the building itself, naturally there would be insufficient funds for any interim or take-out financing for those proposers not wishing to employ their own funds in the project.

Note: It should be remembered that the General Electric Pension Trust finally forced through amendments to the contract between the ESD and Brunzell, and forced legislative amendment of the ESD authority to enter the lease-purchase agreement, thus providing a basis entirely foreign to the situation existent on the date of this letter from Equitable Life, General Electric accomplished these changes through a series of conditions to their commitment to fund the loan to Brunzell, and the ESD accepted these conditions to assist a specific and single contractor. The ESD did not make such a new "package" proposal available to others who had bid on the project or those others who might have desired to bid on such a changed situation. In short, the very nature of this early communication pointed out the "net aspects" that Equitable Life considered essential and which did not exist in the lease-purchase proposal at the time.

Note: Lacking any further evidence made available, this communication may have been the basis upon which Brunzell indicated on the required statement which accompanied his accepted lease-purchase proposal that Warren A. Casey was supplying the necessary funds for the project. If so, such a foundation was certainly not applicable under the specific wording of the communication as set forth in this report. Lacking evidence from any other communication made available apparently the proposer fully intended to search for the necessary construction funds at a later date.

May 20, 1960 ESD releases information relative to the Invitation for Lease-Purchase Proposal through legal notices in papers and news story to all media in the state. Individual letters containing this general information and requesting interested parties to be present at a pre-bid conference on May 25, 1960 in Carson City, were also sent to some (8) parties known to be interested in the project.

Note: Project was put out to bid PRIOR TO TIME PLAN AND SPECIFICATION CHECKING WORK WAS COMPLETED.

Note: Planning Board has refused to allow this unusual procedure on May 2, 1960. A letter of May 5 from Ferris & Erskine to Planning Board Chairman may have resulted in Planning Board Director decision in the matter to be overruled.

May 25, 1960 Pre-Proposal (Bid) Meeting held in Carson City. Roster of Attendance indicates 12 parties were represented at the meeting. Remarks made in response to questions to be incorporated, along with other questions not answered at the meeting, in an Addendum #1 to be sent out May 31st, 1960. Addendum #2 to be sent out after June 14th, the cutoff date for submission of any additional requests for information.

May 25, 1960 Lease-Purchase Agreement (Sample form) which was issued at the pre-bid conference of this date.

Note: A discussion of the basic provisions as changed by a Revision "A" of this Lease-Purchase Agreement sample form, will be found at date June 15, 1960 in the chronology.

A CONDENSATION OF IMPORTANT PROVISIONS OF THIS LEASE-PURCHASE AGREEMENT - (sample form) - WHICH ARE IN ADDITION TO THE PROPOSAL OF MAY 18, 1959, AND TO THOSE ALREADY INDICATED BY THE MAY 20, 1960 PROPOSAL ITSELF. (NECESSARY SINCE THE AGREEMENT FORMS DID NOT ALWAYS INCORPORATE ALL OF THE PROVISIONS OF THE PROPOSAL AND OF NECESSITY HAD MATERIAL IN ADDITION TO THE PROPOSAL AND SOMETIMES CONTAINED MORE SPECIFIC LANGUAGE.)

1. The agreement identified a lease period of 20 years, commencing 300 calendar days after lessor shall receive from the lessee (ESD) a notice to proceed with the construction of the building.

2. Lessee (ESD) agreed to nominate the selected lessor as purchaser of the building site as provided by law (Chapter 190 of the 1960 Statutes of Nevada), and the lessor agreed that he would forthwith proceed with the purchase of the property.

3. A notice to proceed with construction was contained. The ESD Director was to wait a reasonable time for the consummation of such purchase. At the expiration of that reasonable time, the ESD was to notify the lessor to proceed with the construction.

4. That if the lessor should construct the building himself he was to be considered the contractor.

5. Provision for payment of $200.00 per day by the lessor for failure to have building ready for occupancy after 300 days.

Note: Daily penalty was given as $300.00 in the proposal, somehow changed to $200.00 in accompanying agreement. Provision not to apply if lessor constructs building himself.

6. The matter of architectural fees to be paid for by the lessor was carried through and incorporated in the sample Lease-Purchase Agreement form. HOWEVER, no provision was so incorporated for the lessor to repay to the ESD the costs the department had incurred for engineering tests and surveys.

Note: These costs of engineering tests and surveys were identified in the proposal as to be repaid to the ESD. The sample form agreement failed to provide for such repayment.

7. No maintenance work to be performed by the ESD. Lessor to furnish copies of all maintenance contracts for equipment in the building to the ESD. Exterior to be repainted by lessor at least once every four years. The interior to be repainted by the lessor at least once every three years.

8. Insurance to be at the lessor's cost, taxes and municipal assessments to be paid by the lessor, and lessor to repair or rebuild the building, in the event of full or partial destruction of the improvements.

Note: All these costly items eventually passed over as obligations of the ESD by further revisions and later amendments to contracts for the construction of the Carson City central office building for the ESD.

May 26, 1960 Communication from Jack A. Means, Reno, Nevada, consulting engineer, to State Planning Board outlining structural discrepancies after a review of the plans and specifications prepared by Ferris & Erskine as follows: (16) Statutory (Building Code) Violations, Ref. UBC 1958 Edition; (6) Structural Violations, Ref. UBC 1958 Edition; (22) Comments and Suggestions; and (7) Violations for which waivers have been granted.

May 26, 1960 W. A. Stains, Consulting Engineers, Sacramento, California, to Planning Board indicating code violations, lawn sprinkler system comments, plumbing, heating and air conditioning and electrical conduits, relative to plans and specifications for the ESD building.

May 31, 1960 ESD paid out of their Employment Security Fund, (penalty & interest fund) restricted to administrative purposes only, the sum of $6,882.50 to Ferris & Erskine for partial payment of working drawings and specifications for the office building.

Note: Represents one of the six installments due to architects for the balance of 75% of the total service fee. (12½% x 6% x $891,000) or $6,682.50, plus $200 for landscape working drawings, totaling $6,882.50.

Note: Notation on claim that this amount will be reimbursed by the lessor at time lease-purchase agreement becomes effective.

Note: Such reimbursement was made when agreement became effective.

May 31, 1960 Addendum #1 prepared by Ferris & Erskine and issued by ESD relative to basic working plans and specifications.

Note: This addendum #1 covered technical matters associated with the plans and specifications for the most part.

Note: One additional provision was added by Addendum #1 as an additional cost for the prospective lessor to consider in his bid as follows: A flat fee of $300.00 for the services of a landscape consultant through the office of the architect.

Note: Reference is contained in Planning Board records indicating the receipt of an Addendum #1 on June 10th as well as on June 2nd and reference to an original Addendum #1. Possibly there were two Addendum #1.

June 10, 1960 Planning Board to ESD enclosing information relative to estimated cost of the plan checking. The estimate given was $2,125.00, based on architect's estimated construction figure given this office (Planning Board) of $1,000,000.00.

Note: At this time the building cost was revised upwards to $1,000,000.00 by the architects, Ferris & Erskine.

June 15, 1960 Date appearing on the Addendum #2. The addendum was actually available and in the hands of the Planning Board on June 10th as they forwarded copies of Addendum #2 to the plan checkers, (Means of Reno and Stains of Sacramento) as of that earlier date.

Note: There were actually at least two different Addendum #2 issued. One contained (7) pages and another contained (11) pages. From a review of the shorter addendum it was apparent that all material in the short addendum was also contained in the longer form, with some rearrangement. As noted above, for addendum #1, there must have been revisions to these addenda.

Note: The following new provisions were contained in the long form of Addendum #2 which augmented those which had been made a part of Addendum #1 and the base plans and specifications to which they were referring. Some provisions gave clarification to provisions not changed.

1. Neither a bid bond nor a performance bond are required of the proposers.

Note: Earlier mention has been made of the exclusion of a bid bond and the lack of protection under such a procedure. Also mentioned was the lack of a completion bond. A performance bond would have been highly desirable even in the light of where a proposer was an owner as well as a contractor. Proposers noted the lack of these normal requirements. The answer provided in Addendum #2 settled the point squarely, that neither were required as they had been in the initial Invitation to Lease-Purchase Proposal made in 1959 based upon material furnished to the ESD by the State Planning Board.

Note: Information received from the State Planning Board on February 26, 1962 indicates that the 1960 Lease-Purchase Agreement, which they examined, had within it all the elements which would be common to and contained in an agreement for the construction of a building, with the exception of the requirement of a performance bond, specifically excluded. The Planning Board also states that the Lease-Purchase Agreement was an agreement to construct a building with the lease terms added, forming therein a single document. The Planning Board did not make a determination as to whether this combined form eliminated the possibility of considering it to be "an agreement for the construction of a building."

Note: NRS Section 339.020 provides as follows: At the time of making any contract for the erection, construction, alteration or repair of any public building or structure the contract price of which shall exceed the sum of $500, the party letting the contract shall exact from the contractor, and the contractor shall give to such party, a good and sufficient bond: Although it is quickly recognized that the building was being built for a private party to sell to a state agency, and was not constructed directly by the state, the very nature of the location within the Capitol Complex and the control the State Planning Board had over specifications, does suggest the possibility

of the applicability of this section to the ESD project. (See notation under number (5), Lease-Purchase Sample Form, Revision "A" attached to Addendum #2, at date June 15, 1960 in this chronology.)

2. Proposers will be required to repay the ESD the cost of the plan check made by the State of Nevada Planning Board.

Note: This had previously been estimated to be about $2,125.00.

Note: The provision was, however, NOT included in a Revision "A" Lease-Purchase Proposal which was attached to Addendum #2.

3. The building permit is to be obtained by the construction contractor ans is included in his construction cost figure.

4. Regarding the question of maintenance contracts for the entire life of the lease for maintenance, service, and adjustment of the electronic heating and ventilating controls, pneumatic heating and ventilating controls, the boiler, the air handling units including the periodic changing of filters in these air handling units, the refrigeration unit, and the elevator and pneumatic sewage ejector, the proposers were advised that the lease-purchase agreement sample form (revised) had been extensively revised at paragraph 7 eliminating all mention of Maintenance Contracts as well as the specific responsibility of maintenance of landscaping and planting.

Note: This was a major revision contained in the second sample Revision "A" of the lease-purchase agreement made available. The responsibility for such maintenance was taken on by the ESD and eliminated from the responsibilities of the prospective lessor.

5. The necessary insurance for the full value of the building shall not include the cost of any architectural fees.

6. Construction to begin after written notice from the Executive Director of the ESD.

Note: Provided by Revision "A" of the Agreement at paragraph 5 and 6b. Written notice will be sent after a REASONABLE TIME has been allowed for the Lessor to purchase the property, (obtain title, and sign contracts with construction firm for the construction of the building). Material in ( ) not carried through into agreement, however.

7. Tax provisions were completely revised to provide for an estimated value of taxes and for adjustments in the lease payment due to increases or decreases of taxes above or below that estimated amount.

Note: Provided also by Revision "A" of the Agreement of paragraph 10.

8. The balance of Addendum #2 was primarily changes in plans and specifications and did not provide for alterations or changed provisions to a following lease-purchase agreement to be executed by ESD and the chosen proposer.

June 15, 1960 LEASE PURCHASE AGREEMENT (sample form) REVISION "A," attached to Addendum #2.

Note: Following are the significant changes made in the Revision "A" from the basic sample form of Lease-Purchase Agreement issued at the pre-bid conference held May 25, 1960.

1. The revised form "A" employs the term "contract" as being entered into as well as reference to a lease-purchase agreement.

2. The revised form "A" specifies that the construction shall be in full compliance with the plans and specifications dated May 4, 1960 and in addition shall comply also with Addendum #1 dated May 31, 1960 and Addendum #2 dated June 15, 1960.

Note: These addenda were not available to have included with the original lease-purchase agreement form issued on May 25, 1960.

3. An expanded section was added by revised form "A" entitled, DEFINITIONS AND DESCRIPTION OF INSTRUMENTS which was a listing of documents which made up the contract, seven in number, and were made a part of the contract by reference.

4. Term of Lease and Rental. Addition was made relative to when term of lease should commence. Original had provided that term shall start (300) days after notice to proceed. Additional provision was made to provide that it could start before or after such (300) day provision when Lessor had completed all improvements and has premises ready for complete occupancy.

Note: This apparently provided for a more practical time at which to have payments on the lease-purchase start.

5. Construction Contract preamble. Added by Revision "A" was a phrase directing the lessor to proceed with construction "WITHOUT UNNECESSARY DELAY."

Note: Deleted from the original lease-purchase agreement sample was the following:

"IF THE LESSOR SHALL CONSTRUCT THE BUILDING HIMSELF, HE SHALL BE CONSIDERED A CONTRACTOR FOR THE PURPOSES HEREOF."

6. Construction Contract. Revised form "A" eliminated the escape provision that damages in the amount of $200.00 per day would not be made if the LESSOR WAS TO CONSTRUCT THE IMPROVEMENTS HIMSELF.

Note: This apparently tightened up the revision "A" in the interest of the ESD.

7. Construction Contract: Contingent Fund. Revision "A" made a further provision in regard to this fund that it be returned to the lessee as follows: "All or any part of this contingent fund which may have been turned over to lessor by lessee if demand is made for its return prior to the time it is used for improvements to the premises."

8. Damages to Lessee. Eliminated by Revision "A" was the provision that the $200.00 per day payment by lessor for damages due to failure to have the building completed within 300 days, could be modified by extensions of that time factor allowed and agreed to be the lessee, and by A.I.A. agreements.

9. Maintenance of Premises. Revision "A" eliminated the provision that the lessor furnish to the lessee executed copies of all maintenance contracts running for the entire term of the lease for maintenance, servicing, and adjustment of all electronic heating and ventilating controls, the heating boiler, all air handling units and periodic changing of filters in such units, for the refrigeration unit, the elevator, and the pneumatic sewage ejector, from the manufacturer's representatives, as provided by Addendum #2.

Note: The elimination of this provision would apparently make necessary the obtaining of these agreements by the ESD. Since at this time the lessor was still to be responsible for all maintenance, janitorial services excepted, it would be normal for the lessor and not the lessee to be charged with such a responsibility. Also, the lessor, having had the building built for him, or having built it himself, would be in a better position to know what contracts existed and with whom they were executed.

10. Maintenance of Premises. Revision "A" modified the requirement that the lessor repaint exterior finishes every 4 years and extend this requirement to once every 8 years. Interior repainting was left at once every 3 years.

Note: No such a change had been indicated by Addendum #2. It was made in the agreement form and not identified as a change to be made in any addendum. The fluid and uncertain "package" which proposers were expected to bid on certainly left much to be desired.

11. Maintenance of Premises. Revision "A" changed the responsibility for maintenance of lawns, plants and trees around the building from a lessor responsibility to a responsibility of the lessee, as provided by Addendum #2.

Note: The ESD had provided under the basic sample form of the lease-purchase agreement issued at the pre-bid conference held on May 25, 1960 to restrict responsibility of maintenance of landscaping to cutting and watering grassed areas only. Not pruning, fertilizing, spraying, etc. as full maintenance of this landscape.

12. Taxes. Lessor agreed to pay all taxes including municipal charges and assessments. However, Revised form "A" provided that in the event there was an increase or decrease of the estimated figure provided for in Revised form "A," at the beginning or during the term of the lease, that the rental payments from the lessees to the lessor would be increased or decreased to the extent that the lessor would receive enough additional rent to cover increases or to prevent the lessor from receiving any benefits from reduced taxes, as provided by Addendum #2.

Note: This would provide for a varying rental payment which could result in an unknown 20 year lease-purchase cost.

13. Destruction of Premises: Eliminated by Revision "A" was the provision that the lessor was not responsibile for repair or rebuilding improvements when destruction was due to act of God, war, civil disturbance or earthquake.

14. Destruction of Premises: Effect on rental payments. Revision "A" changed the provision for rental abatement from non-payment of the rent during such time as the ESD could not use the facilities to a more reasonable provision reducing the rental payments on a pro-rata basis of usable floor space for the period of time during which ESD could not use portions of the building.

Note: With a partial destruction or only slight destruction the ESD would undoubtedly wish to make use of facilities available and would by the modification only pay rental in ratio to that portion of the building still being used.

However, under the former provision possibly the ESD could have held the lessor to quickly repair the building since rentals would be non-payable during any partial destruction.

Under both the Revised "A" and lease-purchase agreement which was revised, provision was made for the proceeds from insurance covering the destruction to be placed upon demand by the ESD in an Escrow account for the purposes of defraying the cost of reconstruction.

15. Destruction of Premises: Revision "A" provided for an extension of the term of the lease when partial rental payments had been made due to destruction, to a period of time necessary to constitute the full 20 years of rental payments. The former provided for an extension equal to the period of time when no rental payments were being made. Both agreements allowed the ESD to hold if necessary to a period of time representing only one-half actual time as an extension of the term of the lease, in the event he felt the reconstruction had not been carried out as soon as possible and without unnecessary delay.

16. Option of Lessee to Purchase: Revised form "A" expressly provided for a title insurance contract and further provided that title insurance would be in an amount representing full appraised value of the property and improvements, rather than representing the builders cost plus cost of acquiring land, provided for in the former agreement.

17. Option of Lessee to Purchase: Revision "A" does not provide for any pre-payment of rental for obtaining title to property prior to the expiration of the lease-purchase agreement. The former agreement mentions such a possibility but does not provide for any reconsideration of the rental amount if so paid in advance.

18. Revised form "A" of the lease-purchase agreement failed to provide for reimbursement by the lessor to the ESD for the cost of plan checking, the cost of engineering tests and surveys, and landscape architectural services. These three costs were provided for as lessors costs in Addenda #1 and 2 and the May 4th lease-purchase proposal.

Note: About half of these costs had been indicated on claims presented to the Budget Department for pre-audit control, to be so reimbursed to the ESD by the lessor.

This lease-purchase agreement (sample form) Revision "A" which was attached to Addendum #2, the fact that there were at least two versions of Addendum #2, and the failure to incorporate provisions of the addenda or placing provisions not found in the addenda into a revised lease-purchase agreement, demonstrates a lack of care on the part of the architects who were primarily responsible for compiling and distributing this material to prospective bidders. Just how any proposer could have been placed in information which would result in his clear understanding of what he was bidding on is not abundantly clear.

June 16, 1960 Means to Planning Board listing items still not remedied by architects after a review of Addenda #1 and #2 to the plans and specifications for the building, and recommending waivers be granted in some cases. On same date Planning Board received a review of the Addenda in regard to other phases of plan checking indicating one additional item still to be corrected.

June 18, 1960 Letter from Salk, Ward & Salk, Inc., Chicago, Illinois, addressed to Brunzell Construction Company. This communication indicated that this mortgage banking institution felt the entire lease-purchase proposal was "unmakeable" and listed a number of factors indicating why they felt the project could not be financed. Chief among these reasons was the matter of maintenance of the building and was stated as follows:

"Item 6 - Maintenance of Premises. This almost renders the lease impossible unless you can get signed contracts from responsible companies who could perform the specific duties that this Maintenance of Premises calls for."

June 22, 1960 Planning Board to ESD transmitting invoice for mechanical and electrical plan checking expenses in the amount of $525.00.

June 22, 1960 Letter from the Franklin Life Insurance Company to Mr. Charles A. Jostee, Vice-President of Northern California Mortgage Company, 315 Montgomery Street, San Francisco.

Note: This letter drew the mortgage company's attention to several aspects of the building project and financing, listing them numerically. One of these is of special interest to this study, as follows: "9. . . . Further, lessee is not permitted by law to subordinate the purchase option to the lien of any mortgage."

Note: Reference to "not permitted by law" was an attorney's opinion to this effect in connection with their loan #27-399 made on the Reno ESD Building.

Note: The point the lender in this case was emphasizing to the prospective lessor was that there was not contained in the lease-purchase agreement the provision that at the time of exercising the option to purchase by the state it would be provided that the state would secure title to the building free of encumbrances and subordinations to liens. There is this protection to the state in both the Reno and Las Vegas lease-purchase agreements. Such protection is not found in the lease-purchase agreement on the Carson City central office building for the ESD.

Note: The several letters from lending institutions contained in this report, demonstrate the difficulty encountered by proposers in obtaining financing for the project.

June 28, 1960 Bids opened 3:30 p.m. at the Employment Security Building. Seven bidders submitted bids on the basis of cents per month per square foot of gross area for a period of 20 years to amortize building costs, as follows:

P.L. Larquire	.369	Cost of Const.	$963,863	(by) Simpson Const. Co.
Leo Freedman	.3475	Cost of Const.	913,257	(by) Rbt. Gordon Const. Co.
J.R. Land	.345	Cost of Const.	895,448	(by) Hardesty & Sons
Brunzell	.3087	Cost of Const.	944,400	(by) (self)
Davis	.385	Cost of Const.	959,270	(by) Davis Contracting
A.E. Levinson	.375	Cost of Const.	988,635	(by) W.H. Wine Const.
Parr-Cox	.343	Cost of Const.	873,802	(by) Walker-Boudin

Note: Cost of construction includes Kawneer alteration.

July 6, 1960 Planning Board to ESD in regard to four items still not remedied in structural drawings. Items must be corrected before Planning Board approval of the building project.

July 8, 1960 Letter from ESD Director to Federal Agency outlining the provisions which had been met in the Federal Manual relative to Lease-Purchase arrangements.

Note: One of these FEDERAL REQUIREMENTS was the necessity for bid procedure which was carried out by the ESD.

Note: At the end of these Federal requirements (Employment Security Manual, Part IV, Sec. 2520) a paragraph indicated in the manual that "IT SHOULD BE UNDERSTOOD CLEARLY THAT THE APPROVAL OF THE APPLICATION OF FUNDS GRANTED FOR RENTAL SPACE TOWARD THE AMORTIZATION OF THE COST OF SUCH SPACE IS LIMITED BY LAW TO THE CURRENT FISCAL YEAR AND DOES NOT CONSTITUTE A COMMITMENT ON THE PART OF THE BUREAU TO MAKE GRANTS FOR FUTURE PERIODS."

Note: Section 2521 provided for strong recommendation of the Appointment of Building Committee:

Federal Employment Security Manual, Section 2521, entitled Appointment of Building Committee, is of extreme interest with regard to suggested conduct to follow under a lease-purchase project contemplating a building for ESD. The Section reads as follows:

"Since rental-purchase transactions are generally complex and involve the expenditure of large sums of money, the state should take more than ordinary precautions to insure that the public interest is protected. Approval by the governor of a proposed rental-purchase agreement is one possibility. Another and very desirable arrangement would be the appointment by the governor, or other duly constituted authority of a State building committee,

composed of responsible State officials, such as the State treasurer, the State attorney general, the State architect, and the State engineer and/or representatives of the public, unless such or similar governmental organization is already functioning as a unit of the State government. If such a committee were appointed, it would be responsible for advertising, reviewing, and working with the State employment security agency with respect to all negotiations incident to the acquisition or construction of buildings, including selection and acquisition of the site; obtaining and passing upon the adequacy of plans and specifications; advertising for and obtaining bids and awarding contracts; arranging for all necessary financing; determining the cost or fair market value of the building at the time the rental-purchase agreement is entered into by the state; and furnishing the Bureau of Employment Security adequate evidence that the amount necessary to amortize the cost of the space does not exceed the rental for other suitable, privately owned space in the same locality." (underscoring supplied)

Note: It appears that these suggestions were largely disregarded. Evidently, the Federal agency did little to encourage the application of its suggested method and apparently disregarded the intent of their own identified and proper procedure.

July 15, 1960 Employment Security Department paid out of Employment Security Fund (penalty & interest fund), restricted to administrative expenses only, an amount of $525.00 to W. A. Stains for plan checking of mechanical and electrical specifications. Represents 70 hours at $7.50 an hour.

Note: This was the first such amount expended from the Employment Security Fund for which there was no accompanying statement to the effect that the amount was to be reimbursed to the ESD.

Note: Claims made after this date likewise failed to contain an accompanying statement, and it is not clear that the amount would be reimbursed by the lessor to ESD in the future.

July - August, 1960 Communication from Federal Agency to the ESD indicating they would not support the project at the rental cost established by low bid.

Note: Reasons given for the refusal of the Federal Agency to support the project in line with the first low bid offer were finally obtained in 1962 and are set forth in this report at date July 6, 1962 in the chronology.

August 18, 1960 ESD Director to Ferris & Erskine directing the architectural firm to notify all proposers who submitted proposals on June 28, 1960, that all previous proposals have been rejected, and that the same proposers are

being invited to re-propose on a new basis as set forth in an accompanying Invitation to Bid, Proposal Form, Lease-Purchase Agreement, and modifications to other contract documents. Re-proposals to be received by August 30, 1960. ESD Director authorized Ferris & Erskine to calculate rebidding cost to ESD on the basis of straight salary time for employees, a $15 an hour charge for partner time, and to multiply total by 20% for office overhead.

Note: The rebidding was RESTRICTED TO THOSE WHO HAD BID ON JUNE 28, 1960. No explanation is contained in the documents examined as to why this was a restricted bid. Conversation with those familiar with the project indicated they felt it was a fair way of treating those who had bid and there was a serious time factor of concern to the ESD.

Note: No date of issuance is indicated on the re-bid of the Ferris & Erskine plans and specifications for the lease-purchase project. However, since ESD notified Ferris & Erskine to prepare re-bid forms on August 18, 1960, and the re-bid was due back at Carson City by August 30, 1960, it is logical to suspect that at the very best the proposers had no more than 10 days to examine the new basis for bidding and submit new figures. Just what position this would have placed potential contractors and proposers interested in the terms of a new bid "package," who did not figure on the project under the former provisions, is hard to say. The mechanics of the re-bid were such that possibly only those familiar with the project and who submitted bids the first time could possibly comply with such a short notice which may actually have resulted in less than 10 days in which to rework a bid proposal.

August 25, 1960 Employment Security Department paid out of its Employment Security Fund (penalty & interest fund) restricted to administrative expenses only, the sum of $1,268.45 to Jack A. Means, consulting engineer, for plan check on structural details.

Note: The amount represents $500 plus .001 x $768,452.00. The fee was based upon the contract cost of the building minus architectural and land acquisition costs.

Note: No further references to reimbursement to be made to ESD by lessor. However, reimbursement was effected.

August (?), 1960 Invitation for Lease-Purchase Proposal (Second, based on Ferris & Erskine Plans & Specifications), no date given indicating when made available to proposers.

Note: Following introductory paragraph was contained on Proposal:

The Department of Employment Security has decided to reject all seven proposals as submitted June 28 and to invite the same proposers to re-submit proposals based upon the accompanying documents.

Note: A significant addition was made in the re-bid procedure.

The proposers were required to attach to their proposals signed letters on the form provided certifying to availability of funds for the project. The name of the institution to provide the funds to the proposer in the event he was selected by ESD was entered on these form letters.

Note: Notation was made on the Invitation that there were no changes since June 28th in the drawings and specifications, with the exception of the Kawneer alteration for the second floor window frames.

Note: Continued was the provision that the ESD did not obligate itself to accept the lowest or any other proposal.

Note: Sections 10, 11 and 12 were not made a part of the new Invitation as they were not applicable at this time. They had to do with pre-bid conference, availability of plans, and matters already covered.

August 26, 1960 Letter from the Equitable Life Assurance Society to Parr-Cox Construction Company of San Francisco.

This communication states in part as follows: "Confirming our many conversations and meetings to-date we are definitely interested in financing the building you propose to construct for the captioned tenent in Carson City. We have reviewed the lease and preliminary plans and feel confident that such a loan will be granted by our Finance Committee upon formal presentation."

Note: The Parr-Cox Construction Company was one of the six proposers who bid on the second lease-purchase proposal and indicated that their local contractor would be the Walker-Boudwin Construction Company of Reno, Nevada.

Note: It is of interest to observe that their bid which was eventually made was (.25¢) as against that of Brunzell's which was (.2472¢).

Note: This relatively clear but informal commitment was made after many objectionable features had been removed from the lease-purchase proposal by the ESD to satisfy brokers and lenders.

Note: The insertion of this communication in the report is made to suggest that other proposers were equipped and ready to move to obtain funds for the project.

August 30, 1960 Date placed on form letter which was required on this re-bid procedure on which had to be indicated the name of the institution that would provide the necessary funds over and above such funds as are provided by the proposer himself for the lease-purchase project.

August 30, 1960 Date on Lease-Purchase Proposal as modified for re-bid. This lease-purchase proposal had the following significant provision changes, which provided the proposers with a new basis upon which to bid.

1. Cost of the construction of the building was to include changes made by Addenda #1 and #2 and included Kawneer modifications.

2. NO MODIFICATION TO THE FORM OF THE LEASE-PURCHASE AGREEMENT WOULD BE PERMITTED.

   Note: However, extensive amendments were entered into by ESD and the selected lessor at a later date, which significantly modified the lease-purchase agreement.

3. Again included as reimbursements to the ESD were the costs of plan and specifications checks in the amount of $2,125.00, landscape architectural services at $300.00, and $1,741.84 for engineering surveys and tests.

4. Excluded as a consideration of cost to the proposer was the land cost for the building site in the amount of $25,738.00.

   Note: The land was to be purchased by the lessor but the ESD was to reimburse the lessor for this cost. He, therefore, did not have to consider it as a cost factor in bidding.

5. In Section 7 which provides that the chosen lessor must enter into a lease-purchase agreement within 10 days after notification, again it was reiterated that NO MODIFICATION TO THE FORM OF THIS LEASE-PURCHASE AGREEMENT WILL BE PERMITTED.

   Note: In spite of this having been placed in emphasized capital letters at two places in the lease-purchase proposal, extensive modifications were allowed by the ESD Director at a later date. Such notation was not a part of the previous proposal issued earlier.

August 30, 1960 Sample form of Lease-Purchase Agreement which accompanied lease-purchase proposal dated August 30, 1960.

This lease-purchase agreement form differed in several major respects from the Revision "A" lease-purchase agreement sample copy issued on June 15, 1960. This final and last revision of the lease-purchase agreement, formed the basis of the contract finally entered into by Brunzell and ESD for erection and purchase of the building.

The final revision had these following significant changes from Revision "A" of June 15th.

1. Under DEFINITIONS AND DESCRIPTION OF INSTRUMENTS: The documents which made up this contract, the Lease-Purchase Proposal, upon which the proposers entered their bids as a rental cost per sq. ft. of gross area per month and indicated the total cost of construction, as well as the various reimbursements for architects fees, landscaping services, and plan specification check, was not to be included.

   Note: The removal of the Lease-Purchase Proposal as a document making up and being part of the Lease-Purchase Agreement may have provided for the eventual disclosure that reimbursements for landscaping services, cost of plan and specification check, and cost of engineering surveys and tests, were NOT PROVIDED TO BE REIMBURSED TO THE ESD BY THE LESSOR in the contract as finally executed.

   Note: In the confusion, Brunzell reimbursed for these amounts anyway, without having to do so.

2. Under Purchase of Real Property there was added the following in the final revision: WITHIN 30 DAYS AFTER LESSOR PURCHASES AND ACQUIRES TITLE TO SAID REAL PROPERTY LESSEE (Employment Security Department) SHALL REIMBURSE LESSOR THE AMOUNT OF THE PURCHASE PRICE LESS $1.00.

   Note: This provision removed the cost of acquiring the land ($25,738.00) as a consideration the proposers had to take into account in formulating their re-bid.

3. Under the Construction Contract: In regard to completion date, the following was added: . . . BUT ALL EXTENSIONS OF TIME GRANTED TO CONSTRUCTION CONTRACTOR PURSUANT TO THE A.I.A. STANDARD FORM OF AGREEMENT SHALL BE EXCLUDED FROM SAID THREE HUNDRED (300) DAYS.

   Note: The clarification provided for such standard causes and resultant time, not to be included within the number of days necessary for the contractor to complete the building.

4. Under the Construction Contract: The provision for a contingent fund in the amount of $15,000.00 was completely removed from the final agreement form.

   Note: This provision being struck out removed the cost of such a fund of $15,000.00 as a consideration the proposers had to take into account in formulating their re-bid.

   Note: The removal of this contingent fund resulted in the ESD having to pay directly to Brunzell approximately $10,000.00 for change orders numbers 1, 2, 3 and 4. It is not known precisely just how the Federal ES agency intends to reimburse the local ESD Employment Security Fund for these costs.

5. Under Maintenance of Premises: A complete reversal of this obligation was effected by the final revision of the lease-purchase agreement form. All the various provisions which spelled out the lessors responsibility in regard to maintenance were removed and replaced with the following single sentence: LESSEE, (Employment Security Department) AT ITS SOLE COST AND EXPENSE, AGREES AT ALL TIMES DURING THE TERM OF THIS LEASE TO PERFORM ALL NECESSARY MAINTENANCE AND REPAIR TO AND ON THE DEMISED PREMISES.

   Note: This casting of the responsibility for all maintenance and repairs as an obligation of the lessor to the ESD removed such an estimated cost for a period of 20 years as a consideration the proposers had to take into account in formulating their re-bid.

6. Under Insurance: A complete reversal of the cost of carrying insurance on the building was effected in the final form of the lease-purchase agreement form. The following provision was added: WITHIN 30 DAYS AFTER RECEIPT OF PROOF OF PAYMENT BY THE LESSOR OF ANY SUCH INSURANCE PREMIUMS LESSEE (Employment Security Department) SHALL REIMBURSE LESSOR IN FULL FOR THE AMOUNT OF SUCH INSURANCE PREMIUMS SO PAID.

   Note: This casting of the responsibility for all hazard insurance costs from the lessor to the ESD removed such an estimated cost for a period of 20 years as a consideration the proposers had to take into account in formulating their re-bid.

7. Also under Insurance: The following provision making available to the lessor the proceeds of such hazard insurance for lessor's obligations set forth under destruction of premises. The section reads as follows:

   It is understood by and between lessor and lessee that lessor will obtain a loan from a lending institution to provide funds for the construction of the facility herein described and will secure the payment of said loan by a first deed of trust upon demised premises of which deed of trust the lending institution will be the holder and beneficiary (hereinafter called "holder").

   Lessee hereby consents to the execution and delivery of such deed of trust and hereby agrees that such policy or policies of insurance referred to in this paragraph 9 of this agreement shall provide a standard mortgagee endorsement in favor of such holder and shall be deposited with the holder upon the condition that such holder agrees, (a) provided said loan is in good standing, to make the proceeds of such insurance available to the lessor for the performance by lessor of lessor's obligations as set forth in paragraph 11 of this agreement (Destruction of Premises), (b) to notify lessee of any default by the lessor or claimed default at least thirty (30) days prior to the recordation of any notice of default and, (c) that, in the event of such a default or a claim of such default lessee may at its

election, but shall be under no obligation so to do, cure such default. In the event lessee so elects, lessee may expend any sums which may be reasonably necessary for such purposes for the account of lessor and deduct the sums so expended from payments due or to become due to lessor under this agreement.

Note: The lessor by these terms would have available to him the proceeds of the insurance with which to take care of destruction to the building. At this point it is important to understand that such responsibility was still resting with the lessor and not the ESD.

8. Under Taxes: A complete reversal of the cost for all taxes and municipal charges and assessments was effected in the final form of the lease-purchase agreement. The following provision was added: WITHIN 30 DAYS AFTER RECEIPT OF PROOF OF PAYMENT BY LESSOR OF ANY SUCH TAXES, INCLUDING MUNICIPAL CHARGES AND ASSESSMENTS, LESSEE (Employment Security Department) SHALL REIMBURSE LESSOR IN FULL FOR THE AMOUNT OF SUCH TAXES, CHARGES AND ASSESSMENTS SO PAID.

Note: This casting of the responsibility for all taxes, charges, and assessments from the lessor to the ESD removed such an estimated cost for a period of 20 years as a consideration the proposers had to take into account in formulating their re-bid.

9. Also under Taxes: Completely removed from the final agreement form was any reference to what taxes were estimated to be at the time of the beginning of the lease. Also removed was the provision for a fluctuating monthly rental which could change to reflect increases or decreases in actual taxes as experienced over the 20 year period of time.

Note: This was obviously of no further concern to the proposers since whatever amounts they had to pay in taxes, charges and municipal assessments would be REIMBURSED TO THEM BY THE ESD.

10. Under Destruction of Premises: A slight addition was made necessary to provide that the proceeds of the hazard insurance would be HELD BY THE HOLDER (lending institution) in an escrow account. This, to tie in with the additions made to the insurance section.

11. Under Option of Lessee to Purchase: The following was added as a prerequisite of purchase: Upon payment by the lessee of all the rent pursuant to this contract, AND UPON THE REIMBURSEMENT BY LESSEE (Employment Security Department) OF THE SUMS TO BE REIMBURSED PURSUANT TO THIS CONTRACT, lessee shall have the right to purchase the demised premises from the lessor for One ($1.00) Dollar.

Note: Specific reference was made at this point to the reimbursements the ESD was obligated to make for the cost of (a) the land upon which the lessor was to build the building, (b) cost of hazard insurance, and (c) all taxes.

12. Under Option of Lease to Purchase: This section again reiterated in exact form the option of the lessee to cure any default in payment by the lessor to the holder of the Deed of Trust by making such sums available to the lender and deducting same from his monthly rental payments to the lessor.

This Lease-Purchase Agreement (sample form) attached to the re-bid Lease-Purchase Proposal failed to provide for reimbursements by the Lessor to the ESD for several thousand dollars expended by the ESD for plan checking, engineering surveys and tests, and landscape architectural services. IT WAS SPECIFICALLY INDICATED IN THE LEASE-PURCHASE PROPOSAL ATTACHED TO THE AGREEMENT, at paragraph 4, Sections (a), (c) and (d) THAT THESE COSTS AS REIMBURSEMENTS TO THE ESD WERE TO BE TAKEN INTO CONSIDERATION BY THE PROPOSERS WHEN SUBMITTING BIDS. Furthermore, the ESD had so indicated on claims for such costs already paid for by the ESD, that most of this money was to be REIMBURSED TO THE ESD BY THE LESSOR.

Note: It is not clear as to how prospective bidders could intelligently bid under such confusion of provisions between a proposal and a sample form of an agreement offered on the same date by the ESD.

Note: Such confusion carried through in actual practice after the execution of the contract between the ESD and Brunzell. This is indicated by the payment of Brunzell on April 26, 1961 to the ESD of a sum of $4,166.84 to cover costs of engineering tests and survey work, plan and specification checking, and landscape architectural costs. Brunzell was under nothing more than a moral obligation to have made this reimbursement to the ESD because such provision, although in the final ESD proposal, was not carried through and incorporated into the ESD final lease-purchase agreement (sample form), nor was it incorporated into the final executed contract between ESD and Brunzell.

At this point we should review the different character of the last revised lease-purchase agreement form and to list those provisions which made it possible for the proposers to substantially lower their bids per sq. ft. on the re-bid.

It should be kept in mind that the removal of certain cost factors from the prospective lessor and placing them as obligations of the ESD, CREATED A SITUATION WHICH WOULD NECESSITATE THE ESD PAYING FOR THESE OBLIGATIONS, LARGELY THROUGH THE METHOD OF REIMBURSEMENTS, FROM FUNDS OVER AND BEYOND THOSE WHICH THE FEDERAL GOVERNMENT HAS INDICATED IT

WOULD PAY FOR THE RENTAL PAYMENTS. JUST WHERE THE ESD WAS TO OBTAIN THESE FUNDS WAS NOT AT THIS POINT CLEAR. (Later chronological data will disclose the source of reimbursement funds.)

Factors which proposers were able to eliminate as costs to them to make a lower lease-purchase proposal bid on the re-bid are as follows:

(a) No reimbursement was provided necessitating repayment to the ESD of $(2,125.00) for the monies expended by ESD for the plan and specification check, by lack of such provision in the agreement form.

(b) No reimbursement was provided for necessitating repayment of ($300.00) to the ESD for monies expended by ESD for landscape architectural service, by lack of such provision in the agreement form.

(c) No reimbursement was provided for necessitating repayment to the ESD of ($1,741.84) for monies expended by ESD for engineering surveys and tests, by lack of such provision in the agreement form.

Note: (a), (b) and (c) above were stipulated in the lease-purchase proposal but were not carried through to the lease-purchase agreement sample form of the same date, the lease-purchase proposal having been eliminated as a document forming a part of the lease-purchase agreement (sample form).

Note: Although the lease-purchase agreement form, and the contract following, did not require the proposers to make reimbursements for these three costs, the selected proposer who became the lessor did make such reimbursements but was under nothing more than a moral obligation to make them.

(d) No cost of building site need be considered an amount of ($25,738.00), since the ESD was to reimburse the LESSOR for his cost of acquiring the site, less $1.00.

(e) No cost of a contingency fund in the amount of ($15,000.00), need be considered as provision for it was eliminated.

(f) No cost of maintenance need be considered as this was made the responsibility of the ESD. Over a period of 20 years this would amount to approximately $690,000 for heating, air conditioning and other major maintenance factors plus repainting exterior and interior and other forms of general maintenance.

(g) No cost for hazard insurance policies need be considered, an estimated amount of $78,000.00 since ESD reimbursed lessor for actual costs of the policies.

(h) No cost for taxes, and municipal charges and assessments need be considered, an amount estimated to be about $328,000.00, since whatever these actual tax costs amounted to was to be reimbursed by the ESD to the lessor.

Note: After a review of the above eliminated costs to the proposers, they were able to significantly lower their bids on the project.

August 30, 1960 Opening of re-bid proposals on Ferris & Erskine plans and specifications for the central office building for ESD in Carson City, Nevada.

		Const. Cost	By
P. L. Larquire	.2855	$994,519	Simpson Const. Co.
Leo Freedman	.252	918,000	Robert Gordon Const. Co.
J. R. Land	.25	882,000	Hardesty & Sons
Brunzell	.2472	827,258	Self
Davis	NO BID		
A. E. Levinson	.30	951,570	W. H. Wine Const.
Parr-Cox	.25	852,802	Walker-Boudwin

Note: Brunzell Construction Company was low bidder at .2472¢. Construction cost was given as $827,258.00.

Note: The letter form required with this re-bid procedure indicating the name of the institution which would supply funds over and beyond those which the proposer was making available toward the project was given as follows:

Warren A. Casey, 155 Montgomery St., San Francisco 4, California.

September 1, 1960 Letter from ESD Director to Federal agency transmitting information on the re-bid procedure and results thereof pointing out that the re-proposal rental figures do not reflect insurance or taxes.

Also indicates that preliminary negotiations with the firm of Brunzell who submitted the lowest proposal for rent had been entered into.

Preliminary negotiations included three questions put to Brunzell as follows:

Q. Would Brunzell sign the lease-purchase agreement as attached to their proposal? (sample form)

A. Their answer was a qualified "Yes," by a request that they be permitted to submit the form of the lease-purchase agreement to EQUITABLE LIFE ASSURANCE COMPANY--their lending agency. They saw no reason why there would be anything OTHER THAN MINOR CHANGES NECESSARY, certainly no changes altering meaning or intent.

Note: Warren A. Casey, 155 Montgomery St., San Francisco, was entered by Brunzell as the one to provide necessary funds. San Francisco financial centers were contacted and questioned about a Warren A. Casey. None contacted could identify this individual, or what financing agency (s) he represented. This is very unusual in view of the size of the project being financed.

Note: The lease-purchase proposal with which Brunzell had just submitted his bid, contained the following language at two points in the proposal in large capital letters: "NO MODIFICATION TO THE FORM OF THIS LEASE-PURCHASE AGREEMENT WILL BE PERMITTED."

SECOND QUESTION:

Q. Would Brunzell substitute another sub-contractor for the elevator, since in the opinion of the architect the sub-contractor listed did not meet the terms of the specifications?

A. Brunzell's answer was that they would make such substitution.

THIRD QUESTION:

Q. Who is the loaning agency?

A. Brunzell's answer was that it was EQUITABLE LIFE INSURANCE COMPANY (Assurance Society?) and that a written statement to this effect with the name of the brokerage firm in San Francisco would be submitted to the state agency immediately.

Note: We have been advised by the ESD that Brunzell was not able to obtain this statement from the Equitable Life Insurance Company.

ESD Director continued by explaining to the Federal agency that the estimated cost of the hazard insurance is $3,900 per year or $.01 per square foot per month. The estimated cost of taxes would be $16,400 per year or $.04 per square foot per month. IT WAS FURTHER INDICATED THAT THESE COSTS WOULD BE INCLUDED IN THE RENTAL CATEGORY IN THE AGENCY'S BUDGET.

Note: It is hard to realize why, if this was to be so, the Federal agency did not allow these factors to be included in the "bid package." Further information was as follows: The Nevada agency will reimburse the lessor for the cost of the land from the Employment Security Funds. It is the understanding of the Nevada agency that this cost will be repaid to the Employment Security Fund through amounts granted for rental or other appropriate means.

Note: It is likewise difficult to fathom why this was not in the proposal at the end, if in fact the Federal agency is to pay for it anyway. Furthermore, the cost was an exact one known in advance, not subject to fluctuation.

Note: This is the Employment Security Fund which under Nevada law is restricted to administrative expenses only.

Final information contained in the ESD Director's letter to the Federal agency: "It is the feeling of the Nevada agency and its architectural firm that the Nevada agency, at its own expense, i.e., from the Employment Security Fund (penalty and interest fund), should engage the services of a building superintendent during the course of construction in the interests of the agency. We discussed the possibility of this item also being repaid to the penalty fund by the Bureau in the twenty-first year.

Note: Again, this Employment Security Fund is restricted to administrative expenses only by Nevada statutes.

A review of this communication to the Federal agency brings up the following questions and also suggests the following explanation for the unusual manner in which certain expenses of the project were to be handled:

1. No mention was made as to how major maintenance costs for heating and air condition plants, structural items, and for repainting exterior and interior and other usual maintenance expenses are to be met by the Nevada agency, major cost factors which the proposers were pleased to have removed as an item in their bidding.

   Note: At a later date this matter was identified as an obligation of the Federal ESD.

2. Also missing was a consideration of how plan checking costs, engineering survey and test expenses, and architectural landscape services, in a total amount of $4,166.84 are to be reimbursed to the penalty and interest fund.

   Note: These costs reimbursed by Brunzell, April 26, 1961, without requirement that he do so.

3. It is entirely possible that the Federal agency calculated that proposers would be able to come forward with a much closer bid if considerations for variables such as maintenance, taxes and insurance costs were eliminated from consideration. In practical application, a proposer would not have to protect himself against these fluctuations, especially maintenance, and would not have to consider a "pad" in his bid to cover the unknown.

   Note: Insurance costs to the Federal agency would be no more than actual, since they represent reimbursements for costs actually paid for by the lessor. The lessor

likewise would not have to calculate a "pad" for increases which might be over and above actual. Tax increases or decreases had heretofore been provided for with a variable monthly rental payment to reflect such differences and a similar provision could have been made for hazard insurance. Obviously, the maintenance cost over a twenty-year period was a significant variable to both proposers and the ESD.

September 2, 1960 ESD Director to Federal agency as follows: (Followup to September 1st communication).

"Major changes in the lease-purchase agreement, such as the method of handling taxes, insurance, maintenance of the premises and purchase of the land made it necessary for the Nevada agency to call for new proposals based on the revised lease-purchase agreement. It was felt by the agency that the only equitable method of procedure was to reject all previous proposals and to invite the seven original proposers to submit supplemental proposals based on the new lease-purchase agreement. This was done and we feel it has eliminated any possible question as to the fairness of the "bidding" procedure.

Note: Since a new lease-purchase proposal was being offered, and as quoted contained "major" changes in the agreement, it is wondered just why the bidding was so restricted to those who entered bids previously. The changes were so major as to have possibly attracted bids from additional proposers.

September 13, 1960 Communication from Federal agency to ESD indicating that they have no questions which would prevent signing of contract for the construction of the building at Carson City.

September 16, 1960 A contract with Brunzell Construction Co., Inc. was executed for the construction and contract payment of a central office building for the ESD in Carson City, Nevada.

THE DATE OF EXECUTION OF THE CONTRACT IS OF INTEREST (September 16th) (However, see entry at September 13, 1960 directly above)

The lease-purchase proposal, upon which was entered the Brunzell bid, stipulated that the selected proposer would sign the lease-purchase agreement WITHIN (10) DAYS after notice of selection:

Note: In a letter to Federal agency, dated September 1, 1960, the ESD Director indicated that immediately after the opening of bids on August 30th the Department entered into preliminary negotiations with Brunzell. It is therefore suspect that Brunzell was notified of his successful bid and selection on that date, otherwise how could preliminary negotiations have been entered into? HOWEVER, it was not until 17 days later that the lease-purchase agreement was executed by Brunzell.

Note: The provisions of the contract followed word for word the form of the sample lease-purchase agreement in its final revised form, with only two technical adjustments as follows:

1. In section 11: Destruction of Premises, second paragraph. Struck out was the matter of the proceeds from hazard insurance to be held by the holder in an escrow account UPON DEMAND OF THE LESSEE. Substituted for these underlined words was holder OF THE FIRST DEED OF TRUST. A technical change and obviously necessary since the escrow should be established and not dependent upon the demand of the lessee. This did not change the matter of who held the funds, it merely provided that it would be so without lessee action.

2. In section 16. Option of Lessee to Purchase, first paragraph. Several changes in wording to clarify the requirements of the holder to notify the lessee relative to default in mortgage payments by the lessor. Addition of provision that holder was to notify lessee of INTENT to record a notice of default. All technical changes which were apparently necessary to clear the meaning of the provisions.

It is of interest to note several of the provisions of this original contract executed between Brunzell and the ESD which have not been elaborated heretofore:

1. Term of the lease was for 20 years and payable at the rate of $8,281.20 per month for a total rental payment of $1,987,488.00.

   Note: The total rental payments alone and without consideration for the various reimbursements for land, taxes, and insurance, as well as assumption of maintenance, will run close to two million dollars. With reimbursements and maintenance costs the figure is approximately $3,000,000.00 for which the state has obligated itself.

2. ESD agreed that immediately upon the execution of the contract they would nominate the lessor as purchaser of the building site. Also, ESD agreed to reimburse the lessor for the cost of acquiring the land within 30 days after lessor acquired title.

3. Lessor (Brunzell) agreed that he would forthwith after being nominated proceed with the purchase of the building site.

4. NOTICE TO PROCEED WITH CONSTRUCTION was to be given to the lessor by ESD Director AFTER SUCH TIME AS THE DIRECTOR DEEMS REASONABLY NECESSARY FOR THE CONSUMMATION OF THE PURCHASE OF SAID PROPERTY.

5. Provision was contained in the contract that the lessor was to reimburse the ESD for the cost of architectural services of Ferris & Erskine.

Note: The contract FAILS TO SPECIFY WHEN THIS REIMBURSEMENT IS TO BE MADE. Reimbursements required by the ESD to the lessor are stated at several places to be made within 30 days after receipt of notice that such payments to be reimbursed have been made, or 30 days after land has been acquired in the case of building site reimbursement. Such specific time of reimbursement was not provided when it came to reimbursements to be made to the state ESD, however.

Note: Although specifically specified as reimbursements to the ESD by the lessor for over $4,000.00 as a result of monies expended by ESD for plan checking, engineering surveys and tests, and landscape architectural services, in the August 30, 1960 Lease-Purchase Proposal, NO PROVISIONS FOR THESE REIMBURSEMENTS WERE CARRIED THROUGH AND INCORPORATED IN THE SAMPLE LEASE-PURCHASE AGREEMENT FORM NOR CARRIED THROUGH TO THE ACTUAL EXECUTED CONTRACT. However, see notes and item entered at date (April 26, 1961).

6. Under Insurance and Destruction of the Premises, provision is made at two points that any proceeds of hazard insurance are to be kept in an escrow by the holder of the first deed of trust for the purpose of defraying the cost of said building and repairs. At one point the additional provision, that these proceeds would be made available to the lessor under qualifying normal conditions.

Note: Under the terms of the Consent to Assignment, the General Electric Pension Trust agrees to make the proceeds of such insurance available to the ESD to defray the cost of building and repairing.

7. Under Assignment of This Agreement, the ESD Director may allow the lessor to assign the contract if he feels the assignee to be responsible.

Further authorization is granted by the contract whereby the lessor or any assignee may pledge or otherwise hypothecate any monies due because of rent, or otherwise, from the ESD, and the ESD bound itself to so recognize and honor any such hypothecation to the extent made.

Note: Such hypothecation of rentals would of course not alter Brunzell's obligation under the terms of the promissory note and deed of trust. Such an agreement would be unnecessary; for the ESD at this point would owe the monthly sums due to Brunzell and he could assign them. (At a later date the monthly rentals were assigned to the General Electric Pension Trust.)

8. Assignment for Benefit of Creditors, Insolvency, and Non-Performance by Lessor.

Under this section an illustration is made by the provisions contained, emphasizing the difficulties which can arise and how they would be met and dealt with in the event the lessor should "go out of business" or otherwise find himself in financial difficulties.

Note: It is obvious at this point that the continued existence of the ESD is a factor of great stability, however, the continued existence of the lessor is not likely to reflect such stability over a period of 20 years.

9. Under Option of Lessee to Purchase. The provision is written in such a manner and employing such terms as to closely identify the contract as a sales contract rather than a true lease-purchase agreement.

Note: Some of the provisions still contained at this time, and subsequently removed by several amendments, do indicate some adherence to lease-purchase. Their subsequent removal or alteration left no doubt that the contract was one to buy and sell a building. Even at this particular stage, it was clear that, without the over abundance of evidence which would be formed through amendments, the contract was more closely associated with a contract to build and sell a building than any form of a lease arrangement.

September , 1960 Brunzell's undated letter which accompanied the Lease-Purchase Proposal delivered to ESD by Mr. Jackson (Brunzell Corporation).

Note: This letter makes reference to the lease-purchase agreement which has been signed and stipulates that such lease signing as required under the terms of the bid should be understood to be a "conditional" signing, and cannot be considered to be "final" until a commitment had been issued by a finance agent, institution or trust which is to undertake the financing of the construction.

Note: Brunzell asked the ESD Director to sign an accompanying statement which acknowledged acceptance of the above understanding. To the credit of the ESD Director it should be emphasized that the Director did not sign such statement. (However, see entry at date, September 20, 1960, in which the ESD Director did make a modifying agreement.)

Note: This undated letter accompanied the lease-purchase proposal which was delivered to the ESD prior to the opening of bids on August 30, 1960. However, the letter contains this opening phraseology:

"The undersigned (Brunzell), as the successful low bidder on the building for the Department of Employment Security. . ."

On the date of the transmittal of this letter along with the bid proposal to the ESD it could not have been known that Brunzell was in fact the successful low bidder. It is recognized that the undated letter carried a blank to be completed following "September." However, it was made out and accompanied a bid proposal offered at or prior to bid opening date of August 30, 1960.

Note: The letter also stated that Brunzell would notify the ESD Director in writing upon the issuance of a commitment for funds for the building project from a financing agency.

It is abundantly clear that Brunzell did not consider the lease-purchase agreement which he had signed on September 16,1960, to be anything more than a conditional agreement, and did not consider that it would become a final agreement until a firm commitment for funds could be secured by him. The lease-purchase agreement executed does not contain any such provision.

Note: From an examination of the events which followed, it is clear that the ESD Director must have likewise attached this "conditional" and non-final implication to the lease-purchase document. If it was the intention of the parties to the contract that such consideration be given to the proposer, such provision should have been contained in the lease contract.

September 19, 1960 Communication from ESD to Planning Board nominating the Brunzell Construction Co., Inc. for the purchase of the building site as provided for in Chapter 190, Statutes of 1960.

September 20, 1960 Letter from ESD Director to Brunzell which states the position of the ESD in regard to time allowed to secure financing for building project.

Note: This letter states in part as follows: "I fully understand that performance must be contingent upon a firm commitment from Equitable or some other lending institution--even though you filed a tentative commitment with your Supplementary Proposal." While the Director of the ESD might have considered this important certification which was required to accompany every lease-purchase re-proposal to be in the nature of a "tentative commitment," such was not the wording on the certification regardless of the legal implications of enforceability. The certification stated, "agrees to provide with sufficient funds."

Note: This certification which had to accompany each proposal was a key factor in the bid procedure and was not common to the first lease-purchase proposal. If the ESD considered that it was merely a token or tentative indication of the financial backing, then it is hard to understand for what reason they required such statement to be a part of the re-bid procedure.

Note: In addition to the above quoted statement, the Director closed the communication with the following sentence: "It is my intent that you should be allowed a reasonable amount of time to complete these preliminary financial arrangements." A reasonable amount of time in the light of the press for time and space which the ESD indicated they were battling with, could hardly encompass the many months which were finally allowed Brunzell by the ESD.

September 29, 1960 Brunzell Construction Co., Inc. to Planning Board confirming conversation relative to their being prepared to purchase the property, from the Planning Board.

October 1, 1960 By a formal motion, the State of Nevada Planning Board at their regular meeting acknowledged and accepted the ESD "nomination" of the Brunzell Construction Company, Inc. of Nevada.

October 14, 1960 Planning Board to Attorney General soliciting his office to prepare the Agreement of Sale, Escrow Instructions, and Deed, for the transfer of the building site property.

Note: The communication indicated that the net cost to the state to acquire the property was $25,462.00 and that Brunzell is to pay in full all costs in conjunction with his purchase of the property in addition to this figure.

October 21, 1960 ESD paid out of its Employment Security Fund (penalty and interest fund) restricted to administrative expenses only, an amount of $305.10 to the firm of Ferris & Erskine for the cost of the re-bid procedure they had been instructed to provide for the ESD.

Note: The amount represented 13 hours of partners time, 14 hours secretarial time, office overhead figured at 20% of the combined partner and secretary time, plus phone calls in the amount of $16.50.

Note: No indication that this cost to the architect was to be reimbursed to the ESD by the lessor.

November 3, 1960 Approval of Escrow instructions for land transfer to Brunzell, by Attorney General.

November 7, 1960 Escrow instructions for land transfer executed by Brunzell.

Note: Instructions provide that escrow shall close within (30) days.

Note: Date of Lease-Purchase contract between ESD and Brunzell was September 16, 1960.

Paragraph 17 of this contract reads as follows: "TIME IS OF THE ESSENCE OF THIS CONTRACT AND OF ALL ITS TERMS AND CONDITIONS; STRICT INTERPRETATION OF TIME REQUIREMENTS IS INTENDED BY BOTH LESSOR AND LESSEE."

In addition, Paragraph 4 of the contract contained the following: "The Lessor (Brunzell) agrees that he will forthwith after being nominated proceed with the purchase of said real property for the purpose of expediting and effectuating this Lease-Purchase Agreement."

The ESD was under pressure to have facilities available to them in the shortest period of time possible. HOWEVER, IN SPITE OF THIS PRACTICAL SITUATION, AND IN THE FACE OF PARAGRAPH 4 AND 17 INDICATED ABOVE, AN ESCROW AGREEMENT BY WHICH BRUNZELL WOULD ACQUIRE THE BUILDING SITE WAS NOT EXECUTED BY BRUNZELL UNTIL NOVEMBER 7, 1960. The contract further provided that after a reasonable length of time allowed by the ESD Director for the land purchase, the Director would issue a notice to the lessor to proceed with construction.

Note: At this point the following delays are interesting to note:

(a) Contract with Brunzell was signed a full week later than the terms of the proposal called for. Proposal called for the contract to be executed within 10 days.

(b) It took almost 8 weeks for the ESD to notify the Planning Board, the Planning Board in turn to request the Attorney General to prepare Escrow instructions, and for the Attorney General to prepare same, and for Brunzell to execute the escrow instructions.

Note: It is important to observe that FOR A RE-BID ON A VASTLY ALTERED LEASE-PURCHASE PROPOSAL the ESD wished to rush this matter through in about 10 days, and without opportunity for any outside proposers to have a chance to bid. (PROPOSERS COULD HARDLY HAVE DONE SO IN SUCH A SHORT PERIOD OF TIME ANYWAY.)

Note: It should be observed that it took the Planning Board some time to request the Attorney General's office to prepare escrow instructions and further, that it took that office an unusual amount of time to prepare the escrow. HOWEVER, WE CANNOT CANNOT LOCATE CORRESPONDENCE IN ANY OF THE MATERIALS EXAMINED WHERE THE ESD AT ANY TIME REQUESTED THESE TWO AGENCIES TO ASSIGN ANY PARTICULAR PRIORITY IN THE INTERESTS OF THE TIME FACTOR HELD TO BE OF SUCH IMPORTANCE JUST A FEW WEEKS PRIOR. Such special requests had been made to the Planning Board on several occasions, particularly when such pressure had been placed on the Board that their Manager was overruled and forced to agree to bidding procedure while plan checking was still in progress. Had any formalities been necessary, in regard to the Planning Board's acceptance of the nominee, it is suspected that such acceptance could have been requested and obtained from the Board on such an important project, prior to formalities of the next scheduled meeting. The Board Chairman had been contacted for other purposes to expedite the project, and the expedition had been granted.

Note: Had all parties been interested in the time factor and proceeded in accordance with the proposal and contract provisions, the following schedule indicates by what date the building project could have been underway. This schedule provides ample time, and that actually specified in most cases, for the process to have been brought about with normal interest in time factors being given consideration by the ESD Director.

Award of bid to Brunzell (negotiations entered) August 30, 1960.

Last day to enter contract--September 9, 1960.

Request Planning Board to procure escrow for building site transfer to Brunzell--September 9, 1960.

Ample time for preparation of escrow instructions and execution of same by Brunzell--September 15, 1960.

Escrow of (30) days to obtain land which was the actual time finally agreed to in the escrow instructions--October 15, 1960.

Notice to proceed with construction--October 15, 1960.

BY THE TERMS OF THE CONTRACT AND OTHER DOCUMENTS, THE BUILDING WOULD THEN HAVE BEEN COMPLETED AND READY FOR OCCUPANCY BY AUGUST OF 1961.

December 5, 1960 Closing date for escrow to transfer land to Brunzell as provided for in escrow instructions dated November 4th and executed by Brunzell on November 7, 1960.

Note: Escrow was never closed until 3 months later, on March 6-7th.

December 8, 1960 ESD Counsel, R. L. Waters, Jr., to First of California Mortgage Company, wire reads as follows: "In response to your query the Executive Director of the ESD has specific statutory authority to enter into lease-purchase agreements for the purchase of office buildings. He has no authority to issue bonds, or construct buildings. Therefore, ES building transaction in Carson City, Nevada, is being handled on the basis of a lease-purchase agreement as entered into with Brunzell Construction Company, Inc., of Nevada, on September 16, 1960.

Note: Former indications were that the matter was being handled through a San Francisco broker with a lending institution identified as the Equitable Life Assurance Society.

Note: There is some evidence that at least by this time the originally identified lender and possibly others did not see fit to provide funds for the project.

January 5, 1961 Date of the Amendment of Lease, dated September 16, 1960 of Employment Security building at Carson City, Nevada, between Brunzell Construction Co., Inc., of Nevada, lessor, and State of Nevada by and through the Employment Security Department as lessee.

This four page amendment of the original lease-purchase agreement changed many highly significant provisions as outlined in the numbered paragraphs that follow:

It is significant to note that nowhere in any preamble to the amendments is there any reference as to why these amendments are being agreed to and for what consideration the state assumed additional liability and burden which developed through almost each and every section containing the various amendments. Lacking such consideration, these amendments are of questionable validity.

Par. 1 Except as amended by the following sections the basic contract was to remain in full force and effect.

Par. 2 Provided that the proceeds of hazard insurance would be made available to the ESD under its new obligation to assume responsibility to repair or replace damaged building.

Note: This was necessary to tie in with the following amendment set forth as Paragraph No. 3.

Note: The amendment said that Paragraph 9, on page 8, under clause (a) "shall be rewritten" to effect the change. WE CAN FIND NO RECORD OF SUCH REWRITTEN PARAGRAPH HAVING BEEN MADE.

Par. 3(a) Provided for the complete deletion of Paragraph 11 of the contract entitled Destruction of Premises. In place thereof was the following provision: IN THE EVENT OF THE FULL OR PARTIAL DESTRUCTION OF THE IMPROVEMENTS UPON THE DEMISED PREMISES AT ANY TIME DURING THE TERM OF THIS LEASE, LESSEE (Employment Security Department) AGREES THAT IT WILL REPAIR OR REPLACE SUCH DAMAGED OR DESTROYED IMPROVEMENTS AND PLACE THEM IN AS GOOD CONDITION AS THEY WERE PRIOR TO ANY SUCH DAMAGE OR DESTRUCTION, AND THAT IT (Employment Security Department) WILL DO SO AS SOON AS POSSIBLE AND WITHOUT ANY UNNECESSARY DELAY.

Note: This had formerly been the obligation of the lessee, not the ESD.

(b) Further provision was made as follows: . . .THAT THE PROCEEDS FROM ANY INSURANCE POLICY OR POLICIES BECAUSE OF SAID DAMAGE OR DESTRUCTION TO THE PREMISES SHALL BE HELD BY THE HOLDER OF THE FIRST DEED OF TRUST IN AN ESCROW ACCOUNT FOR THE PURPOSE OF DEFRAYING THE COST OF SAID BUILDING AND REPAIRING.

Note: The amendments and the contract were agreements between the ESD and the lessor, with the holder of the first deed of trust not a party to the agreement. In such case the holder might easily elect not to turn over the proceeds of the insurance to the ESD. The holder might elect instead, particularly if there was a total destruction, to keep the funds and under more recent market conditions place them somewhere else to greater advantage. It is hard to see how an agreement between "A" and "B" could possibly be binding upon "C" who was not a party to the agreement. (However, a consent to assignment made at a later date did provide for the proceeds to be made available to the ESD.)

(c) In addition, the following was also an amendment: "DURING THE PERIOD OF REPAIR OR REBUILDING CAUSED FROM ANY CATASTROPHE THE RENT HEREIN SHALL IN NO EVENT ABATE BUT SHALL CONTINUE TO BE DUE AND PAYABLE IN THE SAME MANNER AND FORM, WITHOUT DELAY OR DEDUCTION."

Note: Under original contract, rental payments were to be reduced on a pro-rata basis reflecting the proportion of floor space usable and that which was not usable. Under total destruction then, rental payments would have abated.

THE NO ABATEMENT OF RENTAL PAYMENTS IS ONE OF THE STRONGEST INDICATIONS THAT BY THE TIME THESE AMENDMENTS WERE ADDED, THE NATURE OF THE CONTRACT HAD BECOME NOTHING MORE THAN A SALES CONTRACT. Similar to the purchase of an automobile on time, it matters not the destruction to the vehicle, the payments continue to be due and payable and do not abate.

Par. 4 Provided for the deletion of last sentence under Non-Payment of Rent which read as follows: "IN NO EVENT SHALL NON-PAYMENT OF RENT GRANT A LEGAL RIGHT OF RECISION OF THIS CONTRACT TO THE LESSOR."

Note: This is of little importance in view of the onerous factual requirements for a right of recision. The most important requirement is that both parties be put in the same position they were before the contract. That simply cannot be done; for Brunzell would have to return all rental payments and deed the land in its former state to Nevada.

Par. 5 Under Option of Lessee to Purchase, was added the following provision as follows:

"THE OPTION OF THE LESSEE TO PURCHASE SHALL NOT BE EXERCISED IN ANY EVENT UNTIL THE LAPSE OF TEN (10) YEARS AND THIRTY (30) DAYS FROM THE DATE OF OCCUPANCY OF THE COMPLETED BUILDING."

Note: This provision in the amendments is an illusion. It appears to accelerate the state's right to exercise the option, but a study of both documents shows this is not the case. Even though the amendments were valid, all the provisions thereof nullify the purported acceleration.

In addition, the following provision was added:

"THE RIGHTS OF THE LESSEE UNDER THIS PARAGRAPH SHALL AT ALL TIMES BE SUBJECT AND SUBORDINATE TO THE LIEN OF ANY DEED OF TRUST MADE BY THE LESSOR TO SECURE THE REPAYMENT OF MONEY BORROWED BY THE LESSOR FOR THE CONSTRUCTION OF THE OFFICE BUILDING."

Note: This provision adds nothing to the legal obligations incident to the transaction. The law applicable to encumbrances on titles to real property, gives priority to the deed of trust, and no agreement contained in the lease-purchase agreement can affect it in the slightest degree.

Note: Since there is no provision in either the amendments or the lease-purchase agreement itself relative to a guarantee by the lessor (Brunzell) that he will provide a marketable title which is free from any encumbrances to the state, any outstanding lien which has not been cleared by the lessor would naturally encumber the title. A marketable title is not necessarily a title free of encumbrances, and most commonly when attractive mortgages are held against properties it is an asset.

Note: Both the Reno and Las Vegas lease-purchase contracts for ESD buildings in those cities do guarantee that at the time the state takes title to the buildings they will be free and clear of any liens. No such guarantee is a part of the Carson City building agreement.

Par. 6 Added to the lease was the following additional paragraph to be known as Paragraph 18.

"The lessee promises and agrees to pay the rental herein provided in the amount and at the time and in the manner set forth herein during the full term of 20 years, without deduction or delay, and subject to all the rights and conditions as set forth in favor of the lessor and the owner and holder of the first deed of trust or mortgagee. LESSEE (Employment Security Department) AGREES TO PAY THE RENTALS FROM FUNDS OF THE EMPLOYMENT SECURITY DEPARTMENT, WITHOUT LIMITATION, INCLUDING FUNDS MADE AVAILABLE BY THE UNITED STATES BUT NOT LIMITED TO SAID FUNDS."

Note: This amendment executed on January 5, 1961 appears to be in conflict with the specific language contained in the authorization given to the ESD Director to enter into lease-purchase agreements.

The authorization act, Chapter 191 of the 1960 Session, read as follows:

RENTALS TO THE LESSOR SHALL BE PAID BY THE EMPLOYMENT SECURITY DEPARTMENT. . .FROM GRANTS RECEIVED BY THE ESD OR STATE AGENCY FOR SUCH PURPOSES, TO THE EXTENT THAT FUNDS ARE MADE AVAILABLE BY THE CONGRESS OF THE UNITED STATES.

Par. 7 The last amendment was the addition of provisions to be known as Paragraph 19 of the original contract, and read as follows:

"The lessor and lessee agree that in the event of the default of the lessee in making the payment of rent in the amount, manner and time as required herein, such default, extending for a period of ninety (90) days after the grace period of the first month of default, shall entitle the lessor to have such action at law or in equity as provided by the law of Nevada to repossess the premises for non-payment of rent as in other cases provided. The provisions of this paragraph shall in no way prevent action on the part of the holder of the first deed of trust or mortgagee from proceeding with foreclosure in the event of default of the lessor, PROVIDING, HOWEVER, that lessee shall be entitled to prevent such foreclosure or sale, as provided in Paragraph 9, by curing such default and taking credit for sums expended against the rental herein provided.

Note: This is an abortive attempt to give the lessor a right to equitable relief after a 120 day default. In the original agreement the lessor was limited to legal action to collect rent due and unpaid.

The purported granting of the right to cure lessor's default in payments required by the promissory note secured by the deed of trust, adds nothing as the same right was granted in paragraph 9 of the original lease-purchase agreement.

Again, the reference to no interference with rights under the deed of trust is of no force or effect. All rights thereunder are paramount to and immune from provisions of the lease-purchase agreement or purported amendments thereto.

The material in these seven paragraphs constituted the purported amendments to the original lease-purchase agreement (contract) entered into by the ESD with Brunzell on September 16, 1960.

The following general comments should be made in regard to the amendments in general:

1. The enforceability and validity of the amendments is of doubt since there was insufficient grounds upon which to base any mutual consideration shown in the document containing the amendments.

Note: The subject of consideration is complex and difficult, if not impossible, for one not legally trained and experienced to understand or comprehend. It came into being before the Roman Empire and was developed during the early English common law period. There was little flexibility in the law from Roman through English common law times, and the doctrine sprang from no single source.

Presently, and for years in this country, consideration requires a detriment to the promisee "incurred at the request of the promissor"; or as is so often stated, to have a valid consideration there must be a detriment to the promisee and a benefit to the promissor. However, this was not always the case. In England at least as early as the beginning of the 16th century only a detriment to the promisee was considered as legal consideration. The English law courts implied a promise to pay in order to have mutuality. The whole doctrine during its English growth is so involved with common law actions, such as: Indebitatus assumpsit.

For a long period of time both in English equity and law courts a breach of a parole promise was considered a fraud and thus a tort. Actions to recover on such a promise, even in assumpsit were considered as actions ex delictu not actions ex contractu. Gradually by natural transition or better reasoning, actions based upon parole promises were regarded as actions founded upon contract.

It may be well to note that in English common law courts made a distinction between contracts under seal and contracts not under seal. Contracts under seal required no consideration, perhaps because of the archaic reverence for seals.

Contracts not under seal were of two kinds or classes; both required consideration. The class was determined by the consideration which supported the contract. This also determined what action must be brought to recover for a breach.

Irrespective of the common law concept, consideration now for a promise is the thing given or done by the promisee in exchange for the promise. In other words, the consideration must be that which the parties agree to be the consideration. It cannot simply be a fortuitous benefit or detriment.

Furthermore, although mutual promises are sufficient consideration to support a contract, irrespective of the value involved, mere promises are not sufficient to support amendments to such a contract. The reason being that the rights and obligations of the parties have been legally established by the original agreement, and a bare promise to do or refrain from doing what has already been agreed upon is not legal consideration for the amendments.

So it is with the proposed amendments to the lease-purchase agreement. There is no consideration whatever to support the proposed amendments.

It may be well to state that there is a difference in consideration for executed and executory contracts or rather for amendments thereto. However, that difference does not exist in the case under discussion.

2. From time to time, the ESD Director allowed his Department to accept provisions which cast a burden upon both the state and federal governments.

3. One of the amendments accepted by the Director may have been contrary to the law existent on that date. This was one which removed the restriction on rental payments to be made from only those funds made available by the Federal Congress.

4. The lease-purchase proposal stated in two sections that "NO MODIFICATION TO THE FORM OF THE LEASE-PURCHASE AGREEMENT WILL BE PERMITTED."

Note: Other proposers would assume that such was to be the case. Had they anticipated that this important provision might be scrapped at a later date for the benefit of a lessor, they too might have thrown in a comparable bid and hoped to be given such consideration to assist them in obtaining financing at a later date.

Note: At this point in the negotiations, and after the purported amendments in particular, the true nature of the agreement between Brunzell and the ESD became evident. Rather than emerging as a lease-purchase contract, the documents taken as a whole constituted an agreement to build and sell a building, with normal lessor obligations eliminated, thus ending the existence of lease-purchase provisions normal to lease-purchase proposals. Factors which show that the so called lease-purchase agreement was in fact an agreement to sell, and not a lease, are as follows:

(a) Lessor agrees to purchase the building site, "construct thereon an office building, and lease said building and property to the lessee (ESD) for the time hereinafter set forth, and at the end of said term to sell said building (and property) upon the terms and conditions set forth herein."

(b) Lessor agrees to purchase property (building site) and lessee (ESD) agrees to "reimburse lessor the amount of the purchase price less $1.00."

(c) Lessee (ESD) at its sole cost and expense, agrees at all times during the term of the lease to perform all necessary maintenance and repair to and on the demised premises.

(d) Lessee (ESD) agrees to reimburse in full for all insurance premiums paid by lessor for insurance on said building.

(e) Lessee (ESD) agrees to reimburse lessor for all taxes, including municipal charges and assessments paid by lessor during the term of the lease.

(f) Lessee (ESD) agrees that rent shall not abate during any period building or any portion thereof is damaged so as to prevent occupancy.

(g) Lessor may not assign, sell, or transfer his interest or any part thereof in or to the real property.

(h) Upon payment by lessee of all rent "pursuant to this contract" and reimbursement by lessee of all sums agreed to be reimbursed, "lessee (ESD) shall have the right to purchase the demised premises from the lessor for $1.00."

(i) Lessor agrees that he has executed a Grant, Bargain and Sale Deed to the Lessee (ESD) and deposited the same with the Washoe Division of Pioneer Title Insurance Company with instructions to deliver said deed to lessee (ESD) upon a showing that all payments of rent required to be paid pursuant to the Lease-Purchase Agreement have been paid and also the payment of the additional sum of $1.00.

(j) Lessor agrees to furnish lessee (ESD) with a policy of title insurance not later than the beginning of the term of the lease and another policy of title insurance when lessee decides to exercise its option to purchase provided in said lease-purchase agreement.

(k) Phraseology employed in preliminary correspondence, such as: "Once the cost of construction of a building under a rental-purchase agreement has been fully amortized, no further costs shall be charged against the ESD in connection with the occupancy of the building other than reasonable costs of operation and maintenance." (Letter Brockway to Ham, 2/10/60.)

Note: The term "amortized" is not normal to leases, and is more directly associated with sales of property.

(l) Phraseology in proposed bill to be introduced, attached to Brockway letter of 2/10/60 and wording copied from said proposed bill and incorporated in Assembly Bill No. 226, 1960 Session, which became Chapter 191, Statutes of Nevada, 1960.

Note: Such provisions requiring the lessee (ESD) to be responsible for all maintenance, taxes, insurance, municipal assessments, and non-abatement of rental, and the constant reference to amortization in many documents and correspondence, are abnormal to a lease or lease-purchase agreement. In the Reno and Las Vegas (ESD) contracts the matters of maintenance, taxes, insurance, etc., are the responsibility of the lessor and not the lessee (ESD).

January 10, 1961 Letter from Federal agency to Ferris & Erskine indicating that the terms of the lease-purchase agreement are found to comply with the U.S. Bureau fiscal standards, and rental payments under this lease are eligible for reimbursement by the Federal bureau.

Note: It is not known if reference is made to the lease-purchase agreement as amended or not. At this date the amendments had been executed, however.

Note: No indication is made as to whether certain terms of the contract as amended (if such was known by the Federal agency) WERE IN COMPLIANCE WITH NEVADA STATUTES on this date.

January 10, 1961 Conditional Commitment from General Electric Pension Trust to Brunzell Construction Company relative to funds for the building project in Carson City.

Note: This is a conditional commitment which was later, by wire of January 16th and letter of January 17th, further modified by additional conditions effecting the commitment made by the General Electric Pension Trust.

Note: An examination of the conditions of the commitment are of interest:

(1) The conditional commitment mentions the lease dated September 16, 1960, between the ESD and Brunzell and also the amendments dated January 5, 1961, requiring Brunzell to construct a building within 300 days from the date notified to commence construction.

(2) Reference is made to the Brunzell request that General Electric Pension Trust LEND HIM THE FUNDS NECESSARY FOR THE CONSTRUCTION of the building.

Note: The agreement was for a loan of $1,200,000.00, and we understand the building cost under $900,000 to construct. Why such an amount had been requested is not overly clear.

(3) The interest rate was set at 5½% per year FROM THE RENTALS PAYABLE UNDER THE LEASE to be evidenced by a note payable to General Electric in the amount of $1,200,000.00 TO BE SECURED BY AN ASSIGNMENT TO GENERAL ELECTRIC OF THE LEASE (THE ASSIGNMENT), AND THE RENTALS PAYABLE THEREUNDER ($1,987,488.00) and further, the RIGHT TO RECEIVE THE PURCHASE PRICE OF THE PREMISES IN THE EVENT OF THE EXERCISE BY NEVADA OF THE OPTION TO PURCHASE, and by a FIRST MORTGAGE OR DEED OF TRUST ON THE PREMISES.

Note: The loan was made and secured principally by an assignment to General Electric of the rental payments under the terms of the lease and the right to receive the purchase price if Nevada purchased the property. This security was fundamental to the consideration by General Electric to make the loan, which at the time represented at least 120% of the value of the building and land. A first mortgage on the property also offered security but was evidently not sufficient for the amount of the loan.

(4) Eleven (11) conditions were set forth which had to be met before General Electric would agree to make the first advance of the fund requested ($1,200,000.00). They were as follows:

(a) Execution and delivery of the Note in the amount of $1,200,000.00.

(b) Execution and delivery of the Assignment with Nevada's consent thereto.

(c) Execution of a Building Loan Agreement between General Electric and Brunzell to provide for advances to be made in accordance with a schedule annexed thereto. Said schedule would provide for advances not more frequently than once a month, and not to exceed 85% until the building is 50% completed, and thereafter not to exceed 95% of the cost of materials and labor as certified to General Electric by Brunzell and by the firm of Ferris & Erskine.

The certifications made by Brunzell and Ferris & Erskine in regard to the cost of materials and labor to be accompanied by satisfactory evidence of payment of materials and labor as General Electric might request and subject at General Electric option for verification and approval by the Real Estate and Construction Operation of General Electric.

Brunzell to promptly furnish General Electric with a schedule of estimated monthly construction advance requirements and a schedule of the costs of the major categories of construction of the building.

ADVANCES TO BEAR INTEREST AT 5½% from the respective dates of advances made, PAYABLE MONTHLY, WITH ADDITIONAL INTEREST AT THE TIME OF EACH ADVANCE in

an amount of 1½%. (This is a 1½% discount or "points" in addition to the 5½% interest rate.)

Note: The total of all advances made by General Electric were NOT TO RUN TO MORE THAN 95% OF THE TOTAL COST OF THE BUILDING. If the full $1,200,000.00 was advanced to Brunzell then the actual building cost certified to by Brunzell and Ferris & Erskine must have been in excess of $1,200,000.00. Actual building cost would have to be at least $1,263,157.90. (See entry at date June 7, 1962 in chronology, indicating amount General Electric loaned to Brunzell.)

(d) Execution and delivery of the Mortgage (Deed of Trust) which was a first lien on the premises to the extent of advances made under the Building Loan Agreement.

Mortgage to contain covenants to comply with lease and to provide for the carrying of insurance in the amounts General Electric might reasonably require.

Note: Mortgage (Deed of Trust), dated March 6, 1961, provides as follows: The Trustor (Brunzell) promises to keep insured all buildings and improvements on said property against loss or damage by fire, with extended coverage endorsement including (but not necessarily limited to) the hazards of flood, windstorm and tornado, in the full amount of the replacement value of the improvements on said premises, in some insurance company or companies to be approved by the Beneficiary (General Electric Pension Trust). However, an earlier instrument, the contract between the ESD and Brunzell, specifically sets forth the following: The Lessor (Brunzell) agrees that such policy or policies must be approved both as to the insurer and the form, by the Lessee (ESD) prior to filing, and a failure to secure such approval shall constitute non-compliance with this paragraph. Obviously there is a collision between authority here to select the insurer. Both the ESD and the General Electric Pension Trust have an interest in the identity of the insurer. However, these provisions from different documents are obviously at variance.

Mortgage not prepayable except under terms of the lease where an option was allowed to Nevada to purchase the premises after the tenth year at a premium computed on the unpaid balance which was set at 10% in the eleventh through the fifteenth years and declining thereafter at a rate of 2% per year through the twentieth year.

Note: This provision was made a part of the contract by one of a series of amendments made on January 5, 1961.

(e) Brunzell to procure a performance bond, naming General Electric as obligee, in an amount equal to the General Electric commitment.

Note: Performance bond had been required by original proposal plans drawn up by the Planning Board, with the ESD the recipient of the proceeds of the bond. No performance bond requirement was a part of either of the formal bid proposals produced by the ESD.

(f) Brunzell to provide Builder's Risk Insurance, with General Electric named as the insured as General Electric interests shall appear, and payable as provided in the Building Loan Agreement. Also, Liability Insurance in amounts General Electric may specify.

(g) Brunzell to provide General Electric with the Guarantee of the payment of the Note in accordance with its terms by EVERRETT S. M. BRUNZELL AND HIS WIFE.

Note: Additional security of a personal guarantee was required in addition to that of the Brunzell Corporation.

(h) Brunzell to furnish an officer's certificate to the effect that the financial statement dated November 18, 1959, accurately reflected financial condition as of that date, and that no material adverse changes have occurred since then. Same requirement relative to Everrett S. M. Brunzell as separate from the corporation.

(i) To have received an opinion from Hawkins, Rhodes, and Hawkins to the effect that Brunzell is a duly organized and validly existing Nevada corporation with full power to own and lease the premises.

Opinion from Hawkins that the Lease, Assignment, Consent to Assignment, Note, Deed of Trust (Mortgage), Building Loan Agreement, and the Guaranty have been duly authorized and executed AND ARE ENFORCEABLE AGAINST THE PARTIES IN ACCORDANCE WITH THEIR RESPECTIVE TERMS.

WITH RESPECT TO THE ENFORCEABILITY OF THE LEASE AGAINST FUNDS OTHER THAN CONGRESSIONAL GRANTS TO THE ESD, COUNSEL MAY RELY ON AN OPINION OF THE ATTORNEY GENERAL OF THE STATE OF NEVADA.

Note: Reference is made to "an" opinion. It is not known to which Attorney General opinion General Electric made reference. In any event, the further conditions of the commitment which followed a few days later strongly indicate that General Electric was not overly sympathetic to opinions issued by the Attorney General's office holding that the State of Nevada was liable for the rental payments, without an amendment to existing law.

(j) Brunzell to furnish General Electric with an ATA policy of mortgage insurance in the amount of the purchase price of the premises (building site cost of $25,462.00) which will be increased as advances are made under the terms of the Building Loan Agreement.

Note: Reference to "purchase price of premises" could be easily confused with the purchase price of the project to the state, an amount of $1,987,488.00.

(k) Receipt of satisfactory evidence that the terms of the lease have been found to comply with the U.S. Bureau of Employment Security Fiscal Standards and that the rental payments are eligible for reimbursement by that Bureau.

(5) General Electric Pension Trust specified that their obligation to make advances during the construction of the building would also be subject to the conditions to be agreed to in the Building Loan Agreement, yet to be executed.

(6) A further condition of the commitment was the receipt of plans and specifications by the General Electric Real Estate and Construction Operation at

Schenectady, and their approval of these plans and specifications would have to be obtained.

(7) Brunzell to pay all costs and expenses of whatever kind in connection with the transaction, including the fee and expenses of special counsel and General Electric local counsel and review costs of the General Electric Real Estate and Constructions Operations Division (not to exceed $1,500.) and all recording costs, taxes, fees of the Trustee (General Electric), and any brokers' commissions.

(8) The terms of the commitment may not be incorporated in the formal contracts to be entered into and shall survive the closings and remain binding on you.

Note: Possibly General Electric did not wish to have the terms of their commitment made of record in following documents. Also, any incorporation might not be complete. In order to insure secrecy, completeness, and survival, this provision was probably included in the commitment.

January 11, 1961 Attorney General Opinion Number 200, by Deputy Charles E. Catt to ESD.

Note: Holds in general that as of this date, the state was liable for the project although at that time the law provided that no state funds were involved, and legislation which might have made the state liable was not introduced until some time later.

January 16, 1961 Telegram from the General Electric Pension Trust to representative of Brunzell Construction Company, Incorporated, which makes reference to the General Electric conditional commitment letter of January 10th. The telegram adds one more condition to the General Electric commitment to Brunzell relative to funds for financing the ESD building project in Carson City.

Note: This additional condition is that NRS 612.227 be amended to eliminate the matter following the word "PROGRAM."

Note: The "matter following the word program" is as follows: FROM GRANTS RECEIVED BY THE EMPLOYMENT SECURITY DEPARTMENT OR STATE AGENCY FOR SUCH PURPOSES, TO THE EXTENT THAT FUNDS ARE MADE AVAILABLE BY THE CONGRESS OF THE UNITED STATES.

Note: The requested amendment of the Nevada law was the express requirement of the General Electric Pension Trust. HOWEVER, THE EMPLOYMENT SECURITY DIRECTOR HAD ALREADY SIGNED A SERIES OF AMENDMENTS

TO THE ORIGINAL LEASE-PURCHASE AGREEMENT CONTRACT WHICH PROVIDED FOR THIS CHANGE ONE OF WHICH MAY HAVE BEEN IN CONFLICT WITH THE LAW.

Note: Obviously, General Electric realized that such an amendment would hold little water in the face of a statute to the contrary, and further, that any Attorney General's opinions would offer no foundation where they might be in collision with contemporary statutes.

January 17, 1961 Letter from General Electric Pension Trust to Brunzell Construction Co., Inc.

Communication makes reference to the January 10th letter agreement with Brunzell which granted a conditional commitment for a mortgage loan to be given final approval at a later date. An additional condition had been wired to Brunzell on January 16th. This January 17th letter re-identifies the January 16th condition, and adds thereto still another condition for making the commitment.

Note: The reidentification of a condition was stated as follows: "An additional condition to our obligation to consummate the commitment shall be the AMENDMENT OF N.R.S. 612.227 (sub-section 1 of Section 1, Chapter 191, Laws 1960) TO ELIMINATE THE MATTER FOLLOWING THE WORD "PROGRAM." This "matter" is reviewed at the January 16th date immediately preceding this letter.

Note: The new condition was stated as follows: "There shall be deleted from the opinion referred to in paragraph 9 that part of clause (ii) thereof which follows the word (terms)." Reference is made to paragraph 9 of the letter agreement of January 10th.

The part of clause (ii) in this paragraph 9 which follows the word "terms" is as follows: "WITH RESPECT TO THE ENFORCEABILITY OF THE LEASE AGAINST FUNDS OTHER THAN CONGRESSIONAL GRANTS TO THE EMPLOYMENT SECURITY DEPARTMENT, COUNSEL MAY RELY ON AN OPINION OF THE ATTORNEY GENERAL OF THE STATE OF NEVADA."

Note: The elimination of this provision in the January 10th conditional commitment indicated that THE GENERAL ELECTRIC PENSION TRUST DID NOT WISH COUNSEL TO RELY ON AN ATTORNEY GENERAL OPINION, VERY POSSIBLY THE CATT OPINION NO. 200.

January 25, 1961 Introduction of Senate Bill No. 38 by the Senate Judiciary Committee, (Senators Dodge, Gallagher, Whitacre, Brown, Echeverria).

Senator Dodge moved the bill be referred to the Committee on Judiciary. Seconded by Mr. Slattery.

Note: Senate Bill No. 38 struck out the provision that the rentals for the building project would be limited to those made available by the Congress of the United States.

January 30, 1961 Senate Bill No. 38 read second time.

January 31, 1961 Senate Bill No. 38 read third time and passed. Vote - Yeas 17, Nays 0.

February 1, 1961 Senate Bill No. 38 read first time in Assembly. Mr. McElroy moved that the bill be referred to the Committee on Judiciary, (Bissett, Tyson, Briare, Parraguirre, Bybee, McKissick, Von Tobel).

February 2, 1961 Senate Bill No. 38 reported from committee by Chairman J. Roger Bissett with the recommendation: Do Pass.

February 2, 1961 Attorney General Opinion No. 206 (by John Porter) issued to the Superintendent of Public Instruction which holds in general that a lease-purchase agreement for the acquisition of school buildings and other facilities would be violative of both constitutional and statutory restrictions and limitations. (See body of report for analysis)

Note: Only 8 days later the same deputy of the Attorney General's office issued a five page syllabus to Assemblyman Gibson holding directly the opposite view in the case of the lease-purchase agreement on the ESD project.

February 3, 1961 Senate Bill No. 38 read second time in Assembly.

February 6, 1961 Mr. Berrum moved that Senate Bill No. 38 be taken from the General File and placed on the Chief Clerk's desk. Motion carried.

Remarks by Messrs. Berrum and Bissett.

BISSETT: Mr. Bissett indicated to the Assembly that the purpose of removing the restriction, effected by Senate Bill No. 38, was to conform the statute to the Attorney General's opinion which held that the state was liable for the rental payment anyway. That the lending institutions wanted further assurance, for the particular building now under construction so it can be completed by the target date of March 10th.

If the state was in fact liable anyway, it is hard to see why a lending institution would require further assurances. It appears that the General Electric Pension Trust did not fully agree with Attorney General Opinion No. 200, written by Deputy Charles E. Catt.

The building is mentioned as being under construction with a completion date of March 10th. THE BUILDING WAS AT THE TIME NOT UNDER CONSTRUCTION AND IT IS NOT KNOWN THE MARCH 10th OF WHAT YEAR WAS SET AS A TARGET DATE.

BERRUM: Mr. Berrum questioned Mr. Bissett on the point of this being held against the indebtedness for which the state is held responsible.

BISSETT: Mr. Bissett replied that it had no connection with the state's indebtedness, that the bill closes ONE MINOR LOOPHOLE.

SWACKHAMMER: Mr. Swackhammer indicated he quite agreed with Mr. Berrum that the project will certainly have to be taken into account and reduce the amount of indebtedness allowed to the state by just that amount.

BASTIAN: Mr. Bastian indicated he understood the state would only be obligated for that portion of the operating cost of the ESD to the extent of maintenance and possibly of the building if the federal government failed to appropriate.

BERRUM: Moved that the bill be placed on Chief Clerk's desk until they gathered a little more information on it.

February 7, 1961 Mr. Gibson moved that Senate Bill No. 38 be taken from the Chief Clerk's desk and re-referred to the Committee on Ways and Means. Motion carried.

Remarks by Messrs. Gibson and Bissett.

GIBSON: Mr. Gibson in moving that the bill be re-referred to the Committee on Ways and Means, indicated that on the previous day there was some discussion on the effect of this bill, that on the evening of February 6th a meeting was held with members of the Senate Committee and the ESD Director and also the attorney from the bill drafters and there was serious question as to the effect of this measure, if passed, on the bonded indebtedness of this state. Gibson continued by saying he felt the bill should be clearly understood by the members before they vote on the bill. We would like to have the opportunity to go into that thoroughly and find out just exactly what the effect will be.

BISSETT: Mr. Bissett indicated he had no objection to the bill being referred to Ways and Means.

February 10, 1961 Attorney General Opinion to Assemblyman Gibson (written by John Porter) which holds in general that the amendment which would be made by Senate Bill No. 38, striking out the restriction of rental payment to Federal funds, would in no way effect the amount of state debt incurred, and such payments are not binding upon the state (see body of report for analysis).

February 10, 1961 Senate Bill No. 38 reported from committee by Chairman James I. Gibson with the recommendation: Do pass.

February 13, 1961 Senate Bill No. 38 read third time and passed. Vote - Yeas, 42; Nays, Swackhammer; Absent - Palludan, Petrini, Viani - 3; Not Voting - Kean.

Note: Remarks by Messrs. Knisley, Swackhammer, Gibson, McKissick, Rowntree and Waters.

KNISLEY: Mr. Knisley indicated that the amendment effected by Senate Bill No. 38 had been requested by General Electric to give a little more substance to the source of the funds. The Attorney General has rendered an opinion that striking the clause referring to Federal funds does not increase in any manner the state's liability. Mr. Knisley also pointed out comparisons showing that the rental amount was reasonable.

SWACKHAMMER: Mr. Swackhammer asked Gibson to explain the meaning of the language in Section 3 which stated that agreements heretofore entered into by the Executive Director are hereby ratified, confirmed and adopted.

GIBSON: Mr. Gibson replied that he assumed the reference was to agreements on the offices that are located in Las Vegas.

SWACKHAMMER: Mr. Swackhammer then brought up two points and asked Mr. Gibson to assist with answers to the latter. The first point made was that under the terms of the existing legislation, (without the strike out of restricted rental payments), the state was obligating itself to furnish the ESD rent free quarters after the period of 20 years. He indicated that this was a questionable piece of thinking in his mind. Mr. Swackhammer then asked Mr. Gibson if the ESD asked for bids on the project themselves, and, if so, how did they get around the Planning Board.

GIBSON: Mr. Gibson replied that the ESD had acted as negotiating agency as they went through the procedure and went on to give costs per square feet for other structures.

SWACKHAMMER: Mr. Swackhammer pointed out that the information did not answer his question in regard to the Planning Board. Swackhammer went on to reiterate that he still felt that the state would have a "complete and total and existing liability when this language is taken out of here."

GIBSON: Mr. Gibson replied by quoting from the very recent opinion of the Attorney General's office written by Mr. Porter to the effect that the state would assume no such liability and that striking out the restriction does not create an obligation against the State of Nevada for the full amount of the term of the lease.

MC KISSICK: Mr. McKissick pointed out that he had reservations about the affect of the bill but had concluded that ". . .it's like a month-to-month rental, month-to-month tenancy--I do not believe that any contingent liability would fall back on the State of Nevada." He indicated that, "I do not think that the theoretical objections that Mr. Swackhammer has can stand up in the light of practicality."

SWACKHAMMER: Mr. Swackhammer pointed out that his objections had been termed "theoretical" but that evidently the lending institutions didn't feel it was a theoretical matter at all or they would not insist now that we take this language out that removes us from the liability.

KNISLEY: Mr. Knisley answered Swackhammer's previous question which was still unanswered about the Planning Board being bypassed by pointing out that it was a rental agreement and not subject to their review.

ROWNTREE: Mr. Rowntree pointed out the $1,980,000 cost of the lease-rental and asked if we couldn't have obtained the building cheaper by bond issue.

KNISLEY: Mr. Knisley indicated that such a method had been given some consideration but that due to other state structures at the Prison and University there was probably insufficient leeway under the debt limit to suggest that this method should be further explored.

WATERS: Mr. Waters pointed out that the amendment would not affect the existing legislation at all unless the ESD were abolished. "The building won't cost the state a penny," was given in reply to Mr. Rowntree's question relative to a less costly financing method.

SWACKHAMMER: Mr. Swackhammer pointed out that the answer to his question of the bypassing of the Planning Board was that the agreement was a rental and not a purchase. He indicated that the language of the lease-purchase agreement identified it as a purchase.

(Vote was taken at this time.)

ROWNTREE: In explanation of his vote:
After the vote, Mr. Rowntree made the remarks on the floor of the Assembly that he felt this was a very poor way to make investments for the state. He continued, "There's no question in my mind that the state has incurred a direct liability that should or should not be counted against their bonded indebtedness and all the remarks made here this morning make me think so even more. Mr. Knisley's remark that we probably haven't that much leeway in our bonding issue makes me think it's very

poor business to let the state be obligated to an amount which it will find inconvenient to raise and pay. In the original bill, we ratified a couple of similar deals that were put in before in Las Vegas and Reno; and perhaps it was essential to do that, but, in the future I would be very suspicious of anything like this, even though it has a clause in it that says that the State of Nevada assumes no liability because we see here--and we should all know very well that the State of Nevada assumes full liability."

Note: At this juncture it might be well to consider the point raised by Assemblyman Rowntree relative to what the cost of the Carson City building might have been if financed by some other method. (Information obtained from the State Planning Board) Building cost would be $875,764 for a 36,800 sq. ft. structure compared to 33,400 sq. ft. size of ESD building. Topographic and soil surveys, architectural fees, engineering fees, etc., raises cost to $916,252.

Direct Appropriation	Bond Issue 10 Years	Bond Issue 20 Years	Lease-Purchase
$916,252	$1,081,252	$1,231,252	$1,987,488

Further consideration should be given to the fact that if this larger building had been built as a state owned building from the outset, there would be no costs to be paid for through reimbursements, for taxes and municipal assessments. Likewise, insurance which is not excessive could have been taken out as the state felt necessary, and not in line with the demands of a lender.

Note: As a further comparison between methods and projects it might be well to set forth the differences in costs between lease-purchase agreements in general. It is obvious that there are considerable variations among lease-purchase contracts and the variations in cost are related to differing provisions for which party assumes different obligations, either directly or through reimbursements. Likewise, it should be realized that the Carson City building differs considerably from both the Reno and Las Vegas buildings in the matter of quality of the structure.

The following cost comparison has been made on a square foot cost to the state for the entire 20 year term.

Reno Employment Security Building	$ 68.07
Las Vegas Employment Security Building	$ 77.90
Carson City Employment Security Building	$128.58

Note: Reimbursement provisions for taxes, municipal charges, excessive insurance, and complete responsibility for all maintenance, cause the Carson City project to rise much higher in cost than the former projects in Reno and Las Vegas.

February 15, 1961 Senate Bill No. 38 enrolled and delivered to the Governor. Approved by the Governor the same day as Chapter 11, Statutes of Nevada of 1961.

Note: The unusual speed with which this Senate bill moved through the Legislature is of note. For example, it received action on every weekday but one in the Senate after introduction. On that one day it was in the hands of the Committee on Judiciary of the Senate.

In the Assembly it received action on every weekday but two. On those two days it was in the Committee on Ways and Means which it had been re-referred to. The Committee on Judiciary reported it out with a do pass the day after receiving the bill.

The Governor approved and signed the bill the day it was received by him.

Note: At the moment the bill was enacted into law (effective upon passage and approval) A NEW BASIS EXISTED UPON WHICH INTERESTED PROPOSERS WOULD HAVE HAD AVAILABLE TO THEM A FOUNDATION TO OFFER THE STATE A NEW SET OF RENTAL COSTS FOR A BUILDING FOR THE EMPLOYMENT SECURITY DEPARTMENT.

A portion of their last rental cost per foot bid was obviously based upon COST OF FINANCING TO THEM. This was in fact a major consideration in determining what bids proposers could offer on the project. With rentals heretofore guaranteed ONLY BY THE FEDERAL GOVERNMENT, it is natural that the proposers were all struggling with HIGH COST FINANCING. HOWEVER, they were underbid by a proposer who could not produce immediately the financing which he indicated was available in his proposal bid.

Note: It appears that the ESD might have properly considered this ENTIRELY NEW ELEMENT, and offered proposers the opportunity to come forward with new bids in the light of the NEW GUARANTEE OF RENTAL PAYMENTS FROM THE PROJECT. The position of the ESD at this time was admittedly difficult; the Department had a signed contract with a lessor who was unable to secure immediate financing. Senate Bill No. 38 was necessary to satisfy the request of the lender. The passage of this bill produced three undesirable results: (1) The State was made liable for the project and perhaps unnecessarily. (2) The entire building project turned upon the Legislature passing favorably upon the request of a particular lending institution for the benefit of a particular lessor. (3) The debt limit of the state may have been reached, and there is now questionable leeway for bond issues authorized by the 1961 Legislature.

Note: The ESD might have considered taking action because of the failure to perform by Brunzell before excessive delays became evident. It should be remembered that Brunzell did not enter into the contract with the state within the time specified in the lease-purchase proposal, largely due to tardy federal approval of the project.

Note: There is also the matter of the indefinite completion date of the contract, an unusual contract in this respect, as well as the date for commencement. It appears that the ESD allowed various delays in the interest of the contractor, and to enable him to search for financing.

Note: In what position would the ESD have found itself had the Legislature refused to pass Senate Bill No. 38 or if Brunzell had found it impossible to obtain financial backing?

Note: The ESD Director has offered the following information as an explanation of the position of the ESD in the matter of the difficulties experienced by the Brunzell Construction Co., Inc.:

"After a lease-purchase agreement was entered into with the Brunzell Construction Company of Reno, it became apparent that under the provisions of Assembly Bill No. 226, financing would be very difficult to obtain. However, this is the responsibility of the lessor and not of the department. At the same time we were anxious to commence construction as soon as possible and work closely with Mr. Brunzell and his various financing sources in an effort to work out any problems. It became further apparent that in order for Mr. Brunzell to get financing, there would need to be a further amendment. Mr. Frederick L. Hill of Goldwater, Taber and Hill, attorneys for Brunzell Construction Company asked if we had any objections to the law being amended to remove from NRS 612.227 1. the phrase, 'from grants received by the employment security department or state agency for such purposes, to the extent that funds are made available by the Congress of the United States.' We had no objections and Mr. Hill subsequently contacted members of the Senate, who after conferring with me introduced and passed, unanimously, I believe, Senate Bill No. 38 introduced January 25, 1961."

Note: It is apparent that the ESD Director and his agency had no objections to the removal of the protective wording which guarded the state from liability.

March 6, 1961 Promissory Note in the amount of $1,200,000.00 executed by Brunzell to General Electric Pension Trust. (Rate of interest 5½%)

Note: Secured by a Deed of Trust on the property and building to be constructed thereon for the ESD.

Note: The General Electric Pension Trust financed the interim construction through several advances as indicated in the note. After term of lease on the building started to run, the note was payable in 240 installments of $6,847.49 per $1,000,000.00 of principal advanced.

Note: Provision was contained in the note for prepayment after tenth year upon condition that the following prepayment penalties would be due in addition to the sum to be prepaid.

10% during the 11th through 15th years
8% during the 16th year
6% during the 17th year
4% during the 18th year
2% during the 19th year
0% during the 20th year

Note: It is of interest to note that the amount of money loaned to Brunzell ($1,200,000.00) is approximately $300,000 in excess of the actual cost of the building to Brunzell. Naturally then, General Electric Pension Trust required additional security. In fact the loan was made largely on the strength of the VALUE OF THE LEASE WHICH WAS ALMOST TWO MILLION DOLLARS. It was obviously for this reason that General Electric was so concerned as to where the rental monies were coming from with which to pay the monthly obligation of the ESD, and demanded that the restriction to Federal monies only, be removed by Senate Bill No. 38.

Note: As a further observation, it may be concluded that since the project did not cost $1,200,000.00, and there may be a variable amount of profit worked in to the contract price quoted on the structure, that an unknown portion of the $300,000 excess may have been borrowed by the contractor from the General Electric Pension Trust, WHICH EXCESS AMOUNT WAS NOT NECESSARY TO THE PROJECT AND WHICH EXCESS POSSIBLY REQUIRED THE REMOVAL OF THE RESTRICTION OF FEDERAL FUNDS ONLY, AND CAST A SHADOW ON THE NEVADA DEBT LIMIT UNNECESSARILY; WHY WAS IT NECESSARY TO BORROW ONE MILLION TWO HUNDRED THOUSAND DOLLARS ON THE STATE PROJECT which cost approximately $900,000 to Brunzell to construct?

Note: The form letter which each proposer was required to sign had to indicate the name of the institution which agreed to provide the lessor WITH SUFFICIENT FUNDS OVER AND ABOVE SUCH FUNDS AS ARE PROVIDED BY THE PROPOSER HIMSELF FOR THE ERECTION OF THE BUILDING. It is hardly possible that the ESD envisioned that some loan request was going to be made on their project OVER AND BEYOND THAT NECESSARY FOR THE ERECTION OF THE BUILDING. Could it have been that it was the amount of the sum requested ($1,200,000) that caused such delay and "shopping" on the part of the lessor to find a willing lender for such a sum representing more than the cost of the project to the lessor?

A FURTHER CONCERN IS THE FACT THAT IN ORDER TO OBTAIN SUCH A LOAN, NUMBERS OF AMENDMENTS HAD TO BE ACCEPTED BY THE ESD TO THE ORIGINAL LEASE-PURCHASE CONTRACT WHICH HAVE CAST A BURDEN UPON THE STATE, THE DEPARTMENT, AND FEDERAL AGENCIES. ALL OF THIS TO SECURE A LOAN FOR AN AMOUNT WELL IN EXCESS OF THAT APPEARING NECESSARY TO THE PROJECT.

Note: Had the selected proposer been financially responsible, and had the intent of the disclosure form requiring naming the institution or person that agreed to provide funds been employed properly, especially for sufficient funds "OVER AND ABOVE SUCH FUNDS AS ARE PROVIDED BY THE PROPOSER HIMSELF FOR THE ERECTION OF THE BUILDING," it is logical to assume that lessor would not have had to secure from a lender much more than $900,000, if he had any reasonable amount of funds "PROVIDED BY THE PROPOSER HIMSELF," available for the project.

Note: Such an amount to be secured from a lender ($900,000) for the building project would have represented an amount equal to only three-fourths of that which was obtained from the General Electric Pension Trust, ($1,200,000).

Just what position the acquiring of an additional ($300,000), an unknown portion of which WAS NOT NECESSARY FOR THE PROJECT, has placed the ESD, the State of Nevada, and the Federal ESD Agency is not at the moment precisely clear, lacking a court decision on the matter. It should be remembered that the interest on the excess amount loaned by the General Electric Pension Trust is a part of the "package" cost to the taxpayers, provided the option is exercised.

Note: Had the other bidders HAD AVAILABLE TO THEM THE GUARANTEE EVENTUALLY GIVEN TO BRUNZELL and the General Electric Pension Trust, it is logical to believe that they could have revised their bids downward to the benefit of the taxpayer, below their bid which had been made WITHOUT ANY STATE LIABILITY FOR REPAYMENT OF RENTAL MONEYS FOR THE PROJECT.

Note: The Federal Agency had among a number of provisions to be met for their authorization of such a project, a requirement that "bids for construction and sale of a building under such a plan" had to be solicited through advertising in newspapers of statewide circulation and "THE AWARD MADE TO THE LOWEST RESPONSIBLE BIDDER." It is not clear just why they did not exercise more supervision over the peculiar pattern of events, and why they did not at an early date move toward a suggested solution, when it became evident the Brunzell was having difficulty in financing the project. If we assume the Federal Agency was kept properly informed, certainly that Agency must SHOULDER MUCH OF THE BLAME FOR A COSTLY PROJECT TO THE TAXPAYER.

Note: The Federal Agency should have exercised unusually close supervision of the project, bid procedure, selection of a lessor, and subsequent suggestion to the Nevada Agency to investigate the possibility of having other proposers proceed with the project, in light of the fact that the Nevada agency was acting alone in the matter, and HAD NOT HANDLED THE PROJECT THROUGH A BUILDING COMMITTEE COMPOSED OF STATE PERSONS OUTSIDE THE ESD AS HAD BEEN SUGGESTED BY THE FEDERAL AGENCY IN SECTION 2521 of the Federal Employment Security Manual.

The Federal Agency was acting in the interests of the taxpayers when they, in effect, rejected the first bids on the Ferris & Erskine plans and specifications and proposal for a lease-purchase agreement. However, it is not too clear just how much, if any, is to be saved by having eliminated certain lessor cost factors only to have the Federal Agency agree to assume such costs eliminated in a round-about fashion by providing the ESD with funds to reimburse the lessor for those costs. Possibly in the area of major maintenance there is room for some savings. HOWEVER, in this area EITHER THE FEDERAL AGENCY MUST REIMBURSE THE ESD OR THE STATE OF NEVADA MUST APPROPRIATE FOR MAINTENANCE. In no event is the taxpayer going to benefit with the possible exception of the elimination of a "cushion" which proposers might have provided to cover maintenance.

March 6, 1961 Deed of Trust executed by Brunzell with the General Electric Pension Trust, as security for the payment of the sum of ONE MILLION TWO HUNDRED THOUSAND DOLLARS.

March 6, 1961 Consent to Assignment executed by the ESD Director, which authorizes the lessor (Brunzell) to assign the lease to the General Electric Pension Trust.

Note: Written consent by the ESD was necessary before the lessor could assign the lease, by the terms of the lease-purchase agreement.

Note: Provides that the proceeds of any insurance due to destruction of the building (which are held in an escrow by the General Electric Pension Trust) will be made available to the ESD for the purpose of rebuilding and repairing the structure under the obligation of the ESD to do so. "Assignee will make the proceeds of insurance available to the Lessee."

Note: In the consent to assignment, the General Electric Pension Trust also agreed to "notify said lessee (ESD) at least 30 days before recording notice of default" and "will recognize the right of the lessee (ESD) to cure any default." Why such a ridiculous provision would be contained in the consent to assignment executed by General Electric and the ESD is not overly clear. How could there be any default under the circumstances allowed to be cured

by the ESD, when the ESD is paying the rentals directly to General Electric under the terms of the assignment consented to?

March 6, 1961 Assignment of the Lease (between Brunzell and the Employment Security Department) to the General Electric Pension Trust.

Note: General Electric obviously required such an assignment of rentals due to Brunzell since the loan they made was well in excess of the value of the building. In order to secure the loan, not only was a deed of trust necessary, but, this assignment of the lease stipulating the rental payments of almost $2,000,000 as well as the personal guaranty from Brunzell and his wife, also executed.

Note: As a result of this assignment, the ESD makes direct monthly payments to the General Electric Pension Trust in the amount of $8,281.20. These monthly amounts reduce the $1,200,000 loan which General Electric made to Brunzell. However, the reduction in the first few years is not overly significant since much of the payment goes toward interest payments and only the balance toward a reduction of the principal amount of the loan.

Note: In the event the option is exercised to pay off the obligation on or after the tenth year, the balance of the $1,200,000.00 which has not been eliminated through the monthly payments of $8,281.20 would have to be paid in addition to the prepayment penalties set forth in the note.

March 6, 1961 Opinion written by Hawkins, Rhodes & Hawkins (General Electric Pension Fund attorneys in Reno, Nevada) as required under the terms of the conditional commitment from General Electric to Brunzell.

Note: This opinion held that Brunzell Construction Company, Inc. of Nevada was a duly authorized and validly existing Nevada corporation with full power and authority to own and lease the premises.

Note: Opinion also indicates that the following documents had been duly authorized and executed:

(a) Lease of Employment Security building at Carson City between ESD and Brunzell, dated September 16, 1960.
(b) Amendments of this lease dated January 5, 1961.
(c) Assignment of the lease as amended to General Electric Pension Trust.
(d) Consent of the assignment by the ESD.
(e) Note for $1,200,000 from Brunzell to General Electric.
(f) Deed of Trust from Brunzell to Pioneer Title Insurance Company of Nevada securing said note.
(g) Building loan agreement between Brunzell and General Electric Pension Trust.

Note: The opinion written on this date did not indicate that the Guarantee required under number 7 of the General Electric commitment had been executed. This was again specifically identified as number 9 (ii) in the commitment. The Guarantee was identified as an instrument to be executed by both Brunzell and his wife to secure payment of the note. Preliminary investigation indicated that such an instrument, although a condition of the General Electric commitment, was not finally required by the Trust Fund. However, information received in a letter dated April 4, 1962, from the General Electric Pension Trust Fund indicated that such an instrument was executed. It was evident that General Electric Pension Trust Fund required not only the backing of repayment for the loan by the Corporation, but also required a guarantee from Brunzell and his wife on a personal asset basis. This is not normally required by a lending institution.

March 6, 1961 Building Agreement executed between Brunzell Construction Co., Inc. of Nevada and the General Electric Pension Trust.

Note: This agreement was a condition of the General Electric commitment and the contents of the agreement follow many of the provisions of the letter of commitment, dated January 10, 1961, particularly in regard to the amount General Electric was obligated to loan and on what basis of certification the progress payments were to be made to Brunzell.

Note: Provisions were as follows: Instrument indicating that Brunzell had made application for a loan in an amount of $1,200,000.00.

1. Advances made by the Pension Trust Fund not to be made more frequently than once in any calendar month.

2. Until the building is 50% completed (as determined by Messrs. Ferris & Erskine) the advances shall not exceed 85%, and thereafter shall not exceed 95%, of the cost of the materials acceptably incorporated in the building, plus labor costs thereof, as certified to the lender by Ferris & Erskine, excepting legal and architects' charges which may be paid when properly billed, without retention.

   Note: It is difficult to understand how the entire $1,200,000.00 was paid out to Brunzell under the terms of this restrictive provision, unless there was a following document providing for this complete disbursement, not made available to the Counsel Bureau.

Note: The original commitment letter of January 10, 1961 had indicated that these certifications would be made to General Electric Pension Trust Fund by both Brunzell and Ferris & Erskine. In this building agreement which followed, the reference to Brunzell was dropped and Ferris & Erskine alone were to make the certifications.

3. These certifications, at General Electric's option, were subject to verfication and approval by the Real Estate and Construction Operation of General Electric Company itself, on whose determination the lender was entitled to rely in case of dispute.

Note: It is wondered if the General Electric Pension Trust availed itself of the opportunity for such review.

4. Construction progress payments were made at the rate of 5½% interest per annum and at the time of each advance the Borrower paid the Lender 1½% of the amount of such advance payment to be in addition to the interest. This was a points charge or discounted in advance.

5. A performance bond was required as in the commitment. In the building agreement this was identified as necessary in an amount of $931,000.00.

6. Other requirements were:

(a) Builders Risk Insurance, completed value form.
(b) Liability Insurance at Lender's specification.

7. ATA Policy of mortgage insurance in the full amount of the loan ($1,200,000.00). This title policy to insure that the Deed of Trust is a valid first lien on the premises to the extent of the advance made by the General Electric Pension Trust, ($1,200,000.00).

Note: Unless the loan is cleared by Brunzell, the state takes over title to the property between the tenth and twentieth years, subject to any amount of this lien still unpaid. No provision in the lease-purchase agreement guarantees that Brunzell will have cleared any such lien. Such guarantee is a part of both the Reno and Las Vegas lease-purchase agreements.

8. Eleven provisions were contained in the building agreement which protected General Electric to the extent that when any one of them became applicable, General Electric was not obligated to make further advancements and the entire obligation would become due and payable.

Note: Oddly enough one such occurrence did come about when a mechanic's lien was filed on the property. General Electric could have required that the entire obligation become due and payable to General Electric which would have undoubtedly required a refinancing of the project. In place of such action, we understand General Electric withheld the sum involved in the mechanic's lien, paid it directly, and turned the balance of the progress payment over to Brunzell, and did not elect to call in the loan.

9. Attached to the building agreement was Exhibit "A" which set forth a schedule of advances which may have represented funds anticipated to be required under the terms of the agreement. These progress payments or advances, amounted to $931,000.00 to the contractor and $49,899.48 to the architect.

Note: This schedule evidently did not obligate General Electric to make such advances, but provided a basis for estimating when and in what amounts Brunzell might make application for progress payments. The 95% of materials and labor acceptably incorporated in the project continued to be the extent of the General Electric obligation to make the loan.

Note: The Legislative Counsel Bureau can find no document or commitment which provided for the payment of the full $1,200,000.00 to Brunzell by the General Electric Pension Trust at completion of the building. It would be quite normal for General Electric to have restricted its payments to Brunzell during the course of construction, to amounts not in excess of materials and labor incorporated into the building.

March 6, 1962 Date when the following documents may have been requested by the General Electric Pension Trust.

COPY OF THE SCHEDULE OF BRUNZELL'S ESTIMATED MONTHLY CONSTRUCTION ADVANCE REQUIREMENTS.

Note: Note made available to the Counsel Bureau.

COPY OF THE SCHEDULE OF THE COSTS OF THE MAJOR CATEGORIES OF CONSTRUCTION OF THE BUILDING.

Note: Not made available to the Counsel Bureau.

COPY OF THE LOAN GUARANTEE AGREEMENT REQUIRED OF MR. BRUNZELL AND HIS WIFE.

Note: Not made available to the Counsel Bureau.

COPIES OF ALL CERTIFICATIONS FROM FERRIS & ERSKINE SHOWING THE COST OF LABOR AND MATERIAL REQUIRED FOR PROGRESS PAYMENTS.

Note: Not made available to the Counsel Bureau.

Note: All these documents were requested from both Brunzell and the General Electric Pension Trust. However, both refused to supply the Counsel Bureau with this information, much of which has an important bearing upon the state's obligation to exercise its purported option, and is directly involved with possible excess funds loaned to Brunzell on the ESD Carson City building project.

March 7, 1961 Recording of the Grant, Bargain and Sale Deed transferring title to the building site from the State of Nevada to the Brunzell Construction Company, Inc.

Note: The escrow instructions between Brunzell and the State Planning Board dated November 4, 1960, and executed by Brunzell on November 7, 1960, indicated that TIME WAS OF THE ESSENCE and further provided that the escrow was to close within THIRTY (30) DAYS from the date hereof (November 4, 1960).

Note: It is of unusual interest to note that IT TOOK OVER ONE HUNDRED AND TWENTY (120) DAYS TO CLOSE THE ESCROW, keeping in mind that the state had obtained clear title to the land only a few months previously.

Note: At this point we must recall that the ESD Director was to NOTIFY THE LESSOR TO PROCEED WITH THE CONSTRUCTION OF THE IMPROVEMENTS REQUIRED TO BE PLACED AND ERECTED UPON THE PROPERTY, after such time as the Director of ESD DEEMS REASONABLY NECESSARY FOR THE CONSUMMATION OF THE PURCHASE OF THE PROPERTY.

Obviously, had the escrow been closed as agreed to by Brunzell and the ESD, within (30) days from November 4, 1960, the ESD Director would have been placed in a position where he would have shortly after December 4, 1960, (at the latest), had to send notice to Brunzell to proceed with construction, AN ACTION WHICH APPARENTLY BRUNZELL WAS ILL PREPARED TO PERFORM AT THAT TIME. Time would have started to run as of that notice, and the building would have had to be up and ready for occupancy by the ESD within (300) days. IN LIEU OF THIS COMPLETION, BRUNZELL WOULD HAVE BEEN SUBJECT TO A PENALTY OF $200.00 PER DAY.

Note: There is some concern then as to just why it took so long to transfer the land from the state to Brunzell.

We must again point out that the ESD must have been aware of the difficulties being experienced by the lessor in obtaining financing as proven by communications on file indicating other financing institutions who were involved in preliminary financial negotiations and which never followed through.

March 7, 1961 Pioneer Title Company forwarded $25,462.00 to the State Planning Board for the purchase of the land by Brunzell.

Note: This was later reimbursed to Brunzell by the ESD without legal authorization for such a reimbursement.

March 10, 1961 Formal notice to proceed with construction sent by ESD Director to Brunzell.

Note: Brunzell had been awarded the bid on August 30, 1960. Brunzell was to proceed with construction after notice from the Director of ESD after the Director had allowed a reasonable time for the acquisition of the land. As pointed out heretofore, a following contract should have been executed and a 30-day escrow for the acquisition should have been entered into which would have allowed for the notice to proceed with construction to have been issued by OCTOBER 15th AT THE LATEST. Such action would have been normal under the terms of the proposal and actual time which was eventually agreed to by both parties.

IN ANY EVENT, IT DID TAKE LONGER THAN HALF A YEAR, FOR REASONS WHICH ARE NOT COMPLETELY CLEAR, PARTICULARLY IN VIEW OF THE TREMENDOUS PRESS FOR SPACE AND FACILITIES IN WHICH THE ESD FOUND ITSELF.

March 13, 1961 Agreement between ESD and Stanley V. Golas, of Sunnyvale, California.

Note: Provides for payment by the month of the named party to act in the capacity of "Clerk of the Works." Provides for (10) payments in the amount of $732.00 per month with provision for extension at same rate if services required.

Note: Information from the State Planning Board indicates that their job inspectors salary range between $600 and $650 per month. Their top project coordinator, who handles all jobs and coordinates the activities of all job inspectors, has a monthly salary of $800.

Note: The salary payments to the ESD Clerk of the Works was subsequently paid for out of their Employment Security Fund (penalty and interest fund), restricted to administrative expenses only.

Note: Information indicates that possibly the Federal Employment Security agency will reimburse for this salary after amortization of the building project.

March 15, 1961 Planning Board remittance of the $25,462.00 paid by Brunzell for the building site acquisition from the state, to State Treasurer's Office.

Note: This money could not be given to the ESD and then reimbursed by the ESD to Brunzell, since the sale of land and proceeds thereof must be placed in the General Fund. Only by legislative act could it have been withdrawn therefrom by the ESD and employed to make the reimbursement.

March 17, 1961 Date of formal ground breaking ceremonies in Carson City for the new ESD central office building.

March 20, 1961 ESD paid out of its Employment Security Fund (penalty and interest fund), restricted to administrative expenses, the sum of $942.80 as payment to Ferris & Erskine for blueprinting and duplication of plans and specifications.

Note: The amount represented the cost of 28 extra sets of plans @$33.10 per set, plus copies of soil test for addendum #1 @$16.00.

Note: No mention was made of reimbursement by the lessor.

Note: The lease-purchase agreement specifically provides that architectural fees are to be reimbursed by the lessor (Brunzell). However, this amount has never been reimbursed to the ESD by Brunzell.

March 27, 1961 Letter from Brunzell to ESD indicating the enclosure of a Glens Falls Insurance Company Policy No. P22594. The policy is a course of construction fire insurance policy with extended coverage and names Brunzell and the ESD as insured under the policy.

Note: Lease-purchase contract provided for reimbursement for insurance policy costs to the lessor by the ESD. However, such reimbursements are limited to those insurance costs DURING THE TERM OF THE LEASE.

Note: The ESD was included under the terms of the insurance since the term of the lease could have started prior to the 300 day period of construction. It would, therefore, be wise to include the ESD as an insured "as its interest may appear."

March 29, 1961 ESD paid out of its Employment Security Fund (penalty and interest fund) an amount of $448.59 to Stanley V. Golas as Clerk of the Works.

Note: Represents services rendered for part of a month (March 13-31) and paid in accordance with executed contract based on $732.00 per month.

Note: Fund restricted to administrative expenses only.

Note: Subsequent monthly payments were made in the amounts of $732.00 to the same party from the same fund and are not listed separetly in this chronology. However, payments past the contract for ten months, and date of completion are noted.

March 30, 1961 Date of progress payment application No. 1 to General Electric Pension Trust covering work performed by Brunzell and services to the architect to March 31st 1961, on the project.

Note: Architects progress payment amounted to $980.45 and that to the contractor after 15% rentention was $35,669.14.

Note: This is the only progress payment application made available to the Counsel Bureau.

April 26, 1961 Brunzell reimbursed to the ESD an amount of $4,166.84. This amount we understand represented the total of ($2,125.00) expended by the ESD for plan and specification check, ($1,741.84) expended by the ESD for engineering surveys and tests, and ($300.00) expended by the ESD for landscape architectural services. (See further analysis in chronology at March 22, 1962 date.)

Note: The monies thus reimbursed by Brunzell were placed by the ESD in the Employment Security Fund (penalty and interest fund), from which they had been withdrawn to cover these costs.

Note: Although Brunzell made such reimbursement to the ESD, the ESD had failed to provide in their contract with Brunzell that these amounts had to be reimbursed to the ESD. It must be recalled that mention of these reimbursements had been made in the last proposal issued by the ESD. HOWEVER, THE LEASE-PURCHASE PROPOSAL WAS ELIMINATED AS A DOCUMENT WHICH MADE UP THE FINAL CONTRACT, AND WAS ELIMINATED IN THE LEASE-PURCHASE AGREEMENT FORM ISSUED BY THE ESD ON AUGUST 30, 1960.

Note: Brunzell was under no obligation to make the reimbursements. The ESD and the state are fortunate that Brunzell kept to the spirit of the proposal, in the face of what was apparently an error on the part of attorneys working on the agreement and final contract.

May 2, 1961 ESD to Brunzell Construction Company, Inc. of Nevada requesting reimbursement for architect's fees paid by the ESD to the firm of Ferris & Erskine for plans and specifications.

Note: Request is for an amount of $40,095.00 paid to Ferris & Erskine made in (5) separate payments from September 15, 1959, through to the May 19, 1960, payment. Fee is based upon 6% of $891,000 as estimated cost of the building.

Note: The ESD requested that a check be made payable to the Department in the amount of these total payments, ($40,095.00). However, since the ESD had failed to protect the state in the contract with Brunzell by stipulating when the reimbursement was to be made, the Director finally agreed with Brunzell that this reimbursed amount could be made payable to the ESD in monthly payments of $4,000.00 as long as all of the amount set forth as owed to the ESD was reimbursed before the ESD accepted the building.

May 9, 1961 ESD paid out of its Employment Security Fund (penalty and interest fund) an amount of $25,737.00 to Brunzell Construction Company, representing the reimbursement for the cost of the building site called for in the lease-purchase contract, less $1.00.

Note: Lease-purchase agreement called for this reimbursement to be made to the lessor within (30) days after lessor purchased and acquired title to the land. This date was March 7, 1961, at the latest, and reimbursement should have been made by April 6, 1961.

Note: It is also possible that the ESD was in question as to just how to make the reimbursement and from what funds. The money paid to the state by Brunzell went into the General Fund. The question is whether this expenditure for the purpose of acquiring land was within the meaning of the administrative expenses restriction in the Employment Security Fund section at law. However, eventually it was paid out of this fund.

May 10, 1961 Letter from Federal Agency to ESD Director indicating that as of this date only four states (Arizona, Kansas, New Hampshire, and North Dakota) had constructed buildings with financing by private interests.

Note: Apparently the lease-purchase method of financing buildings for ESD offices in other states has not had wide acceptance, although the method is suggested by the Federal Agency with considerable reference to required procedure and suggested controls set forth in the Federal Employment Security Manual.

May 22, 1961 Legislative Commission directed the Legislative Counsel Bureau to make a thorough study of the lease-purchase arrangement of the ESD.

May 23, 1961 Brunzell reimbursed the ESD $4,000.00. We understand that this amount was the result of an informal agreement between Brunzell and the ESD Director in regard to the reimbursement for major architects' fees expended by the ESD at the rate of 6% of the cost of the building. The agreement was to the effect that Brunzell would reimburse at the rate of $4,000.00 per month SINCE THE ESD CONTRACT WITH BRUNZELL HAD FAILED TO MAKE MENTION OF HOW AND WHEN SUCH REIMBURSEMENT WAS TO BE MADE. Subsequent reimbursements of like amounts of $4,000.00 were made on June 22, July 19, August 22, September 19, October 19, December 13, December 29, and January 18, 1962, for a total of $36,000.

Note: These payments of $4,000.00 were placed in the Employment Security Fund, from which architects' payments had been made by the ESD.

Note: The ESD had paid to Ferris & Erskine, architects, the sum of $40,095.00 as of May 31, 1960 (exclusive of $305.10 cost of re-bid work; $942.80 for extra sets of plans; $299.37 for change order #1; $775.51 for change order #23; $65.08 for change order #3; and $492.02 for change order #4 by Ferris & Erskine). THIS STILL LEAVES OVER $7,000.00 YET TO BE REIMBURSED TO ESD BY BRUNZELL AT THIS DATE.

July 12, 1961 ESD paid $299.37 to Ferris & Erskine for architectural fee on change order #1. Paid out of the Employment Security Fund (penalty and interest fund), limited to administrative expenses only.

Note: Formal change order #1 was not executed until August 3, 1961. However, Ferris & Erskine received payment prior to this date.

August 3, 1961 Change order #1 made by ESD for extra work performed to stabilize bearing soil under footings. Cost of change order, ($2,952.64). Paid to Brunzell out of Employment Security Fund (penalty and interest fund), limited to administrative expenses only.

Note: The final lease-purchase agreement sample form submitted to proposers on the re-bid of the Ferris & Erskine plans and specifications, and the contract following, eliminated a contingency fund in an amount of $15,000.00 which would have provided for such necessary changes.

Note: With the elimination of the $15,000.00 contingency fund as a consideration for bids on the re-bid, the ESD was left without such an amount with which to cover this and other changes which followed. THE COST OF THESE CHANGES, in this case, $2,952.64, had

to be borne by the ESD out of its Employment Security Fund (penalty and interest fund), restricted to administrative expenditures only.

Note: We understand that after the period of amortization, the Federal Bureau may reimburse such amounts expended by the Nevada ESD to the Nevada Administrative Fund.

August 3, 1961 Change order #2 made by ESD involving three additions at a cost of $511.03. Also, two deductions from the original specifications resulting in a saving of $2,605.40. TOTAL DEDUCTION BY CHANGE ORDER #2 WAS $2,094.37.

Note: This represented a saving of $2,094.37 which the ESD could employ as an offset to the $2,952.64 additional cost provided by change order #1.

Note: At this point the two change orders, (#1 and #2) resulted in an added expense to the ESD of $858.27.

August 9, 1961 ESD paid $775.51 to Ferris & Erskine for architectural fee on change order #2. Payment was made from the Employment Security Fund (penalty and interest fund), restricted to administrative expenses only.

September 18, 1961 Planning Board to Legislative Counsel Bureau in regard to an estimated cost for the ESD building if built with state funds. Estimate was given as $916,252.82.

November 27. 1961 Change order #3 made by the ESD resulting in two additions costing $1,116.43, and two deductions amounting to $181.72. TOTAL ADDITIONAL COST TO THE ESD AS A RESULT OF THESE FOUR CHANGES WAS $934.71.

Note: As commented on for change orders #1 and #2, the ESD will have to pay for this cost out of its Employment Security Fund (penalty and interest fund), limited to administrative expenditures by Nevada law, since the contingency fund had been eliminated in the final proposals for bids.

Note: This amount may be reimbursed to the Nevada ESD by the Federal agency after amortization of the project.

Note: As a result of the three change orders to date, and deletions from original plans which cut the cost of change orders, the ESD owed Brunzell $1,792.98.

December 8, 1961 ESD paid out of its Employment Security Fund (penalty and interest fund), restricted to administrative expenses only, an amount of $65.08 to the firm of Ferris & Erskine for a 6% fee on architectural change order #3 which cost $934.71.

January 6, 1962 Theoretic date of completion for the ESD Carson City building which date is (300) days from the date Brunzell received the Notice to Proceed with Construction from the ESD Director.

Note: Notice of Completion was not filed until April 2, 1962. (See entry made at May 14, 1962 date in the chronology.)

March 15, 1962 Date of change order #4 on the ESD building project at Carson City.

Note: Total of 16 additions and one deletion resulting in added cost to the ESD of $8,200.31.

Note: Total additional cost to ESD for the Carson City central office building under the terms of the four change orders was $9,993.29.

Note: This added cost to the ESD was necessitated by the terms of the final lease-purchase agreement which did not provide for a $15,000.00 contingency fund specifically designed for such change orders which are normal in such a project of this size an type. Naturally, with the contingency fund eliminated from the re-bid procedure, the proposers could lower their lease-purchase proposal. However, in the end the taxpayer will pay for these change orders since no fund was reserved to cover for them.

Note: In addition to this amount billed to the ESD for change order #4, there was an architectural fee charged for the change order in the amount of $492.02 paid for by the ESD.

Note: It is not known just how or when this amount of $9,993.29 will be returned to the Employment Security Fund by the Federal ES agency. Some mention of reimbursement for the salary of the "Clerk of the Works" was not to be made until after amortization (20 years).

March 20, 1962 ESD paid to Stanley V. Golas of Sunnyvale, California, the last of the ten monthly payments on his contract with the ESD to act as "Clerk of the Works" on the Carson City ESD central office project. However, subsequent payments were made possible by an automatic continuation provision.

Note: Total paid to this individual for services under ten separate payments was $7,320.00. Funds to make these payments came from the ESD Employment Security Fund (penalty and interest fund) restricted to administrative expenses only.

Note: Possibly to be reimbursed by federal agency after amortization of the project.

March 22. 1962 Letter from ESD to Legislative Counsel Bureau indicating that the ESD had paid $40,095.00 (representing 75% of the 6% architectural fee) to the firm of Ferris & Erskine. The 25% balance was stated as paid to Ferris & Erskine directly by the Brunzell Construction Company, Inc.

Note: This letter states that the ESD 75% sum was paid out of the Employment Security Fund (penalty and interest fund), limited to administrative expenses only.

Note: Indication that as of this date Brunzell had reimbursed to the ESD the amount of $36,000 representing a balance due of $4,095.00 to the ESD.

Note: The $4,095.00 amount was paid by Brunzell on April 27, 1962. For an account of this, and moneys still owed to the ESD for architectural fees, see chronology at April 27, 1962.

Note: Letter states that Brunzell had also reimbursed for the following amounts: (See entry in chronology at April 26, 1961).

$ 300.00	landscape drawings
2,125.00	plan checking expenses
1,741.84	soil tests
$4,166.84	Total

Note: It will be recalled that Brunzell was under no obligation to have made these reimbursements as explained previously in the chronology at date, April 26, 1961. In the event the ESD and Brunzell felt that it was necessary to have made these reimbursements for other costs which the ESD had incurred in connection with engineering and plan checking, a complete listing of these would be as follows:

November	1959	$1,741.84	engineering survey
May	1960	200.00	landscape drawings
July	1960	525.00	plan checking, mechanical & electrical
August	1961	1,268.45	plan checking, structural
July	1961	1,132.00	engineering fee
		$4,866.29	Total

The above listing is at variance from the amounts set forth in the ESD letter of information. Landscape drawings are set at $300 in the letter, but it is noted that a disbursement for only $200 was made to Ferris & Erskine. Secondly, we have included an engineering fee of $1,132.00, and can account for only $1,793.45 disbursed by the ESD for plan checking. Their figure

on plan checking runs to $2,125.00. The Legislative Counsel Bureau experienced difficulty in checking claims, since some of the original claims were filed improperly, which may account for some of these variations. There was a billing of $60.00 from the International Conference of Building Officials early in the plan negotiation stage which the Planning Board suggested Ferris & Erskine pay directly. It could not be ascertained with certainty from the records how or by whom this charge had been paid. It is possible it is associated with the above reimbursement.

Note: The ESD indicates that landscape drawings and plan checking costs were reimbursed on the basis of actual contract provisions, rather than amounts of charges for these items, thus explaining variations.

From the two lists of amounts given above, apparently Brunzell may owe to the ESD an additional $700 in the event these parties interpret the final contract as requiring Brunzell to make these types of reimbursements to the ESD.

March 22, 1962 Letter sent by the Legislative Counsel Bureau to the General Electric Pension Trust requesting information and various documents associated with the construction of the Carson City office building for the ESD.

Note: Letter made specific request for the following:

(a) Copy of building loan agreement
(b) Schedule of estimated monthly construction advance requirements
(c) Schedule of the cost of the major categories of construction of the building
(d) The total of certifications made by Brunzell and Ferris & Erskine, for the cost of materials acceptably incorporated in the building. Also, the total of certifications made by these parties for labor costs associated with the building.

Note: Only the building and loan agreement was received from General Electric.

April 2, 1962 Notice of Completion filed relative to the ESD Carson City building.

Note: See entry made at May 14, 1962 date in the chronology.

April 4, 1962 Letter received from General Electric Pension Trust indicating that this Pension Trust did receive the guarantee in connection with their commitment to Brunzell.

Note: The guarantee was in addition to the note and deed of trust from Brunzell Construction Company, Inc., and guaranteed the loan of $1,200,000 personally by both Mr. and Mrs. Brunzell.

Note: Both Brunzell and the General Electric Pension Trust have refused to furnish the Legislative Counsel Bureau with a copy of this document.

April 16. 1962 ESD paid to Stanley V. Golas (Clerk of the Works) for the ESD building project, an amount of $732.00 representing payment of a month's salary for the period April 1, 1962 to April 30, 1962. Payment made from the Employment Security Fund (penalty and interest fund) limited to administrative expenses only.

Note: The ESD - Golas contract provided for ten monthly payments of $732.00 for a total of $7,320.00. However, should the period of construction continue past the tenth month, Golas was to be paid at the same rate for such extended period of time.

Note: Notice of Completion of construction was filed on April 2, 1962.

However, this payment was for services purportedly rendered to the ESD for the period April 1, 1962, to April 30, 1962. Such period of service, whether rendered or not, was outside the Golas contract which provided only for continuation of salary past the ten month period, and for such time as the building was under construction.

Note: Golas should not have been paid for this month's salary under the original contract, with the exception of the first two days in April. A new, subsequent contract should have been executed.

April 20, 1962 Letter from Federal ES agency to local ESD, indicating that with the information furnished the Federal agency in connection with the local ESD occupancy of the building in Carson City they consider the project as meeting the conditions of Section 2520-2589, Part IV of the Employment Security Manual. (Federal reimbursement or budgeting for amortization costs of the project.)

Note: There was an important provision associated with this statement, and that provision conditioned their statement as follows: "With the understanding that your agency will continue to occupy the space rent-free except for operation and maintenance costs after the initial cost of the building has been fully amortized. . . ."

Note: Once again the matter of rent-free forever enters the picture. The main discourse has repeatedly pointed out that such a

provision, which has no computable date of ending, has obvious legal implications which make the effectiveness of such an agreement unenforceable. However, the main basis of continuing Federal funds to support the amortization of the project, rests upon this peculiar understanding which cannot be guaranteed to anyone.

April 25, 1962 Building Superintendent Announcement #597 issued by the Nevada State Personnel Department as an open competitive examination for a building superintendent.

Note: The State Personnel Department has advised that from this list established, a building superintendent would be selected to operate in that capacity in the new ESD central office building.

Note: Salary range was set at $464 to start, with increases to $562 on a monthly basis.

Note: The regional office of the Federal Employment Security Department advises that they are allowing the local ESD to budget for this amount and the salary in effect is paid for out of federal funds.

Note: Federal agency considered at some length the employment of a superintendent and finally concurred with the local ESD. (Information contained in their letter of 7/6/62.)

April 26, 1962 Legislative Counsel Bureau letter to General Electric Pension Trust requesting information relative to requirements of Brunzell as stipulated in the building and loan agreement.

Note: On May 3, 1962, the Counsel Bureau was advised to contact Brunzell personally since they did not feel it proper to dispatch such a disclosure to the Counsel Bureau without the consent of Mr. Brunzell.

April 27, 1962 Brunzell reimbursed to the ESD $4,095.00 representing payment for moneys the ESD had expended for architectural fees to Ferris & Erskine.

Note: Brunzell, prior to this payment made nine (9) separate reimbursements of $4,000.00 each under a monthly payment arrangement with the ESD which was necessary since the matter of when the reimbursement was to be made was not properly contained in the contract. These nine payments totaling $36,000.00, plus this final payment, equaled $40,095.00. This amount in turn equals 75% of the 6% architect's fee based upon a building cost

of $891,000.00. However, the lease-purchase contract between Brunzell and the ESD provides that the lessor (Brunzell) shall repay to the lessee (ESD) all fees incurred by the Lessee for architectural services in connection with the building.

April 27, 1962

Note: Certainly the terminology of "all fees incurred by the lessee (ESD) for architectural services in connection with the construction of the improvements upon the demised premises," would include any and all costs charged by the architects (Ferris & Erskine) to the ESD. The original contract stated that architectural fees have been paid by the lessee (ESD) to the firm of Ferris & Erskine of Reno, Nevada, pursuant to a written agreement entered into between lessee and said firm whereby it was agreed that said firm would receive a fee of 6% of the construction cost of all improvements erected upon said demised premises.

Note: Actually, as of the date of execution of the contract (September 16, 1960) which contained the statement that "architectural fees have been paid," the ESD had not paid Ferris & Erskine more than 75% of the 6% of the cost of the project, as was properly provided for prior to actual construction and set forth in the standard A.I.A. Form B102 (Rev. 6-1-53) as amended to include the cost to the ESD for any plans in excess of (30) sets. Payments as of this date were as follows and include a $200 payment for landscape working drawings, outside the 75% of 6% of $891,000.00.

September	1959	$12,000.00
January	1960	1,365.00
March	1960	6,682.50
April	1960	13,365.00
May	1960	6,682.50
May	1960	200.00
		$40,295.00

Excluding the May payment of $200 for landscape working drawings, this figures to exactly 75% x 6% x $891,000.00 (building cost), or $40,095.00.

Note: Brunzell on this date of April 27, 1962, through (9) separate payments of $4,000 each, and by an additional payment of $4,095, had reimbursed the ESD for much of the architectural fees paid by the ESD to Ferris & Erskine. However, there remains the matter of additional architectural fees paid by the ESD for other services and fees for change orders. The ESD had to pay for the change orders since there was no provision for a contingency fund. However, under the terms of the contract between the ESD and Brunzell which states as follows: "This covenant shall not, however, be construed to limit in any way the responsibility of the lessor (Brunzell) to repay to the lessee (ESD) all fees incurred by the lessee for architectural services in connection with the construction of the improvements upon the demised

premises," it is obvious that the Brunzell reimbursements are not limited to the 6% of 75% of $891,000 identified as having been paid in the contract. The following amounts are still due and payable to the ESD by Brunzell:

October	1960	$ 305.10	cost of re-bid procedure
March	1961	942.80	extra sets of plans and specifications
July	1961	299.37	architectural fee, change order #1
August	1961	775.51	architectural fee, change order #2
December	1961	65.08	architectural fee, change order #3
June	1962	492.02	architectural fee, change order #4
		$2,879.88	Total

Note: There is another matter of concern which is separate from the construction of the building. However, it is again associated with a payment made to Ferris & Erskine by the ESD. This report noted that a sum of $516.75 was paid to Ferris & Erskine for purported architectural services relative to selection of furnishings for the new building at Carson City.

Note: The standard A.I.A. agreement between Ferris & Erskine and the ESD covers such payments to the architect in the event they request the architect to produce specifications for furnishings for the building.

Note: Since the Brunzell Construction Corporation must reimburse for all architectural services, it is reasonable to expect that they should have reimbursed the ESD for this service rendered. We find no such reimbursement made to the ESD.

April 27, 1962 Letter from ESD Director to the Trustees of General Electric Pension Trust accepting the ESD Carson City building. Letter also indicates that it is agreed that rental payments shall commence May 1, 1962, and be due on the 13th day following the commencement date, and on the same day of each and every month thereafter throughout the term of the lease.

Note: Paragraph 3 of the lease-purchase agreement between Brunzell and the ESD provided that the rental payments would begin at the time the building was completed. Notice of Completion was filed on April 2, 1962.

Note: It is not overly clear just how the rental payments were put off until May 1, 1962, in view of this contract provision. However, see chronology entry made at date May 1, 1962, which offers a practical explanation, but not an explanation of the non-compliance with a contract provision.

May 1, 1962 Recording of a lien filed by John Kuenzli (Hillcrest Plumbing Company) against the Carson City ESD building project. (Ormsby County 49382)

Note: This materialman's lien was in the amount of $16,823.78, which amount had not been paid to the plumbing company by the contractor, Brunzell. A 30-day period of time from notice of completion (April 2, 1962) was given during which time liens could be filed.

May 1, 1962 Comprehensive commerical fire insurance policy issued by Federal Insurance Company of New York covering the ESD Carson City Building, and countersigned May 14, 1962 by agent at Newport Beach, California. Limit of liability on the building listed as $803,000.00 with co-insurance at 100%.

Note: Building appraised at $803,000 in papers attached to the policy. Appraisal by Ormsby County Assessor was $822,860 including a land value of $39,400.

Note: The appraised value from these two sources indicates that there is a significant differential between valuation and what the building was purportedly indicated to have cost (approximately $928,000 including land).

May 1, 1962 Date the ESD occupied the Carson City central office building.

Note: Building was substantially completed on April 2, 1962. However, actual occupancy was delayed by what we understand were two major factors.

(a) Federal funds for the rental payments at $8,281.20 had not been secured with which to make a month's payment for occupancy for the month of April. However, under the terms of the contract, the ESD owed rental payments from and after April 2, 1962, the date the Notice of Completion was filed. It mattered not that they did not take physical occupancy of the structure.

(b) There was some delay in the delivery of furniture which had been ordered for the building. This factor made it likewise difficult for the ESD to take occupancy when the building was finished.

Note: The ESD might have to make direct payments to the General Electric Pension Trust, under the terms of the assignment consented to, from and after April 2, 1962, (notice of completion filed), and under the terms of their contract which provided as follows: "The term of this lease shall be for a period of (20) years, and shall commence three hundred (300) calendar days after the lessor shall have received from the lessee (ESD) notice to proceed with the construction of the improvements which must be erected and placed upon the demised premises, or at such time before or after said

three hundred (300) calendar days when lessor has completed all improvements required to be made by him hereunder and has the premises ready for complete occupancy by the lessee."

Note: However, the ESD did not accept the building until a later date, at which time the term of the lease started to run.

May 8, 1962 Again ESD paid to Golas (Clerk of the Works) on the Carson City building project salary for a period of time outside the terms of the Golas - ESD contract, May 1, 1962 to May 15, 1962, since the completion date notice was filed on April 2, 1962. Payment was made as usual from the Employment Security Fund (penalty and interest fund), limited by Nevada law to administrative expenses only.

Note: This evidently represents the last salary paid to Golas and was for one-half of the month of May 1962.

Note: Lacking any evidence of a supplemental contract, the ESD paid Golas salary for a month and a half past their obligation and this salary represents an amount of over-payment of $1,098.00. This does not take into account payment which could have been made to Golas for the first two days in April 1962, under the terms of his contract.

May 10, 1962 The Legislative Counsel Bureau wrote to the Brunzell Construction Company, Inc., at the suggestion of the General Electric Pension Trust, and asked for the total of the certifications made by Ferris & Erskine to the Pension Trust for the cost of materials and labor incorporated into the building as required under the terms of the building loan agreement with the Pension Trust.

Note: The reply to this communication came from Brunzell's attorney, Goldwater, who indicated that they knew of no law which would require the disclosure of this information and were at a loss to understand why the state was interested.

May 10, 1962 Brunzell letter to Ferris, Erskine & Calef, indicating dates of inclement weather, strike, and other causes and requesting a total of 116 days to be added to the allowable contract time (300 days).

Note: Identified 31 days for unusual soil conditions.
Identified 27 days for change orders on the project.
Identified 72 days due to strikes.
Identified 54 days due to inclement weather in which no outside work could be accomplished.
Identified 10 days necessary for reinstallation work required after strong winds of 12/18/61.

Note: Although the total amounted to 194 days, Brunzell requested only 60% of this amount of time, or 116 days.

May 14, 1962 Letter from Ferris, Erskine & Calef to ESD Director relative to completion date on Carson City building project.

Note: Notice of Completion filed on April 2, 1962.

Note: The architects indicated that according to the contract between the ESD and Brunzell, the completion date for the job was January 6, 1962. This date is determined by running 300 days from the date of the ESD Director's Notice to Proceed With Construction (March 10, 1961). Such period of time (300) days would by accurate calculation place the date of completion on January 4, 1962. However, the contract protected Brunzell on this point by reading that the time would run from the date such a notice from the ESD was received by Brunzell. The U. S. Registration Return Receipt indicates that Brunzell did not receive this Notice until March 12, 1962, thus accounting for the January 6, 1962 date identified by the architects as the formal date of completion.

Note: Since Notice of Completion was not filed until April 2, 1962, the project took 387 days to construct. This excess of 87 days by the terms of the contract was liable for a daily compensation for damages in the amount of $200. However, Brunzell was allowed any additional time necessary due to circumstances identified in the standard A.I.A. Form of Agreement as determined by the architects.

Note: Ferris, Erskine & Calef certified by the letter of this date that Brunzell was not obligated to pay damages in the amount of $200 per day for these (87) days, since in their opinion a reasonable amount of time for extension would have been in excess of these (87) days.

Note: The authority for the architects to interpret the A.I.A. provisions and likewise apply them to events which occurred during the course of construction, obviously opens a large area to nullify any precise number of days allowed for course of construction and any associated damages for time past the stipulated allowable term of construction.

Note: In view of this information as set forth in the architects' letter to the ESD Director, they recommended that no claim for liquidated damages would be valid, and that in their opinion the contract was completed in a reasonable time by Brunzell.

May 25, 1962 Legislative Counsel Bureau wrote the General Electric Pension Trust for information which it had not been able to obtain directly from Brunzell Construction Company, Inc.

Note: This letter was sent after the Counsel Bureau had contacted Brunzell directly at the suggestion of the Pension Trust and had not been able to secure information. A single request was contained in this letter, that of the exact cost of the ESD Carson City office building.

May 25, 1962 ESD indicated to the Legislative Counsel Bureau that the cost of the ESD central office building was $932,019.00.

Note: This cost included the four change orders, cost of land, topographical survey, architects fee, foundation tests, plans, landscape fees and an engineer fee.

Note: The total cost of the building not including these change orders and incidental fees was given as $827,000.00 with the main items of architects' fees and land costs eliminated.

Note: It is understood that this estimate is not entirely correct and will be amended by an estimate received at a later date (see entry at date July 18, 1962).

June 2, 1962 Recording date of release of materialman's lien which had been filed against the Carson City building project by Hillcrest Plumbing Company in the amount of $16,823.78 (Ormsby County 51380).

Note: It is understood that the General Electric Pension satisfied this lien against the project by direct payment to the plumbing company, and subtracted this amount from their gross advances to Brunzell of $1,200,000.00.

June 4, 1962 ESD paid to Brunzell Corporation the sum of $7,040.65 from their Employment Security Fund (penalty and interest fund). limited to administrative expenses, for the balance of costs of change orders due to Brunzell.

Note: It will be remembered that the elimination of the contingency fund of $15,000 from the last bid procedure required the ESD to pay cash for any changes they might request in the building.

Note: The total of the (4) change orders amounted to $9,993.29 and the ESD had previously paid to Brunzell for change order #1 an amount of $2,952.64. This $7,040.65 represented the balance due to Brunzell.

June 5, 1962 ESD paid their first payment to the General Electric Pension Trust in the amount of $8,281.20 under the terms of the assignment of the lease by Brunzell to the Trust. The amount represented payment for the month of May 1962 and was paid from the Unemployment Compensation Administrative Fund.

Note: The ESD was liable for an April payment also. No indication of how this liability was by-passed. This first billing was received through Brunzell.

June 7, 1962 Letter from General Electric Pension Trust to Legislative Counsel Bureau, indicating that the Pension Trust had made gross advances to Brunzell Construction Company aggregating $1,200,000 (less $16,823.78 which was withheld to cover a materialman's lien filed against the property).

Note: This communication makes certain that the loan of $1,200,000.00 was made to Brunzell, minus a relatively small amount of $16,823.78.

Note: The Hillcrest Plumbing Company had filed a materialman's lien against the project and the General Electric Pension Trust probably cleared this lien through a direct payment to that company, disbursing the balance of the last payment to Brunzell.

June 8, 1962 ESD paid to Ferris & Erskine the sum of $492.02 representing design fee on change order #4. ($8,200.31 x 6%)

Note: This amount was paid out of the Employment Security Fund (penalty and interest fund), limited to administrative expenses only.

Note: It is not known just how these types of expenses will be reimbursed to the local ESD by the federal agency.

Note: The original lease-purchase contract, specifically provided that all architectural fees incurred by the lessee (ESD) for architectural services were to be reimbursed by the lessor (Brunzell). The fact that they were involved with change orders does not eliminate this necessity.

June 13, 1962 ESD paid to Ferris & Erskine the sum of $516.75 for supervision fee on furniture purchased for the new building. Payment was made from the ESD Unemployment Compensation Administration Fund.

Note: This amount is equal to the cost of the furniture ($34,450.30) times 6% x 25%.

June 27, 1962 ESD made their second payment of $8,281.20 (from the Unemployment Compensation Administration Fund) to the General Electric Pension Trust. Statement received directly from the trust this second time, and represented payment for the month of June 1962.

Note: No further entries will be made in the chronology relative to additional monthly payments.

June 27, 1962 ESD paid $25,000.00 to the Nevada State Purchasing Department for partial billing on furniture for the new ESD Carson City office building. Payment was made from the Unemployment Compensation Administration Fund.

Note: Total cost for new furniture for the building was $34,450.30.

June 28, 1962 ESD notified both Brunzell and the General Electric Pension Trust through their attorney, that they were concerned about the fire insurance policy covering the ESD building in Carson City.

Note: The ESD contract with Brunzell gave the ESD the right to approve the insurer, and in the event of difference in what constituted the appraised value, the matter would be settled by the Nevada Tax Commission.

Note: The ESD was concerned on two points. First, that they had not been consulted prior to ordering of the insurance, and secondly, they felt the amount of the insurance coverage was insufficient to meet the requirement of the full amount of the replacement value.

July 1, 1962 Letter from the General Electric Pension Trust to the Legislative Counsel Bureau indicating the resignation of the former attorney for the Pension Trust. The letter was signed by the present attorney and indicated he would communicate with the Counsel Bureau "as soon as I have had a chance to familiarize myself with the transaction to which you referred."

Note: This letter was in answer to the Counsel Bureau request for information which had been refused by Brunzell in a letter from his attorney, Goldwater. The Goldwater letter indicated that they knew of no provision at law that would require the release of information requested and could not understand why the state had any interest in the matter.

July 2, 1962 Policy of title insurance issued by the Pioneer Title Insurance Company of Nevada insuring the General Electric Pension Trust in the amount of $1,200,000.00.

Note: This amount had been loaned by the Pension Trust to Brunzell for the construction of the ESD building in Carson City.

Note: The amount of the insurance coverage offered by this policy is well in excess of the valuation of the building, which at the most would run approximately $928,000.

Note: In view of the wording contained in the lease-purchase agreement, "which policy of title insurance shall insure the title in the lessee in a sum equivalent to the full appraised value of the improvements and the property which is subject matter of this option to purchase," we are at a loss to understand the amount the policy insures, and why the provisions of the contract were not complied with.

July 6, 1962 Letter from federal agency to ESD Director Barnum containing reasoning for the federal agency refusal to support the Carson City central office building project under the terms of the first bids received on the lease-purchase proposal. This refusal, it will be remembered, necessitated the re-bid procedure.

Note: The federal agency explained that there were certain differences in interpretation by the proposers relative to inclusion or exclusion of certain obligations under the terms of the lease-purchase proposal. The first reference is to the obligation for maintenance. It is difficult to understand why there would be any misunderstanding on this point since it was so clearly set forth in the agreement accompanying the proposal as follows:

"Lessor agrees that he will at all times during the terms of this lease perform all necessary maintenance and repair, both interior and exterior, including any and all repair and replacement of broken glass, tile, woodwork, plumbing, electrical wiring, heating, ventilating, air conditioning equipment, and elevator."

The lease-purchase agreement further stipulated the following:

"It is the intention of this agreement that the lessee (ESD) shall not be required to perform any maintenance work whatsoever, nor shall lessee be responsible for the performance of any maintenance work."

To pin-point with accuracy just what routine maintenance the ESD would be expected to assume and be responsible for, the lease-purchase agreement contained the following provision:

"It is understood that lessee (ESD) leases the premises demised for the sole purpose of occupying the same as and for office space and uses, and lessee's sole responsibility in reference to maintenance shall be the performance of the usual janitorial services, and maintenance of lawns, plants, and trees."

Note: It is difficult, therefore, to understand the following statement made in the federal agency letter of July 6, 1962. ". . .when the first bids were opened, there were differences in interpretation of some inclusions. Some bids included such items as building maintenance by the contractor during the period of amortization. . . Other bids did not contain such inclusion(s)."

Note: With such clear cut provisions spelled out in the lease-purchase proposal and accompanying agreement, any bids received which did not properly provide for maintenance of the building as provided, should have been cast aside as not meeting the requirements of the proposal. It is difficult to understand why any experienced proposer could not have understood the maintenance provisions as set forth above.

Note: The federal agency letter continued to explain that such misinterpretations were also made by proposers for the items of insurance coverage and taxes. Both of these items are clearly set forth in the lease-purchase proposal and accompanying agreement as follows:

> "Insurance. Lessor agrees to keep the improvements on the demised premises insured at all times during the term of this lease. Such insurance must be in the full amount of the replacement value of the improvements, and shall insure the lessor and the lessee (ESD) against the hazards of fire, with extended coverage endorsement including (but not necessarily limited to) the hazards of flood, windstorm and tornado. Lessee (ESD) is responsible for any insurance it desires on its own files, furniture and furnishings."
>
> "Taxes. Lessor covenants and agrees that he will pay all taxes levied against the leased premises during the term of this lease, including municipal charges and assessments." (Provision was contained for tax increase above an estimate contained in the agreement to be reflected in an increased rental payment.)

Note: From the above information on taxes and insurance, it is likewise difficult to see why proposers would have any question as to whether or not taxes and insurance were to be included or excluded from their bid formula. To have become confused on these matters would have been an admission of a lack of knowledge of the English language. Further, the federal agency letter makes reference not to some interpretation of the extent or type of insurance, maintenance, and tax responsibilities of the proposers, but to the fact that there was misinterpretation on the point of whether or not they were to be basicly included or excluded. To have suggested that these points were not identified for the purpose of bid figures is to ignore the common meaning of words.

Note: It is speculated that the bid figures based on a per sq. ft. basis did come out higher than would have been normal for most regions in the nation. Nevadans appreciate the high cost of construction and related items, and perhaps Washington would not have had this understanding. However, for the federal agency to base their refusal on misinterpretations made by proposers in the light of such clear provisions in the lease-purchase proposal and agreement, casts some reflection of incompetency on our local ESD and their ability to produce an intelligent lease-purchase proposal. Rather, elimination of any proposals made by groups

or contractors which did not include these items of expense properly, should have been made. Then the proposers themselves would be identified as at fault, if in fact this was a factor.

Note: The second bid on the project uniformly eliminated costs for building maintenance, taxes, and insurance to be assumed by the lessor. These were assumed as costs of the ESD, and the federal agency, it is understood, will allow the local ESD to budget for these costs. Thus, the federal agency will be paying for these items of expense out of the left hand pocket in place of the right hand pocket. In partial defense of the federal agency action, the following information in their letter should be considered:

> "We believe that it is to the advantage of the Federal Government to assume the added costs of maintenance of the building (including air conditioning equipment) and the payment of taxes and insurance, over and above the net rental figure during the life of the lease-purchase agreement."

Note: The big factor in obtaining perhaps a better break for the taxpayer lies in the area of maintenance. Proposers had little basis for determining what maintenance costs would run over the 20 year period of time, due chiefly to the fact that no comparable air conditioned building of this particular type had been in operation for a long enough period of time in this part of Nevada to establish intelligent maintenance cost factors. Hence, they would have been prone to place a "pad" into their bid formula to allow for the uncertain. With the federal agency picking up this obligation through elimination of the provision in the lease-purchase agreement, certainly the cost would not be more than actual to the government, and there would be no overage charge in a rental charge per month.

Note: The elimination of taxes and insurance did not necessarily develop to the same savings, or any savings at all. Taxes had been the responsibility of the lessor the first time and it was provided that if the taxes increased, that the ESD would have its rental figure increased in a like amount. Thus, it can be seen that in the first proposal there would have been no reason for a proposer to have entered a "pad" in his bid formula to allow for unknown tax increases. Likewise, the insurance provision could have been provided for in a similar manner, although the item itself is not one subject to such wide fluctuation as the tax factor.

Note: The above maintenance elimination from the second proposal was correctly identified in the federal agency letter of July 6, 1962. We strongly question their reference to misinterpretation of the proposal the first time around in regard to inclusion or exclusion of maintenance, taxes, and insurance by proposers in the light of the provisions set forth as taken from the document as strong reasoning for rejection. Certainly this is a very weak

excuse for refusal to accept the low bid. Again, had any proposals not properly contained these provisions, they should have been rejected.

Note: Since the federal agency has accepted lease-purchase proposals as finally executed into lease-purchase contracts, and is now allowing the local ESD to budget for amortization costs on the lease-purchase buildings that the ESD is buying in Reno and Las Vegas, and since both of these projects include maintenance, taxes and insurance factors as an obligation of the lessor and not the lessee (ESD) within the monthly amortization cost, we are somewhat at a loss to understand their changed position in regard to the Carson City project. Without a thorough understanding of what is included and what is excluded, the rental cost per sq. ft. has very little true meaning.

July 6, 1962 The Legislative Counsel Bureau again made an appeal to the General Electric Pension Trust for information which would assist the Counsel Bureau toward an understanding of financial arrangements associated with the ESD Carson City building project. Specifically set forth in the letter was a request for the following documents and information.

1. Copies of all certifications from Ferris & Erskine showing the cost of labor and material required for progress payments, and the dates thereof; also the amount of money advanced Mr. Brunzell in excess of the certifications and the dates of such advance or advances.

2. Also, did General Electric avail itself of the option to have the certifications reviewed by the real estate and construction operation of the General Electric Company?

3. Copy of the schedule of Mr. Brunzell's estimated monthly construction advanced requirements executed and sent to you after the execution of the building loan agreement.

4. Copy of the schedule of the costs of the major categories of construction of the building, required of Mr. Brunzell in your letter of January 10, 1961.

5. A copy of the loan guarantee agreement required of Mr. Brunzell and his wife, mentioned in your letter of April 4, 1962.

Note: None of these documents or information had been supplied to the Counsel Bureau as of the date of completion of the report (August 15, 1962).

July 18, 1962 ESD letter to Brunzell and others relative to insurance coverage on the new ESD building in Carson City.

Note: Again the ESD registered their concern about the insurer and the amount of insurance indicated on the policy selected by Brunzell insuring the building. The ESD indicated that they would not reimburse for the cost of this policy until this matter was settled to their satisfaction. Obviously, Brunzell should have consulted with the ESD before ordering a policy to cover the building.

July 18, 1962 ESD letter to the Legislative Counsel Bureau indicating that the total cost of the ESD Carson City building was $927,830.26. This figure included the cost of the land, and almost $10,000 in changes which were required by the ESD, which were not costs to Brunzell but paid for by the ESD by either reimbursement or direct payment.

Note: This communication corrected a former one sent to the Counsel Bureau, dated May 25, 1962, which listed the total cost at $932,019.00.

Note: Estimated building cost (less land costs, changes, architects' fees, etc.), listed as $827,000 in this and the May communication. However, in a letter dated March 22, 1962, the estimated building cost is listed as $891,000.00, obviously after federal authorization for a larger building.

July 20, 1962 Letter from General Electric Pension Trust to the Counsel Bureau, which, in effect, is a refusal to supply the documents requested in connection with the report. In place of requested information, the Pension Trust alleged that the Counsel Bureau did not fully understand the financial transactions associated with the Carson City building project.

Note: The letter did nothing to assist the Counsel Bureau by supplying the information upon which to lend any understanding to the financial arrangements in which the State of Nevada has an interest.

July 30, 1962 Letter from Legislative Counsel Bureau to General Electric Pension Trust again requesting information previously requested in Counsel Bureau request of July 6, 1962.

Note: As of date of completion of this report, no reply had been received from the Pension Trust (August 15, 1962).

August 15, 1962 Date of completion of the chronology. No further information or documents received as of this date from the General Electric Pension Trust or the Nevada Employment Security Department.

Note: Remarks relative to unavailable material as set forth in the chronology remain as stated.