

CITIES; ANIMAL FEEDING OPERATIONS: Authority of cities to regulate animal feeding operations within annexed territory. Iowa Const. art. III, § 38A; Iowa Code §§ 204.2(1), 204.2(3), 364.1, 368.1(2), 414.1, 414.3, 414.23, 455B.172(4), 455B.173(13), 657.11. City ordinances which attempt to regulate the conduct of animal feeding operations would be preempted by state law. A city may enact a zoning ordinance pursuant to Iowa Code chapter 414 to prohibit animal feeding operations within city limits; however, enactment of a zoning ordinance to prohibit an existing animal feeding operation could adversely affect the rights of those who have a property interest in the animal feeding operation. (Benton to Frevert, State Representative, 1-19-00) #00-1-2

January 19, 2000

The Honorable Marcella R. Frevert  
State Representative  
3655 - 450th Avenue  
Emmetsburg, IA 50536

Dear Representative Frevert:

You have requested our opinion concerning the extent to which a city may regulate livestock confinement operations in areas annexed by the city. Your letter states that residents of a rural, unincorporated area of Palo Alto County are concerned that the proliferation of these facilities threatens Five Island Lake. These residents are considering voluntary annexation into a nearby city so that the confinement operations could be subject to more stringent city ordinances. In light of these concerns, you ask whether a city ordinance may apply to an animal feeding operation within areas annexed by the city. It is our opinion that city ordinances which attempt to regulate the conduct of animal feeding operations would be preempted by state law. A city may enact a zoning ordinance pursuant to Iowa Code chapter 414 to prohibit animal feeding operations within city limits; however, enactment of a zoning ordinance to prohibit an existing animal feeding operation could adversely affect the rights of those who have a property interest in the animal feeding operation.

Iowa Code section 368.1(2) defines annexation as the addition of territory to a city. The procedure for voluntary annexation is set forth in Iowa Code section 368.7(1) which states in part that an annexation is voluntary when "[a]ll of the owners of land in a territory adjoining a city. . . apply in writing to the council of the adjoining city requesting annexation of the territory." Agricultural land is subject to annexation. McQuillin, Mun. Corp., § 7.21, p. 496 (3rd ed. 1996). Once annexed, agricultural land may be subject to regulation by city ordinances in two forms: city ordinances which regulate the conduct of animal feeding operations; and city ordinances which zone animal feeding operations.

## GENERAL ORDINANCES

Like counties, cities have home rule powers "to determine their local affairs." Iowa Const. art. III, § 38A. The exercise of a home rule power by a city must not be "inconsistent with the laws of the general assembly." Iowa Code § 364.1. The Iowa Supreme Court has employed the same analysis to determine whether a county ordinance is authorized under home rule, or is "inconsistent" with state law. Goodell v. Humboldt County, 575 N.W.2d 486, 492 (Iowa 1998).

The requirement that the exercise of a home rule power by either a city or county not be "inconsistent" with state law gives rise to the doctrine of preemption. Preemption may be either express or implied. Goodell, 575 N.W.2d at 492. Express preemption occurs when the general assembly has specifically prohibited local action in an area. Id. Implied preemption may take two forms: where an ordinance prohibits an act permitted by statute or permits an act prohibited by statute, the ordinance is considered inconsistent with state law and preempted. Id. at 500-502. Implied preemption may also occur where the legislature has covered a subject in such a manner as to demonstrate a legislative intention to occupy the field and preclude local regulation. Id. at 498-500.

In Goodell the Court considered a challenge to four county ordinances which attempted to regulate livestock confinement operations. The Court in Goodell invalidated the four Humboldt County ordinances on the grounds of both express and implied preemption. For example, Ordinance 24 adopted by Humboldt County had prohibited large livestock confinement feeding operations from applying manure on any land in Humboldt County that drained into an agricultural drainage well. Id. at 490. The Court held that this ordinance conflicted with Iowa Code section 455B.172(5) which makes the Iowa Department of Natural Resources exclusively responsible for regulating the disposal of livestock waste from confinement facilities and was therefore expressly preempted.<sup>1</sup> Id. at 505.

The remaining Humboldt County Ordinances were struck down on the grounds of implied preemption. The Court noted that Iowa Code section 455B.173(13) invested the Environmental Protection Commission with authority to adopt rules "relating to the construction or operation of animal feeding operations," including, but not limited to, "requirements for obtaining permits." Id. at 502. The Court further noted that the DNR has provided by rule that certain animal feeding operations must obtain construction and operation permits under 567 IAC 65.3-6. Id.

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<sup>1</sup> Since 1998 counties have been expressly prohibited from adopting or enforcing any county ordinances regulating animal feeding operations, unless expressly authorized by state law. Iowa Code § 331.304A (1999). See 1998 Iowa Acts, ch. 1209 § 9. This statute does not preclude a city from adopting or enforcing city ordinances regulating animal feeding operations.

Thus, the Court found that Ordinance 22, requiring persons seeking to construct a large livestock confinement feeding facility to obtain a county permit, was preempted as being inconsistent with state law. The Court reasoned that an operation could meet state law requirements for a permit but not the county's additional requirements. Id. at 503. Because the county ordinance in effect would prohibit what state law allowed, it conflicted with state law and was found invalid. Id.

Iowa Code sections 204.2(1) and (3) established a manure storage indemnity fund for the purpose "of indemnifying a county for expenses related to cleaning up the site of the confinement feeding operation."<sup>2</sup> The Court in Goodell analyzed Humboldt County Ordinance 23 under this statute. Ordinance 23 made the operation of a regulated facility conditional on the posting of financial responsibility for site cleanup. Id. at 504. The Court found that this ordinance suffered from the same infirmity as Ordinance 22, because furnishing financial assurance was made a condition of lawful operation of a livestock confinement center. Therefore, a facility that would be authorized to operate under state law could be prohibited from operation by the county ordinance. Id. The ordinance was therefore irreconcilable with and preempted by state law. Id.

The Court in Goodell relied on Iowa Code section 657.11 in evaluating Humboldt County Ordinance 25. This statute limited nuisance actions against animal feeding operations by creating a rebuttable presumption that an animal feeding operation which had received all permits under chapter 455B was not a public or private nuisance. Humboldt County Ordinance 25 restricted off-site emissions of hydrogen sulfide, and provided that the county could seek an order of abatement through a civil action in the event of a violation.

The Court held that there was a direct and irreconcilable conflict between the ordinance and section 657.11. Id. at 506. In the Court's view, the ordinance permitted what section 657.11 prohibited by allowing the county to seek injunctive relief against an animal feeding operation without meeting the conditions imposed by the state statutes. Id.

The ordinances analyzed in Goodell were adopted pursuant to the county's home rule authority. The Court's decision in Goodell provides guidance as to how a city ordinance adopted under home rule to regulate livestock feeding operations in annexed territory would be analyzed.

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<sup>2</sup> Iowa Code chapter 204 has now been transferred to Iowa Code chapter 455J. 1998 Iowa Acts, ch. 1209, § 2.

## ZONING ORDINANCES

Imposition of city ordinances which zone animal feeding operations present different considerations. Under Iowa Code chapter 414 cities are given authority to zone. Iowa Code section 414.1 provides in part that, "[f]or the purpose of promoting the health, safety, morals, or the general welfare of the community. . . any city is hereby empowered to regulate and restrict. . . the location and use of buildings, structures, and land for trade, industry, residence, or other purposes." Zoning ordinances must be made in accordance with a comprehensive plan, and with reasonable consideration for "encouraging the most appropriate use of land throughout the city." Iowa Code § 414.3.

The distinction between a zoning ordinance and a general ordinance adopted under home rule was analyzed in Goodell. Iowa Code ch. 335 establishes zoning authority for counties. However, section 335.2 exempts land and structures used for agricultural purposes from zoning. Livestock confinement operations are exempt from county zoning under this statute. Kuehl v. Cass County, 555 N.W.2d 686, 689 (Iowa 1996). Rejecting the argument that the ordinances in Goodell were county zoning regulations and, therefore, subject to the statutory exemption, the Court noted that zoning regulations often take the form of "performance controls" to limit or control traffic, noise, dust, odors or like problems. Goodell v. Humboldt County, 575 N.W.2d. at 496. But the principal attribute of zoning is regulation of land use by district. Id. The ordinances in Goodell could not be considered zoning regulations, because even though the ordinances "may advance the health and general welfare of the community, they do not do so by regulating the usage of land by district." Id.

We find no statutes which prohibit a city from zoning animal feeding operations within the city limits. Iowa Code chapter 414 which governs city zoning does not contain any exemption for property used for agricultural purposes. Only statutes governing city zoning in *unincorporated areas* contain an exemption for property used for agricultural purposes. Iowa Code section 414.23 extends city zoning power to the unincorporated area up to two miles beyond the limits of the city, except where county zoning exists. This statute states in part that the "exemption from regulation granted by section 335.2 to property used for agricultural purposes shall apply to such unincorporated area." Iowa Code § 414.23 (emphasis added). Section 335.2, in turn, restricts county ordinances from application to land, buildings or structures "primarily adapted, by reason of nature and area, for use for agricultural purposes." An animal feeding operation is considered to fall within this exemption for "agricultural purposes." See Thompson v. Hancock, 539 N.W.2d 181, 183 (Iowa 1995). Accordingly, cities are prohibited from zoning land, buildings, or structures "primarily adapted, by reason of nature and area, for use for agricultural purposes," but only in unincorporated areas.


Representative Frevert  
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Under principles of statutory construction the prohibition against cities zoning land, buildings, or structures used for agricultural purposes in unincorporated areas supports the inference that this type of zoning is *not* prohibited within city limits. In interpreting statutes the expression of one thing is considered the exclusion of another. Bennett v. Department of Natural Resources, 573 N.W.2d 25, 28 (Iowa 1997); Marcus v. Young, 538 N.W.2d 285, 289 (Iowa 1995). Underlying this maxim is the principle "that legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned." Bennett v. Department of Natural Resources, 573 N.W.2d at 28, *quoting from*, Marcus v. Young, 538 N.W.2d 285 at 289. By prohibiting cities from zoning land, buildings, or structures used for agricultural purposes in unincorporated areas, therefore, the statutes may be construed to not prohibit cities from zoning land, buildings, or structures used for agricultural purposes within city limits.

Our construction of these statutes does not mean that a city has an unfettered right to annex agricultural land and, thereafter, use its zoning authority to prohibit those animal feeding operations already in existence. Application of zoning ordinances in these circumstances could adversely affect the rights of those who have a property interest in an ongoing animal feeding operation. See Nemmers v. City of Dubuque, 716 F.2d 1194 (8<sup>th</sup> Cir. 1983), *appeal after remand*, 764 F.2d 502 (8<sup>th</sup> Cir. 1985). For this reason, a city enacting a zoning ordinance to prohibit animal feeding operations on annexed land should consider whether application of the ordinance would adversely affect the rights of property owners whose property was annexed. Cf Iowa Code § 172D.4(e) ("A zoning requirement adopted by a city shall not apply to a feedlot which becomes located within an incorporated or unincorporated area subject to regulation by that city by virtue of an incorporation or annexation which takes effect after November 1, 1976 for a period of ten years from the effective date of the incorporation or annexation.").

In summary, city ordinances which attempt to regulate the conduct of animal feeding operations would be preempted by state law. A city may enact a zoning ordinance pursuant to Iowa Code chapter 414 to prohibit animal feeding operations within city limits; however, enactment of a zoning ordinance to prohibit an existing animal feeding operation could adversely affect the rights of those who have a property interest in the animal feeding operation.

Sincerely,

  
TIMOTHY D. BENTON  
Assistant Attorney General  
Environmental & Agricultural  
Law Division

TDB\cfb



ELECTIONS; COUNTIES; SCHOOL DISTRICTS: Local option sales tax (LOST) for school infrastructure purposes; property tax relief. 1999 Iowa Acts, ch. 156, §§ 20, 23; Iowa Code §§ 28E.12, 422E.1, 422E.2, 422E.4 (1999). A LOST ballot proposition does not need to set forth any intergovernmental agreement between a school district and a city; these entities may enter into such an agreement after voters have approved a LOST ballot proposition. Equal-protection guarantees do not prohibit a LOST ballot from setting forth two propositions for separate school districts that would give property tax relief only to those taxpayers residing within one of the school districts. A LOST ballot proposition may include language premised upon the passage of future legislation. (Kempkes to Van Fossen, State Representative, 2-4-00) #00-2-1

February 4, 2000

The Honorable Jamie Van Fossen  
State Representative  
Statehouse  
LOCAL

Dear Representative Van Fossen:

You have requested an opinion on a local option sales tax -- commonly known as a LOST -- imposed by a county on behalf of school districts for school infrastructure purposes. Referring to Iowa Code chapters 28E and 422E (1999), you pose three questions about the election preceding the imposition of such a LOST:

- (1) "Does [an intergovernmental agreement under chapter 28E between a school district and a city receiving a portion of the anticipated LOST revenues] have to be on a LOST ballot? Can the school district, at any time after voter approval, enter into such an agreement with the city to designate a portion of the anticipated LOST revenues to the city?"
- (2) "Is it constitutional for voters in a county to vote on a LOST ballot proposition involving two school districts that will give property tax relief only to those taxpayers living within a portion of one school district, thus treating like taxpayers differently?"
- (3) "Can a LOST ballot proposition include language premised upon the passage of future legislation?"

## I.

Chapter 28E is entitled Joint Exercise of Governmental Powers. In general, it “permits state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities . . . .” Iowa Code § 28E.1. Any “public agency,” Iowa Code § 28E.2 -- which includes a school district, 1998 Op. Att’y Gen. \_\_\_ (#97-9-2(L)) -- may enter into an intergovernmental agreement under chapter 28E with another public agency, Iowa Code § 28E.12.

Chapter 422E is entitled School Infrastructure Funding. It provides that, upon receiving voter approval, a LOST “for school infrastructure purposes may be imposed by a county on behalf of school districts” for a maximum of ten years throughout the county at a maximum rate of one percent and that LOST revenues “shall be utilized solely for school infrastructure needs.” See Iowa Code §§ 422E.1(1)-(3), 422E.2(1). See generally Iowa Code § 4.1(30) (if undefined in statutes, “shall” imposes a duty and “may” confers a power). Chapter 422E also provides that a school district “in which a [LOST] for school infrastructure purposes has been imposed shall be authorized to enter into a chapter 28E agreement with one or more cities or a county whose boundaries encompass all or a part of the area of the school district.” Iowa Code § 422E.4, as amended by 1999 Iowa Acts, ch. 156, § 20. It further provides that a city entering into 28E agreement “shall be authorized to expend its portion of the [LOST] revenues for any valid purpose permitted by this chapter or authorized by the governing body of the city.” Iowa Code § 422E.4.

In 1999, the General Assembly amended chapter 422E by passing Senate File 469, which provided that school districts can also enter into 28E agreements with counties and that a county

entering into a chapter 28E agreement with a school district in which a [LOST] for school infrastructure purposes has been imposed shall be authorized to expend its designated portion of the [LOST] revenues to provide property tax relief within the boundaries of the school district located in the county. . . .

1999 Iowa Acts, ch. 156, § 20 (amending Iowa Code § 422E.4).

## II.

Local option laws provide a means of tailoring state policies to local conditions. See generally 2 E. McQuillin, The Law of Municipal Corporations ch. 4 (1996); Annot., “Schools -- Local Property Tax -- Validity,” 41 A.L.R.3d 1220 (1972). We address your questions on the LOST authorized by chapter 422E ad seriatim.



(A)

You have asked: “Does a 28E agreement between a school district and a city have to be on a LOST election ballot? Can the school district, at any time after approval of the LOST by the electorate, enter into an agreement with the city to designate a portion of the anticipated LOST revenues to the city?”

Chapter 422E specifies the procedure governing LOST elections for school infrastructure purposes. Section 422E.2(3) sets forth two requirements for a LOST ballot: “The ballot proposition [1] shall specify the rate of tax, the date the tax will be imposed and repealed, and [2] shall contain a statement as to the specific purpose or purposes for which the revenues will be expended.” Accord 720 IAC 21.803(3) (setting forth uniform LOST ballot for school infrastructure purposes). Section 422E.2(3) thus does not require a LOST ballot to set forth a 28E agreement between a school district and a city. See generally England v. McCoy, 269 S.W.2d 813, 815 (Tex. Civ. App. 1954) (when statute does not require ballot to set forth all details of a proposal, “[i]t must have been presumed that the voter would familiarize himself with the contents . . . before entering the ballot box, otherwise the legislature would have required a full copy on the ballot”).

A school district may also enter into a 28E agreement with a city after voter approval of a LOST for school infrastructure purposes. Section 422E.4 clearly contemplates such an occurrence: it provides that school district “in which a [LOST] for school infrastructure purposes has been imposed shall be authorized to enter into a chapter 28E agreement . . .” (emphasis added).

(B)

Originally, chapter 422E permitted school districts to expend LOST revenues for any school infrastructure purpose and permitted a city entering into 28E agreements with school districts to expend its portion of such revenues “for any valid purpose permitted by this chapter or authorized by the governing body of the city.” See Iowa Code § 422E.4. The 1999 amendment to chapter 422E permitted school districts to enter into 28E agreements with counties as well and provided that, in such an instance, a county “shall be authorized to expend its designated portion of the [LOST] revenues to provide property tax relief within the boundaries of the school district located in the county. . . .” 1999 Iowa Acts, ch. 156, § 20 (amending Iowa Code § 422E.4).

You have a concern about a LOST ballot under chapter 422E that set forth two propositions mandating different uses for the anticipated LOST revenues within different school districts. The first proposed that a school district receive one hundred percent of its share of the LOST revenues for school infrastructure purposes; the second proposed that another school

district receive fifty percent of its share of the LOST revenues for school infrastructure purposes and that the remaining fifty percent “shall be expended for property tax relief pursuant to a chapter 28E agreement with one or more local governments which levy property taxes whose boundaries encompass all or part of the area of the school district.” Against this background, you have asked: “Is it constitutional for voters in a county to vote on a LOST ballot proposition involving two school districts that will give property tax relief only to those taxpayers residing within one school district, thus treating like taxpayers differently?”

We provide opinions on precise legal questions. See 61 IAC 1.5(2), 1.5(3)(d). We do not use the opinion process to conduct generalized reviews of laws to identify issues. 1996 Op. Att’y Gen. 119 (# 96-10-11(L)); 1992 Op. Att’y Gen. 176, 177. This limitation has particular applicability when the subject matter involves a highly complex statutory scheme that can implicate a number of legal arguments premised upon a number of constitutional provisions. See generally Exira Community School Dist. v. State, 512 N.W.2d 787, 791 (Iowa 1994). Accordingly, we proceed to answer your question on the assumption that it rests solely upon equal-protection principles.

(1)

Preliminarily, we note that the first state constitution, ratified in 1846, specifically required the General Assembly to “provide for a system of common schools . . . .” Iowa Const. art. IX, § 3 (1846). Eleven years later, in 1857, Iowans ratified the second state constitution, which deleted this language. See Iowa Const. art. IX (1857).

The 1857 state constitution does not expressly guarantee the right to an education. 1982 Op. Att’y Gen. 130, 134-35. See generally “State Constitutional Law and State Educational Policy,” in State Constitutions in the Federal System ch. 9 (July, 1989). Nor does it expressly require an equal distribution of any tax revenues to school districts. Compare Iowa Const. art. IX with Mont. Const. art. X, § 1(3).

(2)

The federal constitution expressly prohibits a state from taking action that denies any person equal protection of the law. See U.S. Const. amend. XIV (1868). This guarantee also reins in a state’s political subdivisions. See Avery v. Midland County, 390 U.S. 474, 480, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1967); Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 294-96, 33 S. Ct. 312, 57 L. E. 510 (1912). It thus encompasses counties and school districts as political arms of the state.

The federal constitutional guarantee of equal protection also encompasses a state’s conferring a benefit upon individuals as well as imposing a tax upon them. See Hooper v. Benalillo County Assessor, 472 U.S. 612, 618, 105 S. Ct. 2862, 86 L. Ed. 2d 487 (1985); J.

Nowak, R. Rotunda & J. Young, Constitutional Law 585 (1983). The state constitutional guarantee of equal protection appears to have a similar reach.. See Callender v. Skiles, 591 N.W.2d 182, 187 (Iowa 1999); Sherman v. Pella Corp., 576 N.W.2d 312, 317 (Iowa 1998); Exira Community School Dist. v. State, 512 N.W.2d at 792-93; 1982 Op. Att’y Gen. 130, 130 N.W.2d 1; Note, 67 Iowa L. Rev. 309, 309 (1982).

In order to succeed on an equal-protection claim, a challenger must initially show that the state action treats similarly situated persons or entities in a different manner. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989 (1920); see Plyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982). Upon making that showing, the challenger must normally show that all “legitimate state interests” underlying the different treatment do not outweigh the interests of persons adversely affected by the state action. Norland v. Grinnell Mutual Reinsurance Co., 578 N.W.2d 239, 242 (Iowa 1998), cert. denied, 142 L. Ed. 2d 282. For purposes of a taxpayer challenge to a LOST ballot proposing different uses of anticipated LOST revenues for different school districts, we believe that the “rational basis” standard applies to that balancing test: such a legislative distinction does not implicate a “fundamental right” or arise out of a “suspect classification,” which would require a more heightened degree of scrutiny than the rational basis standard. See 1982 Op. Att’y Gen. 130, 132-33; see also Exira Community School Dist. v. State, 512 N.W.2d at 792, 794.

In Sperfslage v. City of Ames, 480 N.W.2d 47 (Iowa 1992), the Supreme Court of Iowa observed:

We recognize a presumption favoring the constitutionality of [statutes. A statute creating a classification that does not adversely affect a fundamental right or rest upon suspect criteria will be] upheld under the rational basis standard if we find the legislature could reasonably conclude that the classification would promote a legitimate state interest. This standard is easily satisfied in challenges to tax statutes. We do not declare a statute unconstitutional unless it clearly, palpably and without doubt infringes on the constitution. Every reasonable doubt is resolved in favor of the statute’s constitutionality.

Id. at 49.

With regard to imposing taxes, the U.S. Supreme Court has observed that the states

are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are

appropriate to reasonable schemes of state taxation. . . . That a state may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a real distinction, or difference in state policy.

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526-27, 79 S. Ct. 437, 3 L. Ed. 2d 480 (1958) (citations omitted).

A state “has wide discretion in the allocation of tax burdens among its inhabitants . . . .” Gwinn Area Community Schools v. Michigan, 741 F.2d 840, 845 (6<sup>th</sup> Cir. 1984). See Exxon Corp. v. Eagerton, 462 U.S. 176, 194, 103 S. Ct. 2296, 76 L. Ed. 2d 497 (1983) (legislatures “have especially broad latitude in creating classifications and distinctions in taxing statutes”); Hudson Motor Car Co. v. City of Detroit, 136 F.2d 574, 576-77 (6<sup>th</sup> Cir. 1943) (“[a]bsolute equality in taxation is unattainable”). Accordingly, the U.S. Supreme Court “generally defers to the judgment of legislative bodies” in equal-protection challenges to state tax statutes. J. Nowak, R. Rotunda & J. Young, Constitutional Law 395 (1983).

(3)

Our state commonly makes classifications according to geography that result in different treatment. Depending on where we are or where we live, we may have very different rights. As the U.S. Supreme Court observed in 1964,

there is no rule that counties, as counties, must be treated alike; the Equal Protection Clause relates to equal protection of the laws “between persons as such rather than between areas.” . . . A State, of course, has a wide discretion in deciding whether laws should operate statewide or shall operate only in certain counties, the legislature “having in mind the needs and desires of each.”

Griffin v. County School Bd., 377 U.S. 218, 230-31, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964) (citations omitted).

In addition, our state has chosen to delegate a large measure of its control over education to local communities. See 1990 Op. Att’y Gen. 65 (# 90-2-9(L)); see also Iowa Code ch. 257 (Financing School Programs); Exira Community School Dist. v. State, 512 N.W.2d at 792, 795; Annot., “Schools -- Local Property Tax -- Validity,” 41 A.L.R.3d 1220, 1223, 1224-25 (1972). That delegation means, as a practical matter, that every school district has different needs. See generally San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 54-55, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); San Rafael Elementary School Dist. v. California Bd. of Educ., 87 Cal Rptr. 2d 67, 73 n. 10 (App. 1999); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 144 (Tenn. 1993); Heise, “State Constitutions, School Finance Litigation, and the ‘Third Wave’:

From Equity to Adequacy,” 68 Temple L. Rev. 1151, 1151 (1995). Indeed, inherent in the power to create school districts “is the ability of the state to allow differences among [them].” Lafayette Steel Co. v. City of Dearborn, 360 F. Supp. 1127, 1130 (E.D. Mich. 1973).

When school financing originates in whole or in part with local taxes, as in Iowa, local control does not lend itself to exact equality in such financing. See Heise, “State Constitutions, School Finance Litigation, and the ‘Third Wave’: From Equity to Adequacy,” 68 Temple L. Rev. 1151, 1170 (1995); see also Exira Community School Dist. v. State, 512 N.W.2d at 792, 795, 796. A taxpayer challenging different allocations of LOST revenues to different school districts would thus have to acknowledge that differences in philosophy, preferences, priorities, abilities, and resources inhere in any fragmentation of control and financing.

In a suit brought on behalf of poor children, San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), the U.S. Supreme Court identified the many advantages of local control over education:

[Local control means] the freedom to devote more money to the education of one’s children. Equally important, however, is the opportunity it offers for participation in the decision-making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for education excellence . . . . No one area of social concern stands to profit more from a . . . diversity of approaches than does public education.

Id. at 49-50 (footnote omitted). Importantly, the Court held that local control amounted to a legitimate state interest, that a property-tax-based system of school finance bore a rational relationship to that interest, and that such a system thus did not offend the federal constitutional guarantee of equal protection. Id. at 54-55. See Lafayette Steel Co. v. City of Dearborn, 360 F. Supp. at 1130; Kukor v. Grove, 436 N.W.2d 568, 580-81 (Wis. 1989), reconsideration denied, 443 N.W.2d 314.

One commentator has observed that the Court in San Antonio Independent School District v. Rodriguez “[was essentially closing] the door to a federal constitutional basis for school finance litigation” (at least from the perspective of poor children) and was “disinclined to diminish local control over allocation decisions concerning local tax revenue.” Heise, “State Constitutions, School Finance Litigation, and the ‘Third Wave’: From Equity to Adequacy,” 68 Temple L. Rev. 1151, 1156, 1157 (1995). See Joondeph, “The Good, the Bad, and the Ugly: An Empirical Analysis of Litigation-Prompted School Finance Reform,” 35 Sta. Clara L. Rev. 763, 765-66 (1995) (within the sphere of local control over education “has rested the power of each community to determine how much of the local public fiscal budget should be devoted to

educating the community's children"). A federal appeals court has similarly observed that taxing and spending decisions go hand-in-hand in this area: "The one who pays the educational piper generally gets to call the educational tune . . . ." Kelley v. Metropolitan Bd. of Educ., 836 F.2d 986, 999 (6<sup>th</sup> Cir. 1987), cert. denied, 487 U.S. 1206. See Catalano & Modisher, "State Constitutional Issues in Public School Funding Challenges," 2 Emerging Issues in State Const. Law 206, 212 (1998); but see Tennessee Small School Systems v. McWherter, 851 S.W.2d at 155-56. See generally J. Nowak, R. Rotunda & J. Young, Constitutional Law 826 (1983).

After San Antonio Independent School District v. Rodriguez, this office issued two opinions on optional financing methods available to school districts. Both opinions, which addressed taxpayer concerns, noted the importance of the Court's conclusion that local control over education amounted to a legitimate state interest.

In 1982, we examined the statutory authority of school districts to call a special election for imposing a supplemental school income tax on individual state income. See 1982 Op. Att'y Gen. 130. If this local option levy received voter approval, "the taxable income of the residents of different districts will vary, as does the value of taxable property, [and so] the surtax rate which must be applied to produce a certain amount of revenue will vary among the districts." Id. at 131. In addressing whether such a disparity constituted a violation of equal protection, we reviewed San Antonio Independent School District v. Rodriguez and found "little difficulty" in concluding that the statute rationally serves the legitimate state interest of allowing local control over schools. Id. at 135.

In 1990, we examined the statutory authority of school districts to certify a cash reserve levy. See 1990 Op. Att'y Gen. 65 (#90-2-9(L)). We concluded that the levy

bears a rational relationship to the legitimate state purpose of allowing local control of schools. [It] also provides a practical mechanism for local school districts to generate cash reserves which might otherwise be depleted by delayed or reduced state aid payments. While it is true that utilization of the cash reserve levy will result in some inequality in the property tax rate among school districts, [the Court in San Antonio Independent School District v. Rodriguez] made clear that this fact does not render the provision unconstitutional so long as a legitimate state purpose is served. . . .

Id. Compare Hubsch, "The Emerging Right to Education Under State Constitutional Law," 65 Temple L. Rev. 1325, 1334 (1992) with Dupree v. Alma School Dist., 651 S.W.2d 90, 93 (Ark. 1993).

Finally, in 1991, the Supreme Court of Iowa decided Scott County Property Taxpayers Association, Inc. v. Scott County, 473 N.W.2d 28 (Iowa 1991). There, a county proceeding

under the LOST provisions in chapter 422B allocated the revenues to its general fund, rather than to its rural services fund, to relieve property taxes throughout the county. Although this allocation tended to favor residents of the county's incorporated areas over those of the county's unincorporated areas, the court refused to declare the allocation as violative of equal protection. Id. at 30-31.

(4)

The foregoing authorities suggest that sound explanations could conceivably underscore an allocation of X percent in LOST revenues to one school district and an allocation of X-1 percent to another, with the difference applied to property tax relief. Accordingly, we conclude that equal-protection guarantees do not prohibit a county from providing voters with a LOST ballot proposition for separate school districts that would give property tax relief only to those taxpayers residing within one of the school districts. See Town of Ball v. Rapides Parish Police Jury, 746 F.2d 1049, 1061-62 (5<sup>th</sup> Cir. 1984) (taxpayers of one town within taxing district which received no sales tax revenues from the district, while other towns received shares of them, could not overcome rational basis standard in equal-protection challenge to the district's allocation: it was conceivable that the town, in comparison to the others, simply had no need for any of those revenues); see also Shofstall v. Hollins, 515 P.2d 590, 593 (Az. 1973) (“[w]e find no magic in the fact that [taxes are greater in some school districts] than in others”). See generally Livingston School Bd. v. Livingston Bd. of Educ., 830 F.2d 563, 572 (5<sup>th</sup> Cir. 1987), cert. denied, 487 U.S. 1223 (“[r]ough accommodations are constitutionally permissible, even where not wholly logical or scientific”).

(C)

As previously indicated, school districts in which voters had approved LOST proposals for school infrastructure purposes originally had authority under chapter 422E to enter into 28E agreements with cities only. Compare Iowa Code § 422E.4 (school district in which LOST imposed for school infrastructure purposes has authority to enter into 28E agreement “with one or more cities”) with Iowa Code §§ 28E.2, 28E.12 (school district, as “public agency,” authorized to enter into 28E agreement with cities and counties); 1998 Op. Att’y Gen. \_\_\_ (#97-9-2(L)) (school district may enter into 28E agreement with cities or counties for performing governmental service, activity, or undertaking). See generally 1998 Iowa Acts, ch. 1130, § 4 (creating Iowa Code section 422E.4). Passage of the 1999 amendment to chapter 422E provided school districts with specific authority to enter into 28E agreements with counties as well. See 1999 Iowa Acts, ch. 156, § 20 (amending Iowa Code § 422E.4 by authorizing school district in which LOST imposed for infrastructure purposes to enter into 28E agreement “with one or more cities or a county”).

You have a concern about a LOST ballot -- drafted before passage of the 1999 amendment authorizing school districts to enter into 28E agreements with counties -- specifying

that a portion of the anticipated revenues would be expended for property tax relief pursuant to a chapter 28E agreement with “one or more local governments” levying property taxes within the school district. You suggest that the drafters anticipated passage of the 1999 amendment and therefore, in their phrasing of this LOST ballot, eschewed the narrow phrase “one or more cities” in favor of the broad phrase “one or more local governments” in order to allow the county to participate in a future 28E agreement with the school district if, in fact, voters later approved the ballot. Against this background, you have asked: “Can a ballot proposition include language premised upon the passage of future legislation?”

In passing the 1999 amendment, the General Assembly made it retroactive to July 1, 1998. See 1999 Iowa Acts, ch. 156, § 23(3). We have discovered nothing in chapter 422E that prohibits premising the language of a LOST ballot proposition upon the passage of future legislation. In the most analogous Iowa case, Pennington v. Town of Sumner, 222 Iowa 1005, 270 N.W. 629 (1936), a ballot proposing to establish a municipal utility expressly mentioned a proposed contract to construct the facility if voters approved the ballot issue. The court held that when statutory provisions contemplate the existence of such a contract, it “[must] be the product of the future [and naturally] cannot be printed on the ballot [for the electorate].” 270 N.W. at 632.

That a law expressly takes effect upon the passage of future legislation or the occurrence of some other event is not unheard of. See, e.g., State v. Padley, 237 N.W.2d 883, 885 (Neb. 1976); State v. Dumler, 559 P.2d 798, 803-04 (Kan. 1977); XX Kan. Op. Att’y Gen. 14 (#86-35)); 2 Sutherland’s Statutory Construction § 33.07, at 17 (1991); Annot., 171 A.L.R. 1070 (1947). See generally 1968 Op. Att’y Gen. 379, 381 (after gubernatorial approval, act may take effect when it specifies it shall take effect). The General Assembly has, for example, conditioned legislation to take effect only upon the passage of future federal or state legislation. See, e.g., 1997 Iowa Acts, ch. 139, § 18; 1987 Iowa Acts, ch. 120, § 11.

Although we conclude that a ballot proposition may include language premised upon the passage of future legislation, we do not comment upon the motive, if any, possibly underlying the wording of a particular ballot. See 1986 Op. Att’y Gen. 10, 12; see also 61 IAC 1.5. See generally Gray v. Taylor, 227 U.S. 51, 56, 33 S. Ct. 199, 57 L.E. 413 (1913). We can only examine the text of a ballot in an opinion to determine its lawfulness. See Pennington v. Town of Sumner, 270 N.W. at 631-32. In doing so here, we cannot agree on a purely textual level that the phrase “one or more local governments” necessarily supports a conclusion that the drafters of the LOST ballot anticipated a future 28E agreement between the school district and the county. See generally Iowa Code § 405A.1(1) (“local government” includes city and county); Black’s Law Dictionary 846 (1979) (“local government” includes city and county); Cyclopedic Law Dictionary 562 (1912); Random House Dictionary of the English Language 840 (1971).

We agree as a general rule that ballot propositions should be drafted as precisely as possible; at the same time, we recognize that their phrasing encompasses some measure of



leeway and that inaccuracies in drafting do not always involve material matters. See Honohan v. United Community School Dist., 258 Iowa 57, 137 N.W.2d 601, 602 (1965) (minor defects in form of ballot do not affect election results); Pennington v. Town of Sumner, 270 N.W. at 632 (ballot should not be construed in technical manner). Ballot sufficiency thus hinges upon substantial, not strict, compliance with applicable legal principles. Honohan v. United Community School Dist., 137 N.W.2d at 602; Whiteside v. Brown, 214 S.W.2d 844, 847 (Tex. Civ. App. 1948); 4 Antieau's Local Government Law § 45.11, at 395 (1987); see O'Keefe v. Hopp, 210 Iowa 876, 230 N.W. 876, 879 (1930); Bickel v. City of Boulder, 885 P.2d 215, 225, 226 (Colo. 1994) cert. denied, 513 U.S. 1155. The test for the sufficiency of ballot language "is whether the electorate is afforded an opportunity fairly to express their will, that is, 'whether the question is sufficiently definite to apprise the voters with substantial accuracy as to what they are asked to approve.'" 3 E. McQuillin, The Law of Municipal Corporations § 12.12, at 119 (1990) (footnote omitted). See 2 E. Yokley, Municipal Corporations § 321, at 123 (1957) ("all that is required is that the proposition . . . be submitted with sufficient definiteness and certainty as not to mislead").

In general, a ballot will not undergo invalidation if it accurately and fairly states the intent of the proposition and does not, in its entirety, mislead or confuse the electorate. Bickel v. City of Boulder, 885 P.2d at 232. A court will not invalidate a choice of ballot language unless it is clearly misleading. Id. A post-election challenge to a ballot would require the challenger to carry the heavy burden of showing that it did not fairly portray the proposition, that the unfair portrayal involved a material matter, and that voter deception resulted. Gray v. Taylor, 227 U.S. at 58; Pennington v. Town of Sumner, 270 N.W. at 632; Bickel v. City of Boulder, 885 P.2d at 227; Whiteside v. Brown, 214 S.W. at 851; 4 Antieau, supra, § 45.11, at 396-97. See generally Henry v. City of Pontiac, 109 N.W.2d 835, 836 (Mich. 1961). As one court has observed: "Elections are solemn events of tremendous public significance. [A] concluded election will not be voided for an irregularity in the ballot unless it can be said that in all human likelihood it interfered with the full and free expression of the popular will and thus influenced the result." Two Guys from Harrison, Inc. v. Furman, 160 A.2d 265, 283 (N.J. 1960). Accord Hardy v. Ruhnke, 218 A.2d 861, 867 (N.J. 1966).

### III.

In summary: Under Iowa Code chapter 422E (1999), a LOST ballot proposition does not need to set forth any intergovernmental agreement between a school district and a city; these entities may enter into such an agreement after voters have approved a LOST ballot proposition. Equal-protection guarantees do not prohibit a LOST ballot from setting forth two propositions for separate school districts that would give property tax relief only to those taxpayers residing

Representative Jamie Van Fossen  
Page 12

within one of the school districts. A LOST ballot proposition may include language premised upon the passage of future legislation.

Sincerely,

A handwritten signature in black ink that reads "Bruce Kempkes". The signature is written in a cursive style with a large, looping initial "B".

Bruce Kempkes  
Assistant Attorney General

CITIES; CIVIL SERVICE: Consolidation of positions in fire department. Iowa Code §§ 20.7, 372.8, 400.7, 400.28 (1999). A civil service commission lacks statutory authority to review or approve consolidations of civil service positions in a fire department serving a city organized under Iowa Code section 372.7 when the city, acting in good faith, consolidates them for the purpose of improving economy or efficiency in the fire department. (Kempkes to Connor, State Representative, 2-15-00) #00-2-2

February 15, 2000

The Honorable John Connors  
State Representative  
Statehouse  
LOCAL

Dear Representative Connors:

You have requested an opinion about the proper role of a civil service commission in a city governed by a mayor, a council elected from wards and at large, and an appointed city manager. See generally Iowa Code ch. 372 (1999) (Organization of Cities). You ask whether such a commission has statutory authority to review or approve a proposed reorganization of the city's fire department involving consolidations of civil service positions. The proposed consolidations would (1) merge three positions of assistant fire chief (fire suppression, training officer, and fire marshal) who have different job duties into a single position of assistant fire chief who will have responsibility for their former duties and (2) merge two positions of captain (fire suppression and fire inspector) who have different job duties into a single position of captain who will have responsibility for their former duties. According to the fire chief, these personnel reclassifications would improve economy and efficiency in the fire department.

Obviously, collective bargaining agreements may govern the manner and mode of effectuating changes in the civil service. See generally Iowa Code ch. 20 (1999) (Collective Bargaining). Your question, however, focuses solely upon whether any statute provides the civil service commission with authority to review or approve the proposed consolidations. We conclude that no law provides a civil service commission with such authority and that a city, acting in good faith, may consolidate the positions for the purpose of improving economy or efficiency in the fire department.

## I.

Iowa Code chapter 400 is entitled Civil Service. It defines three general areas of responsibility for civil service commissions: establishing guidelines for examinations; certifying lists of qualified persons; and determining appeals from suspensions, demotions, and discharges. See Iowa Code §§ 400.8, 400.9, 400.11, 400.18, 400.20, 400.23; City of Bettendorf v. Kelling, 465 N.W.2d 299, 302 (Iowa 1990).

The Iowa Constitution grants home rule authority to cities. See Iowa Const. amend. 25 (1968). In essence, home rule permits cities to exercise any power and perform any function they deem appropriate for improving the general welfare of their residents as long as such action does not offend state law. See Iowa Code §§ 364.1, 364.2(3), 364.3. Of importance to your question, cities may exercise their general powers subject only to limitations “expressly imposed” by a state or city law. Iowa Code § 364.2(2). See 1992 Op. Att’y Gen. 169 (#92-9-6(L)).

Pursuant to statute, cities have the specific duty to provide fire protection and the specific power to establish, staff, and maintain fire departments. Iowa Code § 364.16; 1992 Op. Att’y Gen. 169 (#92-9-6(L)). Fire chiefs have statutory authority to make appointments and promotions within their fire departments. Iowa Code § 400.15; Smith v. Civil Serv. Comm’n, 561 N.W.2d 75, 79 (Iowa 1997). No statute, however, requires that a fire department have a specific number of assistant fire chiefs or captains.

## II.

You have asked whether a civil service commission has statutory authority to review or approve a proposed reorganization of the city’s fire department involving consolidations of civil service positions.

### (A)

For cities governed by a mayor, a council elected from wards and at large, and an appointed city manager, see Iowa Code § 372.7, section 372.8 grants power to a city manager to employ, reclassify, or discharge all employees and fix their compensation, “subject to civil service provisions . . . .” Chapter 400, which sets forth those provisions, does not expressly provide (or necessarily imply) any authority on behalf of civil service commissions to review or approve consolidations of civil service positions within fire departments. Civil service commissions possess only such duties and powers as expressly granted by statute. Bryan v. City of Des Moines, 261 N.W.2d 685, 687 (Iowa 1978); 3 E. McQuillin, The Law of Municipal Corporations §12.55, at 282 (1990); 2 A. Sands & M. Libonati, Local Government Law § 10.12, at 104 (1992).

On the other hand, chapter 400 -- as well as chapters 20 and 372 -- affirmatively indicates that civil service commissions lack authority to review or approve consolidations in fire departments. See, e.g., Iowa Code § 20.7 (public employers have right to hire, promote, demote, transfer, assign, and retain public employees in positions; maintain efficiency of governmental operations; and determine and implement methods, means, assignments, and personnel by which public employer's operations conducted), § 372.8 (city manager shall take active control of city's police, fire, and engineering departments), § 400.7 (employee shall have full civil service rights in a position upon its reclassification "by the city"), § 400.28 (when required by the public interest, city may abolish an office and remove employees from their classification or grade or reduce the number of employees in any classification by suspension).

In addition, case law suggests that civil service commissions play no role in consolidations of civil service positions. In Helgevold v. Civil Service Commission, 367 N.W.2d 257, 261 (Iowa App. 1985), the Iowa Court of Appeals observed that "[a]mong the administrative duties of the city which have been recognized is the authority to establish different salary positions and grades; the ability to reclassify in furtherance of successful function of the service; and to reorganize within departments as long as the city is not attempting to avoid the purposes of the city service laws." See generally Bryan v. City of Des Moines, 261 N.W.2d at 687; Wood v. Loveless, 244 Iowa 919, 58 N.W.2d 368, 373 (1953); Kern v. City of Des Moines, 213 Iowa 510, 239 N.W. 104, 105 (1931); 1978 Op. Att'y Gen. 121, 121. When the Supreme Court of Iowa examined Helgevold v. Civil Service Commission in a later case, it did not indicate any disagreement with it. See McBride v. Sioux City, 444 N.W.2d 85, 88 (Iowa 1989).

As a matter of logic, the authority to create and abolish positions includes the authority to consolidate them. City of Miami v. Rodriguez-Quesada, 388 So.2d 258, 259 (Fla. App. 1980); 2 Sands & Libonati, supra, § 10.50, at 424. Cities possess this authority even though the persons affected by its exercise enjoy civil service status. 2 Sands & Libonati, supra, § 10.23, at 173. Cities "are not bound to keep [civil service employees] upon the payrolls if it is decided, in good faith, that the positions should be abolished, either because of financial necessity or the dictates of good and economical business management." Wood v. Loveless, 58 N.W.2d at 371. See 3 McQuillin, supra, § 2.76, at 381.

That cities may make good-faith modifications in the civil service for the purpose of economy or efficiency comports with their authority, in general, to exercise full control over all their officers and employees. See generally Misbach v. Civil Serv. Comm'n, 230 Iowa 323, 297 N.W. 284, 286 (1941); 3 McQuillin, supra, § 12.01, at 55, §12.55, at 276. Courts have viewed the creation or abolition of a position in city government as something more than a mere administrative act. Orange v. County of Suffolk, 830 F. Supp. 701, 705 (E.D.N.Y. 1993). The abolition of a position in the budgetary process is a "quintessential legislative function, reflecting [a governing body's] ordering of policy priorities in the face of limited financial resources." Rateree v. Rockett, 852 F.2d 946, 950 (7<sup>th</sup> Cir. 1988). See generally Iowa Code § 400.28. Civil service legislation thus does not completely restrict city government in the areas of personnel and

fiscal management. See Gorecki v. Ramsey County, 437 N.W.2d 646, 650 (Minn.1989). We have observed:

Although Civil Service statutes are designed to protect and safeguard against arbitrary actions of superior officers in removing employees, the overriding concern is always the protection of the public. As such, Civil Service legislation is not designed to prevent a department from being reorganized in the interest of efficiency and economy. Any reclassification, therefore, which conforms the civil structure to the realities of the agency prior to the reclassification is valid.

1978 Op. Att’y Gen. 119, 119-20. See Iowa Code § 4.4(5).

(B)

We have also issued a caveat against merely establishing a title and moving individuals into newly consolidated positions in order to establish a pay differential: “It should be shown that there is a substantial difference in the work performed and that the reorganization accords with realities.” 1978 Op. Att’y Gen. 119, 120. A similar caveat was issued by the court in Helgevold v. Civil Service Commission:

There are limits upon actions the city may take for administrative reasons. The municipality may not avoid the dictates of the civil service laws by merely labeling an action administrative. Reclassification or reorganization will not be permitted when its purpose is to avoid civil service laws. . . .

Therefore, [a] court must balance the interests involved; those of the city in controlling the functions and administration of the [city], and of the employee in serving without threat of demotion or removal for improper or partisan reasons. The fulcrum in balancing these interests is the public good.

367 N.W.2d at 261 (citations omitted). See generally Annot., “Abolition of Civil Service Position,” 87 A.L.R.3d 1165 (1978).

The limitations mentioned by these caveats would require factual findings. See Taylor v. City of New London, 536 N.W.2d 901, 903 (Minn. App. 1995); see also Kern v. City of Des Moines, 239 N.W. at 105 (challenger to city’s reduction in civil service force, allegedly made to improve economy or efficiency, must show fraud, subterfuge, sham, or arbitrariness). The

Representative John Connors  
Page 5

opinion process cannot resolve disputed issues of fact, and this opinion does not purport to do so.  
See 61 IAC 1.5(3)(c); 1994 Op. Att'y Gen. 146, 148.

**III.**

In summary: A civil service commission lacks statutory authority to review or approve consolidations of civil service positions in a fire department serving a city organized under section 372.7 when the city, acting in good faith, consolidates them for the purpose of improving economy or efficiency in the fire department.

Sincerely,

A handwritten signature in black ink that reads "Bruce Kempkes". The signature is written in a cursive style with a large, looping initial "B".

Bruce Kempkes  
Assistant Attorney General





LAW ENFORCEMENT; STATE OFFICERS AND DEPARTMENTS: Scope of power granted to Iowa Law Enforcement Academy Council. Iowa Code § 80B.3 (1999). The Iowa Law Enforcement Academy Council has authority under section 80B.3(3) to determine who among those denominated as "peace officers" by statute are "law enforcement officers" and, therefore, obligated to meet the standards, training, and certification requirements in chapter 80B. Nothing in chapter 80B would empower the Council to confer peace officer status -- and the legal authority that is carried with this designation -- upon particular individuals. The Council could not determine to include as "law enforcement officers," upon whom standards, training, and certification requirements should be imposed, persons who have been improperly delegated the duties of peace officers. (Pottorff and Kempkes to Shepard, Director, Iowa Law Enforcement Academy, 2-21-00) #00-2-5

February 21, 2000

Mr. Gene W. Shepard, Director  
Iowa Law Enforcement Academy  
P.O. Box 130  
Johnston, Iowa 50131

Dear Mr. Shepard:

You have requested an opinion on the scope of authority granted to the Iowa Law Enforcement Academy Council under Iowa Code chapter 80B (1999). Chapter 80B invests the Council with certain regulatory power over any "law enforcement officer" and defines that phrase in part to include any person who may be required to perform the duties of a peace officer. See Iowa Code § 80B.3(3). You state that throughout the Iowa Code there are various references to persons who are vested with the authority to act as peace officers while performing job duties. By contrast, some persons employed by public office holders are required by job description to perform the duties of peace officers although not denominated as peace officers by statute. You specifically ask whether, pursuant to Iowa Code section 80B.3, the Council may "confer 'peace officer' status" upon those persons who, after appropriate inquiry, the Council determines are performing the duties of a peace officer. Our review of chapter 80B leads us to conclude that the Council does not have this authority.

Chapter 80B creates the Academy and the Council. The Academy, under the day-to-day administration of its Director, serves as a central law enforcement training facility. The Council generally oversees the Academy and consists of three state residents, a county sheriff, two police officers, a member of the Iowa Department of Public Safety, a state senator, and a state representative. See Iowa Code §§ 80B.4, 80B.6. See generally 1996 Op. Att'y Gen. 24 (#95-6-6(L)); 1980 Op. Att'y Gen. 882 (#80-12-4(L)).

Mr. Gene Shepard  
Page 2

Chapter 80B authorizes the Director, subject to the Council's approval, to promulgate rules regarding such matters as (1) minimum entrance requirements, courses, attendance requirements, and equipment and facilities at law enforcement training schools; (2) minimum basic training requirements for law enforcement officers; (3) minimum standards of physical, educational, moral, and mental fitness; and (4) grounds for revoking law enforcement officer certification. See Iowa Code § 80B.11. See generally 501 IAC 2.1 et seq. Chapter 80B also authorizes the Council to issue certificates to law enforcement officers fulfilling various statutory requirements and to revoke their certificates. See Iowa Code § 80B.13.

You have asked whether the Council may "confer 'peace officer' status" upon persons who, as determined by the Council, perform the duties of a peace officer. To address your question, we turn to the applicable statutory definition. Chapter 80B specially defines "law enforcement officer" to mean:

an officer appointed by the director of the department of natural resources, a member of a police force or other agency or department of the state, county or city regularly employed as such and who is responsible for the prevention and detection of crime and the enforcement of the criminal laws of this state and all individuals, as determined by the council, who by the nature of their duties may be required to perform the duties of a peace officer.

Iowa Code § 80B.3(3) (emphasis added). The emphasized portion of this definition was added to section 80B.3(3) in 1970. 1970 Iowa Acts, 63rd G.A., ch. 1048, § 4. Under this definition a law enforcement officer includes numerous specifically described categories of persons as well as those individuals "determined by the council" to be law enforcement officers based on the nature of their duties. Your inquiry requires us to construe the scope of the authority of the Council to "determine" whether additional individuals are "law enforcement officers" based on requirements that these persons perform the duties of a "peace officer."

Those persons classified as "law enforcement officers" under chapter 80B must, inter alia, meet minimum entrance requirements, satisfy minimum physical and mental fitness requirements, undergo basic course training and complete certain in-service training. Iowa Code § 80B.11. Law enforcement officers are certified and may have their certification revoked following a hearing before the Council. Iowa Code § 80B.13.

In construing the scope of the Council's authority to determine which additional individuals are "law enforcement officers" subject to these requirements, we turn to principles of statutory construction. The polestar of statutory construction is legislative intent. Carlson Co. v. Board of Review, 572 N.W.2d 146, 154 (Iowa 1997); Harris v. Olson, 558 N.W.2d 408, 410 (Iowa 1997). The ultimate goal of statutory construction is to give effect to the legislative intent. McCracken v. Iowa Dep't of Human Services, 595 N.W.2d 779, 784 (Iowa 1999); Hornby v. Iowa Bd. of Regents,

559 N.W.2d 23, 25 (Iowa 1997). The intent of the legislature in creating the Academy and the Council is set out expressly in chapter 80B. “It is the intent of the legislature in creating the academy and the council to maximize training opportunities for law enforcement officers, to coordinate training and to set standards for the law enforcement service, all of which are imperative to upgrading law enforcement to professional status.” Iowa Code § 80B.2. Accordingly, we should construe the Council’s authority to include additional persons as “law enforcement officers” pursuant to section 80B.3(3) with this legislative purpose in mind.

There are numerous statutes which authorize state officers and state agencies to designate particular employees to act as peace officers. See, e.g., Iowa Code § 7.10 (“[w]henver the governor is satisfied that a state of emergency exists . . . the governor shall designate any employee or employees of this state as peace officers”); § 29A.56 (“[t]he adjutant general may by order . . . commission one or more of the employees of the military division as special police” who “shall . . . exercise the powers of regular peace officers”); § 174.5 (“[t]he management of any society may appoint such number of special police as it may deem necessary” and “[s]uch officers are hereby . . . charged with the duties of peace officers”); § 203.13 (“[t]he department may designate by resolution certain of its employees in the warehouse bureau to be enforcement officers” who “shall have the authority of a peace officer”); § 262.13 (“[t]he board may authorize any institution under its control to commission one or more of its employees as special security officers” who “shall have the powers. . . of regular peace officers”); § 321.477 (“[t]he department may designate by resolution certain of its employees upon each of whom there is hereby conferred the authority of a peace officer”); § 328.12 (“general powers of peace officers are conferred upon the director, and officers and employees of the department designated by the director to exercise such powers”); § 330A.8(16) (“[a]n authority is granted the following rights and powers . . . [t]o designate employees upon whom are conferred all the powers of a peace officer”).

Still other statutes designate particular positions as including the power of peace officers. See, e.g., Iowa Code § 147.103 (“[i]nvestigators authorized by the board of physician assistant examiners have the powers and status of peace officers”); § 147.103A (“[i]nvestigators appointed by the board have the powers and status of peace officers”); § 152.11 (“[i]nvestigators authorized by the board of nursing have the powers and status of peace officers”); § 153.33 (“[i]nvestigators authorized by the board of dental examiners have the powers and status of peace officers”); § 155A.26 (“[o]fficers, agents, inspectors, and representatives of the board of pharmacy examiners shall have the powers and status of peace officers”); § 507E.8 (“[b]ureau investigators shall have the power and status of peace officers”); § 907.2 (“[p]robation officers . . . are peace officers”).

Analyzing the authority of the Council to determine whether individuals “by the nature of their duties may be required to perform the duties of a peace officer” in light of these statutes, we construe section 80B.3(3) to empower the Council to determine who among those denominated as “peace officers” by statute are “law enforcement officers” obligated to meet the standards, training and certification requirements under chapter 80B. “Peace officers” are not otherwise specifically included in the definition of law enforcement officers. Compare Iowa Code § 80B.3(3) with Iowa Code

§ 801.4(11). A legislative grant of discretion to the Council to determine which “peace officers” must meet standards, training, and certification requirements under chapter 80B is consistent with the legislative intent of the chapter “to maximize training opportunities for law enforcement officers, to coordinate training and to set standards for the law enforcement service to centralize training and standards for law enforcement officers.” Iowa Code § 80B.2.

We cannot determine through an opinion whether the Council additionally may include as “law enforcement officers” persons who have been delegated the duties of a “peace officer” in fact but without express statutory authorization. Resolution of this question would require legal analysis of the authority under which the duties of a peace officer were delegated and factual analysis of the actual duties being performed. The Council could not determine to include as “law enforcement officers,” upon whom standards, training, and certification requirements should be imposed, persons who have been improperly delegated the duties of peace officers. Whether an individual may be legally delegated the duties of a peace officer without express statutory authority and whether the Council could determine that individual is a “law enforcement officer” based on performance of those duties must be determined on a case-by-case basis.

In response to your narrow question whether the Council may “confer ‘peace officer’ status” upon persons who, as determined by the Council, perform the duties of a peace officer, we do not construe section 80B.3(3) to empower the Council to confer peace officer status upon any individual based on an audit of job duties. Chapter 80B is directed toward training, standards, and certification of law enforcement officers. See Iowa Code § 80B.2. Nothing in chapter 80B would empower the Council to confer peace officer status -- and the legal authority that is carried with this designation -- upon particular individuals. This power would be inconsistent with the express legislative intent of chapter 80B, see Iowa Code § 80B.2, to maximize training opportunities, to coordinate training, and to set standards. See McCracken v. Iowa Dep’t of Human Services, 595 N.W.2d at 784; Hornby v. Iowa Bd. of Regents, 559 N.W.2d at 25. Rather, the Council may only determine who among those performing the duties of peace officers must undergo training, meet standards, and be issued certificates.

In summary: The Iowa Law Enforcement Academy Council has authority under Iowa Code section 80B.3(3) to determine who among those denominated as “peace officers” by statute are “law enforcement officers” and, therefore, obligated to meet the standards, training, and certification requirements in chapter 80B. Nothing in chapter 80B would empower the Council to confer peace officer status -- and the legal authority that is carried with this designation -- upon particular individuals. The Council could not determine to include as “law enforcement officers,” upon whom

Mr. Gene Shepard  
Page 5

standards, training, and certification requirements should be imposed, persons who have been improperly delegated the duties of peace officers.

Sincerely,

Handwritten signature of Julie F. Pottorff in cursive script.

Julie F. Pottorff  
Deputy Attorney General

Handwritten signature of Bruce Kempkes in cursive script.

Bruce Kempkes  
Assistant Attorney General



PUBLIC FUNDS; COUNTIES: Repurchase and reverse repurchase agreements. Investment of idle cash in money market mutual funds having ability to participate in temporary reverse repurchase agreements. Iowa Code § 12B.10 (1999). A county (1) may exchange its idle cash for securities until such time the original holder reacquires them by paying the county a higher price; (2) may not exchange its securities for cash and later reacquire them for a higher price; and (3) may invest in a money market mutual fund that has the ability to exchange its securities for cash and later reacquire them for a higher price. (Kempkes to Sarcone, Polk County Attorney, 2-21-00) #00-2-6

February 21, 2000

Mr. John P. Sarcone  
Polk County Attorney  
Polk County Office Bldg., rm. 340  
111 Court Ave.  
Des Moines, IA 50309

Dear Mr. Sarcone:

You have requested an opinion on the proper investment of public funds. You ask whether a county has statutory authority "to invest in mutual funds that invest in temporary reverse repurchase agreements under the Investment Company Act of 1940 and operate in accordance with regulations promulgated [thereunder]." Upon our review of Iowa Code chapter 12B (1999), we conclude that a county (1) may exchange its idle cash for securities until such time the original holder reacquires them by paying the county a higher price; (2) may not exchange its securities for cash and later reacquire them for a higher price; and -- in answer to your specific question -- (3) may invest in a money market mutual fund that has the ability to exchange its securities for cash and later reacquire them for a higher price.

#### I.

Chapter 12B is entitled Security of the Revenue. Section 12B.10 -- formerly Iowa Code section 452.10 (1991) -- specifies the boundaries for the investment of public funds. See generally 1992 Op. Att'y Gen. 86, 88; 1988 Op. Att'y Gen. 87, 88.

Section 12B.10(1) grants county treasurers the power to place "any public funds not currently needed" in authorized investments. See Iowa Code § 12C.1(1); 1992 Op. Att'y Gen. 86, 88 (county treasurer "is vested with exclusive investment authority for idle county public funds"). See generally Iowa Code § 12.62 (state treasurer has the responsibility to adopt rules for

providing technical information and assistance on the investment of public funds and provide such information and assistance to counties upon request, “including but not limited to technical information regarding the statutory requirements for [their] investments [in order that they may] invest funds in accordance with state law”). Regarding that power, section 12B.10(2) requires county treasurers to “exercise the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use” in making investments and provides a priority of primary goals of investment prudence: the first being “[s]afety of principal,” the second being “[m]aintaining the necessary liquidity to match expected liabilities,” the third being “[o]btaining a reasonable rate of return.”

Chapter 12B, in two provisions, also restricts counties from making certain investments. Section 12B.10(3) prohibits counties from trading securities “in which any public funds are invested for the purpose of speculation and the realization of short-term trading profits.” Section 12B.10(5) sets forth a laundry list of permissible and impermissible investments, even though it specifies that county treasurers “shall purchase and invest only in the following” investments:

- (a). Obligations of the United States government, its agencies and instrumentalities.
- (b). Certificates of deposit . . . at [approved] federally insured depository institutions . . . .
- (c). Prime bankers’ acceptances [meeting certain requirements] . . . .
- (d). Commercial paper or other short-term corporate debt [meeting certain requirements] . . . .
- (e). Repurchase agreements whose underlying collateral consists of the investments set out in paragraph (a) if the [county] takes delivery of the collateral either directly or through an authorized custodian. Repurchase agreements do not include reverse repurchase agreements.
- (f). An open-end management investment company registered with the federal securities and exchange commission under the federal Investment Company Act of 1940, [ch. 686, 54 Stat. 789, codified as amended at] 15 U.S.C. §§ 80(a), and operated in accordance with [federal regulations codified at 17 C.F.R. § 270.2a-7].



(g). A joint investment trust [meeting certain requirements]

(h). Warrants or improvement certificates of a levee or drainage district.

Futures and option contracts are not permissible investments.

(emphasis added). See generally Iowa Code § 4.1(30)(a) (if undefined, “shall” in statutes imposes a duty).

## II.

In essence, you have asked whether counties have authorization under chapter 12B to invest in mutual funds that, in turn, invest in temporary “reverse repurchase agreements.” Before answering your question, we need to define these agreements and explain their role in financial markets. “To people who come upon [repurchase and reverse repurchase agreements] for the first time, they are the most confusing of all money market transactions.” M. Stigum, The Money Market 312 (1978). They are “a very important, but often poorly understood, money market instrument.” Handbook of Fixed Income Securities 238 (F. Fabozzi, ed., 1991).

### (A)

Section 12B.10(5) provides counties with a list of authorized and unauthorized investments for their idle cash. See generally 1994 Op. Att’y Gen. 72, 74. Section 12B.10(5)(e) authorizes investment in repurchase agreements meeting certain requirements, but specifically excludes reverse repurchase agreements from the scope of the phrase “repurchase agreements.” Section 12B.10(5)(e) thus prohibits investment in reverse repurchase agreements.

Chapter 12B does not, however, define either “repurchase agreement” or “reverse repurchase agreement.” Our review of several lines of authority provides some insight into the legislative intent underlying these financial phrases. See, e.g., 11 U.S.C. § 101(41); Cal. Gov’t Code § 16480.4 (1989); In re Bevill, Bresler & Schulman Asset Management Corp., 878 F.2d 742, 745-46 (3<sup>rd</sup> Cir. 1989); In re Comark, 124 B.R. 806, 809 nn. 4-6 (C.D. Cal. 1991); State v. Gaul, 691 N.E.2d 760, 762-63 (Ohio Ct. App. 1997); 1981 Conn. Op. Att’y Gen. (March 17, 1981); 1982 Ky. Op. Att’y Gen. 2-236 (# 82-209); 1989 Miss. Op. Att’y Gen. (June 13, 1989); 1989 Miss. Op. Att’y Gen. (February 8, 1989); 22 Okla. Op. Att’y Gen. 81 (1990); J. Downes & J. Goodman, Dictionary of Finance and Investment Terms 336-37 (1985); Government Accounting Standards Board, Statement No. 3: Deposits with Financial Institutions, Investments (including Repurchase Agreements), and Reverse Repurchase Agreements 9 (1986); E. Guttman, Modern Securities Transfers § 5.03[3][a] (1987); Handbook of Fixed Income Securities ch. 12 (F.

Fabozzi, ed., 1991); G. Miller, Investing Public Funds 100, 104 (1986); M. Stigum, After the Trade chs. 2, 13 (1988); M. Stigum, The Money Market 44-46, 575-82 (1989); Kolar, "Hammersmith Meets Orange County: "Wishing Upon a Star" with Taxpayer Money in the Municipal Bond Derivative Market," 49 Wash. U. J. Urb. & Contemp. L. 315, 318 n. 20 (1996); Schroeder, "Repo Madness: The Characterization of Repurchase Agreements Under the Bankruptcy Code and the U.C.C.," 46 Syracuse L. Rev. 999, 999-1004 (1996).

In industry practice, a standard repurchase agreement -- known as a repo, RP, or buyback -- describes a transaction from the perspective of a holder or dealer of securities, who, in return for cash, transfers them to a party and simultaneously promises to reacquire them (or their equivalent) at a higher price in the future. The higher price effectively incorporates a rate of interest calculated with reference to prevailing market rates for that period of time between the transfer of the securities and their reacquisition. In industry practice, a standard reverse repurchase agreement -- known as a reverse repo -- represents a mirror image of a repurchase agreement: it describes the same transaction from the perspective of the party who, in providing cash to the holder of the securities, later receives a higher price for them upon their reacquisition by the holder.

"[A] repurchase agreement and a reverse repurchase agreement are identical transactions. [If someone] is seeking cash, he is involved in a repurchase agreement. Conversely, if he is seeking securities in exchange for cash, he is involved in a reverse transaction." Schatz, "The Characterization of Repurchase Agreements in the Context of Federal Securities Laws," 61 St. John's L. Rev. 290, 295 n. 20 (1987) (citations omitted). Accord M. Stigum, The Money Market 35 (1978). Thus, a repurchase agreement and a reverse repurchase agreement -- an "unnecessary" and "sometimes confusing" phrase, S.E.C. v. Miller, 495 F.Supp. 465, 471-72 n. 37 (S.D.N.Y. 1980) -- simply represent different sides of the same coin.

Accepted industry practice, however, may cause some confusion whenever such a cash-for-securities agreement involves a governmental entity as one of its parties: the definitions reverse. Thus, what private parties would call a "repurchase agreement" governmental entities would call a "reverse repurchase agreement," and what private parties would call a "reverse repurchase agreement" governmental entities would call a "repurchase agreement."

As the Oklahoma Attorney General concluded in an opinion involving that state's law, 22 Okla. Op. Att'y Gen. 81 (1990), we conclude that the General Assembly intended these "reversed definitions" to apply to section 12B.10(5)(e). See generally Iowa Code § 4.1(30) (words and phrases shall be construed according to context and approved English usage, but technical words and phrases shall be construed according to their peculiar and appropriate meaning). In other words, "repurchase agreement" in section 12B.10(5)(e) actually means a "reverse repurchase agreement" as private parties in the financial world would term it. A county thus has authority under section 12B.10(5)(e) to transfer its idle cash to a holder of securities, receive those securities as collateral for the cash, and receive a higher price for them upon their delivery back to

the holder; conversely, a county does not have authority under section 12B.10(5)(e) to exchange its securities for cash and later reacquire them (or their equivalent) for a higher price.

Apart from aligning with industry practice, this interpretation precisely aligns with the phrasing of section 12B.10(5)(e) in its entirety. Section 12B.10(5)(e) permits investment in a "repurchase agreement" only "if the [county] takes delivery of the collateral either directly or through an authorized custodian." (emphasis added). This requirement necessarily contemplates that the county holds idle cash and will take delivery of securities -- the collateral -- held by another party in return for that cash.

This interpretation of section 12B.10(5)(e) also aligns with section 12B.10(5) in its entirety. Section 12B.10(5) provides a county with a number of authorized investments in which to put idle cash; it does not provide a county with any means to obtain cash. A county seeking a place to invest its idle cash for the short-term will, in exchange for securities as collateral, provide that cash to their holder and reacquire them after a period of time at a higher price. Indeed, we understand that counties frequently participate in this type of transaction. See S.E.C. v. Miller, 495 F.Supp. at 471 ("[a]mong the important lenders in the repo market are large corporations and state and local governments"); M. Stigum, The Money Market 316 (1978).

Various authorities have differed on the proper characterization of repurchase agreements and reverse repurchase agreements; for example, some view them as sales and purchases of securities, others view them as secured debts. See generally S.E.C. v. Miller, 495 F.Supp. at 467 n. 2; Schatz, supra, 61 St. John's L. Rev. at 290-305, 310; Schroeder, supra, 46 Syracuse L. Rev. at 999-1004. Whatever their proper label, they rest upon sound economics: the Federal Reserve Board's Open Market Committee frequently uses them to regulate the amount of money in circulation, and they constitute one of the largest sectors of the U.S. money market. "The word 'repo' may not exactly be a household term, but repo trading is one of the largest markets in the United States, with daily volume of over \$600 billion," and may constitute "the single most important short-term credit (debt) market in the U.S." Schroeder, supra, 46 Syracuse L. Rev. at 1002, 1045 (footnote omitted). See M. Stigum, The Money Market 34, 316 (1978).

These financial instruments can provide a substantial benefit to each party to the agreement. See In re Bevill, Bresler & Schulman Asset Management Corp., 878 F.2d at 745-46. A holder of securities -- without needing to liquidate them before maturity -- can obtain short-term cash in order to, for example, cover shortfalls in cash accounts. A holder of large amounts of idle cash -- often an institutional investor or governmental entity -- has access to an instrument with an easily tailored maturity date in which to invest that cash for short periods of time, sometimes overnight, at an attractive rate of interest.

The exchange of idle cash for securities and a higher rate of return constitutes a relatively safe investment that serves a useful purpose in an organization's cash management. See Schatz, supra, 61 St. John's L. Rev. at 294 n. 18, 297 n. 35 (repurchase agreements carry risks inherent

in the trading of securities; the dealer may prove uncreditworthy and default on the obligation to repurchase; yet risk of default remains low, because the U.S. government guarantees the underlying collateral). If, however, governmental entities enter into these types of instruments for the purpose of leveraging their assets, they assume a very high degree of risk -- a lesson learned by Orange County, California, in late 1994 when its treasurer lost \$1.7 billion of a \$7.5 billion investment pool and bankrupted the county. See Bronfman & Ferguson, "Don't Ask, Don't Tell and Other Contracting Considerations," 21 J. Corp. L. 155, 161-62 (1995); Kolar, *supra*, 49 Wash. U. J. Urb. & Contemp. L. at 315-18, 332; Note, "State and Local Governmental Entities: In Search of . . . Statutory Authority to Enter into Interest Rate Swap Agreements," 63 Fordham L. Rev. 2177, 2211-16 (1995); Note, "Regulating Risk in Financial Markets: Private Insurance for Public Funds," 69 S. Cal. L. Rev. 1163, 1163, 1177 n. 69 (1996); see also *S.E.C. v. Miller*, 495 F.Supp. at 472-73.

(B)

Section 12B.10(5)(f) effectively authorizes investment in "money market mutual funds" (or more simply, "money market funds"). See generally 15 U.S.C. § 80a-1 *et seq.*; 17 C.F.R. § 270.2a-7. Apart from its referral to federal law, section 12B.10(5)(f) does not otherwise define or describe this type of fund, which Congress has recognized as having "a peculiar role in the national economy." *Comptroller of the Currency v. First United Bank & Trust*, 578 A.2d 192, 197 (Md. Ct. App. 1990). In common parlance, however,

[m]oney market mutual funds are . . . designed to return a market rate of interest, while maintaining a stable value, normally of \$1 per share. Such funds invest in short-term debt instruments such as government securities, commercial paper, and large denomination bank certificates of deposits. The Investment Company Act of 1940 and the rules promulgated under it closely regulate money market mutual funds. . . . Tight governmental regulation and careful analysis by rating organizations provide substantial security in obtaining interest and repayment of principal. Of course, the funds cannot guarantee that the net asset value will remain stable at \$1, but deviations from this norm are rare.

Just as stability of the fund's net asset value cannot be absolutely guaranteed, all fixed-income securities are subject to price fluctuations based on interest rate movements, maturity, liquidity, and the supply and demand for each type of security. This is true of underlying obligations issued or backed by the federal government, as well as privately issued securities. . . . State funds will [thus] be vulnerable to interest-rate fluctuations both if the State invests in securities directly or if the State invests in mutual

funds. Because of the diversification and active management designed to achieve stability of a money market fund, the interim risks are probably less than those of investing in individual, underlying securities.

[T]hese investments involve minimal risk. The Investment Company Act requires that such funds only invest in stable securities that have received high stability ratings by nationally recognized statistical ranking organizations. Therefore, while not risk-free, these investments are exceptionally secure.

1996 Ind. Op. Att’y Gen. 3 (footnotes omitted). See 1988 Op. Att’y Gen. 87, 88; 1980 Tenn. Op. Att’y Gen. 80-208; Dictionary of Banking and Finance 335 (1982).

As indicated, money market mutual funds invest in short-term debt instruments such as government securities, commercial paper, and large denomination bank certificates of deposits. More important to your question, they also participate in repurchase agreements. J. Downes & J. Goodman, Dictionary of Finance and Investment Terms 235 (1985); see Schroeder, supra, 46 Syracuse L. Rev. at 1026 n. 107 (mutual funds constitute “significant class of repo participants”). Administrative regulations expressly mention the use of such agreements. See 17 C.F.R. §§ 270.2a-7(a)(5), 270.2a-7(c)(4)(ii)(A). In contrast, we have discovered no federal law permitting money market mutual funds to participate in reverse repurchase agreements.

(C)

We have concluded that section 12B.10(5)(e) does not authorize counties to exchange their securities for cash and later reacquire them for a higher price. Given the semantic morass surrounding “repurchase agreement” and “reverse repurchase agreement,” we interpret your question as asking whether section 12B.10(5)(f) authorizes counties to invest in a money market mutual fund that, in turn, has the ability to exchange its securities for cash and later reacquire them for a higher price: Can counties do indirectly what they cannot do directly?

In the abstract, the law generally prohibits governmental entities from doing so. See, e.g., Schwarzkopf v. Sac County Supervisors, 341 N.W.2d 1, 5 (Iowa 1983); Independent School Dist. v. City of Burlington, 60 Iowa 500, 15 N.W. 295, 297 (1883); 1984 Op. Att’y Gen. 167, 170; 2 Sutherland’s Statutory Construction § 41.11, at 289-90 (1973). That principle, however, simply does not apply in this instance, because section 12B.10(5)(e) does not stand alone: its companion provision, section 12B.10(5)(f), affirmatively authorizes investment in money market mutual funds and, in so doing, imposes no restriction relating to repurchase or reverse repurchase agreements. Thus, counties can invest in any money market mutual fund in compliance with 15

U.S.C. § 80a-1 et seq. and 17 C.F.R. § 270.2a-7, which section 12B.10(5)(f) by its terms incorporates. Section 12B.10(5)(f) expressly authorizes counties to do indirectly what section 12B.10(5)(e) does not authorize them to do directly.

This analysis of section 12B.10(5) receives support from a 1998 opinion by the Maryland Attorney General. That opinion addressed the authority of the state to invest in money market mutual funds that held a substantial amount of commercial paper when a statute severely restricted the amount of commercial paper that the state could directly hold in its investment portfolio. See 1998 Md. Op. Att’y Gen. 002. Noting that the state had an affirmative, unrestricted, statutory authority to invest in money market mutual funds, the opinion concluded that the state could thus invest in such funds regardless of the amount of commercial paper in their portfolios. See id. The unrestricted statutory authority to invest in money market mutual funds -- one of several authorized investments -- was “separate and distinct” from the restricted statutory authority to hold commercial paper. Id. Cf. 1988 Op. Att’y Gen. 87, 89 (a bond and a mutual fund investing in bonds are different investments; statutory authority to invest in former thus does not include authority to invest in latter). The opinion emphasized that principles of statutory construction usually forbid engrafting a restriction onto a statute that sets forth a power. See 1998 Md. Op. Att’y Gen. 002.

Such analysis would apply to sections 12B.10(5)(e) and 12B.10(5)(f). Both represent separate and distinct types of investments. Had the General Assembly actually intended to restrict investment in money market mutual funds to those lacking the ability to exchange their short-term cash for securities and receive a higher price for those securities upon their reacquisition by the initial holder, it could have expressly imposed this restriction in section 12B.10(5).

We must examine statutes as the General Assembly drafted them; we may not add words or phrases under the guise of statutory construction; we may not insert restrictions into grants of power. See Iowa R. App. P. 14(f)(13); Wyciskalla v. Iowa Dist Ct., 588 N.W.2d 403, 406 (Iowa 1998); State v. Byers, 456 N.W.2d 917, 919 (Iowa 1990); Clarion Ready Mix Concrete Co. v. Iowa St. Tax Comm’n, 252 Iowa 500, 107 N.W.2d 553, 559 (1961); Iowa Power & Light Co. v. Hicks, 228 Iowa 1085, 292 N.W. 826, 828 (1940). When a statute contains unambiguous language, we have no reason to resort to principles of statutory construction. See Iowa Dep’t of Transp. v. Iowa Dist. Ct., 588 N.W.2d 102, 103 (Iowa 1998). “Unambiguous” means that “reasonable minds [cannot] disagree or be uncertain as to [the] meaning [of the language].” State v. Schlemme, 301 N.W.2d 721, 723 (Iowa 1981). We believe that section 12B.10(5) falls within that definition for purposes of your question.

### III.

In summary: Under Iowa Code section 12B.10(5) (1999), a county (1) may exchange its idle cash for securities until such time the original holder reacquires them by paying the county a higher price; (2) may not exchange its securities for cash and later reacquire them for a higher

Mr. John P. Sarcone  
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price; and (3) may invest in a money market mutual fund that has the ability to exchange its securities for cash and later reacquire them for a higher price.

Sincerely,

A handwritten signature in black ink that reads "Bruce Kempkes". The signature is written in a cursive style with a large, looping initial "B".

Bruce Kempkes  
Assistant Attorney General





CITIES; COUNTIES: Iowa Code §§ 384.37, 384.38, 384.45 (1999). Cities may specially assess county property under chapter 384 for the cost of public improvements. (Kempkes to Whitacre, Mills County Attorney, 8-10-00) #00-8-4

August 10, 2000

Mr. C. Kenneth Whitacre  
Mills County Attorney  
Courthouse  
418 Sharp St.  
Glenwood, IA 51534

Dear Mr. Whitacre:

You have requested an opinion on the financing of public improvements by special assessments, which generally do not constitute ordinary taxes, but instead represent payments for benefits specially conferred upon property. See Newman v. City of Indianola, 232 N.W.2d 568, 573-74 (Iowa 1975); Sioux City v. Sioux City Indep. School Dist., 55 Iowa 150, 7 N.W. 488, 489-90 (1880); Hayes, "Special Assessments for Public Improvements in Iowa, Part I," 13 Drake L. Rev. 3, 4-5 (1962). In Iowa Code chapter 384 (1999), the General Assembly delegated to cities the authority to assess property for the making of certain public improvements. You ask whether this authority encompasses property owned by counties. We conclude that it does.

#### I.

Chapter 384 is entitled City Finance. In its division entitled Special Assessments, chapter 384 authorizes a city to establish districts in which it proposes to make certain public improvements. See Iowa Code § 384.45. Chapter 384 authorizes a city to assess against the state the cost of a public improvement adjacent to, extending through, or abutting upon state lands. See Iowa Code § 384.56; see also Iowa Code § 307.45. Section 384.38(1) specifically authorizes a city to assess to "private property within the city" the cost of construction and repair of the improvements. Under section 384.37(15), the phrase "private property" means "all property within the district, except streets."

Chapter 427 is entitled Property Exempt and Taxable. Among other things, it provides that the "property of a county" devoted to a public use "shall not be taxed." See Iowa Code § 427.1(2).

## II.

The law of special assessments varies greatly from jurisdiction to jurisdiction. Annot., "Widening Street -- Special Assessment," 46 A.L.R.3d 127, 129 (1972). What property is subject to assessment and what property is exempt depends upon the specific language of state constitutional provisions or legislative enactments.

States have not uniformly provided cities with statutory authority to assess county property for the cost of public improvements. 14 E. McQuillin, The Law of Municipal Corporations § 38.73, at 258, § 38.74, at 264 (1998); 70A Am. Jur. 2d Special or Local Assessments § 60, at 1179, § 64, at 1182 (1987). In Iowa, however, it appears that cities have long had this authority.

In Edwards & Walsh Construction Co. v. Jasper County, 117 Iowa 365, 90 N.W. 1006 (1902), a city assessed the county courthouse for the cost of improvements to the surrounding streets. The county objected on the ground that the precursor to chapter 384, which generally permitted assessments against "lots or land," did not specifically authorize the city to assess county property. Id. at 1008. On appeal, however, the Supreme Court of Iowa accepted the counter-argument that assessment of "all kinds of property is specifically authorized [by the broad terms of the statute]." Id. The court also contrasted the lack of a specific exemption for county property for purposes of assessment with the specific exemption for county property for purposes of taxes and concluded that this difference in treatment amounted to "strong evidence" of a legislative intent against exempting any county property from assessment. Id. at 1012. Last, the court noted that "[t]here is no reason why [a] county . . . should not pay for the benefits received by it the same as any other property owner." Id. at 1011.

Later, the court upheld an assessment against county property, see Madison County v. City of Winterset, 164 Iowa 223, 145 N.W. 492, 493 (1914), and this office summarily concluded that cities had statutory authority to do so, see 1920 Op. Att'y Gen. 369, 369. More recently, one commentator has cited Edwards & Walsh Construction Co. v. Jasper County and Madison County v. City of Winterset in support of the proposition that "county-owned property is . . . subject to special assessment." Hayes, "Special Assessments for Public Improvements in Iowa, Part III," 14 Drake L. Rev. 3, 13 (1964). Cf. Sioux City v. Sioux City Indep. School Dist., 7 N.W. at 489-90 (upholding assessment against school district); 1909 Op. Att'y Gen. 295, 295-96.

We believe that chapter 384 continues to authorize assessments against county property for the cost of public improvements. Chapter 384 permits cities to assess "private property" located within their boundaries. See Iowa Code § 384.38(1). Although the phrase "private property" normally excludes public property, Black's Law Dictionary 1195 (1990), section 384.37(15) specially defines it to encompass "all property within the district, except streets." (emphasis added). We cannot ignore this statutory definition, because the General Assembly may serve as its own lexicographer. See Seeman v. Iowa Dep't of Human Servs., 604 N.W.2d 53, 57 (Iowa 1999). Statutory definitions are "not for us to question." Id. Commonly understood, the

Mr. C. Kenneth Whitacre

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adjective "all" admits of no exception. Walters v. Bartel, 254 N.W.2d 321, 322 (Iowa 1977); Consolidated Freightways Corp. v. Nicholas, 258 Iowa 115, 137 N.W.2d 900, 904 (1965); Cedar Rapids Community School Dist. v. City of Cedar Rapids, 252 Iowa 205, 106 N.W.2d 655, 659 (1960). See generally Iowa Code §§ 4.1, 4.1(38). Accordingly, "all property" includes county property.

We also cannot ignore the effect of an express statutory exemption. "All property covered by the general terms of [a] statute, and not specifically exempted, is subject to assessment for local improvement." 14 McQuillin, supra, § 38.30, at 135 (emphasis added). Section 384.37(15) only exempts streets from assessment. Chapter 384 contains no exemption for county property of any type, in contrast to chapter 427, which exempts certain county property from taxes. Had the General Assembly thus intended to exempt county property from assessment, it clearly knew how to do so in express language. See Iowa R. App. P. 14(f)(13). Indeed, according to Edwards & Walsh Construction Co. v. Jasper County, the General Assembly's provision of an express exemption for county property in chapter 427 precludes any implied exemption for county property in chapter 384. 90 N.W. at 1012.

### III.

In summary: Pursuant to Iowa Code chapter 384 (1999), cities may specially assess county property for the cost of public improvements.

Sincerely,



Bruce Kempkes  
Assistant Attorney General



CONSTITUTIONAL LAW; EQUAL PROTECTION; ELECTIONS; STATE FAIR BOARD;  
STATE OFFICERS AND DEPARTMENTS: Selection of State Fair Board District Directors,  
Apportionment of State Fair Board Districts – Iowa Code §§ 173.1, 173.2 (1999). The selection  
of district directors to serve on the State Fair Board is not subject to the constitutional principle  
of one person, one vote because the district directors are not popularly elected. Consequently,  
proportionate representation is not necessary when apportioning the districts from which the  
State Fair Board’s directors are chosen. (Lundquist to Brauns, State Representative, 8-31-00)  
#00-8-7

August 31, 2000

Hon. Barry Brauns  
State Representative  
2264 Ridgeview Drive  
Muscatine, IA 52761

Dear Representative Brauns:

This letter is in response to your request for an Attorney General’s opinion as to “whether proportionate representation is necessary for allocating state fair board districts.” The resolution of your inquiry is dependent upon answering whether the constitutional principle of “one person, one vote” is applicable to the selection of district directors to serve on the Iowa State Fair Board. The current statutorily mandated selection process does not provide for the popular election of the State Fair Board’s district directors by the public at large. Accordingly, membership on the State Fair Board is not subject to the one person, one vote principle and proportionate representation is not necessary when apportioning the districts from which the State Fair Board’s directors are to be chosen.

Having first established the “one person, one vote” principle in Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed.2d 506 (1964), the United States Supreme Court, has subsequently declared that:

whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election.

Polk County Board of Supervisors v. Polk Commonwealth Charter Commission, 522 N.W.2d 783, 788 (Iowa 1994) (quoting Hadley v. Junior College Dist., 397 U.S. 50, 56, 90 S. Ct. 791, 795, 25 L. Ed.2d 45, 50-51 (1970)). The goal of the one person, one vote principle is to ensure that the votes of all individuals who participate in the election of bodies that perform governmental functions carry equal weight and significance. Polk County Supervisors, 522

N.W.2d at 788 (citing Reynolds v. Sims, 377 U.S. 533, 562-63, 84 S. Ct. 1362, 1382, 12 L. Ed.2d 506, 527-28 (1964)).

In evaluating the applicability of the one person, one vote principle to the selection of a particular body's members, a threshold determination must be made as to whether that body performs governmental functions. Polk County Supervisors, 522 N.W.2d at 788. The Iowa State Fair authority is a public instrumentality of the State of Iowa, but is not considered a state agency except for specifically enumerated purposes. Iowa Code § 173.1 (1999). The powers of the Iowa State Fair authority are vested in the Iowa State Fair Board. Id. The State Fair Board is charged by statute with exercising "custody and control of the state fairgrounds." Iowa Code § 173.14. The Board's authorized activities include:

1. Holding an annual fair and exposition on the state fairgrounds.
2. Preparing premium lists and establishing rules of exhibitors for the state fair.
3. Granting permission to persons to sell items on the state fairgrounds.
4. Appointing security personnel and peace officers to patrol the state fairgrounds.
5. Erecting and repairing buildings on the state fairgrounds.
6. Granting permission to persons to use the state fairgrounds when the state fair is not in progress.
7. Taking, acquiring, holding, and disposing of property by deed, gift, devise, bequest, lease, or eminent domain.
8. Soliciting and accepting contributions from private sources for the purpose of financing and supporting the state fair.

See generally Iowa Code § 173.14. The corporate powers with which the Iowa General Assembly has vested the State Fair Board includes the authority to:

1. Issue negotiable bonds and notes.
2. Sue and be sued in its own name.
3. Have and alter a corporate seal.
4. Make and alter bylaws for its management.
5. Make and execute agreements, contracts, and other instruments, with any public or private entity.
6. Accept appropriations, gifts, grants, loans, or other aid from public or private entities.
7. Make, alter, and repeal rules.

See Iowa Code § 173.14A; see also Iowa Code § 173.14B (authorizing the State Fair Board to issue bonds subject to legislative approval); Iowa Code § 173.16 (authorizing the State Fair

Board to request special capital improvement appropriations from the State of Iowa, emergency funding from the executive council for natural disasters, and maintenance services from the department of transportation); Iowa Code § 173.24 (exempting the State Fair Board from the state system of uniform purchasing procedures and authorizing the Board to develop its own purchasing system).

The State Fair Board has the authority to regulate access to the fairgrounds, collect admissions, charge rent, enter contracts, purchase property, hire employees, and pass rules relating to the use of the grounds. The State Fair Board may retain the revenue generated from its management of the state fairgrounds to use as the Board deems necessary for the maintenance and improvement of the fairgrounds. See Iowa Code §§173.14(1), 173.16. The vast powers delegated by the Iowa General Assembly to the State Fair Board over the administration and governance of the state fairgrounds establishes the Board as the fairgrounds' defacto governing body. Unlike the Mayor's Commission in Polk County Board of Supervisors v. Polk Commonwealth Charter Commission that was only intended to serve an advisory role and could exercise no meaningful power over the legislative and executive functions of Polk County, the State Fair Board exercises sufficient substantive governmental functions to meet the threshold query for applying the one person, one vote principle to the selection of the Board's members. Compare Polk County Supervisors, 522 N.W.2d 783, 789-90 (describing the Mayors Council's "quiddity" as "advisory") with Board of Estimate of City of New York v. Morris, 489 U.S. 688, 694-96, 109 S. Ct. 1433, 1438-39, 103 L. Ed.2d 717, 728-29 (1989) (finding that N.Y. Board exercised a "significant range of functions common to municipal government") and Hadley, 397 U.S. at 53-54, 90 S. Ct. at 794, 25 L. Ed.2d at 49) (finding that junior college trustees exercised governmental functions of "sufficient impact" to apply one person, one vote).

Having met the threshold requirement, further analysis is necessary to determine if the State Fair Board qualifies for an exception to the one person, one vote rule. The one person, one vote principle is not applicable to the selection of any body exercising governmental functions if either of two circumstances exists. First, the principle does not apply to those governmental bodies whose members are appointed and not popularly elected. Polk County Supervisors, 522 N.W.2d at 788; see also Hadley, 397 U.S. at 54-56, 90 S. Ct. at 794-95, 25 L. Ed.2d at 49-51 (expressing necessity that officials be elected by "popular vote" before applying one person, one vote). Second, the principle is not applicable to those governmental entities that exercise only narrow, limited governmental powers and their activities disproportionately affect a specific group of individuals. Polk County Supervisors, 522 N.W.2d at 788 (citing Ball v. James, 451 U.S. 355, 364, 101 S. Ct. 1811, 1817-18, 68 L. Ed.2d 150, 158-59 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728, 93 S. Ct. 1224, 1229, 35 L. Ed.2d 659, 666 (1973); Hadley, 397 U.S. at 56, 90 S. Ct. at 795, 25 L. Ed.2d at 51; Cunningham v. Municipality of Metro. Seattle, 751 F. Supp. 885, 890-91 (W.D. Wash. 1990)).

Membership on the Iowa State Fair Board is statutorily defined. The governor of the state, the secretary of agriculture, and the president of Iowa State University or their qualified representatives shall serve on the board. Iowa Code § 173.1(1). Two directors from each federal congressional district are elected to serve on the State Fair Board by a statewide convention of delegates appointed from each Iowa county. Iowa Code § 173.1(2). Lastly, a treasurer and a secretary selected by the Board shall serve as nonvoting members. Iowa Code §§ 173.1(4), 173.1(5).

The Iowa General Assembly has in effect delegated its authority to appoint the State Fair Board's district directors to a convention of county delegates. Under the current statutory scheme, the convention which selects the State Fair Board directors from the five federal congressional districts is composed of:

1. The members of the state fair board as then organized.
2. The president or secretary of each county or district agricultural society entitled to receive aid from the state, or a regularly elected delegate therefrom accredited in writing, who shall be a resident of the county.
3. One delegate, a resident of the county, to be appointed by the board of supervisors in each county where there is no such society, or when such society fails to report to the association of Iowa fairs in the manner provided by law as a basis for state aid.

Iowa Code § 173.2. The Legislature may properly delegate to county fair boards and agricultural societies the power to participate in the appointment of State Fair Board directors. See 1977 Op. Att'y Gen. 65 (#77-2-16). The statute provides, however, that delegates to the selection convention are only eligible to vote for the district directors from their own congressional district. Iowa Code § 173.4(2).

Neither the State Fair Board district directors nor the selection convention delegates are named through a general plebiscite of the eligible voters of the respective congressional districts. Consequently, for purposes of applying the one person, one vote principle to the selection of the district directors, the State Fair Board is properly considered an appointed and not an elected governing entity. See Sailors v. Board of Education of the County of Kent, 387 U.S. 105, 109-111, 87 S. Ct. 1549, 1553, 18 L. Ed.2d 650, 654-55 (1967) (finding that county school boards elected by delegates appointed by local school boards were appointed governmental bodies); MacKenzie v. Travia, 286 N.Y.S.2d 965 (1968) (finding that the N.Y. Board of Regents, whose selection was delegated to a joint session of the legislature, was not an elected body). The principle of one person, one vote is not applicable to the selection of the State Fair Board's district directors so long as those directors are selected through a process other than a popular vote of each respective district's eligible voters.



Although the means through which the State Fair Board's district directors are appointed is dispositive of the question as to whether the one person, one vote principle is applicable, the State Fair Board arguably performs such a limited special function that the one person, one vote principal would not apply regardless of how the board members were selected. Entities that perform limited special governmental functions that disproportionately affect specific groups are exempt from the rule of one person, one vote. See, e.g., Ball v. James, 451 U.S. 355, 101 S. Ct. 1811, 68 L. Ed.2d 150 (1981) (holding that agricultural and power district was special purpose entity exempt from one person, one vote); Salyer Land Co. v. Tulare Water District, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed.2d 659 (1973) (holding that water district was special purpose entity exempt from one person, one vote); Plowman v. Massad, 61 F.3d 796 (10th Cir. 1995) (holding that dentistry board was special purpose entity exempt from one person, one vote); Goldstein v. Mitchell, 494 N.E.2d 914 (Ill. Ct. App. 1986) (holding that drainage district was limited purpose body exempt from one person, one vote); but see Board of Estimate, 489 U.S. at 696, 109 S. Ct. at 1439, 103 L. Ed.2d at 728-29 (finding that a city management board had sufficiently general governmental functions to impact citizens throughout the entire city, thus requiring one person, one vote); Hadley, 397 U.S. at 56, 90 S. Ct. at 795, 25 L. Ed.2d at 51 (finding that elected educational trustees perform vital governmental functions affecting all citizens, thus requiring one person, one vote).

The State Fair Board is responsible for discharging numerous governmental functions, but the Board's broad authority is directed toward performing the special limited purpose of organizing and promoting an annual fair and other activities on the state fairgrounds. See Iowa Code § 173.1 ("The [Iowa State Fair] authority is established to conduct an annual state fair and exposition on the Iowa state fairgrounds and to conduct other interim events consistent with its rules."). The activities of the State Fair Board disproportionately affect those persons who participate in the annual state fair and other interim events on the state fairgrounds. Persons who attend events on the state fairgrounds would presumably have a much greater interest in the operations of the State Fair Board than those persons who do not visit the fairgrounds. Each individual county fair or agricultural society that participates in the director selection convention, however, would have a substantially identical interest in the State Fair Board's establishment of rules and premiums for competitions and exhibits, among other Board activities, regardless of their respective county's population. See 371 IAC 6.1 (authorizing creation of competitive exhibits and competitions). Thus, the limited scope of the State Fair Board's purpose and the disproportionate affect the Board's activities has on identifiable groups, are additional grounds for excluding the selection of the State Fair Board from the requirements of one person, one vote.

The State Fair Board, not being a popularly elected body, is not subject to the one person, one vote principle. The State Fair Board's narrow purpose and disproportionate impact on specific groups also limits the applicability of the one person, one vote principle to the selection

Hon. Barry Brauns  
Page 6

of the Board's district directors. The State Fair Board district directors may be selected from districts of disproportionate population.

Sincerely,

A handwritten signature in black ink, appearing to read "John R. Lundquist". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

JOHN R. LUNDQUIST  
Assistant Attorney General

INCOMPATIBILITY: Natural Resources Commission; County Conservation Board. Iowa Code ch. 350; 455A; 456A; 461A; Iowa Code §§ 350.2, 350.4, 350.7, 350.11; 455A.5, 455A.19; 456A.19; 461A.32, 461A.79. The common law doctrine of incompatibility of office does not prohibit dual appointment to the Natural Resources Commission and to a county conservation board. Iowa Code section 455A.5(1) does not authorize a member of the NRC to serve on a county conservation board, but supports the conclusion that the common law doctrine of incompatibility does not prohibit these dual appointments. A person who is appointed to both public offices should be careful to avoid the conflicts of interest that will likely arise. (Pottorff to Black, State Senator, 9-15-00) #00-9-1

September 15, 2000

The Honorable Dennis H. Black  
State Senator  
5239 E. 156 Street S.  
Grinnell, Iowa 50112

Dear Senator Black:

You have requested an opinion on whether a person can serve as a member of the Iowa Natural Resources Commission (NRC) and, at the same time, serve as a member of a county conservation board. We conclude that incompatibility does not prohibit dual appointments, but caution against dual appointments that will likely confront a person repeatedly with conflicts of interest.

The common law prohibits a person from occupying incompatible public offices. State ex rel. LeBuhn v. White, 257 Iowa 606, 608, 133 N.W.2d 903, 904 (1965).  
Incompatibility

is not concerned with how a person performs in office or how a person executes the duties of the office. The doctrine of incompatibility is concerned with the duties of an office apart from any particular office holder. Consequently, the question of incompatibility can be resolved by comparing the respective duties of the two offices in question and examining how the duties relate. In contrast, when one discusses conflict of interest one must look to how a particular office holder is carrying out his or her official duties in a given fact situation.

1982 Op. Att'y Gen. 220, 221.

To determine whether two offices are incompatible, the courts look to the statutory powers and duties of the offices. If the statutes show a “definite and clear incompatibility exists,” it is “contrary to public policy for one person to hold the offices concurrently.” State ex rel. LeBuhn v. White, 257 Iowa at 611, 133 N.W.2d at 905-06; State ex rel Crawford v. Anderson, 155 Iowa 271, 136 N.W. 128 (Iowa 1912). This can occur, for example, where one office “is subordinate to the other and ‘subject in some degree to its revisory power,’ or where the duties of the two offices ‘are inherently inconsistent and repugnant’.” Id. Iowa at 271, 136 N.W. at 128, *quoting from State v. Bus*, 135 Mo. 325, 36 S.W. 636 (1896). This office narrowly construes the incompatibility doctrine and applies it cautiously to avoid infringing on the interests of those seeking to hold public office and to avoid infringing on the interests of those seeking to have their choice of public officials respected. 1994 Op. Att’y Gen. 35 (#93-9-1(L)); 1994 Op. Att’y Gen. 1 (#93-1-2(L)); 1982 Op. Att’y Gen. 16 (#81-1-8(L)). In keeping with these principles, we will conclude that two offices are incompatible as a matter of law only where definite and clear statutory inconsistencies will arise in performing important statutory functions of the offices.

The doctrine of incompatibility only applies to “public offices” and not mere positions of public employment. 1982 Op. Att’y Gen. at 224. If two public offices are incompatible a person ipso facto - “by the fact itself” - vacates the first public office held upon the acceptance of the second public office. State ex rel. LeBuhn v. White, 257 Iowa at 610-11, 133 N.W.2d at 905-06; 1994 Op. Att’y Gen. 35 (#93-9-1(L)); 1982 Op. Att’y Gen. at 221.

Based on our prior opinions, membership on the NRC and membership on a county conservation board are each “public offices” to which the doctrine of incompatibility applies. We have previously concluded that membership on the former Natural Resources Council, now part of the Environmental Protection Commission, constitutes a public office. See 1960 Op. Att’y Gen. 218 (#59-1-16(L)). Membership on the Natural Resources Commission includes the same attributes of a public office. See 1996 Op. Att’y Gen. 97 (#96-10-2(L)) (elements of public office generally include legislative creation of position; legislative delegation of sovereign power to position; legislative definition of position's duties; performance of duties independent and without control of superior power other than law; permanency and continuity in the position). See generally State v. Spaulding, 102 Iowa 639, 72 N.W. 288, 290 (1897). We have also previously concluded that membership on a county conservation board constitutes a public office. 1992 Op. Att’y Gen. 172, 175; 1970 Op. Att’y Gen. 763, 764. Accordingly, membership on the NRC and membership on a county conservation board are each “public offices.”

In order to determine whether these two public offices are incompatible, we turn to the statutory duties of each position. County conservation boards are created either by passage of the proposition by a majority of the voters, or after January 1, 1989, by statute. Iowa Code §§ 350.2, 350.11 (1999). Members in either case are appointed by the board of supervisors. Iowa Code §§ 350.2, 350.11. The boards so formed

shall have the custody, control and management of all real and personal property heretofore or hereafter acquired by the county for public museums, parks, preserves, parkways, playgrounds, recreation centers, county forests, county wildlife areas, and other county conservation and recreation purposes . . . .

Iowa Code § 350.4. A county conservation board, therefore, has the custody, control, and management of its county's conservation areas and facilities. See Iowa Code § 350.1.

The members of the NRC are appointed by the governor and are vested with authority over proposals for acquisition or disposal of state lands and waters relating to state parks, recreational facilities, and wildlife programs, submitted by the director. Iowa Code §§ 455A.5(1), 455A.5(6). Because the NRC shares conservation goals in common with the county conservation boards, the duties of the NRC members may intersect with the duties of the county conservation board members. The NRC participates in the transfer of state property to the county conservation boards. Iowa Code § 350.4(2). The NRC is also vested with authority over the distribution of grant funds to county conservation boards. Iowa Code §§ 455A.19, 456A.19. In order to determine whether the statutory duties preclude a member of the NRC from serving as a member of a county conservation board as a matter of law, we must examine the duties of each office more closely with respect to these functions.

#### Transfers of Land

An analysis of the respective statutory duties of the NRC and the county conservation boards in transferring public lands reveals related, but not necessarily incompatible, duties. As noted above, the Iowa Supreme Court has found public offices incompatible where one body is subordinate to, or has revisory decision making authority over, another body. In State ex rel. LeBuhn v. White, 257 Iowa at 610-11, 133 N.W.2d at 905-06, the Court concluded that membership on the local school board and on the county board of education were incompatible where the local school board was subordinate to, and subject to the revisory authority of, the county board of education on matters of

curriculum, transportation to school, merger of school districts and adjustment of district boundaries. In these matters, decisions of the local school board were subject to approval of, review by, or appeal to, the county board of education.

Applying the principles articulated in White, we do not believe the statutory duties of the county conservation boards are subordinate to, or subject to the revisory power of, the NRC to a degree which renders the offices incompatible as a matter of law. Upon request of a county conservation board, the NRC may transfer to the board land and buildings owned or controlled by the DNR and not devoted or dedicated to any other inconsistent public use. Iowa Code § 350.4(2). The decision whether to transfer any land and buildings to a county conservation board, however, rests in the discretion of the Executive Council.<sup>1</sup> The NRC may only recommend action to the Executive Council. Iowa Code § 461A.32 ( “Upon request by resolution of any city or county or any legal agency thereof,” the Executive Council “may, upon majority recommendation of the [NRC], convey . . . such public lands under the jurisdiction of the commission as in its judgment may be desirable for city or county parks.”). Accordingly, the board requests and the NRC recommends, but the Executive Council decides, whether a request from a county conservation board for a transfer of land and buildings will be granted. Because decision making rests in a separate agency, we do not consider the roles of the NRC and the county conservation boards in this process to be incompatible.<sup>2</sup>

#### Allocation of Grant Funds

An analysis of the respective statutory duties of the NRC and the county conservation boards in allocation of grant funds similarly reveals related, but not necessarily incompatible, duties. Grant funds are allocated to the county conservation

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<sup>1</sup> The Executive Council is composed of the Governor, the Secretary of State, the Auditor of State, the Treasurer of State and the Secretary of Agriculture. Iowa Code § 7D.1.

<sup>2</sup> The NRC and the county conservation boards have additional duties concerning certain land transactions which do not raise significant incompatibility issues. The NRC may enter into agreements with county conservation boards to share the costs of acquisition projects. Iowa Code § 461A.79. Further, the county conservation boards must file with the NRC “all acquisitions or exchanges of land within one year.” Iowa Code § 350.4(3).

boards in two ways. First, the Department of Natural Resources (DNR) credits money from the Fish and Game Protection Fund to the County Conservation Board Fund to provide grants to county conservation boards to fund projects within the scope of chapter 350. Grant applications are then submitted by the boards to the NRC. Iowa Code § 456A.19. Second, the DNR credits money from the Iowa Resources Enhancement and Protection Fund to County Conservation Account to award competitive grants to the counties. Iowa Code § 455A.19(1)b(3). We consider these grant allocation processes in turn.

The county conservation boards may make grant applications to the NRC under Iowa Code chapter 456A for money from the County Conservation Board Fund. However, making applications for these grants is not a statutory duty of the county conservation boards. Rather, it is a discretionary power that may or may not be exercised by the boards. See Iowa Code §§ 456A.19, 350.4(1)-(10). We cannot conclude that the mere possibility that a discretionary grant application could be made by a county conservation board would, as a matter of law, prohibit someone from serving as a member of that board and the NRC on grounds of incompatibility. We recognize that a grant application from one body to another certainly could create divided loyalties for a person who serves on both bodies. See Wilson v. Iowa City, 165 N.W.2d 813, 819 (1969). This conflict of interest, however, may be resolved by abstention from participation in particular grant applications if the situation actually arises.<sup>3</sup> In this respect, the conflict presented is not unlike the conflict presented when any two public bodies contract with each other. Participation on both sides of the contractual relationship would not render the two public offices incompatible, but could create conflicts of interest.

As an alternative source of grant funds, twenty percent of the money deposited in the Iowa Resources Enhancement and Protection Fund by the Director of the DNR is allocated to the County Conservation Account. Of this twenty percent: thirty percent is allocated to each county equally; thirty percent is allocated to each county on a per capita basis; and forty percent is allocated to an account in the state treasury for the NRC to award to counties by a project selection committee on a competitive grant basis. Iowa Code § 455A.19(1)b(1)-(3). The committee, in turn, is composed of two DNR staff members and two county conservation board directors - all appointed by the Director of

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<sup>3</sup> Rules promulgated by the NRC address conflicts of interest that may arise when projects are submitted to the NRC by a county conservation board. The rules require that an individual with a conflict of interest refrain from participating in discussions and abstain from voting. 571 IAC 33.21.

the DNR - and one person selected by a majority vote of the other appointees. The NRC is directed by statute to establish by rule "procedures for application, review, and selection of county projects submitted for funding."<sup>4</sup> Iowa Code § 455A.19(1)b(3).

The NRC award of competitive grants to the counties under Iowa Code section 455A.19(1)b(3) similarly fails to demonstrate incompatible statutory duties. Awards of grants by the NRC under section 455A.19(3)b(3) are made by a Project Planning and Review Committee. Iowa Code § 455A.19(1)b(3) ("Upon recommendation of the project planning and review committee, the director shall award the grants."). Although the NRC promulgates rules governing the grant procedures, neither members of the NRC nor members of the county conservation boards serve on this committee. The county conservation boards are represented on the Project Planning and Review Committee by county conservation board directors, not members. A county conservation board director is distinguishable from a county conservation board member in that the directors are employed by the boards to carry out board policies. Iowa Code § 350.4(6).

This statutory system for allocation of grants falls short of rendering the public offices incompatible. Although the grant money flows through the NRC to the counties, allocation by the Project Planning and Review Committee insulates the NRC from any incompatible statutory duty. In similar circumstances we have declined to opine that the public offices of state legislator and school board member are incompatible based on legislative control of appropriations to schools, where the funds are actually allocated by a specific formula and the legislature does not "directly control the amount of money allocated to an individual school district." 1994 Op. Att'y Gen. 1(#93-1-2(L)). Further, because the county conservation board directors who serve on the Project Planning and Review Committee are employed by the boards, the directors are "employees" and not "public officials" to which the doctrine of incompatibility applies. See 1982 Op. Att'y Gen. at 224.

Based on our review of the relevant statutes governing transfers of land and allocation of grants, we conclude that the common law doctrine of incompatibility does not prohibit dual appointment to the NRC and to a county conservation board. Two additional

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<sup>4</sup> Rules promulgated by the NRC provide, *inter alia*, for project selection criteria under the competitive grants program. 571 IAC 33.30 et. seq. NRC rules also address procedures for administration of private cost-sharing funds within the Open Spaces Account, the County Conservation Account, and the City Park and Open Spaces Account of the Resource Enhancement and Protection Fund. 571 IAC 33.1 et. seq.



statutory provisions support this conclusion. First, the enabling act for county conservation boards specifically addresses cooperation between the NRC at the state level and the county conservation boards at the local level. “Any county conservation board may cooperate with the federal government or the state government *or any department or agency thereof* to carry out the purposes and provisions of this chapter.” Further, “the *natural resources commission*, county engineer, county agricultural agent, and other county officials shall render assistance which does not interfere with their regular employment.” Iowa Code § 350.7(emphasis added). The legislature, therefore, anticipated that these bodies have a cooperative relationship, rather than a relationship in which the duties are “inherently inconsistent” or “repugnant.” See 1982 Op. Att’y Gen. at 221.

Second, the legislature has expressly addressed the issue whether NRC members may simultaneously serve in other public offices. Under Iowa Code section 455A.5(1) the legislature expressly prohibited NRC members from holding “any other state or federal office,” but failed to expressly prohibit NRC members from holding offices on the county conservation boards. Although this statute does not authorize membership on both bodies by negative implication, it is consistent with our analysis of the common law principles.

We have declined to construe statutes prohibiting dual appointments to public offices as completely superseding the common law, even though incompatibility is a matter which the legislature could address by statute and thereby displace common law principles. State ex rel. LeBuhn v. White, 257 Iowa at 612, 133 N.W.2d at 906 (“The legislature could provide that one person could serve on both boards . . . if it so desires, but in the absence of a statute expressing such intention the common law rule of incompatibility must be applied.”). Rather, we have construed incompatibility statutes as complementing the common law. In 1993 our office declined to construe statutory language prohibiting elected officials, other than statewide elected officials and members of the General Assembly, from holding “more than one elective office at the same level of government at a time” as rendering other offices compatible by negative implication.<sup>5</sup> 1994 Op. Att’y Gen. 35(#93-9-1(L)).

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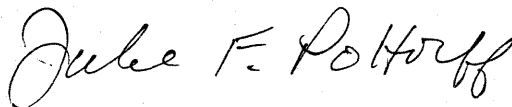
<sup>5</sup> In matters of incompatibility construction of these statutes differs from construction of statutes under general principles of statutory construction. Generally, when examining statutes we, like courts, are guided by the maxim “*expressio unius est exclusio alterius*,” or “expression of one thing is the exclusion of another.” Marcus v. Young, 538 N.W.2d 285, 289 (1995). “This expresses the well-established rules of statutory construction that legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.” Id.

Nevertheless, we consider the legislative omission to be significant to our analysis. Where interaction between the NRC and the county conservation boards appears repeatedly in the governing statutes and dual appointment to these two bodies remains unaddressed in the incompatibility language of section 455A.5(1), the omission is consistent with, and thereby lends support to, our analysis of the common law and our conclusion that the statutory duties are not incompatible.

Although we conclude that the two public offices are not incompatible as a matter of law, we stress that the statutory duties thrust a person appointed to both public offices into situations in which conflicts of interest may arise. Our opinions have emphasized the distinction between incompatibility and conflicts of interest See 1982 Op. Att'y Gen. at 221 (“[T]his area is one which is characterized by a degree of confusion. Over recent years there has been a tendency by commentators to intertwine the concept of incompatibility with the concept of conflict of interest.”). While we do not wish to blur the distinctions that have been drawn, we caution against the appointment of one person to two public offices that will likely confront the person repeatedly with conflicts of interest.

In summary, the common law doctrine of incompatibility of office does not prohibit dual appointment to the Natural Resources Commission and to a county conservation board. Iowa Code section 455A.5(1) does not authorize a member of the NRC to serve on a county conservation board, but supports the conclusion that the common law doctrine of incompatibility does not prohibit these dual appointments. A person who is appointed to both public offices should be careful to avoid the conflicts of interest that will likely arise. We caution against dual appointments that will likely confront a person repeatedly with conflicts of interest.

Sincerely,



JULIE F. POTTORFF  
Deputy Attorney General

IOWA PUBLIC OFFICIALS ACT; COMMUNITY COLLEGES: Authority of the Iowa Ethics and Campaign Board over employees and officials of community colleges. Iowa Code §§ 68B.26, 68B.32; 68B.32B; 68B.35 (Iowa Code 1999). Status of community colleges as state agencies or political subdivisions; status of employees of community colleges as employees of the executive branch. Iowa Ethics and Campaign Disclosure Board has authority to process complaints against employees of community colleges to require personal financial disclosure statements of certain community college employees. (Johnson to McKinley, Iowa Ethics and Campaign Disclosure Board, 9-21-00) #00-9-3

September 21, 2000

Bernard McKinley, Chairman  
Iowa Ethics and Campaign Disclosure Board  
514 East Locust Street  
Suite 104  
Des Moines, IA 50309-1912

Dear Mr. McKinley:

On behalf of the Iowa Ethics and Campaign Disclosure Board (hereinafter "Board"), you have requested an Attorney General's opinion on the applicability of Iowa Code chapter 68B to employees and officials of community colleges. You have noted that community colleges are included in the definition of "state agency" in Iowa Code section 68B.2(2), although community colleges are treated as political subdivisions of the state in other bodies of law. In light of this apparently inconsistent classification of community colleges, you question whether complaints against employees or officials of community colleges should be filed with the Board pursuant to Iowa Code section 68B.32B(1), or with county attorneys pursuant to section 68B.26. You also question whether the financial disclosure requirements of section 68B.35 apply to personnel at the community colleges. Finally, you question whether this perceived inconsistent treatment in the governmental status of community colleges creates a "conflict of laws" which would invalidate any enforcement actions taken by the Board against community college employees or officials.

#### THE STATUS OF COMMUNITY COLLEGES

Before analyzing the applicability of specific sections of chapter 68B to community colleges, it is helpful to address your underlying concerns regarding the conflicting governmental status of community colleges under Iowa law. You are correct that community colleges are treated as political subdivisions of the State in some contexts. Community colleges are created by Iowa Code chapter 260C, and are operated by "merged areas" pursuant to that statute. Past opinions of this office have recognized that community colleges and merged areas are governmental subdivisions of the state. 1988 Op. Att'y Gen. 75 (#88-2-4(L))(community colleges and merged areas were subject to being audited as "governmental subdivisions" under former Iowa Code section 11.18); 1998 Op. Att'y Gen. \_\_\_ (# 98-7-2(L))(community colleges, like local school districts, are "school corporations" under Iowa Code section 260C.16); 1998

Op. Att’y Gen. \_\_\_\_ (# 97-7-2(L)) (directors of community colleges are subject to Iowa Code section 279.7A prohibiting self-dealing by directors of a school corporation). Governmental subdivisions have been described as essentially local governmental bodies. 1988 Op. Att’y Gen. 100 (#88-7-6(L)). In some contexts it has been explicitly recognized that community colleges are not state agencies. Stanley v. Southwestern Community College Merged Area, 184 N.W.2d 29, 32 (Iowa 1971) (merged area creating a community college not considered a state agency subject to constitutional restrictions on incurring debt); 1994 Op. Att’y Gen. 1 (#93-1-1(L)) (merged area “is not an agency of the State”, nor is the word “department”, which means institution or agency of state government, likely to encompass a community college).

However, community colleges are expressly classified as “state agencies” for purposes of chapter 68B, which contains definitions of both an “agency” and a “state agency”. An “agency” is defined in section 68B.2(1) to encompass many entities, including “any department, division, board, commission, bureau, or office of a political subdivision of the state.” In section 68B.2(2) an “agency of state government” or “state agency” is defined explicitly to include “community colleges”, but does not mention political subdivisions of the state. The Legislature clearly did not intend to include all “political subdivisions of the state” within the definition of “state agency” for purposes of chapter 68B. The Legislature just as clearly intended that “community colleges” would be considered “state agencies” and not political subdivisions for purposes of that statute.

This disparate treatment of the governmental status of community colleges is not unusual. The Legislature has the power to create state agencies for varying purposes, with varying amounts of power, so long as the legislative action is within the bounds of the Iowa Constitution. Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 179 N.W.2d 449, 454 (Iowa 1970). The Legislature can classify governmental entities as “state agencies” for some purposes, but not for others. 1988 Op. Att’y Gen. 100 (#88-7-6(L)) (“A state-authorized entity may be a state agency for some purposes but not others”); Alaska Commercial Fishing v. O/S Alaska Coast, 715 P.2d 707, 709 (Ak 1986). This was recognized by the Iowa Supreme Court in Graham v. Worthington, 146 N.W.2d 626 (Iowa 1966), which involved the applicability of the Iowa Tort Claims Act to political subdivisions. The Court noted that, although “ordinarily political subdivisions are classified as agencies or arms of the state”, they were not so classified in the definition of state agency in the Iowa Tort Claims Act. Explaining that “the legislature may be its own lexicographer”, the Court refused to apply the Iowa Tort Claims Act to political subdivisions. “[I]t is not for us to . . . extend, enlarge, or otherwise change the terms or plain intent and meaning of the statute.” Id. at 855.

Other Iowa governmental entities are accorded this variable status. The Iowa State Fair Authority is a “public instrumentality of the State”, but is “not an agency of state government.” Iowa Code § 173.1. Yet the Iowa State Fair Authority is statutorily designated as a state agency for purposes of chapters 17A, 20, 91B, 97B, 509A, and 669. Id. The state universities are considered agencies of the State for purposes of the Iowa Tort Claims Act. Vachan v. State of

Iowa, 514 N.W.2d 442, 444 (Iowa 1994); Speed v. Beurle, 251 N.W.2d 217, 218 (Iowa 1977). These same universities are explicitly excluded from the definition of “State agency” in Iowa Code section 256.50, dealing with libraries and information services. A soil and water conservation district is a “governmental subdivision of this state” under Iowa Code section 161A.3(5) but is a “state agency” under Iowa Code section 669.2. Regional boards of library trustees created under Iowa Code chapter 256 and judicial district departments of correctional services created under Iowa Code chapter 905 are governmental subdivisions but are included within the definition of “state agency” in Iowa Code section 669.2.

Because the Legislature can create state agencies for varying purposes, with varying degrees of authority, and can classify them differently for different purposes, it does not appear that the disparate treatment accorded “community colleges” creates a conflict or poses any particular problem to the application of statutes that deal with community colleges. Even if there were a conflict, the specific classification of community colleges as state agencies in chapter 68B would control for purposes of that statute. See Iowa Code § 4.7.

#### APPLICABILITY OF CHAPTER 68B TO COMMUNITY COLLEGES

Your questions regarding the applicability of chapter 68B to community colleges concern specific provisions contained in Division III of the statute. Division III establishes a legislative ethics committee to hear complaints against members of the general assembly or legislative lobbyists, while at the same time establishing the Board as the authority to hear complaints against members of the executive branch of state government, as well as other persons. Compare Iowa Code §§ 68B.31 and 68B.32B.

The authority of the Board to hear complaints against certain members of the executive branch and other persons is described in section 68B.32(1) as follows:

... [T]he board shall . . . investigate complaints relating to, and monitor the ethics of officials, employees, lobbyists, and candidates for office in the executive branch of state government  
...

More specific provisions regarding the authority of the Board to hear complaints are set forth in section 68B.32B(1), which provides as follows:

1. Any person may file a complaint alleging that a candidate, committee, person holding a state office in the executive branch of state government, employee of the executive branch of state government, or other person has committed a violation of chapter 56 or rules adopted by the board. Any person may file a complaint

alleging that a person holding a state office in the executive branch of state government, an employee of the executive branch of state government, or a lobbyist or a client of a lobbyist of the executive branch of state government has committed a violation of this chapter or rules adopted by the board. . . . (Emphasis added).

The statute goes on to describe the responsibilities of the board in reviewing and investigating complaints. Iowa Code § 68B.32B(2), et. seq. The statute provides for contested case proceedings before the Board. Id., § 68B.32(C). It authorizes the Board to impose a variety of civil penalties. Id., § 68B.32D(1).

The plain language of the statute clearly gives the Board authority to hear complaints concerning “employees of the executive branch of state government”. The question, then, is whether employees of community colleges are considered employees of the executive branch for purposes of chapter 68B.

State agencies, which are created to implement and administer laws, are generally considered to be in the executive branch, as opposed to the legislative or judicial branches of government. 1978 Op. Att’y Gen.251. Iowa Code chapter 7E, which deals with “Executive Branch Organization and Responsibilities”, states that the executive branch is comprised of, among other things, state agencies and departments. See Iowa Code §§ 7E.2, 7E.5.

Community colleges have been included within the definition of “state agency” and “agency of the state” in section 68B.2(2). Since the Legislature intended that community colleges be considered state agencies for purposes of chapter 68B, we believe the legislature intended to treat community college employees as “employees of the executive branch of state government” for purposes of chapter 68B.

If community college employees were not classified as employees of the executive branch for purposes of chapter 68B, there would be no enforcement mechanism against them for violations of that chapter. Community college employees, as such, certainly would not be considered members of the general assembly or legislative lobbyists for purposes of processing complaints under section 68B.31. See § 68B.2(13); (16). As will be discussed below, community college employees could not be classified as “local” employees or officials subject to prosecution under section 68B.26. Yet there is no doubt that, by including community colleges within the definition of state agency, the legislature intended that employees and officials of those institutions be subject to the provisions of chapter 68B.

In interpreting a statute, “our goal is to determine and give effect to the legislature’s intentions. We seek a reasonable interpretation which will best effectuate the purpose of the statute . . . . We will consider all parts of an enactment together and will not place undue importance on any single or isolated portion.” Miller v. Westfield Insur. Co., 606 N.W.2d 301,

303 (Iowa 2000). In light of the legislature's clear intention that employees of community colleges be subject to the enforcement provisions of chapter 68B, we believe a reasonable interpretation of that statute is that community college employees must be considered employees of the executive branch for purposes of processing complaints under section 68B.32B(1).

You have noted that complaints against "local officials and employees" for violations of chapter 68B "shall be filed with the appropriate county attorney" under section 68B.26, as amended by House File 2431, 78<sup>th</sup> G.A., 2d Sess. § 1. (Iowa 2000). On the basis of this section, you question whether complaints concerning community college employees should be filed with county attorneys pursuant to section 68B.26 instead of the Board pursuant to section 68B.32B. We do not believe these two statutory provisions are inconsistent. Instead, we believe they complement each other, serving to allow county attorneys to handle complaints against local officials and employees and the Board to handle complaints against officials and employees of state agencies.

Sections 68B.2(14) and (15) define local employees and local officials to be employees and officeholders of "a political subdivision of this State." This office concluded in an earlier opinion that the Board does not have authority to impose penalties against "local officials and employees under chapter 68B." 1994 Op. Att'y Gen.46(#93-9-4(L)). However, since community colleges are defined as "state agencies" and not political subdivisions for purposes of chapter 68B, the Board has the authority to hear complaints against officials and employees of community colleges.

You have also questioned the applicability of section 68B.35 to certain employees of community colleges. That statute requires that certain persons file personal financial statements. Section 68B.35(2) requires such statements from executives, deputy executives, and administrative heads of state agencies, and from certain heads of major subunits of state departments or independent state agencies. As noted above, for purposes of chapter 68B, community colleges have been included in the definition of "state agencies". Therefore, we conclude that section 68B.35(2) applies to certain executives, deputy executives, or other administrative heads of community colleges who satisfy the criteria of section 68B.35(2). ( For a discussion of the definition of "executive or administrative head", see 1998 Op. Att'y Gen. \_\_\_ (#97-7-4)).

Finally, you have questioned whether enforcement or compliance action by the Board against officials or employees of community colleges could be invalidated because of the conflicting classification of community colleges in Iowa law. For the reasons discussed above we do not believe there is a problem. Anyone challenging Board action on the basis of this perceived ambiguity in the governmental status of community colleges would have a difficult burden. The classification of community colleges as "state agencies" for purposes of chapter 68B is clearly set forth in the statute with "sufficient definiteness that ordinary people can

Bernard McKinley  
Page 6

understand” the meaning of the statute. See State v. Hunter, 550 N.W.2d 460, 463 (Iowa 1966); State v. Bauer, 337 N.W.2d 209-210-11(Iowa 1983).

#### CONCLUSION

We believe that the Board has authority to process complaints filed against officials and employees of community colleges under Iowa Code section 68B.32B. We believe that the financial disclosure requirements of section 68B.35 apply to certain community college employees. We do not believe that the differential treatment of the governmental status of community colleges under Iowa law changes the clear and plain meaning of chapter 68B as it applies to community colleges. Nor do we believe that this disparate treatment of the status of community colleges would invalidate Board action against employees or officials of community colleges.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis W. Johnson", written in a cursive style.

DENNIS W. JOHNSON  
Solicitor General



STATE OFFICERS AND DEPARTMENTS: DEPARTMENT OF REVENUE AND FINANCE: Duration of authority to collect fee. House File 2545, 78<sup>th</sup> G.A., 2d Sess. § 28 (Iowa 2000). The authority of the director of revenue and finance to charge a fee to recover the cost of administering local option sales taxes, set forth following the appropriation of funds to the department of revenue and finance for the fiscal year ending June 30, 2001, in House File 2545, 78<sup>th</sup> G.A., 2d Sess. § 28 (Iowa 2000), continues in force until abrogated by future action of the legislature. (Mason to Bair, Director, Iowa Department of Revenue and Finance, 10-19-00) #00-10-1

October 19, 2000

G. D. Bair  
Director  
Iowa Department of Revenue and Finance  
Hoover State Office Building  
L O C A L

Dear Mr. Bair:

You have requested a formal opinion regarding your authority to charge a fee to recover the cost of administering local option sales taxes. That authority is set forth in the following provision of House File 2545, 78<sup>th</sup> G.A., 2d Sess. § 28 (Iowa 2000):

The director of revenue and finance may charge a fee to recover the direct costs of administration related to the collection and distribution of a local sales and services tax imposed pursuant to chapters 422B and 422E. The fee revenue shall be treated as repayment receipts as defined in section 8.2 and shall be used to pay the direct costs of administering chapters 422B and 422E.

For the reasons stated below, it is our opinion that your authority to charge a fee to recover the cost of administering local option sales taxes continues in force until abrogated by future action of the legislature.

The differing opinions you have encountered as to whether you have continuing authority to charge the fee in question likely arise because section 28 of House File 2545 also contains the appropriations for your department for the fiscal year ending

June 30, 2001. Also, the fee revenue collected is to be treated as “repayment receipts” as defined in section 8.2, meaning as “moneys collected by a department or establishment that supplement an appropriation made by the legislature.” The language of section 28 does not, however, specify that the fee revenue is to supplement only the one year’s appropriation made to the Department in that section. There are numerous other provisions in the Iowa Code which authorize the collection of fees or other payments to be considered repayment receipts as defined in section 8.2. See, e.g., Iowa Code §§ 10A.107, 22.3A(2), 135.11A, 272C.6(6), 455B.203A(6), 475A.6, 505.7(7), 524.207(3), 533.67(3), and 546.10(4) (1999). They all appear to give continuing authority to collect the specified fees beyond the next fiscal year, regardless of the relationship between repayment receipts and an appropriation.

Unless a statute explicitly provides otherwise, it continues in force until abrogated by subsequent action of the legislature. Franconia Associates v. United States, 43 Fed. Cl. 702, 708 (Cl. Ct. 1999); 2 N. Singer, *Sutherland Statutory Construction* § 34.01, at 31 (5<sup>th</sup> ed. 1993).<sup>1</sup> “[L]egislative intent that a statute operate temporarily must be clearly stated in the act itself or in a related statute.” *Sutherland* § 34.04, at 33. The Iowa Supreme Court often cites *Sutherland Statutory Construction* when interpreting statutes. See, e.g., Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Shell Oil Company, 606 N.W.2d 376, 380 (Iowa 2000); Iowa Erosion Control, Inc. v. Sanchez, 599 N.W.2d 711, 714 (Iowa 1999); State v. Wagner, 596 N.W.2d 83, 88 (Iowa 1999). There is no clearly stated intent in House File 2545 that the authorization for the Department to charge a fee to recover certain administration costs is temporary. Indeed, the fact that the fee is to be “used to pay the direct costs of administering chapters 422B and 422E,” implies that the legislature intended the authority to collect the fee to continue for as long as the Department incurs such costs. Therefore, section 28 of House File 2545 should be construed to give the Department continuing authority to charge the fee until such future time, if ever, that the legislature abrogates that authority.

This conclusion is further supported by the presence of other provisions in House File 2545 which appear to have continuing effect. For example, immediately following the provision authorizing the director of revenue and finance to charge the fee at issue is a provision stating that the director shall prepare and issue a state appraisal manual and its revisions without cost to a city or county. The reference to revisions of the manual indicates that the legislature intended for the manual and revisions to be free to cities and counties during more than just the one fiscal year for which the section 28 appropriations were made. Similarly, several other provisions in the House File 2545 appropriation bill appear to be effective past the single fiscal year for which the bill

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<sup>1</sup>Section 28 of House File 2545 is a valid and binding law, whether or not the Code Editor decides to publish it in the Iowa Code. See Op. Att’y Gen. No. 97-7-1(L).

appropriates funds. These include the preference to be given to Iowa-based transportation businesses provided for in section 3, the license fee refunds authorized in section 5, the direction to submit an application for federal funding set forth in section 12, the payment of per diem and expenses to legislators serving on the deferred compensation advisory board intended in section 19, the filing fee refunds authorized in section 32, and the electronic bid notices required by section 35. Just as there is no indication of a legislative intent to limit these various provisions to one fiscal year, there is no reason to assume that the authority to collect a fee to recover the cost of administering local option sales taxes is so limited.

In summary, due to the absence of a clearly stated legislative intent to the contrary, section 28 of House File 2545 is construed to give the Department continuing authority to charge a fee to recover the costs of administering local option sales taxes. See 2 N. Singer, *Sutherland Statutory Construction* § 34.04, at 33 (5<sup>th</sup> ed. 1993).

Sincerely,

A handwritten signature in cursive script that reads "Marcia Mason".

MARCIA MASON  
Assistant Attorney General

MM:cml



COUNTIES; COUNTY CONSERVATION BOARD: Approval authority over decisions by director. Iowa Code § 350.4(6) (1999). The county conservation board has approval authority over employment and compensation decisions by its director regarding individual employees and assistants. The county conservation board may exercise its discretion to approve, deny, or modify the director's decisions regarding employment and compensation matters, but should give respectful consideration to the director's decisions on these issues. (Kuhn to Vander Hart, Buchanan County Attorney, 11-1-00) #00-11-1

November 1, 2000

Mr. Allan W. Vander Hart  
Buchanan County Attorney  
P.O. Box 68  
Independence, Iowa 50644

Dear Mr. Vander Hart:

You have requested an opinion regarding the authority of a county conservation board to determine the compensation of its employees under Iowa Code section 350.4(6) (1999). Specifically, you ask: (1) "Does section 350.4(6) require that county conservation boards pass on the employment and/or compensation status of individual employees?" and (2) "If the answer to the above is in the affirmative, may boards go beyond simply either affirming or vetoing the hiring and compensation decisions of the director."

Iowa Code chapter 350 governs county conservation boards. The purpose of the chapter is to create county conservation boards and to authorize counties to maintain, develop, and acquire real and personal property for conservation of natural resources and recreational purposes. Iowa Code §§ 350.1, .4. A county conservation board is charged with the responsibility to manage and control county property such as museums, parks, preserves, recreational centers, playgrounds, county forests and wildlife areas. Id. § 350.4.

The powers and duties of the county conservation board are statutorily prescribed in section 350.4. Particular to your inquiry is section 350.4(6), which authorizes and empowers the county conservation board:

To employ and fix the compensation of a director who shall be responsible to the county conservation board for the carrying out of its policies. The director, subject to the approval of the board, may employ and fix compensation of assistants and employees as necessary for carrying out this chapter.

## I.

Your first question is whether the county conservation board has the authority to pass judgment on the director's decisions regarding the employment or compensation status of individual employees. For the reasons that follow we answer your question in the affirmative.

The county conservation board is empowered to employ a director who is directly responsible to the board. Id. § 350.4(6) (director "shall be responsible to the county conservation board"). The director is charged with the responsibility to carry out the policies established by the county conservation board. Id. The director, *subject to the approval of the board*, may employ and fix the compensation of assistants and employees. Id. Your question turns on whether the board has approval authority over the employment and compensation of each individual employee or assistant, or approval authority over only the total number of employees and assistants to be employed and the overall compensation budget.

The employment of assistants and employees is discretionary by the director. See Iowa Code § 4.1(30)(c) ("may" confers a power"); State ex rel. Lankford v. Allbee, 544 N.W.2d 639, 641 (Iowa 1996) (use of "may" indicates act is discretionary but not required). That discretionary decision by the director is conditioned upon the county conservation board's approval. See Iowa Code § 350.4(6); Mayor of Ocean City v. Johnson, 470 A.2d 1308, 1313-14 (Md. App. 1984) (regulation established by police chief was subject to the mayor and city council approval which was a condition precedent to valid adoption). The director is not an independently-appointed official with policy making power separate and distinct from the county conservation board. The director is selected by the county conservation board and is directly responsible to the board to carry out its policies. Iowa Code § 350.4(6). We see nothing in the statute that would limit the board's approval authority to only the total number of employees that the director may employ or the total compensation budget. State v. Schultz, 604 N.W.2d 60, 62 (Iowa 1999) (statutory construction focuses upon what the legislature said, not what it should or might have said). To find otherwise would not be in harmony with the director's statutory duty to carry out the policies of the county conservation board.

We find that the county conservation board has approval authority over its director's decisions regarding the employment and compensation status of individual employees and assistants.

## II.

You also ask what is the scope of the county conservation board's approval authority in reviewing the director's decisions regarding hiring and compensation. Specifically, you ask whether the county conservation board is strictly limited to approving or disapproving the director's decision.

The legislature clearly provided that the director may employ and fix the compensation of employees and assistants. Iowa Code § 350.4(6). The director's discretionary decision is subject to the approval of the board. Id. Your question rests on the meaning of "approval."

The common definition of "approve" includes (1) "to judge and find commendable or acceptable" and "to express often formally agreement with and support of or commendation of as meeting a standard," Webster's Third New International Dictionary 106 (unabr. ed. 1993), and (2) "to give formal sanction to; to confirm authoritatively," Black's Law Dictionary 98 (7<sup>th</sup> ed. 1999). Statutes employing "approval" authority, unless otherwise limited by the context of the legislation, imports the use of discretion and the passing of judgment. Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559, 561 (S.D. 1981); see also Mayor of Ocean City, 470 A.2d at 1314 ("approve" implies "the act of passing judgment, the use of discretion, and the determination as a deduction therefrom"); 1986 Op. Att'y Gen. 107 (#86-8-6(L)) (implicit in the power to approve expense claims is the power to deny or allow to any extent the claims submitted).

The term "approval" is "susceptible of different meanings dependent upon the subject matter and context concerning which the term is employed and the object and purpose to be subserved or accomplished." Mayor of Ocean City, 470 A.2d at 1313 (quoting Powers v. Isley, 183 P.2d 880, 884 (Ariz. 1947)). In viewing the extent or scope of approval authority, the court will look at the overall relationship between the entities at issue. See State ex rel Kuhlemeier v. Rhein, 149 Iowa 76, 127 N.W. 1079 (1910); Smith v. Newell, 254 Iowa 496, 502, 117 N.W.2d 883, 887 (1962); 1986 Op. Att'y Gen. 29 (#85-6-3).

The legislature did not place any limits on the county conservation board's approval authority. The role of the director is to carry out the policies established by the county conservation board. In providing the county conservation board with approval authority over the director's employment and compensation decisions, we believe the legislature intended that the county conservation board have the final determination regarding its employees and its compensation structure. Cf. Mayor of Ocean City, 470 A.2d at 1313 (not uncommon for statutes to require certain acts by subordinate public officials, such as setting compensation of staff, to be subject to approval by superior officials). Employment and compensation decisions necessarily involve budgetary concerns, and monetary expenditures are within the authority and power of the board. See Iowa Code §§ 350.4, 350.6.

Cases and opinions involving the approval authority by one officer or board over the appointments or budgetary decisions of another officer or board are distinguishable. In State ex rel Kuhlemeier v. Rhein, 149 Iowa 76, 79-81, 127 N.W. 1079, 1080-81 (1910), the Iowa Supreme Court concluded that although the board of supervisors was to approve the treasurer's decision as to the place of the deposit of funds, that approval authority did not permit the board of supervisors to select a depository, without the cooperation or consent of the treasurer. The Court found it was a clear division of power between the offices, with the treasurer, who was legally responsible for

the funds, retaining the power of nomination and the board with only the power to approve. Id. at 80-81, 127 N.W. at 1081.

Some fifty years later, the Court relied upon its analysis in Rhein and indicated a board of supervisors' approval authority over a sheriff's appointment of a deputy was limited only to approval or disapproval. Smith v. Newell, 254 Iowa at 502, 117 N.W.2d at 887. The Court noted that the responsibility of the sheriff to keep the peace and to employ deputies to assist him was not a responsibility that rested in the board of supervisors. Id. We similarly found the Executive Council's approval authority over the use of appropriated funds by the Iowa Employment Security Commission, and a board of supervisors' approval authority over elected officials' appointments of deputies and assistants were circumscribed by Rhein. See 1962 Op. Att'y Gen. 384; 1962 Op. Att'y Gen. 169 (#61-8-26(L)).

The relationship between the county conservation board and its director is quite different from the relationship between independent elected officers or boards, which are entitled to more autonomy in decision making. There is nothing in chapter 350 that would remove the ultimate policy-making decision regarding employment and compensation from the county conservation board. The director is not autonomous from the board, but is employed by the board and is directly responsible for carrying out the board's policies. It is the ultimate responsibility of the county conservation board to fulfill its duties to control and manage the county property under its domain, including the work of its employees.

We have not ignored the fact that the board's approval authority, if exercised arbitrarily or capriciously, could effectively negate any purpose for the director to make the initial employment and compensation decisions. In approving or disapproving the director's hiring decisions, the county conservation board should keep in mind the admonition the Iowa Supreme Court gave to boards of supervisors when reviewing appointments made by elected officials pursuant to what is now section 331.903:

In stating that such appointments were subject to approval by the Board of Supervisors, it was also the legislative intent that common sense would be used by the Board. In approving or failing to approve the Board could not reject an appointee on frivolous, trivial, minimal, arbitrary or capricious grounds. For example they could not reject the Sheriff's appointments because they did not like the color of the hair of the appointee, nor because of his politics, religious affiliation, nor age, unless the matter of age was contrary to statute.

McMurry v. Board of Supervisors, 261 N.W.2d 688, 691 (Iowa 1978) (quoting Smith v. Newell, 254 Iowa at 502-03, 117 N.W.2d at 887). While section 331.903 addresses approval authority over elected officials' appointments which is notably different than approval authority over the



Mr. Allan W. Vander Hart

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decisions of a board's employee, the exercise of discretion by any public officer should be driven by common sense, fairness, and the best interests of the public.

We suggest that a county conservation board give respectful consideration to a director's decisions regarding employment and compensation matters. See 1998 Op. Att'y Gen. \_\_ (#98-3-2(L)) (board of supervisors should give respectful consideration to county veteran affairs commission's recommendation on director's salary increase). Because the director is responsible for the day-to-day implementation of the board's policies and the operation and oversight of the board's employees and assistants, the director may be in the best position to assess the need for changes in the workforce and in the compensation system.

### III.

In conclusion, the county conservation board has approval authority over employment and compensation decisions by the director regarding individual employees and assistants. While the county conservation board may exercise its discretion to approve, deny, or modify the director's decisions, it should give respectful consideration to the director's decisions on these issues.

Sincerely,



Cristina Kuhn

Assistant Attorney General



COUNTIES: Eligibility of an area of land incorporated as a recreational lake district to be designated a rural improvement zone. Senate File 2438, 78<sup>th</sup> G.A., 2d Sess., § 3 (Iowa 2000); House File 2541, 78<sup>th</sup> G.A., 2d Sess., §§ 1, 2 (Iowa 2000); Iowa Code §§ 357E.2(1), 357H.1 (1999). An area of the county incorporated or established as a recreational lake district is eligible for designation as a rural improvement zone so long as that area is established outside the boundaries or corporate limits of a city. However, the county board of supervisors should, prior to any such designation, consult with the county attorney to determine whether, under the particular facts and circumstances involved, such designation would contravene the rule (or the underlying public policy) against two distinct municipal corporations existing within the same territory and exercising the same powers, jurisdiction, and privileges. (Nelson to Larson, State Representative, 11-1-00) #00-11-2

November 1, 2000

The Honorable Chuck Larson, Jr.  
State Representative  
2214 Evergreen Street, N.E.  
Cedar Rapids, IA 52402

Dear Representative Larson:

You have requested an opinion of the Attorney General concerning Iowa Code chapters 357E and 357H. Specifically, you ask whether an area incorporated as a “recreational lake district” pursuant to chapter 357E is eligible for designation as a “rural improvement zone” pursuant to chapter 357H. In your request letter, you indicate that the issue arises from language in section 357E.2(1), which provides that an “area may be incorporated as a benefitted recreational lake district,” and language in section 357H.1, which provides that the area to be designated as a rural improvement zone must be in an “unincorporated area” of the county.<sup>1</sup>

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<sup>1</sup> Section 357E.2(1), as amended by Senate File 2438, states that “[i]f an area of contiguous territory is situated so that the acquisition, construction, reconstruction, enlargement, improvement, equipping, maintenance, and operation of recreation facilities for the residents of the territory will be conducive to the public health, comfort, convenience, water quality, or welfare, the area may be *incorporated* as a benefitted recreational lake district as set forth in this chapter. Senate File 2438, 78<sup>th</sup> G.A., 2d Sess., § 3 (Iowa 2000) (emphasis added). Section 357H.1, as amended by House File 2541, provides that “[t]he board of supervisors of a county with less than eighteen thousand five hundred residents, based upon the 1990 certified federal census, and with a private lake development shall designate an area surrounding the lake, if it is an *unincorporated area* of the county, a rural improvement zone upon receipt of a petition pursuant to section 357H.2, and upon the board’s determination that the area is in need of improvements. House File 2541, 78<sup>th</sup> G.A., 2d Sess., § 1 (Iowa 2000) (emphasis added).

The answer to your question turns principally on the meaning of the words “unincorporated area” as used in section 357H.1 to describe the land area of a county. The General Assembly, however, has not defined the words “unincorporated area” in chapter 357H. In the absence of a statutory definition or an established meaning in the law, we give words in a statute their ordinary and common meaning. E.g., T&K Roofing Co. v. Iowa Dep’t of Educ., 593 N.W.2d 159, 162 (Iowa 1999). We must construe words and phrases according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such meaning. Iowa Code § 4.1(38) (1999). In this regard, we note there is a traditional meaning associated with the words “unincorporated area” when used to describe the land area of a county or territory. These words ordinarily mean that part of the county or territory outside the boundaries of incorporated cities. 43 Words & Phrases 474 (1969), citing City of Olivette v. Graeler, 338 S.W.2d 827, 833 (Mo. 1960). See Apple Creek Township v. City of Bismarck, 271 N.W.2d 583, 587 (N.D. 1978) (“unincorporated territory” means any territory not located within the boundaries of an incorporated city). This traditional meaning is consistent with the usage of the words “unincorporated area” in the context of other statutory provisions. See, e.g., Iowa Code §§ 336.16, 384.67, 422B.1(3), 468.585(2) (1999). Therefore, we conclude that an area of the county incorporated or established as a recreational lake district is eligible for designation as a rural improvement zone so long as that area is established outside the boundaries or corporate limits of a city.<sup>2</sup>

While the designation of a recreational lake district as a rural improvement zone is permissible under Iowa statutory law, there is a common law rule that should be considered by a county board of supervisors before making such a designation. There is a firmly established rule that there cannot be at the same time within the same territory, two distinct municipal corporations exercising the same powers, jurisdiction, and privileges. Aurora v. Aurora Sanitation Dist., 149 P.2d 662, 664 (Colo. 1944); 2 E. McQuillin, The Law of Municipal Corporations § 7.08, at 376 (1996).; 56 Am. Jur. 2d Municipal Corporations § 40 (1971). This rule does not prevent the formation of two municipal corporations in the same territory at the same time for different purposes. 2 McQuillin, supra, at 376. Generally, there is no objection to more than one municipal or quasi-municipal corporation coexisting in the same area if they perform different functions. Id.

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2 The word “city” means a municipal corporation, but not including a county, township, school district, or any special-purpose district or authority. Iowa Code § 362.2(4) (Supp. 1999). When used in relation to land area, “city” includes only the area within the city limits. Id. By definition, the term “city” would not include a recreational lake district, a special-purpose district. Chapter 357E governing recreational lake districts is organized under title IX (local government), subtitle 2 (special districts) of the Iowa Code.

The above-described rule “does not rest upon any theory of constitutional limitation, but upon the practical consideration that intolerable confusion instead of good government, almost inevitably would attain in a territory in which two municipal corporations of like kind and powers attempted to function coincidentally.” Aurora, 149 P.2d at 664. The application of this rule has usually been made in cases involving the validity of tax levies and cases involving the jurisdiction of corporate bodies. See People ex rel. Greening v. Bartholf, 58 N.E.2d 172, 180 (Ill. 1944). In addition, courts have applied this rule to special-purpose units and districts. See e.g., Aurora, 149 P.2d at 664 (sanitation district); Boise v. Bench Sewer Dist., 773 P.2d 642, 651 (Idaho 1989) (sewer district); Bellevue v. Eastern Sarpy County Suburban Fire Protection Dist., 143 N.W.2d 62, 63 (Neb. 1966) (fire protection district); People ex rel. Smerdon v. Crews, 92 N.E. 245, 247 (Ill. 1910) (drainage district). Accordingly, we believe this rule is applicable to recreational lake districts and rural improvement zones, which are special-purpose districts.

Applying this rule to a specific factual situation would necessitate an analysis of the particular facts and surrounding circumstances,<sup>3</sup> which prevents us from giving a definitive answer to your question through the opinion process. See 61 IAC 1.5(3)(c); 1998 Op. Att’y Gen. \_\_\_ (#97-7-3(L)). Consequently, we recommend that, prior to designating a rural improvement zone in an area all or part of which has been incorporated as a recreational lake district, a county board of supervisors consult with the county attorney to consider this rule and the underlying public policy in light of the specific facts and circumstances involved. The county board of supervisors, with the assistance of its counsel, is in the best position to weigh all of the relevant facts and circumstances in order to determine whether the results of such designation, including the dual management and control of the same property by two separate boards of trustees and the potential imposition of multiple tax levies, would create a threat to “good government” or sound administration or create the potential for conflicting assertions of jurisdiction.

In summary, we conclude that an area incorporated as a recreational lake district pursuant to chapter 357E is eligible for designation as a rural improvement zone pursuant to chapter 357H

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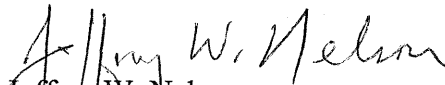
3 We note that various facts and circumstances are relevant to the application of the rule, such as the degree of overlap between the boundaries of a recreational lake district and a proposed rural improvement zone. We also note that Iowa Code chapter 357E has been amended to permit a recreational lake district to combine with a water quality district. Senate File 2438, 78<sup>th</sup> G.A., 2d Sess., § 3 (Iowa 2000). A combined district would be authorized to perform various “water quality activities,” such as dredging, that would improve the water quality of the lake. Senate File 2438, 78<sup>th</sup> G.A., 2d Sess., § 2 (Iowa 2000). A rural improvement zone is authorized to make very similar improvements, including dredging. House File 2541, 78<sup>th</sup> G.A., 2d Sess., § 1 (Iowa 2000). Thus, the combination of a recreational lake district with a water quality district would be relevant to a determination whether such district should be designated as a rural improvement zone.

Hon. Chuck Larson, Jr.

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so long as that area is established outside the boundaries or corporate limits of a city. However, we recommend that, prior to any such designation, the county board of supervisors consult with the county attorney to determine whether, under the particular facts and circumstances involved, such designation would contravene the rule (or the underlying public policy) against two distinct municipal corporations existing within the same territory and exercising the same powers, jurisdiction, and privileges.

Sincerely,

  
Jeffrey W. Nelson  
Assistant Attorney General

JWN

CITIES: Smoking Prohibitions; Preemption. Iowa Const., art. III, §§ 38A, 39A. Iowa Code chapters 142B and 364. Iowa Code §§ 142B.1(3), 142B.2(2), 142B.6, 331.301, 364.2(3), and 364.3(3) (1999). A city ordinance enacted to prohibit smoking in any public place, as defined by Iowa Code § 142B.1(3), would not be inconsistent with or in conflict with Iowa Code chapter 142B, and would not be preempted. (St.Clair to Hammond, State Senator, 11-14-00)  
#00-11-5

November 14, 2000

The Honorable Johnie Hammond  
State Senator  
3431 Ross Road  
Ames, Iowa 50014

Dear Senator Hammond:

You have requested an opinion of the Attorney General regarding the ability of local jurisdictions to adopt ordinances prohibiting smoking in certain public places under Iowa Code chapter 142B, entitled "Smoking Prohibitions." You posed this question:

In view of subsection 142B.2(2) Code of Iowa, would a city ordinance enacted to prohibit smoking in any public place, as defined by subsection 142B.1(3) Code of Iowa be inconsistent with or conflict with Chapter 142B Code of Iowa?

For the reasons that follow, we conclude that such an ordinance would not be inconsistent with or in conflict with chapter 142B of the Code of Iowa. However, before addressing the specific question you have posed, it would be helpful to review some general background regarding the powers of cities and counties to regulate local affairs under Iowa law.

#### I. Home Rule Power of Cities and Counties

The home rule powers of Iowa municipalities<sup>1</sup> are rooted in the Iowa Constitution as well as in Iowa statutes. The Iowa Constitution provides that municipalities may pass ordinances

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<sup>1</sup> Although this opinion addresses the power of *municipalities* to prohibit smoking in certain public places, there are parallel provisions of the Iowa Constitution and the Iowa Code that make the analysis virtually identical for counties. See Iowa Const., art. III, § 39A and Iowa Code § 331.301. See also *Goodell v. Humboldt County*, 575 N.W.2d 486, 492 (Iowa 1998) ("[W]e cite to county home rule cases and city home rule cases interchangeably.")

governing their affairs as long as the particular enactment is “not inconsistent with the laws of the general assembly.” Iowa Const., art. III, § 38A. Iowa Code chapter 364 (1999) sets forth the Home Rule Amendments. Section 364.2(3) defines “inconsistent” as “[a]n exercise of . . . power [that] is irreconcilable with the state law.”

In considering whether a particular municipal ordinance violates the home rule provisions of the Constitution, the Supreme Court attempts to interpret state law to render it harmonious with the ordinance. *Sioux City Police Officers’ Ass’n v. City of Sioux City*, 495 N.W.2d 687, 694 (Iowa 1993). The Court appears especially likely to find harmony between the ordinance and the statutory scheme where the ordinance addresses the health and safety of citizens. See, e.g., *Kent v. Polk County Board of Supervisors*, 391 N.W.2d 220, 223 (Iowa 1986).

Although the Iowa Supreme Court strives to harmonize local regulations with state law, the Court has recognized the authority of the general assembly to preempt local regulation, that is, to restrict local authorities from regulating in designated subject areas. This preemption may be express or implied. *Goodell*, 575 N.W.2d at 492.

Local regulation is expressly preempted where the general assembly specifically prohibits such local action. See e.g., *Chelsea Theater Corp. v. City of Burlington*, 258 N.W.2d 372, 373 (Iowa 1977).

Local regulation is impliedly preempted in one of two ways. First, a local ordinance may be inconsistent with state law by prohibiting activity permitted by state law, or by permitting activity prohibited by state law. *Goodell*, 575 N.W.2d at 493. The second way in which local regulation may be impliedly preempted is where the general assembly has covered a subject area in a manner that demonstrates an intent to preempt. *Id.*, 575 N.W.2d at 493. This latter form of implied preemption is often referred to as “occupying the field.” 62 C.J.S. *Municipal Corporations* § 141 (1999).

## II. Effect of Chapter 142B on Home Rule Power

### A. Express Preemption

On the question of whether the general assembly expressly preempted local regulation of smoking in public places, we turn to the language of the statute. Iowa Code section 142B.6 provides:

Enforcement of this chapter shall be implemented in an equitable manner throughout the state. For the purpose of equitable and uniform implementation, application, and enforcement of state and local laws and regulations, the provisions of this chapter shall



supersede any local law or regulation which is inconsistent with or conflicts with the provisions of this chapter.

The last sentence of this section specifically provides only that inconsistent or conflicting local laws are preempted. The more general statement of purpose (“equitable and uniform implementation, application, and enforcement”) must be interpreted in the light of the specific prohibition of “inconsistent” regulations. *See Hamilton v. City of Urbandale*, 291 N.W.2d 15, 18 (Iowa 1980). This specific reference to “inconsistent” regulations reflects the same home rule principles embodied in the Iowa Constitution and in the Home Rule Amendments, and does not constitute an express statement of the general assembly’s intent to preempt.

The general assembly has had no difficulty expressing its intent to preempt with unmistakable clarity in other contexts. For example, in the *Chelsea Theater* case the Supreme Court found that the following language expressed the general assembly’s intent to occupy the field: “[N]o municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to obscenity.” *Chelsea Theater*, 258 N.W.2d at 373. Such language stands in stark contrast to section 142B.6, which does not by its terms purport to prohibit any county or municipal regulation beyond that which is “inconsistent” with the statute. *See also Bryan v. City of Des Moines*, 261 N.W.2d 685, 687 (Iowa 1978) (“Any limitation on a city’s powers by state law must be expressly imposed.”); *City of Clinton v. Sheridan*, 530 N.W.2d 690, 695 (Iowa 1995) (“If the general assembly intended to preempt . . . it could have done so by express and unambiguous statutory language.”)

We conclude that the language of section 142B.6 does not constitute an express statement of legislative intent to bar municipalities from exercising home rule powers.

#### B. Implied Preemption

As noted above, implied preemption could arise from an overt conflict between chapter 142B and a local ordinance establishing more stringent standards for smoking in public places. In a broad sense, a locality that extends the ban on smoking by prohibiting the designation of smoking areas in certain public places<sup>2</sup> “prohibits an act permitted by a statute.” *City of Des Moines v. Gruen*, 457 N.W.2d 340, 343 (Iowa 1990). However, this expansive approach would mean that a local jurisdiction could *never* establish more stringent standards, which is something localities are expressly permitted to do as a general matter. *See Iowa Code* § 364.3(3) (1999); *see also Goodell*, 575 N.W.2d at 492. Therefore, the issue must be whether the local ordinance prohibits an act expressly *sanctioned* by state law. Chapter 142B does not embody such an

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<sup>2</sup> Note that we are confining this opinion to the ability of a locality to restrict smoking in a “public place” as defined by section 142B.1(3). This opinion does not address the ability or inability of a locality to modify the definition of “public place” as established by the general assembly.

express sanction of smoking in designated public places. On the contrary, as the discussion below reveals, chapter 142B envisions the active involvement of local jurisdictions in expanding the smoking prohibitions of state law.

The other consideration in assessing implied preemption is whether the general assembly indicated an intent to occupy the field. The mere fact that the general assembly has legislated extensively in a given area does not in itself establish legislative intent to occupy the field. *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 812 (Iowa 1983); *Sheridan*, 530 N.W.2d at 695. Moreover, even where a statutory scheme addresses a subject area in a comprehensive manner, a municipality may set “standards more stringent than those imposed by state law, unless state law provides otherwise.” *Gruen*, 457 N.W.2d at 343; *Sioux City Police Officers’ Ass’n*, 495 N.W.2d at 694.

Thus, the Iowa Supreme Court has rarely found a statute to have “occupied the field.” *But see City of Vinton v. Engledow*, 140 N.W.2d 857 (Iowa 1966). This reluctance reflects the strong public policy in favor of granting local jurisdictions the flexibility they need to address local problems; this policy is anchored in the home rule provisions of the Iowa Constitution and the Iowa Code. *See Bechtel v. City of Des Moines*, 225 N.W.2d 326, 332 (Iowa 1975).

As noted above, section 142B.6 requires “uniform implementation, application, and enforcement” of chapter 142B. In *Goodell*, the Supreme Court indicated in dicta that an intent to occupy the field might be found in a clear expression of the general assembly’s desire to have uniform regulations statewide. *Id.*, 575 N.W.2d at 499-500. At least two aspects of chapter 142B militate against this interpretation, however. First, the general reference to uniform application in section 142B.6 is followed by the specific prohibition on inconsistent or conflicting provisions of local law -- clear recognition that there can be *consistent* local regulation in the field.. Second, the provision of chapter 142B highlighted in your request for an opinion, which is discussed below, makes it clear that any legislative desire for uniformity was not intended to prevent localities from regulating smoking in public places.

#### C. Effect of Section 142B.2(2)

With this background, we can turn to the specifics of your request for an opinion. The question you posed highlights section 142B.2(2), which provides:

Smoking areas may be designated by persons having custody or control of public places, except in places in which smoking is prohibited by the fire marshal *or by other law, ordinance or regulation.*

(Emphasis supplied.)

The Honorable Johnie Hammond

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This provision specifies the mechanics of designating smoking areas within public places. In so doing, it expressly recognizes the authority of local jurisdictions to pass ordinances prohibiting smoking in some public places in which state law would permit smoking. Thus, the general assembly clearly acknowledged that localities retained the authority to establish more stringent prohibitions relating to smoking in public places than those embodied in state law.

Given the robust policies favoring home rule, embodied in the Iowa Constitution and enunciated repeatedly by the Iowa Supreme Court, the implications of section 142B.2(2) are especially compelling. The general assembly intended local jurisdictions to retain the power to expand the prohibitions on smoking in public places beyond the regulations embodied in state law, and Iowa Code § 142B.2(2) constitutes a clear expression of that intent.

### III. Conclusion

In summary, a city ordinance enacted to prohibit smoking in any public place, as defined by Iowa Code § 142B.1(3), would not be inconsistent with or conflict with Iowa Code chapter 142B, and would not be preempted.

Sincerely,

A handwritten signature in black ink, appearing to read "S. St. Clair", written in a cursive style.

Steve St. Clair  
Assistant Attorney General



PROFESSIONAL LICENSING BOARDS: Authority of pharmacists to administer prescription drugs; validity of proposed rules of Board of Medical Examiners and Board of Pharmacy Examiners governing administration of prescription drugs by pharmacists. Iowa Code §§ 124.101, 147.76, 155A.3, 155A.4 (1999). Chapter 155A authorizes pharmacists under certain circumstances to administer prescription drugs when they act as authorized agents of physicians who have delegated to them the responsibility of administering prescription drugs. The Board of Medical Examiners and the Board of Pharmacy Examiners have statutory authority to adopt rules to implement and interpret the provisions of chapter 155A. Their proposed rules on pharmacists administering prescription drugs fall squarely within the scope of the authority of the Boards to adopt rules, which would receive considerable deference from a court because they deal with matters uniquely within the expertise of the Boards. (Johnson and Kempkes to Bradley, Chair, Administrative Rules Review Committee, 11-29-00) #00-11-7

November 29, 2000

The Honorable Clyde E. Bradley  
State Representative and  
Chair, Administrative Rules Review Committee  
Iowa General Assembly  
State Capitol  
LOCAL

Dear Representative Bradley:

On behalf of the Administrative Rules Review Committee, you have requested an opinion from this office about the authority of pharmacists to administer prescription drugs and the authority of the Iowa Board of Medical Examiners and the Iowa Board of Pharmacy Examiners to promulgate rules regarding such a practice. You state that, for a number of years, pharmacists have been administering immunizations for influenza and pneumonia pursuant to protocol arrangements with prescribing physicians. You further advise us that the Iowa Board of Pharmacy Examiners and the Iowa Board of Medical Examiners (hereinafter "the Boards"), acting in collaboration, have recently proposed identical sets of rules permitting pharmacists to administer influenza and pneumococcal vaccines pursuant to certain procedures. You have enclosed a copy of the proposed rules as part of your opinion request.

You have raised two specific questions: (1) May a licensed pharmacist administer immunizations (prescription drugs) to patients under a protocol order issued by a licensed physician? (2) May the Iowa Board of Pharmacy Examiners and the Iowa Board of Medical Examiners promulgate rules to establish standards for the regulation of this practice?

#### AUTHORITY OF PHARMACIST TO ADMINISTER PRESCRIPTION DRUGS PURSUANT TO WRITTEN PROTOCOL OF PHYSICIAN

The activity of pharmacists is governed primarily by Iowa Code chapter 155A (1999), the *Iowa Pharmacy Practice Act*. The purpose of chapter 155A is to regulate "the practice of pharmacy and the licensing of pharmacies, pharmacists, and others engaged in the sale, delivery,

or distribution of prescription drugs. . . .” Iowa Code §155A.2(1). Chapter 155A also controls, to some extent, the conduct of physicians in prescribing and administering prescription drugs.

Section 155A.3(1) provides, in pertinent part, that a “practitioner or the practitioner’s authorized agent” may administer a prescription drug by injection. A “practitioner” is defined to include a physician. Iowa Code § 153A.3 (28). The statute defines an “authorized agent” of a practitioner as “an *individual designated by a practitioner* who is under the *supervision* of the practitioner and for whom the practitioner assumes *legal responsibility*.” Iowa Code § 155A.3 (2) (emphasis added).

Section 155A.4(2)(c) also recognizes the power of a physician to have his or her authorized agent administer prescription drugs: “A practitioner, licensed by the appropriate state board, [may] administer drugs to patients. *This chapter does not prevent a practitioner from delegating the administration of a prescription drug to a nurse, intern or other qualified individual . . . under the practitioner’s direction and supervision.*” (emphasis added).<sup>1</sup>

Reading sections 155A.3 (1), (2), and 155A.4 together, it is clear that a physician may appoint a pharmacist to be his or her authorized agent for purposes of injecting prescription drugs if: (1) the pharmacist is designated as an agent of the physician; (2) the pharmacist is a qualified individual; (3) the pharmacist is under the supervision and direction of the physician; and (4) the physician assumes legal responsibility for this delegation of authority. Iowa Code § 4.4(2) (entire statute is presumed to be effective); State v. Wiseman, 614 N.W.2d 66, 67 (Iowa 2000) (courts will interpret a statute in its entirety so as not to make any portion irrelevant or redundant).

You have noted in your opinion request that the type of “supervision” contemplated by the proposed rules would not require the physician to be physically present when the pharmacist administers the prescription drugs. There is no requirement in chapter 155A that the physician be physically present when the authorized agent is administering the prescription drug. This stands in sharp contrast to the somewhat similar statute governing controlled substances. Like section 155A.3(1), section 124.101(1) allows a “practitioner, or . . . the practitioner’s authorized agent” to administer a controlled substance by injection. However, section 124.101(1)(a) only allows the authorized agent to administer the controlled substance “in the practitioner’s presence.” The omission of a similar requirement from section 155A.3(1)(a) indicates that the legislature did not intend to require that a physician be present when an authorized agent is administering prescription drugs. See Bennett v. Iowa Dep’t of Nat. Resources, 573 N.W.2d 25,

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<sup>1</sup>There is no requirement that a prescription drug order be issued when a physician or his authorized agent “administers” the drug under these sections. In interpreting a similar statute governing the administration of controlled substances, this office opined that “a practitioner may delegate the administration of [a controlled substance] to a nurse or intern under his direction and supervision without a written prescription.” 1972 Op. Att’y Gen. 308, 310.

28 (Iowa 1997) (legislative intent is expressed by omission as well as inclusion, and express mention of one thing implies exclusion of other not so mentioned).

A review of other statutes demonstrates that, if the legislature had intended to require the physical presence of the physician when an authorized agent administers prescription drugs, the legislature certainly knew how to say so. Compare Iowa Code § 155A.3(2) (“under the supervision of the practitioner”), § 155A.4(2)(c) (“under the practitioner’s direction and supervision”) with Iowa Code § 147.107(2) (pharmacist or physician may delegate “nonjudgmental dispensing functions” to “staff assistants” only when verification of the accuracy and completeness of the prescription is determined by the pharmacist or physician “in the pharmacist’s or [physician’s] physical presence”), § 156.9(2) (1977) (under “immediate personal supervision”), 135I.1(3) (under “direct supervision”), § 355.7(15) (under “direct personal supervision”), § 356.3 (under “personal supervision”). See generally Estate of Smith v. Lerner, 387 N.W.2d 576, 580 (Iowa 1986) (physicians may, when appropriate, leave orders regarding the treatment of patients for trained personnel to administer).

This conclusion is further supported by a 1979 opinion of this office concerning the Controlled Substances Act. The statute in question was substantially identical to section 155A.4 and provided: “Nothing contained in this chapter shall be construed to prevent a physician, dentist, podiatrist, or veterinarian from delegating the administration of controlled substances under this chapter to a nurse, intern, or other qualified individual . . . under his or her direction and supervision.” Iowa Code § 204.101(1) (1979). This office concluded :

*This paragraph [permits] those practitioners that are licensed physicians . . . to delegate the administration of controlled substances to a “nurse, intern, or other qualified individual.” Once delegation has occurred, there is no statutory or agency requirement that the physician subsequently be present or on the premises during actual administration of the drug to the patient.*

1980 Op. Att’y Gen. 124, 127 (emphasis added).

We conclude that “supervision” of an agent who is administering a prescription drug under the Iowa Pharmacy Practice Act does not necessarily require the physical presence of a physician. We assume, however, that the administration of some prescription drugs may require more direction and supervision than others; the administration of different prescription drugs may occur in a variety of situations and the requirements for the type of supervision that would satisfy the Iowa Pharmacy Practice Act might vary from case to case. We cannot, in this opinion, define what constitutes adequate supervision in all cases.

THE BOARDS' AUTHORITY TO PROMULGATE RULES TO ESTABLISH STANDARDS FOR THE REGULATION OF PHARMACISTS ADMINISTERING PRESCRIPTION DRUGS

Both the Iowa Board of Pharmacy Examiners and the Iowa Board of Medical Examiners are required to adopt rules "to implement and interpret" the statutes governing the conduct of physicians and pharmacists. Iowa Code § 147.76. Of course, any rules adopted by the Boards must be adopted pursuant to the procedures set forth in Iowa Code supplement chapter 17A (1999), the *Iowa Administrative Procedure Act*, and must be consistent with the statutes which are being implemented and interpreted by the Boards. Any rules adopted by the Boards which are contrary to statute or exceed their authority will be struck down as *ultra vires*. Iowa Code supplement §17A.19(10).

The proposed rules provide: "A physician may prescribe via written protocol adult immunizations for influenza and pneumococcal vaccines for administration by an authorized pharmacist if the physician meets these requirements for supervising the pharmacist." IAB Vol. XXII, No. 21, April 19, 2000, p. 1533, ARC 9786A; *Id.*, p. 1534, ARC 9790A.

The proposed rules define who qualifies as an "authorized pharmacist" for purposes of administering these immunizations: the pharmacist must be licensed in the state of Iowa and must have successfully completed an educational program and certification process on vaccine administration, which is described in considerable detail in the rules. IAB Vol. XXII, No. 21, April 19, 2000, p. 1533, ARC 9786A.

The proposed rules define a "written protocol" as being a "physician's order for one or more patients" which contains, among other things, information about the identity of the physician who is authorized to prescribe drugs and who is responsible for the delegation of the administration of the drugs; the identity of the authorized pharmacist; an identification of the vaccines that may be administered by the authorized pharmacist, the dosages, and the route of administration; a description of the activities the authorized pharmacist shall follow in determining if a patient is eligible to receive the vaccine and determining the appropriate frequency of drug administration; procedures to follow in case of life-threatening reactions; and extensive procedures for record keeping and reporting to the physician on the administration of drugs. *Id.* at 1534, 1535.

The proposed rules require the physician to adequately supervise the authorized pharmacist and set forth standards for adequate supervision. "Physician supervision shall be considered adequate" under the proposed rules if the physician ensures that the authorized pharmacist is licensed and has met the required educational and certification criteria; provides an updated written protocol at least annually; is available by direct telecommunication for consultation, assistance, and direction, or provides physician backup to provide these services



when the physician supervisor is not available; and is an Iowa-licensed physician who has a working relationship with an authorized pharmacist within the physician's local provider service area. Id. at 1534, 1535.

As noted in the discussion above, chapter 155A authorizes pharmacists to administer prescription drugs under certain circumstances, even if no rules are adopted to interpret and implement the provisions of chapter 155A. The Boards' proposed rules do not create any rights which are inconsistent with or in addition to those inherent in chapter 155A. Rather, the proposed rules fall squarely within the statutory authority and duty of the Boards to adopt "all necessary and proper rules to implement and interpret" the statutes governing physicians and pharmacists. See Iowa Code § 147.76.

The proposed rules describing who constitutes an "authorized pharmacist" for purposes of administering prescription drugs certainly attempt to clarify who can be an "authorized agent" under section 155A.3(1)(a) or a "qualified individual" under section 155A.4(2)(c) for purposes of administering prescription drugs.

The requirement of the proposed rules that the physician "shall adequately supervise" the pharmacist is consistent with the requirements of section 155A.3(2) and section 155A.4(2)(c). The attempt by the Boards to set forth the requirements of a written protocol and to define what constitutes adequate supervision in the proposed rules appears to be well within their authority to implement and interpret the statutes governing the conduct of physicians and pharmacists.

While this office is not in a position to express an opinion on who is medically qualified to administer prescription drugs or what constitutes adequate supervision among health care professionals, it is noteworthy that the proposed rules are the result of a collaborative effort between the Iowa Board of Medical Examiners and the Iowa Board of Pharmacy Examiners, both of which have considerable expertise in regulating and determining appropriate standards of conduct for their professions. The Boards have attempted by these proposed rules to define when a pharmacist is medically qualified to administer influenza and pneumococcal vaccines. The Boards have also attempted to define what constitutes adequate supervision of pharmacists by physicians in these immunization programs and to define the limits of where one profession's responsibilities end and another's begin. If these proposed rules are adopted, there will be a presumption that they are valid. Dico, Inc. v. Iowa Employment Appeal Bd., 576 N.W.2d 352, 355 (Iowa 1998). The Supreme Court will give considerable deference to the expertise of the Boards in determining when a pharmacist is medically qualified to administer prescription drugs and what constitutes adequate direction and supervision of pharmacists by physicians. Id. at 354. "Notwithstanding the court's ultimate responsibility to decide issues of law, when a case calls for the exercise of judgment on a matter within the expertise of the agency, [the courts] generally leave such decisions to the informed judgment of the agency." Id.

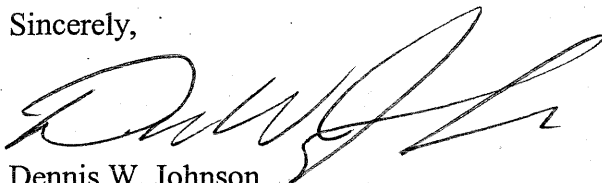
We conclude that the proposed rules fall squarely within the statutory authority of the Boards to implement and interpret the provisions of chapter 155A.

### CONCLUSION

It is our opinion that the provisions of chapter 155A authorize pharmacists to administer prescription drugs under certain circumstances. This may occur when the pharmacist is acting as the authorized agent of a physician because the physician has delegated to the pharmacist the responsibility for administering prescription drugs.<sup>2</sup>

We also conclude that the Iowa Board of Medical Examiners and the Iowa Board of Pharmacy Examiners have authority under section 147.76 to adopt rules to implement and interpret the provisions of chapter 155A. The proposed rules which have been promulgated by the Boards fall squarely within the scope of the Boards' authority to adopt rules, and the courts would give considerable deference to these rules because they deal with matters uniquely within the expertise of the Boards.

Sincerely,



Dennis W. Johnson  
Solicitor General



Bruce L. Kempkes  
Assistant Attorney General

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<sup>2</sup> This opinion is limited to the administration of non-controlled prescription drugs only. We express no opinion herein on the administration of controlled substances.

MUNICIPALITIES: Agreements that landowner and any successor owners “submit” in the future to voluntary annexation. Iowa Const. amend 25 (1968); Iowa Code § 368.7 (1999). In general, a city may enter into agreements with private landowners in which they and any successor owners agree to “submit” to voluntary annexation if the land becomes adjacent to a city boundary within twenty-one years and if the city then desires annexation of the tract. Although this office cannot determine whether a particular annexation agreement binds any successor owners, we point out that persons buying land generally have constructive notice of any properly recorded encumbrances and must, upon accepting the deed, perform any covenant recited within it. (Kempkes to Larson, State Representative, 12-13-00) #00-12-1

December 13, 2000

The Honorable Chuck Larson  
State Representative  
State Capitol  
LOCAL

Dear Representative Larson:

You have requested an opinion on the annexation of an undeveloped tract of land located within two miles of a city’s boundaries, but not presently adjoining a boundary of the city. You indicate a developer wishes to enter into an “annexation agreement” (or, alternatively, a “pre-annexation agreement”) with the city. Under this agreement, the developer and any successor owners of lots within the tract would promise to “submit” to voluntary annexation into the city at such time the tract becomes adjacent to a city boundary and if the city then desires annexation of the tract. You ask whether the agreement binds any successor owners if they have record notice of its terms and if the tract becomes adjacent to the city within twenty-one years.

### **I. Applicable Law**

Iowa Code chapter 368 (1999) is entitled City Development and is the source of authority for the City Development Board, which oversees the annexation of land in an urbanized area. *City of Waukee v. City Development Bd.*, 590 N.W.2d 712, 713-14 (Iowa 1999). An “urbanized area” is any area of land within two miles of the boundaries of a city. Iowa Code § 368.1(15). Under chapter 368,

(1). All of the owners of land in a territory adjoining a city may apply in writing to the council of the adjoining city requesting annexation of the territory. . . .

(2). An application for annexation of territory not within an urbanized area of a city other than the city to which the annexation is directed must be approved by resolution of the council which receives the application. . . .

(3). An application for annexation of territory within an urbanized area of a city other than the city to which the annexation is directed must be approved both by resolution of the council which receives the application and the [City Development Board]

....

Iowa Code § 368.7.

## II. Analysis

As a preliminary matter, we need to determine whether a city acts *ultra vires* by entering into agreements with private landowners that require them and any successor owners to submit to voluntary annexation.

States may expressly authorize cities by statute to enter into such annexation agreements. 2 E. McQuillin, *The Law of Municipal Corporations*, § 7.13.50, at 415 (1996). Iowa law does not specifically authorize cities to do so. Under home rule, however, a city “may exercise its general powers subject only to limitations expressly imposed by a state or city law.” Iowa Code § 364.2(2). See 2000 Op. Att’y Gen. \_\_ (#00-8-5(L)). Although a city by ordinance certainly may prohibit annexation agreements, no statute expressly prohibits them. See generally Iowa Code § 364.2(3) (“[a]n exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law”); Schiedler, “Implementation of Constitutional Home Rule in Iowa,” 22 Drake L. Rev. 294, 311 (1973) (“[i]rreconcilable is a stronger term than inconsistent”). The authority granted to cities in sections 354.8 and 364.4(2) to establish extraterritorial jurisdiction for reviewing subdivisions and to provide extraterritorial services certainly seems consistent with a power to enter into annexation agreements in order to ensure orderly city development. See generally *City of Des Moines v. City Development Bd.*, 473 N.W.2d 197, 200 (1991) (chapter 368, which must be liberally construed in public’s favor, demonstrates in its entirety an intent to have City Development Board oversee and approve orderly development of cities); Yeager, “City and Town Boundaries -- Incorporation, Consolidation, Annexation, and Severance,” 19 Drake L. Rev. 1, 30 (1969) (unregulated urban development on the unincorporated edges of cities constitutes a serious problem for city planning).

We therefore conclude that, as a general proposition, cities may enter into annexation agreements with private landowners. Cf. *Johnson v. City of Le Grande*, 1 P.3d 1036, 1038-39 (Or. App. 2000) (Oregon’s cities could enter into annexation agreements even before enactment of legislation that specifically sanctioned their use); Taub, “Reference Materials for Session on Development Agreements,” C333 ALI-ABA Continuing Legal Educ. 655, 672 (1988) (Florida’s cities have home-rule authority to enter into annexation agreements).

Persons buying land generally have constructive notice of any properly recorded encumbrances and must, upon accepting the deed, perform any covenant recited within it. See

*McSweyn v. Inter-Urban Ry. Co.*, 256 Iowa 1140, 1146, 130 N.W.2d 445, 448 (1964) (citations omitted); *see also* 76 Cal. Op. Att’y Gen. 227 (Oct. 13, 1993) (recording laws give successor owners constructive knowledge of recorded annexation agreements). Courts have upheld, against successor owners, annexation agreements in which the provision of extraterritorial services improved or otherwise benefitted their land. *See, e.g., Village of Orland Park v. First Fed. Savings & Loan Ass’n*, 481 N.E.2d 946, 950-51 (Ill. App. 1985); *City of Springfield ex rel. Burton v. City of Springfield*, 2000 WL 799727 (Ohio); *see also* 2 McQuillin, *supra*, § 7.13.50, at 416. *See generally* *Geralnes B.V. v. Greenwood Village*, 583 F.Supp. 830, 839-40 (D. Colo. 1984); *Greenwood Village v. Proposed City of Centennial*, 3 P.3d 427, 446 (Colo. 2000); 1993 N.C. Op. Att’y Gen. (Nov. 1993); Starritt & McClanahan, “Land Use Planning and Takings,” 30 Land & Water L. Rev. 415, 455-56 (1995). We therefore conclude that, as a general proposition, persons who purchase land with constructive notice of an annexation agreement will be bound by that agreement to the same extent as the previous owner.

Notwithstanding these general propositions, we suggest that a city proceed with caution in this area. We cannot determine in an attorney general’s opinion whether a *particular* annexation agreement binds successor owners, because annexation agreements may vary in their specific terms as well as in the circumstances surrounding their negotiation and execution. *See generally* 61 IAC 1.5(2), 1.5(3)(d); 1972 Op. Att’y Gen. 642, 643 (declining to speculate on court ruling when two municipalities seek to annex same territory under different statutory procedures); 1970 Op. Att’y Gen. 48, 51 (declining to speculate on all possible legal theories in theoretical suit against state).

Moreover, the existence of an annexation agreement does not mean that a city itself can institute a voluntary annexation or that such an annexation will automatically occur when the land subject to the agreement becomes adjacent to the city boundaries. A voluntary annexation can only occur when “[a]ll the owners of land in a territory adjoining a city . . . apply in writing to the council of the adjoining city requesting annexation of the territory.” Iowa Code § 368.7(1). If the annexation agreement requires all landowners to submit to voluntary annexation, but a successor owner refuses to join in making a written application, the city or other landowners may have to initiate judicial proceedings in order to force compliance with the agreement. The success of such an action would depend, among other things, upon the specific terms of the annexation agreement.

We also caution that not every annexation agreement may survive judicial scrutiny. *See, e.g., City of Louisville v. Jefferson County Fiscal Ct.*, 623 S.W.2d 219, 225 (Ky. 1981) (annexation agreement requiring city to undertake certain legislative action, including zone changes, changes in street entrances, and flood control held invalid on ground that “[a] contract which binds a legislative body, present or future, to a course of legislative action is void against public policy”). *Cf.* 1988 Op. Att’y Gen. 50 (#87-10-1(L)) (“[a] waiver of either a statutory or constitutionally protected right must be a voluntarily and intentional act done with an actual knowledge of the existence of the right and the meaning of the rights involved, and with full

Representative Chuck Larson

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understanding of the direct consequences of the waiver”; “absent an express statutory provision to the contrary, a local governmental body [generally] may not bind its successors in matters that are essentially legislative or governmental, in nature”).

Finally, more than one city may seek to annex the same tract of land. In such a case, the City Development Board could properly view an annexation agreement between a single city and a developer as merely one factor to weigh in fulfilling its statutory duty to consider the interests of all parties. *See generally* 1980 Op. Att’y Gen. 282 (#79-7-17(L)) (“the intent of the legislature in requiring approval by the [City Development] Board of voluntary annexations within urbanized areas was to provide a check by an impartial body on competition between cities for certain territories”). We seriously doubt that an annexation agreement between a city and a private developer can usurp the statutory role of the City Development Board. *Cf. Crescent Chevrolet v. Iowa Dep’t of Job Serv.*, 429 N.W.2d 148, 150 (Iowa 1988) (statutory right enabling parties in contested cases to waive certain proceedings does not limit the statutory authority of governing state agency to review proceedings; a stipulation that effectively “prohibits [an] agency from performing its statutory obligations and functions will not be enforced”); *In re Kokomo Times Pub. & Printing Corp.*, 301 F. Supp. 529, 536 (S. D. Ind. 1968) (“the parties could not by agreement . . . bind [others] who were not parties to the agreement”).

### III. Summary

In general, a city may enter into agreements with private landowners in which they and any successor owners agree to “submit” to voluntary annexation if the land becomes adjacent to a city boundary within twenty-one years and if the city then desires annexation of the tract. Although this office cannot determine whether a particular annexation agreement binds any successor owners, we point out that persons buying land generally have constructive notice of any properly recorded encumbrances and must, upon accepting the deed, perform any covenant recited within it. We believe that passage of legislation specifically approving and detailing procedures for annexation agreements would provide cities and developers with greater certainty in their planning.<sup>1</sup>

Sincerely,



Bruce Kempkes

Assistant Attorney General

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<sup>1</sup> Although your question refers to a tract of land becoming adjacent to a city boundary within twenty-one years, you do not explain the significance of that time period. It presumably rests upon Iowa Code section 614.24, which governs stale uses and reversions. We limit this opinion to your specific question and do not consider the impact, if any, of section 614.24.

SCHOOLS; AREA EDUCATION AGENCIES: Financing of services provided to children requiring special education. Iowa Code § 256B.15 (1999). The limitation upon retention of federally funded health care program reimbursements contained in Iowa Code subsection 256B.15(7)(b) applies to area education agencies which receive those funds as the result of the provision of direct services to children requiring special education. The limitation does not apply to Medicaid funding for AEA-based "administrative claiming" activities or to funding received under IDEA Part C, but does apply to Medicaid or other federally funded health care program reimbursement received by an AEA for providing direct services to infants and toddlers with disabilities under the Iowa Early ACCESS program, implementing Part C of the IDEA. (Scase to Stilwill, Director, Department of Education, and Rasmussen, Director, Department of Human Services, 12-26-00) #00-12-2

December 26, 2000

The Honorable Ted Stilwill, Director  
Iowa Department of Education  
Grimes State Office Building - 2<sup>nd</sup> Floor  
LOCAL

The Honorable Jessie K. Rasmussen, Director  
Iowa Department of Human Services  
Hoover State Office Building - 5<sup>th</sup> Floor  
LOCAL

Dear Directors Stilwill and Rasmussen:

You have jointly requested an opinion from this office addressing Iowa Code section 256B.15 (1999), entitled "Reimbursement for special education services," and the applicability of subsection (7)(b) of this section to certain services which may be provided by area education agencies [AEAs] in Iowa. Specifically, you ask:

1. Do the provisions of Iowa Code section 256B.15 prevent the AEAs from retaining 100 percent of the federal portion of their reimbursement for duties related to *Medicaid Administrative Claiming* (section 1903(a)(7) of the Social Security Act)?
2. Do the provisions of Iowa Code section 256B.15 limit the AEAs ability to retain 100 percent of reimbursement for direct care services provided to infants and toddlers with disabilities and their families served under the Early ACCESS program known as Part C of the Individuals with Disabilities Education Act?

Our review of section 256B.15 and the parameters of the federally funded programs at issue leads us to conclude that the subsection 256B.15(7)(b) fund retention limitation applies only to AEAs which receive federally funded health care program reimbursements for the provision of direct services to children requiring special education. The limitation does not apply to Medicaid

funding for AEA-based “administrative claiming” activities or to funding received under IDEA Part C, but does apply to Medicaid reimbursement or other federal health care program funding received by AEAs as reimbursement for providing direct services to infants and toddlers with disabilities served under Part C.

We begin our analysis by review of relevant provisions of section 256B.15.

#### 256B.15 Reimbursement for special education services

1. The state board of education in conjunction with the department of education shall develop a program to utilize federally funded health care programs, except the federal medically needy program for individuals who have a spend-down, to share in the costs of services which are provided to children requiring special education.

...

3. The department of education, in conjunction with the area education agency [designated to develop the program], shall determine those specific services which are covered by federally funded health care programs, which shall include, but not be limited to, physical therapy, audiology, speech language therapy, and psychological evaluations. The department shall also determine which other special services may be subject to reimbursement and the qualifications necessary for personnel providing those services. If it is determined that services are required from other service providers, these providers shall be reimbursed for those services.

4. All services referred to in subsection 1 shall be initially funded by the area education agency and shall be provided regardless of subsequent subrogation collections. The area education agency shall make a claim for reimbursement to federally funded health care programs.

...

7. b. The area education agencies shall, after determining the administrative costs associated with the implementation of medical assistance reimbursement for the eligible services, be permitted to retain up to twenty-five percent of the federal portion of the total



amount reimbursed to pay for the administrative costs. Funds received under this section shall not be considered or included as part of the area education agencies' budgets when calculating funds that are to be received by area education agencies during a fiscal year.

Iowa Code § 256B.15(1), (3), (4), (7)(b) (1999). These provisions were enacted within 1988 Iowa Acts, 72<sup>nd</sup> G.A., chapter 1155, entitled "An Act requiring the area education agencies to utilize federally funded health care programs to share in the costs of services provided to certain children requiring special education . . . ." The articulated purpose of section 256B.15 is to ensure that area education agencies maximize their utilization of available federal health care program funding to share the cost of providing direct services to children requiring special education. Subsection 256B.15(7)(b) has the effect of limiting the portion of the funds received under this section which area education agencies may retain to the actual amount of administrative costs associated with obtaining the reimbursement, not to exceed twenty-five percent of the federal portion of the total amount reimbursed.

Within your request letter you indicate a belief that "section 256B.15 is only operational when the services are 'direct services' provided by the AEA to an individual identified as eligible for 'special education' who has an Individualized Education [Program] (IEP)." Although we agree that section 256B.15 is applicable only to direct services, we find nothing within the statute which limits its applicability to students who have an IEP in place. Our analysis is guided by familiar principles. The "ultimate goal in interpreting statutes is to determine and give effect to legislative intent." Holiday Inns Franchising, Inc. v. Branstad, 537 N.W.2d 724, 728 (Iowa 1995). Intent is determined "from what the legislature said, not from what it might or should have said. If the language is clear and unambiguous, we apply a plain and rational meaning in light of the subject matter of the statute." Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co., 606 N.W.2d 376, 379 (Iowa 2000), citing Iowa R. App. P. 14(f)(13).

By its terms, section 256B.15 is applicable to federally funded health care program reimbursement of "the costs of services which are provided to children requiring special education." In order to resolve your first inquiry, it is necessary to determine the nature of the services covered by this section. Subsection 256B.15(3) includes the following nonexclusive list of the services to which the legislature intended this section to apply: "physical therapy, audiology, speech language therapy, and psychological evaluations." Each item on this list is a service which may be reimbursable under a federally funded health care program only if it is directly provided to an eligible individual. As you indicate, "AEAs currently participate in direct services for Medicaid reimbursement. Direct services are services to provide care, are client specific, and involve an invoice fee for service." See 42 U.S.C. §§ 1396, et seq. [Title XIX of

the Social Security Act]. The subsection 256B.15(7)(b) limitation upon AEA retention of federally funded health care program reimbursement clearly applies to the federal portion of funds received by an AEA as reimbursement for client-specific medical services under the Medicaid program.

In addition to reimbursement for direct medical services, the Medicaid program provides for reimbursement of a portion of the costs associated with certain administrative activities “found necessary by the Secretary [of the federal Department of Health and Human Services] for the proper and efficient administration of the State [Medicaid] plan.” 42 U.S.C. § 1396b(a)(7); see 42 C.F.R. Parts 74 and 95; OMB Circulars A87 and A122. You ask whether the subsection 256B.15(7)(b) limitation applies to the federal portion of reimbursement received under the Medicaid program for administrative activities. Medicaid program administration activities which may be eligible for federal reimbursement, frequently referred to as “administrative claiming,” include outreach, information and referral, intake processing, eligibility determinations and re-determinations, and utilization review. See 42 C.F.R. Parts 74 and 95; *Medicaid School-Based Administrative Claiming Guide / Draft*, U.S. Department of Health and Human Services, Health Care and Financing Administration (Feb. 2000), at p. 11; *Medicaid and School Health: A Technical Assistance Guide*, U.S. Department of Health and Human Services, Health Care and Financing Administration (Aug. 1997). “[P]ayments for allowable Medicaid administrative activities must not duplicate payments that have been, or should have been, included as a part of a direct medical service” to a Medicaid eligible child. 42 C.F.R. Parts 74 and 95; *Medicaid School-Based Administrative Claiming Guide / Draft*, at p. 10.

Administrative activities eligible for administrative claiming, by definition, exclude activities which are reimbursable as direct care services under the Medicaid program. In addition, reimbursable administrative activities may relate to non-disabled as well as disabled children. The fund retention limitation placed upon AEAs by subsection 256B.15(7)(b) applies only to “medical assistance reimbursement” received by AEAs. It appears that activities eligible for administrative claiming are not direct services provided to individual children requiring special education, as contemplated by section 256B.15. Therefore, we resolve your first inquiry by concluding that this limitation is not applicable to reimbursements received by AEAs under the Medicaid administrative claiming program.

Resolution of your second inquiry requires determination of whether infants and toddlers with disabilities who are served under Part C of the Individuals with Disabilities Education Act [IDEA], are “children requiring special education” and, if so, whether Part C constitutes a federally funded health care program. Part C of the IDEA, as amended in 1997, provides financial assistance to States

- (1) to develop and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency system that provides early intervention services for infants and toddlers with disabilities and their families;
- (2) to facilitate the coordination of payment for early intervention services from Federal, State, local, and private sources (including public and private insurance coverage);
- (3) to enhance their capacity to provide quality early intervention services and expand and improve existing early intervention services being provided to infants and toddlers with disabilities and their families; and
- (4) to encourage States to expand opportunities for children under 3 years of age who would be at risk of having substantial developmental delay if they did not receive early intervention services.

20 U.S.C. § 1431(b). Early intervention services encompassed within the program include family training, counseling, home visits, special instruction, and a wide variety of social services, as well as health-related direct care services. 20 U.S.C. § 1432(4). Infants and toddlers under the age of three with disabilities and their families are eligible for early intervention services offered pursuant to Part C. 20 U.S.C. § 1434. To the extent that the early intervention services provided pursuant to Part C constitute direct health care services which are reimbursable to eligible individuals under the Medicaid program, the statewide Part C system must require providers to secure Medicaid reimbursement for the services. 20 U.S.C. §§ 1435(a)(12), 1440. Part C funds may be used to provide direct early intervention services only if the services “are not otherwise funded through other public or private sources.” 20 U.S.C. § 1438(1).

You indicate a belief that “[i]f AEAs are restricted from fully accessing the funds available under Medicaid, they will not be able to fully implement and receive funding for services they need to provide under Part C.” Although we understand this concern, we believe that the provisions of Code section 256B.15, including the fund retention limitation placed upon AEAs under subsection 256B.15(7)(b), are applicable to reimbursements received from Medicaid or other federal health care programs for direct care services provided to disabled infants and toddlers under Part C of the IDEA.

Section 256B.15 applies to reimbursement for the cost of “services which are provided to children requiring special education.” The term “special education” is commonly used to refer to educational, support, and related services provided to children with disabilities pursuant to Part B of the IDEA. We cannot, however, rely upon this general use definition where, as here, the legislature has provided a definition applicable to the statute in question. See Seeman v. Iowa

Department of Human Services, 604 N.W.2d 53, 57 (Iowa 1999) (“the Iowa legislature acts as its own lexicographer”); Hornsby v. State, 559 N.W.2d 23, 25 (Iowa 1997) (“where the legislature defines its own terms and meanings in a statute, the common law or dictionary definitions which may not coincide with the legislative definition must yield to the language of the legislature”). For purposes of chapter 256B, the legislature has specifically defined the phrase “children requiring special education” to mean “persons under twenty-one years of age, including children under five years of age, who have a disability in obtaining an education because of a head injury, autism, behavioral disorder, or physical, mental, communication, or learning disability, as defined by the rules of the department of education.” Iowa Code § 256B.2(1) (1999). This definition expressly includes children below the age of five and does not require a pre-determination of eligibility for special education services or an existing IEP. Rather, the definition includes all persons under the age of twenty-one who have a disability in obtaining an education. Application of this definition to interpretation of section 256B.15, requires us to conclude that the fund retention limitation within subsection 256B.15(7)(b) comes into play when an AEA receives federal health program reimbursement for the provision of a direct care service to a disabled infant or toddler under Part C of the IDEA (the Early ACCESS program in Iowa).<sup>1</sup>

We do not, however, believe that the section 256B.15 fund retention limitation is applicable to Part C funding itself. As detailed above, section 256B.15 is applicable only to federally funded health care programs. Although IDEA Part C funds may be used to provide direct early intervention services to infants and toddlers, these services may include health care services only if no alternate public or private funding source is available. We do not believe that IDEA Part C itself can fairly be characterized as a “federally funded health care program,” as contemplated by 256B.15. The primary purpose of IDEA Part C is to “enhance the development of infants and toddlers with disabilities and to minimize their potential for developmental delay,” thereby reducing “the educational costs to our society.” 20 U.S.C. § 1431(a). Therefore, we conclude that the fund retention limitation contained in subsection 256B.15(7)(b) is not applicable to Part C funding received by AEAs.

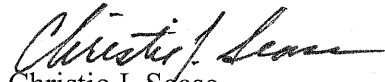
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<sup>1</sup> Although we have concluded that terms of section 256B.15 encompass Medicaid reimbursement for direct services provided to disabled infants and toddlers under Part C, we recognize that this outcome may place a financial hardship upon AEAs as they strive to provide early intervention services. We must, however, defer to the legislature as to the wisdom of applying section 256B.15 to early intervention services. You may wish to consider presenting your policy arguments in favor of allowing AEAs to retain federal funding received for these services directly to the legislature.

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The Honorable Jessie K. Rasmussen  
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In summary, we conclude that the limitation upon retention of federally funded health care program reimbursements contained in Iowa Code subsection 256B.15(7)(b) applies to AEAs which receive those funds as the result of the provision of direct services to children requiring special education. The limitation does not apply to Medicaid funding for AEA-based “administrative claiming” activities or to funding provided under Part C of the IDEA, but does apply to Medicaid or other federally funded health care program reimbursement received by an AEA for providing direct services to infants and toddlers with disabilities under the Iowa Early ACCESS program, implementing Part C of the IDEA.

Sincerely,

  
Christie J. Sease  
Assistant Attorney General

