JUVENILE LAW; COUNTIES: Unreimbursed shelter care costs. Iowa Code §§ 232.141, 234.35, 234.39 (1999). When counties incur expenses for providing children with shelter care services that the State does not reimburse, section 234.39 does not authorize counties to pursue reimbursement for those expenses from the parents. (Kempkes to Zenor, Clay County Attorney, 1-11-01) #01-1-1

January 11, 2001

Mr. Michael L. Zenor
Clay County Attorney
2000 Highway Blvd.
P.O. Box 317
Spencer, IA 51301

Dear Mr. Zenor:

When family crises endanger children, government may intervene to provide services to them and their families. You have requested an opinion about the authority of county governments that intervene to provide endangered children with "shelter care" -- statutorily defined as the temporary care of a child in a physically unrestricting facility. You ask whether counties incurring expenses in providing shelter care for children may pursue reimbursement from the parents for those expenses the State does not reimburse. This question concerns only those costs in excess of the reimbursement rate established by the State, not the cost of shelter care services *per se*, and requires an examination of Iowa Code chapters 232 and 234 (1999).

I. Applicable Law

Chapter 232 is entitled Juvenile Justice. It provides children and their families with shelter care and other services. Section 232.141 addresses (1) the financial liability of the child's parents, if any, which the court determines after a hearing, Iowa Code § 232.141(1); *see* 1992 Op. Att'y Gen. 26 (#91-5-2(L)); (2) the financial liability of the county hosting the proceedings, Iowa Code § 232.141(2), which may seek reimbursement for unreimbursed costs from the "county of legal settlement," if any, Iowa Code § 232.141(8); and (3) the financial liability of the State, which reimburses the host county at specified rates for the costs it incurs, Iowa Code § 232.141(5), (6).

Chapter 234 is entitled Child and Family Services. Section 234.35 establishes the financial liability of the State for foster care services. *See* Iowa Code § 237.15(2)(a); 1978 Op. Att'y Gen. 473, 474. Under section 234.35(1), the Iowa Department of Human Services (DHS) "is responsible for paying the cost of foster care for a child" under any one of nine circumstances, including "[w]hen the child is placed in shelter care pursuant to [provisions in chapter 232]." Iowa Code § 234.35(1)(h). Section 234.39 addresses the financial responsibility of parents for their child's foster care services:

> It is the intent of this chapter that an individual receiving foster care services and the individual's parents or guardians shall have primary responsibility for paying the cost of the care and services. The support obligation established and adopted under this section shall be consistent with the limitations on legal liability established under sections 222.78 [for mentally retarded persons] and 230.15 [for mentally ill persons], and by any other statute limiting legal responsibility for support which may be imposed on a person for the cost of care and services provided by the [DHS]. The [DHS] shall notify an individual's parents or guardians, at the time of the placement of an individual in foster care, of the responsibility for paying the cost of care and services. Support obligations shall be established as follows . . . .

Section 234.39 then provides for the court in certain circumstances to establish "the amount of the parent's or guardian's support obligation for the cost of foster care provided by the [DHS]," Iowa Code § 234.39(1), and for the DHS in other circumstances to "determine the obligation of the individual's parent or guardian," Iowa Code § 234.39(2).

II. Analysis

We understand that the foregoing statutory scheme may result in counties incurring expenses, unreimbursed by the State, for providing shelter care services to children. You have asked whether counties have statutory authority to pursue reimbursement from the parents for those expenses.

Chapter 234 sets forth the limits of parental liability for children who receive "foster care services," which, although statutorily undefined therein, encompasses shelter care services. *See* Iowa Code § 234.35(1)(h) (DHS has financial responsibility for foster care services whenever a child is "placed in shelter care pursuant to [provisions in chapter 232]"); *see also* 441 IAC 156.11(3) (DHS payments for foster care encompass shelter care); *In re N.M.*, 528 N.W.2d 94, 97 (Iowa 1995) ("foster care," undefined in chapter 232, "encompasses any out-of-home placement"); 1992 Op. Att'y Gen. 86 (#92-2-8(L)) (DHS "currently interprets shelter care as a

level of foster care and will pay for shelter care costs [pursuant to section 234.35]"); 1992 Op. Att'y Gen. 26 (#91-5-2(L)) (foster care includes "emergency shelter care"). *Cf.* Iowa Code § 237.15(2)(a) ("child receiving foster care" means "a child defined in section 234.1 [whose placement] is the financial responsibility of the state pursuant to section 234.35").

In suggesting that counties may have grounds in chapter 234 for pursuing reimbursement from the parents for the cost of shelter care services, you specifically refer to the opening sentence of section 234.39: "the intent of [chapter 234 is] that an individual receiving foster care services and the individual's parents or guardians shall have primary responsibility for paying the cost of the care and services." We do not believe that this general statement of legislative intent -- isolated from the rest of section 234.39 -- provides counties with a right to recoup their unreimbursed expenses from parents. *See generally Telegraph Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 532 (Iowa 1980) (statute must be read as part of a whole).

Viewing section 234.39 in its entirety, we see that the general statement of placing upon the parents the "primary responsibility" for paying the cost of care and services only extends to the care and services rendered by the State. Section 234.39 does not extend parental liability to the cost of care and services rendered by counties. *See generally* 1978 Op. Att'y Gen. 473, 478 (observing that the cost of foster care was originally borne by the counties, that section 234.39 was passed as part of a measure relieving them of this cost, and that the cost reverts back to the counties when appropriated funds are exhausted and legislature refuses a supplemental appropriation). Nowhere in its detailed provisions does section 234.39 specifically authorize counties to recoup from parents the expenses incurred in providing shelter care services that the State does not reimburse; in fact, section 234.39 does not mention counties at all. Had the General Assembly intended for parental liability to encompass the unreimbursed expenses incurred by counties in providing shelter care services, it could have made express provision for such authority. *Compare* Iowa Code § 234.39 *with* Iowa Code § 232.52(2)(c)(2) (expressly providing for court orders requiring parents to reimburse county for care and treatment for children who commit delinquent acts), § 252.13 (expressly authorizing counties to recover expenses, for supporting poor persons, from relatives within two years of paying expenses).

We note that neither prior opinion, administrative rule nor case discussing section 234.39 indicates that the General Assembly has conferred upon counties the authority to pursue reimbursement from the parents for any portion of those expenses the State does not reimburse for the provision of shelter care services. *See generally* 441 IAC chs. 99, 156; *In re B.G.*, 508 N.W.2d 687, 688 (Iowa 1993); 1996 Op. Att'y Gen. 84, 84, 85 (section 234.39 concerns parental liability for support of a child receiving foster care services from the State; parents have a duty under section 234.39 to repay the state for public assistance expended on minor children pursuant to foster care placement).

III. Summary

When counties incur expenses for providing children with shelter care services that the State does not reimburse, Iowa Code section 234.39 does not authorize counties to pursue reimbursement for those expenses from the parents.[1]

Sincerely,

Bruce Kempkes
Assistant Attorney General

[1] We understand that you also want to know whether the common law -- under which parents generally bear the responsibility for a child's care and support, 59 Am. Jur. 2d *Parent & Child* § 14, at 146 (1987) -- provides counties with a basis for seeking reimbursement from parents for the provision of shelter care services. This office, however, "does not render official opinions describing theories of liability or recovery in litigation. The function of an . . . opinion is to resolve issues of law to govern public officials without the need to resort to litigation." 1990 Op. Att'y Gen. 52 (#89-11-4(L)).

NUISANCE; COUNTIES: Assessment for abatement by county. Iowa Code §§ 331.384, 364.12, 384.62 (1999). A county abating a nuisance located on a private lot has authority to assess all reasonable abatement costs against the lot. (Kempkes to Lloyd, Clarke County Attorney, 1-18-01) #01-1-2

January 18, 2001

Mr. John D. Lloyd
Clarke County Attorney
Courthouse
100 S. Main St.
Osceola, IA 50213

Dear Mr. Lloyd:

You have requested an opinion on the liability for costs incurred by counties that abate nuisances located on private lots. You ask whether a county has authority to assess all abatement costs against a lot or, instead, whether it only has authority to assess costs up to twenty-five percent of the lot's value. After examining Iowa Code chapters 331 and 384 (1999), we conclude that a county may assess all reasonable abatement costs against the lot.

I. Applicable law

Chapter 331 is entitled County Home Rule Implementation. Section 331.384(1)(a) provides that a county -- like a city, Iowa Code § 364.12(3) -- may require the abatement of a nuisance "in any reasonable manner." Section 331.384(2) provides:

> If the property owner does not perform an action required under this section within a reasonable time after notice, a county may perform the required action and assess *the costs* against the property for collection in the same manner as a property tax. . . . However, in an emergency, a county may perform any action which may be required under this section without prior notice and

> assess *the costs* as provided in this section after notice to the property owner and hearing.

(emphasis added). Section 331.384(5) provides:

> *The procedures* for making and levying a special assessment pursuant to this section and for an appeal of the assessment *are the same procedures as provided in sections 384.59 through 384.67 and sections 384.72 through 384.75*, provided that the references in those sections to the council shall be to the board of supervisors and the references to the city shall be to the county.

(emphasis added).

Chapter 384 is entitled City Finance. Section 384.62 provides in part:

> A special assessment against a lot for a public improvement may not be in excess of the amount of the assessment, . . . *and an assessment may not exceed twenty-five percent of the value of the lot* . . . .
>
> Special assessments for the construction or repair of underground connections for private property for gas, water, sewers, or electricity may be assessed to each lot for *the actual cost of each connection for that lot, and the twenty-five-percent limitation does not apply.*

(emphasis added).

II. Analysis

In permitting a county to assess the costs of abating a nuisance located on a private lot, section 331.384 expressly incorporates certain provisions in chapter 384 that normally apply to special assessments linked with the making of public improvements. One of those provisions, section 384.62, limits special assessments to twenty-five percent of a lot's value in certain instances. The question thus arises whether this limitation applies to an assessment for a county's abating a nuisance on a private lot.

Section 331.384(5) does not broadly provide that "sections 384.59 through 384.67 and sections 384.72 through 384.75" shall apply to special assessments for a county's abating a nuisance. Rather, section 331.384(5) more narrowly provides that "*[t]he procedures* for making and levying special assessments pursuant to this section and for an appeal of the assessment *are*

the same procedures as provided in sections 384.59 through 384.67 and sections 384.72 through 384.75." (emphasis added). By express language, then, section 331.384(5) only incorporates the procedures contained in those specified provisions; it does not incorporate the provisions *in toto*.

The word "procedures" commonly means a set or defined series of steps for accomplishing a goal or performing a task and legally signifies adjective law as distinguished from substantive law. *E.g., United States v. Jones*, 846 F. Supp. 955, 964 n. 19 (S.D. Ala. 1994), *affirmed*, 57 F.3d 1020 (11th Cir. 1995); *People v. Bauer*, 614 N.Y.S.2d 871, 876 (City Ct. 1994); *Marbet v. Keisling*, 838 P.2d 580, 581 (Or. 1992); *Black's Law Dictionary* 41, 1203-04 (1990); *Webster's Ninth New Collegiate Dictionary* 910 (1979). In the context of nuisance proceedings, these meanings do not easily encompass a limitation on costs. *See generally* Iowa Code § 4.1(38) (statutory words and phrases shall be construed according to context and approved English usage). Rather, they encompass such administrative matters as, for example, the filing of an assessment schedule, Iowa Code § 384.59; the challenging of an assessment, Iowa Code § 384.66; and the paying of an assessment, Iowa Code § 384.67.

We therefore conclude that the twenty-five-percent limitation does not apply to an assessment for a county's abating a nuisance on a private lot. This construction harmonizes with section 331.384(2), which permits a county to abate a nuisance on private property "and assess *the costs* against the property" and with section 657.4, which permits district courts by warrant to order abatement of a nuisance "*at the expense of* the defendant." (emphasis added). *See generally March v. Pekin Ins. Co.*, 465 N.W.2d 852, 854 (Iowa 1991) (related statutes must be harmonized). In addition to textual considerations, our conclusion receives support on at least five more levels:

First: Full recovery by counties comports with the common law. *See* 58 Am. Jur. 2d *Nuisance* § 414, at 992, § 422, at 999, § 425, at 1003, § 428, at 1005 (1989). *See generally* Iowa Code § 4.6(4) (statutory construction may take into account the common law).

Second: Full recovery comports with an apparent legislative scheme of permitting public entities the opportunity to recoup, in some manner, their expenses for abating nuisances located on private lots. *See generally* Iowa Code § 4.6(4) (statutory construction may take into account laws upon same or similar subject). Those entities include

-- the Iowa Department of Transportation, Iowa Code § 306C.19(2);

-- cities, Iowa Code § 364.12(3); *City of Muscatine v. Northbrook Partnership Co.*, 619 N.W.2d 362, 367-68 (Iowa 2000) (cities may seek personal judgments against private property owners to recover costs); *French v. Iowa Dist. Court*, 546 N.W.2d 911, 915 n. 3 (1996) (cities may assess private lots for abatement costs);

-- the Iowa Department of Natural Resources, Iowa Code § 455B.275(4);

-- governing bodies of levee and drainage districts, Iowa Code § 468.149; and

-- county health boards, *Boone County Health Bd. v. Wood*, 243 N.W.2d 862, 866 (Iowa 1976); *see* Iowa Code § 137.6(2).

Third: Full recovery encourages the abatement of nuisances that harm or might harm the public health, safety, and welfare by providing some measure of financial assurance to counties. *See generally* Iowa Code § 4.6(5) (statutory construction may take into account consequences of a particular construction). Full recovery does not provide a windfall to counties: it merely gives them the opportunity to recoup their outlays and places them in roughly the same position as a third party who abates a nuisance and thereafter seeks payment for its abatement. *See Boone County Health Bd. v. Wood*, 243 N.W.2d at 868. *See generally* Iowa Code § 4.4(3) (statutory construction presumes that legislature intended just and reasonable result).

Fourth: A county abating a nuisance located on a private lot merely acts as the *alter ego* of the owner, who, in comparison with the county, certainly has a higher responsibility for its abatement. *See generally* Iowa Code § 331.384(2). Less than full recovery encourages lot owners to refrain from properly abating nuisances in a timely fashion and provides them with a type of windfall when the county, acting in the public interest, steps in to abate them. *See Brandon Township v. Jerome Builders, Inc.*, 263 N.W.2d 326, 328 (Mich. App. 1978). *See generally* Iowa Code § 4.4(5) (statutory construction presumes that legislature intended to favor public interest over any private interest); *In re Johnson*, 213 N.W.2d 536, 538 (Iowa 1973) (statutory construction disfavors a construction resulting in an inequity). Equity, which governs nuisance proceedings, does not favor unjustly enriched lot owners who have unclean hands. *Cf.* Iowa Code § 4.2 (courts shall liberally construe statute with a view to promote its object and assist the parties in obtaining justice).

Fifth: A construction of section 331.384(5) incorporating the twenty-five-percent limitation of section 384.62 would ignore the language of section 384.62 in its entirety. *See generally* Iowa Code § 4.4(2) (statutory construction presumes that legislature intended for entire statute to be effective); *State v. Carpenter*, 616 N.W.2d 540, 542 (Iowa 2000) (statute must be construed in its entirety). Although the first paragraph of section 384.62 clearly provides that the twenty-five-percent limitation applies to public improvements, the second paragraph just as clearly provides that this limitation does not apply to every public improvement. *See* Iowa Code § 384.62 (second paragraph: "the twenty-five-percent limitation does not apply" to special assessments for constructing or repairing underground connections for private property for gas, water, sewers, or electricity). Any construction of section 331.384(5) incorporating the twenty-five-percent limitation from section 384.62 would have the rather awkward if not insolvable problem of explaining why the first paragraph takes precedence over the second when counties, acting solely in the public interest, abate nuisances located on private lots.

III. Summary

A county abating a nuisance located on a private lot has authority to assess all abatement costs against the lot. The costs must be reasonable. *Boone County Health Bd. v. Wood*, 243 N.W.2d at 869-70; 6A E. McQuillin, *The Law of Municipal Corporations* § 24.79, at (1997); *see* Iowa Code § 331.384(1)(a).

Sincerely,

Bruce Kempkes
Assistant Attorney General

COUNTIES; ZONING; TAXATION: Distinguishing "industry" from "agriculture"; egg breaking. Iowa Code §§ 331.304, 335.1, 335.2, 335.3, 335.4, 428.20, 441.21 (1999). A county may subject a proposed egg-breaking operation to zoning regulations, because, as a matter of law, that particular operation does not constitute agriculture. "Agriculture" in this context means the art or science of cultivating the ground, including the harvesting of crops and the rearing and managing of livestock. Whether the county may classify the proposed egg-breaking operation as industry for property tax purposes is a question of fact initially for the county assessor's determination and ultimately a court's. "Industry" in this context includes any process of manufacturing, refining, and purifying and excludes any process that does not change the character of an agricultural commodity. (Kempkes to Eddie, State Representative, 2-1-01) #01-2-1

February 1, 2001

The Honorable Russell Eddie
State Representative
State Capitol
LOCAL

Dear Representative Eddie:

Against the backdrop of a continuing debate about the vertical integration of agricultural and industrial operations, *see* Note, 4 Gt. Plains Nat. Resources J. 261, 271-76 (2000), you and the Buena Vista County Attorney's Office have each requested an opinion on the scope of a county's authority to regulate land use through zoning. That authority essentially permits a county to regulate industry and not agriculture.

A facility proposes to engage in egg-breaking operations, in addition to its egg-laying and egg-washing operations, for the purpose of reducing its transportation costs. The egg-laying operation would consist of thirty "high rise cage layer buildings," each nearly 600 feet long and 55 feet wide. The buildings would initially house two million chickens and produce more than 1.4 million eggs per day, and eventually house four million chickens and produce more than 2.8 million eggs per day. The egg-washing operation would help guard against bacterial contamination and result in a substantial amount of wastewater. The egg-breaking operation would separate the shells from the liquid contents, which would then undergo transport (either with commingled or separated whites and yolks) in refrigerated tanker trucks. Five to seven employees would oversee or run several types of equipment in the egg-breaking operation:

conveyors, scanners (for detecting "bad eggs"), breaking machines, squeezing machines (to extract any remaining liquids out of the broken shells), pumps, vats, holding tanks, and storage barrels. The facility would sell or use the broken shells as fertilizer or as an additive to poultry feed.

The questions presented are whether such a proposed egg-breaking operation constitutes agriculture *vis-a-vis* industry for purposes of zoning as well as property taxes. They primarily involve an examination of Iowa Code chapters 335 and 441 (2001).

I. Zoning

(A) Applicable law

Chapter 335 -- formerly chapter 358A -- is entitled County Zoning and was originally enacted in 1947. It applies to any county at the option of its board of supervisors. Iowa Code § 335.1. Among other things, a county must design its zoning regulations to preserve the availability of agricultural land and protect the health and the general welfare of its residents, with a "reasonable consideration [of] the character of the area of the district and the peculiar sustainability of such area for particular uses" and with a "view to . . . encouraging the most appropriate use of land throughout [the] county." Iowa Code § 335.5.

Section 335.3 identifies the subjects of county zoning:

> *Subject to section 335.2*, the board of supervisors may by ordinance regulate and restrict the height, number of structures, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, *and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes* . . . .

(emphasis added). Section 335.2, sometimes termed the "freedom to farm act," provides in part:

> Except to the extent required to implement section 335.27 [which permits enactment of agricultural land preservation ordinances], no ordinance adopted under this chapter applies to *land, farm houses, farm barns, farm outbuildings or other buildings or structures which are primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used.*

(emphasis added). *Cf.* Iowa Code § 331.304(3)(b) (county building code shall not apply to "farm houses or other farm buildings which are primarily adapted for use for agricultural

purposes, while so used"), § 414.23 (section 335.2 applies to city opting to zone land extraterritorially).

(B) Analysis

Premised upon assumed facts and circumstances, the question whether the proposed egg-breaking operation constitutes industry or agriculture for purposes of chapter 335 is one of law. *See Kuehl v. Cass County*, 555 N.W.2d 686, 688 (Iowa 1996) (whether activity or operation falls within section 335.2 "is, in its entirety, a matter of statutory interpretation"). *See generally* 61 IAC 1.5(1).

(1) Principles of review

Four important principles underlie such a question:

First: Zoning regulations promulgated under laws such as section 335.3 are intended "to protect the general well-being of others by prohibiting uses that would be injurious to others." *Helmke v. City of Ruthven*, 418 N.W.2d 346, 352 (Iowa 1988) (Schultz, J., dissenting). "The power to zone is grounded in the general proposition that every owner of property holds it under an implied condition that his use will not be injurious to others having an equal right to enjoyment of their property, nor injurious to the rights of the community as a whole." Note, *Ill Blows the Wind that Profits Nobody": Control of Odors from Iowa Livestock-Confinement Facilities*, 57 Iowa L. Rev. 451, 493 (1971) (footnote omitted).

Second: Enacted in 1947, section 335.2 was intended "[to protect] the farmer and his investment in the land." *Goodell v. Humboldt County*, 575 N.W.2d 486, 494 (Iowa 1998). More specifically, it was intended to exempt "traditional farms" from county zoning. *See* Alan Vestal, Iowa Land Use and Zoning Laws, § 3.11, at 75, 76 (1979); Note, 57 Iowa L. Rev., *supra,* at 495. In 1963, the General Assembly amended section 335.2 by removing a requirement that land and buildings adapted for agricultural purposes be used as a "primary means of livelihood" and adding a requirement that land and structures be "primarily" adapted for agricultural purposes. *See* 1963 Iowa Acts, 60th G.A., ch. 218, § 2. Removing the "primary means of livelihood" requirement clearly broadened the exemption, but only from the standpoint of ownership; adding the requirement that land and structures be "primarily" adapted for agricultural purposes clearly narrowed the exemption. *See* Note, 57 Iowa L. Rev., *supra,* at 496-97.

Third: Courts generally "construe zoning restrictions strictly in order to favor the free use of property." *Ernst v. Johnson County*, 522 N.W.2d 599, 602 (Iowa 1994). Nevertheless, the withholding of power in section 335.2, construed in the extreme, could effectively render the broad grant of power in section 335.3 meaningless. Like exceptions, *State v. Robinson*, 618 N.W.2d 306, 312 (Iowa 2000), exemptions should not swallow their rules, *In re Annis,* 232 F.3d 749, 753 (10th Cir. 2000). Proper analysis thus requires a consideration of section 335.2 and

335.3; it should not address the one and ignore the other. *See State v. Carter*, 618 N.W.2d 374, 377 (Iowa 2000) (statute must not be construed in isolation); *State v. Carpenter*, 616 N.W.2d 540, 542 (Iowa 2000) (statute must be construed in its entirety); *March v. Pekin Ins. Co.*, 465 N.W.2d 852, 854 (Iowa 1991) (related statutes must be harmonized); *see also* Iowa Code § 4.4(2) (statutory construction may take into account that legislature presumably intended for entire statute to be effective). *See generally* Iowa Code § 4.6(1) (statutory construction may take into account legislative object).

Fourth: Courts generally defer to administrative decisions classifying property as industrial or agricultural and review difficult cases under a standard of reasonableness. *See, e.g., Helmke v. City of Ruthven*, 418 N.W.2d at 352 (a court "cannot substitute its judgment for that of [a city] board of adjustment," and thus "whether the evidence in a close case . . . might well support an opposite finding is of no consequence").

(2) Prior use, abandoned use, nature of land

Preliminarily, we note that section 335.2 prohibits the zoning of land or buildings which are primarily adapted, "by reason of nature and area," for use for agricultural purposes, "while so used." The words "by reason of nature and area" have led this office and a district court to conclude that a county can zone land, formerly used as a gravel pit, on which the owner proposes to operate a feed lot. 1968 Op. Att'y Gen. 450, 451-52; Note, 57 Iowa L. Rev., *supra,* at 502. "[T]he land used for the feedlot was not, by its nature, primarily adapted for agricultural purposes due to its essential nature as a gravel pit. Therefore, due to the nature of the land, it could be subjected to regulation under county zoning even though the use made of the land for raising cattle might be considered an agricultural purpose." Note, 57 Iowa L. Rev., *supra,* at 502. The words "while so used," according to one commentator, "apparently mean that [section 335.2] creates a special class of nonconforming uses which become subject to zoning regulations as soon as agriculture is abandoned for a sufficient period of time." Note, *County Zoning in Iowa*, 45 Iowa L. Rev. 743, 756 (1960). Thus, prior use of the land for non-agricultural purposes, abandonment of agricultural activities on the land, or the nature of the land itself may determine whether the county can regulate the proposed egg-breaking operation under chapter 335.

(3) Industry versus agriculture

It appears that large Iowa producers, until recently, brought unbroken eggs to the marketplace, *see* Iowa Code ch. 196, and that such activity, in general, constitutes part of agriculture, *cf.* Iowa Code § 9H.1(11) ("farming" for purposes of corporate farming act includes egg production). The difficult question remains whether the proposed operation of a large Iowa producer to break eggs before bringing them to the marketplace also constitutes agriculture. *See generally Nat'l Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 835-36, 98 S. Ct. 2122, 56 L. Ed. 2d 728 (1978) (Brennan, J., concurring) ("[a]t some point along the path of

downstream integration [from agriculture to industry an agricultural exemption] loses its purpose").

At one end of the chapter 335 spectrum, section 335.3 provides counties with broad powers to zone industry, along with trades and residences. 1998 Op. Att'y Gen. ___ (#97-1-1(L)). "Industry" commonly means systematic labor, especially for the creation of value; a department or branch of a business or manufacture, especially one that employs much labor and capital; or manufacturing as a whole. *Marks Co. v. United* States, 12 U.S. Cust. Ct. App. 110, 112, *cert. denied*, 266 U.S. 625 (1924); Black's Law Dictionary 776 (1990); Webster's Ninth New Collegiate Dictionary 584 (1979); *see North Whittier Heights Citrus Ass'n v. N.L.R.B.*, 109 F.2d 76, 80 (9th Cir. 1940) ("industrial activity" commonly means treating or processing raw products in factories). *See generally* Iowa Code § 4.1(38) (undefined words in statutes shall be construed according to context and approved English usage). "Manufacturing," in turn, commonly means to make a product suitable for use or to produce according to an organized plan and with division of labor. Black's, *supra,* at 964-65; Webster's, *supra,* at 695.

At the other end of the chapter 335 spectrum, section 335.2 prohibits counties from zoning agriculture, which, ironically, has been termed Iowa's "leading industry." *Montgomery v. Bremer County Supervisors*, 299 N.W.2d 687, 696 (Iowa 1980). In the most recent case on section 335.2 -- *Kuehl v. Cass County*, 555 N.W.2d 686, 688-89 (Iowa 1996) -- the Supreme Court of Iowa (1) observed that the phrase "for use for agricultural purposes" refers to the functional aspects of land and structures and (2) specifically defined "agriculture" as the art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock. *Accord Thompson v. Hancock County*, 539 N.W.2d 181,183 (Iowa 1995); *Farmegg Products, Inc. v. Humboldt County*, 190 N.W.2d 454, 457-58 (Iowa 1971) (disapproved in *Kuehl* on other grounds). This definition of "agriculture" excludes the proposed egg-breaking operation as a step beyond the rearing, managing, and harvesting stages.

An earlier case involving the worker compensation law, which expressly exempts employees engaged in agriculture, also drew the agricultural line at the rearing, managing, and harvesting stages. The court in *Crouse v. Lloyd's Turkey Ranch*, 251 Iowa 156, 100 N.W.2d 115 (1959), considered whether the slaughtering of 8,000 turkeys by a ranch that raised some of them constituted agriculture and thus precluded an injury claim by one of six seasonal employees solely engaged in the slaughtering operation. Acknowledging that a single entity may engage in agriculture and industry at the same time and upon the same tract of land, the court distinguished between operations associated with the raising of animals and operations associated with the processing of animals, particularly processes "not necessary but perhaps more profitable" in the marketing of the animals. 100 N.W.2d at 117, 118 (agriculture encompasses harvesting, but different question arises when one takes "one step further" by processing the harvest for purpose of marketing). Thus, when the ranch raised turkeys, which it could and did market alive, it engaged in agriculture; but when the ranch slaughtered them, it moved into the realm of industry. *Id. Accord Helmke v. City of Ruthven*, 418 N.W.2d at 351, 352 (zoning case affirming

Crouse analysis and specifically noting that grain storage facility, which fell within the scope of section 335.2 as agricultural, "does not involve the processing of grain into flour"). *Cf. Kennedy v. State Bd. of Assessment,* 224 Iowa 405, 276 N.W. 205, 206 (1937) ("processing" in sales tax statute means subjecting raw materials to manufacturing).

In addition, the proposed egg-breaking operation falls within the common definition of "industry," because it takes large amounts of a natural, whole, raw, and ready-for-market agricultural commodity and, with division of labor, changes it into something else. *Compare Fischer Artificial Ice & Cold Storage Co. v. Iowa State Tax Comm'n*, 248 Iowa 497, 81 N.W.2d 437, 440 (1957) (breaking, powdering, and adding preservatives to eggs transforms their natural state and constitutes manufacturing); *Kennedy v. State Bd. of Assessment,* 276 N.W. at 206 ("the glazing of an eggshell to better preserve the egg [has been held to be] a processing"); *N.L.R.B. v. Adams Egg Products, Inc.*, 190 NLRB 280 (1971) (breaking and separating eggs changes their raw and natural state and does not constitute agriculture) *with Helmke v. City of Ruthven*, 418 N.W.2d at 351, 352 (grain storage facility engaged in agriculture under chapter 335 when, among other things, it did not process grain into flour). *See generally* Black's, *supra,* at 776, 964-65; Webster's, *supra,* at 584, 695. Egg breaking separates the edible portion of an egg from its inedible shell, much like the turkey slaughtering in *Crouse v. Lloyd's Turkey Ranch* separated the edible portion of a turkey from its inedible "shell" of feathers, bones, and skin.

Administrative rules promulgated by the U.S. Department of Agriculture under the Egg Products Inspection Act, moreover, equate egg breaking with "manufacturing," a term necessarily suggesting the presence of industry. *See* 21 U.S.C. § 1031 *et seq.*; 7 C.F.R. §§ 57.5, 94.2; Black's, *supra,* at 776. Iowa's law on organic agriculture similarly distinguishes between "agricultural commodities" that are raw, natural, and unprocessed and "agricultural products" that are subjected to a separating, extracting, cutting, slaughtering, or some other physically modifying process. *See* Iowa Code § 190C.1(2), (3), (4), (14).

Although we conclude that the proposed egg-breaking operation is industry and thus is subject to county zoning regulations, we emphasize that this conclusion "is limited to the facts of this particular situation." 1980 Op. Att'y Gen. 896 (#80-12-17(L)). *See generally* 61 IAC 1.5(2). All egg breaking does not necessarily constitute industry for purposes of chapter 335, because, like farms, all industrial concerns are not created equally. *See Farmegg Products, Inc. v. Humboldt County*, 190 N.W.2d at 458 (determination whether particular activity is industry or agriculture "'cannot be made in the abstract'"). Quantity may have its own quality. The line dividing industry from agriculture for the processing of a particular agricultural commodity thus might waver along the continuum of "farming as a way of life" on the far end of the line to "large scale 'agri-industry'" on the other. *See generally Kuehl v. Cass County*, 555 N.W.2d at 689 (determination whether activity or operation constitutes agricultural purpose involves consideration of circumstances incident to the site that detract from the agricultural purpose).

Compare, for example, the two following situations: (1) the processing of a few gallons of milk into fresh butter, which is then offered for sale at a self-serve roadside kiosk by a diversified Century Farm that has a hundred acres and a teenager who milks the family's cows and pumps the family's churn and (2) the processing of thousands of gallons of milk into butter, which is then packaged for nationwide transport and marketed by an agricultural conglomerate that operates its butter-making plant within a ten-acre complex of buildings used for manufacturing diverse products, obtains all its milk from individual dairy farmers, manages and trains its many employees to operate, maintain, and repair multiple pieces of sophisticated machinery along the assembly line, adds preservatives to its butter, and generates extensive pollution. Zoning administrators might see a substantial difference between these two situations, even though they both use the same raw material (milk) to create the same end product (butter), and a court would accord deference to their judgment under such circumstances. *See generally Helmke v. City of Ruthven*, 418 N.W.2d at 352 (court cannot substitute its judgment for that of a city board of adjustment; thus, whether evidence in a close case might support opposite finding "is of no consequence").

In this vein, we note that the burden of proof on whether an activity or operation constitutes industry or agriculture apparently lies with the party seeking an exemption from county zoning. *See Johnson v. Linn County*, 347 N.W.2d 441, 442 (Iowa App.1984) (landowner could not rely upon precursor to section 335.2 when "the evidence did not indicate that [his] thirty acre parcel was adapted for agricultural purposes while [he] owned the property"). *See generally* Iowa R. App. P. 14(f)(5) (burden of proof ordinarily falls upon party who would suffer loss if issue not established); *Ernst v. Johnson County*, 522 N.W.2d 599, 602 (Iowa 1994) (party claiming nonconforming use in zoning dispute bears burden to establish lawful and continued existence of use); *Iowa Farmers Purchasing Ass'n v. Huff*, 260 N.W.2d 824, 827 (Iowa 1977) (party claiming statutory exception bears burden to show its applicability); *Cerro Gordo County Supervisors v. Miller*, 170 N.W.2d 358, 360, 361 (Iowa 1969) (county zoning ordinance has a strong presumption of validity, and challenger bears burden to demonstrate its invalidity).

II. Taxation

(A) Applicable law

Chapter 441 is entitled Assessment and Valuation of Property. Among other things, it distinguishes between property used for industry and property used for agriculture. 1982 Op. Att'y Gen. 41, 42; *see* Iowa Code § 441.21. We understand that county assessors essentially equate "manufacturing," as defined in section 428.20, with "industry." *See generally* Black's, *supra,* at 776. Section 428.20 defines a "manufacturer" as a person "who purchases, receives, or holds personal property of any description for the purpose of adding to its value by a process of manufacturing, refining, purifying, combining of different materials, or by the packing of meats, with a view to selling the property for gain or profit. . . ." *See Iowa Limestone Co. v. Cook*, 211

Iowa 534, 233 N.W. 682, 684, 686 (1930) (quarry did not constitute a manufacturer simply by blasting and crushing big rocks to make irregularly shaped small rocks).

(B) Analysis

Whether the proposed egg-breaking operation constitutes industry or agriculture for property tax purposes rests in the first instance with the county assessor, who must consider all relevant facts and circumstances. We have explained that the classification of property "for purposes of taxation is determined by the [county] assessor. It is not the function of this office to determine questions of fact." 1960 Op. Att'y Gen. 220, 225. *See* 701 IAC 71.1(1) (county assessors responsible for classifying real estate); 1976 Op. Att'y Gen. 373, 374.

Two administrative rules of the Iowa Department of Revenue and Finance provide some guidance for the county assessor. The first provides:

> Agricultural real estate shall include all tracts of land and the improvements and structures located on them which are in good faith used *primarily* for agricultural purposes . . . . Land and the nonresidential improvements and structures located on it shall be considered to be used primarily for agricultural purposes if its *principal use* is devoted to the raising and harvesting of crops or forest or fruit trees, *the rearing, feeding, and management of livestock*, or horticulture, all for intended profit.

701 IAC 71.1(3) (emphasis added). The second provides:

> Industrial real estate includes land, buildings, structures, and improvements used *primarily* as a manufacturing establishment. A manufacturing establishment is a business entity in which the *primary* activity consists of adding to the value of personal property by *any process of manufacturing*, refining, purifying, the packing of meats, or the combination of different materials with the intent of selling the product for gain or profit . . . .

701 IAC 71.1(6)(a)(1) (emphasis added).

These rules point the county assessor toward determining the "primary activity" of a facility that houses egg-breaking as well as egg-laying and egg-washing operations upon a single site. Ultimately, a court might have to make that determination in light of three governing principles. *See generally* 1998 Op. Att'y Gen. ___ (#98-5-2(L)); Annot., "Taxes – Manufacturing," 17 A.L.R.3d 7, 20 (1968). *First*: Courts accord deference to assessing officials

and uphold classifications supported by substantial evidence. *See Hearst Corp. v. Iowa Dep't of Revenue and Finance,* 461 N.W.2d 295, 300 (Iowa 1990). *Second*: Courts require taxpayers to bear the burden to show improper classifications. *See Eagle Food Centers, Inc. v. City of Davenport Bd. of Review,* 497 N.W.2d 860, 862-63 (Iowa 1993); 1960 Op. Att'y Gen. 220, 224. *Third*: Courts resolve tax statutes in favor of taxpayers in doubtful cases. *See Welp v. Iowa Dep't of Revenue*, 333 N.W.2d 481, 484 (Iowa 1983).

III. Summary

The county may subject the proposed egg-breaking operation to zoning regulations, because, as a matter of law, that particular operation does not constitute agriculture. "Agriculture" in this context means the art or science of cultivating the ground, including the harvesting of crops and the rearing and managing of livestock. Whether the county may classify the proposed egg-breaking operation as industry for property tax purposes is a question of fact initially for the county assessor's determination and ultimately a court's. "Industry" in this context includes any process of manufacturing, refining, and purifying and excludes any process that does not change the character of an agricultural commodity.

Sincerely,

Bruce Kempkes
Assistant Attorney General

COUNTY AND COUNTY OFFICERS; COURTS: Control over courthouse and personnel. Iowa Code §§ 331.301, 331.361, 331.502, 331.503, 331.903, 331.904 (2001). The supervisors and the auditor both act as caretakers of the courthouse, but the auditor acts subject to instruction from the supervisors. The auditor's general custody and control of the courthouse only involves the building, or buildings, occupied and appropriated according to law for the holding of courts. The supervisors, not the auditor, have authority to hire, fire, and assign maintenance and custodial personnel for the courthouse, purchase maintenance and custodial supplies, and determine the budget therefor. (Kempkes to Dearden, State Senator, 4-12-01) #01-4-1

April 12, 2001

The Honorable Dick L. Dearden
State Senator
Capitol
LOCAL

Dear Senator Dearden:

You have requested an opinion on county government. First, you ask about the respective authority of the county auditor and the county board of supervisors over the courthouse. Second, you ask whether the auditor's authority over the courthouse also encompasses other county buildings that house county officers and employees. Third, you ask whether the auditor has authority to hire, fire, and assign maintenance and custodial personnel, purchase maintenance and custodial supplies, and determine the budget therefor. Your questions primarily invite examination of Iowa Code chapter 331 (2001), entitled County Home Rule Implementation.

I. Applicable Law

Chapter 331 invests supervisors with many defined duties and powers. They have authority to enter into certain leases for real property, *see* Iowa Code § 331.301(10); manage the county's real property, *see* Iowa Code § 331.361(6); and arrange for the construction of new county buildings, *see* Iowa Code § 331.361(7). Supervisors also have many duties and powers undefined by statute. *See generally* Iowa Const. amend. 25 (1968) (constitutional home rule); Iowa Code § 331.301 (statutory home rule). Section 331.301(2) broadly provides that "[a] power

of the county is vested in the [supervisors], and a duty of a county shall be performed by or under [their] direction except as otherwise provided by law . . . ." *See generally* Iowa Code § 4.1(30)(a) ("shall" in statutes imposes a duty unless otherwise defined).

Chapter 331 invests the auditor with many defined duties and powers, albeit far less than those of the supervisors. *See* Iowa Code §§ 331.502, 331.504, 331.511, 331.512; *see also* Iowa Code § 602.1303(1). Only one duty directly concerns the county's real property: section 331.502 provides that the auditor "shall . . . [h]ave general custody and control of the courthouse, subject to the direction of the board [of supervisors]." Only one power directly concerns county personnel: sections 331.503(2), 331.903(1), 331.903(5), and 331.904(4) combine to provide that the auditor may appoint deputies, assistants, clerks, temporary assistants, and extra help and clerks to serve in the auditor's office.

II. Analysis

In addition to the auditor and the supervisors, other members of the executive branch as well as of the judicial branch may exercise authority over the courthouse itself or its operation. *See, e.g., Hurd v. Odgaard*, 297 N.W.2d 355, 358 (Iowa 1980); 1996 Op. Att'y Gen. 25, 27-28; 1990 Op. Att'y Gen. 66 (#90-3-4(L)); 1988 Op. Att'y Gen. 67 (#88-1-11(L)). We limit our discussion, however, to the duties and powers of the auditor and the supervisors.

(A)

You have asked about the respective authority of the auditor and the supervisors over the courthouse. Section 331.502 provides the auditor with general custody and control of the courthouse, subject to the direction of the supervisors.

"Custody" commonly signifies the immediate care, charge, and control of a thing, Black's Law Dictionary 384 (6th ed. 1991), and "control" commonly means the "power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee," 1996 Op. Att'y Gen. 25, 29. *See Connies' Const. Co., Inc. v. Fireman's Fund Ins. Co.*, 227 N.W.2d 207, 210 (Iowa 1975) ("care," "custody," and "control" commonly connote a possessory as opposed to a proprietary right in property and signify in charge of; "care" refers to temporary charge, "custody" implies a keeping or guardian of, and "control" indicates power to manage, superintend, direct, or oversee). *See generally* Iowa Code § 4.1(38) (undefined words and phrases in statute shall be construed according to approved English usage). "Direction" commonly means the act of governing; management; or superintendence. Black's, *supra*, at 460. *See* Crabb's English Synonyms 265 (1917) (to "direct" supposes authority and entails instruction).

We need not pinpoint the difference, if any, between "custody and control" on the one side of the balance and "direction" on the other. *See* J. Fernald, English Synonyms, Antonyms &

Ordway, Synonyms & Antonyms 82 (1913) ("control" is a synonym of "direction") *with* R. Soule, A Dictionary of English Synonymes 95 (1891) ("direct" is a synonym of "control"). Section 331.502 clearly tilts the scale toward the side of the supervisors: it invests them with superior authority by providing that the auditor exercise custody and control of the courthouse subject to their direction. "Subject to" commonly means liable, subordinate, subservient, inferior, obedient to; governed or affected by; or answerable for. Black's, *supra*, at 1425. *Accord In re Kraft's Estate*, 186 N.W.2d 628, 631-32 (Iowa 1971); *Van Duyn v. H.S. Chase & Co.,* 149 Iowa 222, 128 N.W. 300, 301 (1910); *Moen v. Moen,* 519 N.W.2d 10, 14 (N.D. 1994). Similarly, "subjection" means the obligation to act at the discretion, or according to the judgment and will, of others. Black's, *supra*, at 1425. These definitions point to the conclusion that the auditor may only exercise general custody and control over the courthouse pursuant to instruction from the supervisors.

Nonetheless, the auditor and the supervisors both act as caretakers of the courthouse. *See Long v. Board of Supervisors*, 258 Iowa 1278, 142 N.W.2d 378, 384-85 (1966). We cannot precisely define in all instances the line that specifically divides their respective care-taking responsibilities. *See generally* 61 IAC 1.5(2), 1.5(3)(c). We can emphasize that cooperation between the auditor and the supervisors will resolve any conflict arising out of the scheme of dual responsibility created by section 331.502. We can also emphasize that the auditor may have discretion to address a particular subject in the absence of instruction from the supervisors. Emergencies infrequently arise that the supervisors may not foresee. For example, if the supervisors have left the state on an official trip, and a storm blows the roof off the courthouse, the auditor would have authority to take immediate action to prevent damage to its offices and their contents.

(B)

Noting that a county may not house all county officers and employees in its courthouse, you have asked whether the auditor's general custody and control of the courthouse in section 331.502 also encompasses every county building that houses county officers and employees.

The General Assembly has acknowledged that the meaning of its words may depend upon the context. *See generally* Iowa Code § 4.1(38) (statutory words and phrases shall be construed according to context). Thus, at times, "courthouse" may mean the principal building for the housing of county offices and may even signify the county seat. *See* Webster's Ninth New Collegiate Dictionary 259 (1979); *see also Hurd v. Odgaard*, 297 N.W.2d at 358 ("[t]he courthouse is the place where the business of the county is conducted -- where citizens go to pay taxes, obtain licenses, record instruments, and attend court").

More commonly -- and perhaps more accurately reflective of its syllables -- "courthouse" specifies the particular building occupied and appropriated according to law for the holding of courts. Webster's, *supra,* at 259; Black's, *supra,* at 354; 21 C.J.S. *Courts* § 121, at 140 (1990);

courts. Webster's, *supra,* at 259; Black's, *supra,* at 354; 21 C.J.S. *Courts* § 121, at 140 (1990); *accord Board of Comm'rs v. Stout*, 35 N.E. 683, 685 (Ind. 1893) ("courthouse" is chiefly for the use of the court, the remaining uses being subordinate and to a great extent incidental); *Harriss v. State ex rel. Dolan*, 18 So. 387, 388 (Miss. 1895) ("courthouse" is the building occupied and appropriated for holding of courts); *Zangerle v. Court of Common Pleas*, 46 N.E.2d 865, 870 (Ohio 1943) ("courthouse" is the building that primarily provides facilities essential for courts); *Johnson City Buick Co. v. Johnson*, 54 S.W.2d 946, 946-47 (Tenn. 1932) ("courthouse" is the building in which courts are held); *Greensville County v. City of Emporia*, 427 S.E.2d 352, 357 (Va. 1993) ("courthouse" is the permanent place for holding of courts).

Nothing suggests that the General Assembly intended for "courthouse" to be the equivalent of "every county building" or "all county buildings." *See generally Woodbury County v. Sioux City*, 475 N.W.2d 203, 205 (Iowa 1991) ("[t]he legislative intent that controls in the construction of a statute has reference to the legislature that enacted it"). To the contrary, the limited evidence suggests that the General Assembly originally intended "the courthouse" to mean, simply, the courthouse. *See, e.g.,* Iowa Code § 303(5) (1873) (providing county with power to build and keep in repair "the necessary buildings for the use of the county and of the courts"). Nothing in current statutes detracts from this conclusion. *See, e.g.,* Iowa Code § 217.32 (mentioning "courthouse or any other building owned by the county") (2001).

Had the General Assembly ever intended for the auditor to have general custody and control over all county buildings, it certainly knew how to express this intent in clear language. *See, e.g,* Iowa Code § 303(5) (1873); Iowa Code § 217.32 (2001). Accordingly, the auditor's general custody and control of "the courthouse" only involves the building occupied and appropriated according to law for the holding of courts.

This general custody and control may involve more than one building, even though section 331.502 expressly limits it to "the" courthouse. Normally, that article "particularizes the subject which it precedes and is [a] word of limitation as opposed to indefinite or generalizing force of 'a' or 'an.'" Black's, *supra*, at 1477. *Accord* Webster's, *supra*, at 1199. In this context, however, placing "the" before "courthouse" does not necessarily mean a single building, because, historically as well as legally, more than one building may serve as the place for holding court in a single county. *See* Iowa Code § 331.907(4). *See generally* Iowa Code § 4.1(38) (words and phrases shall be construed according to context). It appears, then, that the General Assembly in section 331.502 used "the courthouse" in its generic sense, *see* Webster's, *supra*, at 1199, and that the auditor thus exercises general custody and control over every county building occupied and appropriated according to law for the holding of courts.

(C)

Regarding the courthouse itself, the auditor has no express statutory authority to appoint a janitor or any other personnel or to purchase janitorial or any other supplies. You have asked

whether "general custody and control" of the courthouse in section 331.502 provides the auditor with authority to hire, fire, and assign maintenance and custodial personnel; purchase maintenance and custodial supplies; and determine the budget therefor.

The auditor's general custody and control of the courthouse has long roots, dating to the presidency of Ulysses S. Grant. 1950 Op. Att'y Gen. 19, 20; *see* Iowa Code § 323 (1873) (auditor "shall have the general custody and control of the court house . . . , subject to the direction of the board of supervisors"). Old decisions and opinions on its scope thus retain their relevancy.

In *Kitterman v. Board of Supervisors*, 137 Iowa 275, 115 N.W. 13 (1908), the courthouse janitor sued the supervisors when they did not reappoint him at the end of his contract. In its decision, the court noted in passing that the supervisors "no doubt had the right to provide for the filling of [this position.]" 115 N.W. at 15. In *Arnold v. Wapello County*, 154 Iowa 111, 134 N.W. 546 (1912), an applicant for the position of courthouse janitor sued the supervisors when they appointed someone else to the position. The court held that they had exercised discretion in making the appointment. 134 N.W. at 546-47. In *Sorenson v. Andrews*, 221 Iowa 44, 264 N.W. 562 (1936), the courthouse janitor sued the supervisors when they did not reappoint him at the end of his contract. The court accepted the supervisors' argument that "the selection and appointment of a janitor of the county courthouse, growing out of [their] custodial duties . . . , must be so made as to insure the efficiency, safety, and economy for which [they] must strive." 264 N.W. at 563. In *McLaughlin v. Board of Supervisors*, 227 Iowa 267, 288 N.W. 74 (1939), an applicant for the position of courthouse janitor sued the supervisors when they hired someone else. The court held that they had exercised discretion in making the appointment. 288 N.W. at 77.

In 1949, this office issued an opinion that specifically addressed the question whether the supervisors *vis-a-vis* the auditor had authority over courthouse personnel. We reviewed the foregoing case law and noted as well that, for many years, supervisors across the state had exercised the power of appointing courthouse janitors. 1950 Op. Att'y Gen. 19, 21-23. We thus concluded that the supervisors, not the auditor, have authority to employ a janitor for the courthouse as well as other personnel therein. *Id.* at 23.

More than fifty years have now elapsed since issuance of the 1949 opinion. The absence of any subsequent legislation on the subject creates a presumption that the General Assembly acquiesces in its conclusion. *See* 1992 Op. Att'y Gen. 1, 3; 1950 Op. Att'y Gen. 19, 22-23. Moreover, the strength of this presumption increases over time. We thus see no reason to withdraw the 1949 opinion.

In addition, we believe that staff assignments and terminations, purchasing of necessary supplies, and budgeting therefor logically and reasonably accompany the authority to appoint or employ the janitor of the courthouse and other personnel therein. *Cf.* Iowa Code § 331.903(4)

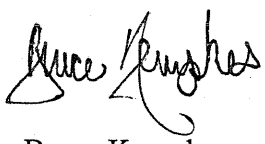
("[e]ach deputy officer, assistant and clerk shall perform the duties assigned by the principal county officer making the appointment"). This allocation of responsibility carries obvious pragmatic appeal, because, among other things, it negates the possibility of appointees facing the prospect of serving two masters. *See generally* Iowa Code § 4.4(4) (presumption in statutory construction that legislature intended a result feasible of execution). It also gives meaning to the phrase "subject to the direction of" in section 331.502, a phrase that appears to impart even more authority than "subject to the approval of." *Compare* Black's, *supra*, at 460 ("direction" means act of governing; managing; or superintending) *with Mayor of Ocean City v. Johnson,* 470 A.2d 1308, 1313 (Md. Ct. Spec. App. 1984) ("subject to approval of" implies that approving body retains discretion and performs more than a ministerial or perfunctory task) *and* 2000 Op. Att'y Gen. __ (#00-11-1) ("subject to approval of" indicates that authority to make final determination lies with approving body).

We therefore conclude that the supervisors have authority to hire, fire, and assign maintenance and custodial personnel for the courthouse, purchase maintenance and custodial supplies for the courthouse, and determine the budget therefor. These determinations align with their express authority over analogous matters. *See, e.g.* Iowa Code § 331.322(5), (10) (county supervisors shall furnish fuel, lights, and office supplies to county officers and supplies for the jail, and shall appoint and pay jail assistants), § 602.1303(1) (county shall provide custodial services for district court). We point out, however, that nothing in chapter 331 would prohibit the supervisors from effectively transferring much of their responsibility over the courthouse and its personnel to the auditor, who, pursuant to section 331.502, acts subject to the direction of the supervisors. A delegation of responsibility to the auditor seems particularly appropriate for counties in which supervisors serve part-time.

III. Summary

The supervisors and the auditor both act as caretakers of the courthouse, but the auditor acts subject to instruction from the supervisors. The auditor's general custody and control of the courthouse only involves the building, or buildings, occupied and appropriated according to law for the holding of courts. The supervisors, not the auditor, have authority to hire, fire, and assign maintenance and custodial personnel for the courthouse, purchase maintenance and custodial supplies for the courthouse, and determine the budget therefor.

Sincerely,



Bruce Kempkes
Assistant Attorney General

TAXATION; NONPROFIT CORPORATIONS; COOPERATIVE ASSOCIATIONS; RURAL WATER DISTRICTS: Property tax exemptions for pollution-control or recycling property of entities providing water to rural areas. Iowa Code §§ 357A.15, 427.1, 427A.1 (2001). Either section 427.1(17) or section 427.1(19) may exempt from property taxes the pollution-control or recycling property of nonprofit corporations having sewage treatment facilities and providing water to rural areas; only section 427.1(19) may exempt from property taxes the pollution-control or recycling property of cooperative associations having sewage treatment facilities and providing water to rural areas; the question whether either exemption applies to particular items of pollution-control or recycling property will depend upon an assessment of the relevant facts and circumstances, a task lying outside the proper scope of an opinion. Section 357A.15 exempts from property taxes all pollution-control or recycling property of rural water districts having sewage treatment facilities. (Kempkes to McKibben, State Senator, 5-1-01) #01-5-1

May 1, 2001

The Honorable Larry McKibben
State Senator
State Capitol
LOCAL

Dear Senator McKibben:

Iowa Code chapters 357A, 499, and 504A (2001) each provide for the organization of entities that provide water to rural areas. You have requested an opinion on the possible taxation of their property, which, in addition to systems for water, may include facilities for treating sewage. *See generally* Iowa Code §§ 357A.11(11), 499.7(7), 455B.291(7), -.298(2), 504A.3-.4(16). You ask whether property tax exemptions apply to unspecified pollution-control or recycling property of those facilities.

I. Applicable law

Chapter 427 is entitled Property Exempt and Taxable. Section 427.13 generally subjects property to taxation, and section 427.1 exempts certain property from taxation. Section 427.1(17) -- formerly section 427.1(30) -- exempts "[t]he real property of a nonprofit corporation engaged in the distribution and sale of water to rural areas when devoted to public use and not held for pecuniary profit." Section 427.1(19) -- formerly section 427.1(32) -- exempts "[p]ollution-control or recycling property" of any entity, subject to certain conditions and amounts.

II. Analysis

We assume that each provision of chapter 427 has a purpose. We thus read chapter 427 as a whole in order to give meaning to each provision. *See* Iowa Code § 4.4(2); *Kohrt v. Yetter*, 334 N.W.2d 245, 246 (Iowa 1984); 1980 Op. Att'y Gen. 639, 643. A clear and unambiguous provision requires no construction. *Farmers Co-op Co. v. DeCoster*, 528 N.W.2d 536, 537 (Iowa 1995). Undefined words and phrases receive their common and ordinary meanings. Iowa Code § 4.1(38).

Legislatures provide tax exemptions based upon types of entities, activities, or property. Section 427.1(19) is an example of an exemption focusing upon a specific type of property. In contrast, section 427.1(17) is an example of an exemption focusing upon a specific type of entity. Government often exempts nonprofit corporations from taxation "to encourage their involvement in necessary or desirable, yet unaddressed, aspects of society." Note, 25 J. Corp. L. 659, 662 (2000).

(A) Nonprofit corporations organized under chapter 504A

We believe that section 427.1(17) clearly and unambiguously provides a blanket exemption to nonprofit corporations organized under chapter 504A that undertake the important task of providing water to rural areas. The exemption encompasses the real property of these nonprofit corporations. Section 427A.1(1)(d) broadly defines "real property" for property tax purposes as including "[b]uildings, structures, equipment, machinery or improvements, any of which are attached to . . . buildings, structures, or improvements . . . ."

Whether a particular item of pollution-control and recycling property properly lies within the scope of this definition amounts to a question of fact, which we cannot answer in an opinion. *See generally* 61 IAC 1.5(3)(c). The breadth of the statutory language, however, certainly favors a factual finding that it does. *See* Iowa Code § 427A.1(2) ("attached" means connected by an adhesive preparation; in a manner such that disconnecting requires the removal of one or more fastening devices (other than electric plugs); or in a manner such that removal requires substantial modification or alteration of the property removed or the property from which it is removed); *see also State v. Bishop*, 257 Iowa 336, 132 N.W.2d 455, 457 (1965) ("equipment" means implements used in operations or activities); Webster's Ninth New Collegiate Dictionary 383 (1979) ("equipment" means apparatus, or all fixed assets other than land and buildings of a commercial enterprise). As indicated in the following paragraph, a nonprofit corporation may seek an exemption under section 427.1(19) to the extent that its pollution-control and recycling property does not lie within the scope of section 427.1(17).

(B) Cooperative associations organized under chapter 499

Section 427.1(17) only applies to a "nonprofit corporation" providing water to rural areas. An entity that provides water to rural areas and organizes under chapter 499 does not constitute a nonprofit corporation. *Compare* Iowa Code § 499.2 ("cooperative association" means one which "distributes its net earnings among its members") *with* Iowa Code § 498.1 ("nonprofit cooperative association" means one which declares itself "not for pecuniary profit"). Nevertheless, cooperative associations may seek an exemption for pollution-control or recycling property pursuant to the more detailed provisions of section 427.1(19). Whether particular items of pollution-control and recycling property satisfy the conditions of section 427.1(19) -- which, among other things, specially defines "pollution-control property" and "recycling property" -- also amounts to a question of fact that lies outside the proper scope of an opinion. *See generally* 61 IAC 1.5(3)(c).

(C) Rural water districts organized under chapter 357A

An entity that provides water to rural areas and organizes under chapter 357A -- a rural water district -- receives special protection from taxation. Section 357A.15 provides in part that "*[t]he facilities constructed or otherwise acquired* by a district, *including but not limited to* ponds, reservoirs, pipelines, wells, check dams, and pumping installations . . . shall not be taxable in any manner by the state or any of its political subdivisions." (emphasis added). We believe that this broad protection encompasses all pollution-control and recycling property as a matter of law, especially in light of the authorization in section 357A.11(11)(b) for rural water districts to construct, operate, and maintain wastewater treatment works. *See* Black's Law Dictionary 591 (1991) (defining "facilities" as that which promotes the ease of any action or operation); Webster's, *supra*, at 406 (defining "facility" as something built, installed, or established to serve a particular purpose). *See generally* Iowa Code § 4.1(38).

III. Summary

Either section 427.1(17) or section 427.1(19) may exempt from property taxes the pollution-control or recycling property of nonprofit corporations having sewage treatment facilities and providing water to rural areas; only section 427.1(19) may exempt from property taxes the pollution-control or recycling property of cooperative associations having sewage treatment facilities and providing water to rural areas; the question whether either exemption applies to particular items of pollution-control or recycling property will depend upon an assessment of the relevant facts and circumstances, a task lying outside the proper scope of an

opinion. Section 357A.15 exempts from property taxes all pollution-control or recycling property of rural water districts having sewage treatment facilities.

Sincerely,

Bruce Kempkes
Assistant Attorney General

DEPARTMENT OF TRANSPORTATION; COUNTIES; MUNICIPALITIES: Train speed regulation. Iowa Code § 327F.31 (2000). The Iowa Department of Transportation may only issue an order approving a locally proposed regulation for train speed if, in addition to meeting the requirements in its administrative rules and the test of reasonableness, the proposal satisfies the requirements of 49 U.S.C. § 20106: (1) it must be "necessary to eliminate or reduce an essentially local safety hazard"; (2) it must not be "incompatible with" a federal law, regulation, or order; and (3) it may not "unreasonably burden" interstate commerce. An opinion, which determines matters of law, cannot determine as a matter of fact whether a specific proposal satisfies the administrative rules or the second exception. (Kempkes to Wandro, Director, Iowa Department of Transportation, 5-7-01) #01-5-2

May 7, 2001

Mr. Mark F. Wandro
Director, Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

Dear Mr. Wandro:

With the chartering of the Baltimore & Ohio in 1827 -- the first Iron Horse in North America -- government at various levels began regulating the railway industry. *See* P. Dempsey & W. Thoms, Law and Economic Regulation in Transportation 3-16 (1986). In 1852, the U.S. Attorney General issued an opinion that a federal statute did not preempt a city from enforcing an ordinance limiting the speed of trains within its corporate boundaries. *See* 5 U.S. Op. Att'y Gen. 554, 556-57. Nearly 150 years later, you ask whether current federal law preempts counties and cities from regulating train speed within their respective corporate boundaries.

I. Applicable law

(A)

Iowa Code chapter 327F (2001) is entitled Construction and Operation of Railways. Section 327F.31 provides that "[a]n ordinance or resolution adopted by a political subdivision of this state which relates to the speed of a train in an area within the jurisdiction of the political subdivision is subject to approval by the [Iowa Department of Transportation (IDOT)] . . . ."

The IDOT has promulgated administrative rules for approval of train speed ordinances. *See* 761 IAC 800.15. It has established a process, including notice and hearing, for determining

whether it shall issue an order approving a particular ordinance. *See* 761 IAC 800.15(3). Factors relevant to the determination include, but are not limited to,

a. Traffic density and speed.
b. Accident frequency.
c. Causes of accidents.
d. Obstruction to visibility.
e. Traffic controls at crossings.
f. Population density.
g. Resulting burden on the rail transportation system.
h. Resulting benefit to residents of the political subdivision.

761 IAC 800.15(4). If the IDOT issues an order approving an ordinance and if the affected railroads do not contest that order, *see* 761 IAC 800.15(6), 761 IAC 800.15(7), it takes effect twenty-five days after the mailing of notice to them. 761 IAC 800.15(6).

(B)

Title 49 of the U.S. Code is entitled Transportation. Subtitle V is entitled Rail Programs, and Subtitle IV is entitled Interstate Transportation.

Enacted as part of the federal High-Speed Rail Development Act of 1994, Part A of Subchapter V is simply entitled Safety. Part A purports to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents" and confers upon the Transportation Secretary broad powers to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. §§ 20101, 20103. Specific chapters address safety appliances, signal systems, locomotives, accidents and incidents, and hours of service. *See* 49 U.S.C. Subtitle V, Pt. A. Provisions of the Federal Railroad Safety Act of 1970, now repealed, still remain in substance in Part A. One of those provisions -- section 20106 -- provides:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. [Exception No. 1:] A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject of the State requirement. [Exception No. 2:] A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order --
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;

> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106. *See generally Florida E. Coast Railway Co. v. City of W. Palm Beach,* 110 F. Supp. 2d 1367, 1373 (S.D. Fla. 2000) (recounting history of federal railway regulation).

In 1995, Congress enacted the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq. See generally* Pub. L. No. 104-88, 109 Stat. 803. Part A, simply entitled Rail, contains chapters that specifically address rates, licensing, operations, finance, and federal-state relations. *See* 49 U.S.C. Subtitle IV, Pt. A. Section 10501(b) in Part A provides that the newly created Surface Transportation Board has "exclusive [jurisdiction]" over

> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classification, rules . . . , practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities . . .
>
> . . . . Except as otherwise provided in this part, the remedies provided in this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

II. Analysis

We must determine whether the Interstate Commerce Commission Termination Act (ICCTA) or the Federal Railroad Safety Act (FRSA) preempts state and local governments from regulating train speed. We presume that those regulations rest upon considerations of public safety. *See generally* 1910 Op. Att'y Gen. 272, 272 (city has statutory authority to regulate train speed if such regulation reasonably and necessarily protects public safety and welfare); Loiacono, "Railroad Safety Steered Off Track," 36 Trial 11, 11 (Aug. 2000) (around 400 fatal and 1,350 nonfatal incidents occurred at railway-highway crossings in 1999).

With its roots in the Supremacy Clause, the preemption doctrine invalidates any state or local law that conflicts with or frustrates federal law. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993). *See generally* U.S. Const., Art. VI, cl. II. There is a presumption that state and local regulation of safety matters can constitutionally co-exist with federal regulation. *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707,

716, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985). Although courts have used labels to classify different types of preemption, the ultimate issue depends on whether Congress clearly and manifestly intended to preempt state or local regulation of a subject. *CSX Transp., Inc. v. Easterwood*, 507 U.S. at 664.

(A)

Section 10501(b) of the ICCTA provides that the Surface Transportation Board shall have exclusive jurisdiction over "transportation by rail carriers [and] the remedies provided in this part" and that "[e]xcept as otherwise provided in this part, the remedies provided in this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." *See generally* 49 U.S.C. § 10102(9) ("transportation" includes locomotive, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property by rail, and services related to that movement). Many federal and state cases have examined section10501(b), but no case has indicated that it preempts state regulation of train speed.

Enactment of the ICCTA did not remove railway safety matters from the duties of the Transportation Secretary. *See Tyrrell v. Norfolk S. Ry. Co.*, ___ F.3d ___, ___ (6th Cir. 2001) (2001 WL 418060). One state administrative agency has observed that section 10501(b) does not preempt state safety regulations for trains. *See In re Petition for Advisory Opinion,* Nev. Pub. Utilities Comm'n, No. 98-4052 (July 16, 1998). The Surface Transportation Board itself has succinctly explained that "section 10501(b) does not preempt valid safety regulation under the [FRSA]." *Borough of Riverdale,* STB Finance Docket No. 33466 n. 4 (February 27, 2001). *See* "Regulations on Safety Integration Plans," STB Ex Parte No. 574, FRA Docket No. SIP-1, Notice No. 1, 63 Fed. Reg. 72225, 75225 (Dec. 31, 1998) (although Surface Transportation Board has some responsibility for promoting safe rail transportation, "primary jurisdiction, expertise and oversight responsibility in rail safety matters are vested in the [Transportation Secretary]"); *see also* Barnett, "Railroad Workplace Safety and Related Employment Issues," SA31 ALI-ABA 749, 755 n. 2 (Transportation Department's Federal Railroad Administration, not Occupational Safety and Health Administration, has responsibility for the "safety of railroad operations"). We therefore proceed to discuss the scope of FRSA preemption.

(B)

Section 20106 of the FRSA sets forth the general rule that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." This language clearly and manifestly reveals a congressional intent to preempt state and local regulation of train speed. *Harris v. Great Dane Trailers, Inc.*, 234 F.3d 398, 400 (8th Cir. 2000); *Stevenson v. Union Pac. R.R.*, 110 F.Supp. 2d 1086, 1088 (E.D. Ark. 2000); *CSX Transp., Inc. v. City of Mitchell,* 105 F.Supp. 2d 949, 952 (S.D. Ind. 1999); *Burlington N. & S.F. Ry. v. City of Sedgewick,* 1997 WL 807872 (D. Kan. 1997); *Price v. Nat'l R.R. Passenger Corp.*,14 P.3d 702,

706 (Utah App. 2000). Thus, state regulation of train speed can only occur if either of the two exceptions in section 20106 applies. *In re Speed Limit for the Union Pac. R.R.*, 610 N.W.2d 677, 683-84 (Minn. App. 2000).

The first exception allows the adoption or continuance in force of a state requirement related to railroad safety until such time as the Transportation Secretary prescribes regulations "covering the subject of" the state requirement. 49 U.S.C. § 20106. The Transportation Secretary -- through the Federal Railroad Administration, *see* 49 U.S.C. § 103(a) -- has promulgated regulations on train speed. *See* 49 C.F.R. §§ 213.1, 213.9; *see also* 63 Fed. Reg. 33992, 33999 (June 22, 1998). Accordingly, this exception no longer has any application. *CSX Transp., Inc. v. City of Plymouth*, 92 F.Supp. 2d 643, 653, 654 (E.D. Mich. 2000); *In re Speed Limit for the Union Pac. R.R.*, 610 N.W.2d at 683; *see* 49 C.F.R. § 213.2.

The second exception provides:

> A *State* may adopt or continue in force an additional or more stringent *law, regulation, or order* related to railroad safety when the law, regulation or order
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

(emphasis added).

Expressly limited to a "State," this exception does not extend to local governments acting on their own. *Landrum v. Norfolk S. Corp.*, 836 F.Supp. 373, 375-76 (S.D. Miss. 1993) (interpreting 45 U.S.C. § 434, precursor to 49 U.S.C. § 20106); *Grand Trunk W. R.R. v. Town of Merriville*, 738 F.Supp. 1205, 1207 (N.D. Ind. 1989) (same); *CSX Transp., Inc. v. City of Tullahoma,* 705 F.Supp. 385, 387 (E.D. Tenn. 1988) (same); *Consolidated Rail Corp. v. Smith,* 664 F.Supp. 1228, 1238 (N.D. Ind. 1987) (same). In Iowa, however, the General Assembly has established a two-step process that involves political subdivisions, which may propose regulations for train speed, and the IDOT, which may approve or reject the proposals. *See* Iowa Code § 327F.31; *see also* 761 IAC 800.15. The question thus arises whether an IDOT order approving a locally proposed regulation of train speed constitutes a "State . . . law, regulation, or order" for purposes of the second exception.

"Law" commonly signifies a body of rules of action or conduct prescribed by controlling authority that have binding legal force. 52A C.J.S. *Law* 737-40 (1968); Black's Law Dictionary 884 (1991). *See generally FMC Corp. v. Holliday*, 498 U.S. 52, 57, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990) (courts assume that ordinary meaning of statutory language accurately expresses congressional purpose). "Regulation" commonly means a rule or order prescribed by competent authority relating to action of those under its control. Black's, *supra*, at 1286. "Order" -- which seems particularly applicable to an IDOT-approved regulation of train speed, *see* 761 IAC 800.15(3), 761 IAC 800.15(6), 761 IAC 800.15(7) -- commonly means a mandate, precept, command, or direction authoritatively given, or a rule or regulation. Black's, *supra*, at 1096.

Whatever the exact parameters of a "State . . . law, regulation, or order," we believe that this phrase properly encompasses an administrative order issued by a state agency that approves a locally proposed regulation for train speed. *See CSX Transp., Inc. v. City of Tullahoma*, 705 F.Supp. at 388 (Congress intended state regulatory agencies to determine whether conditions constitute essentially local safety hazard); *see also Landrum v. Norfolk S. Corp.*, 836 F.Supp. at 376 (municipal action should be viewed as state action; a state legislature does not consider hazards at various crossings and pass legislation accordingly; in practice, local authorities handle such matters). Counties and cities in Iowa simply do not have *carte blanche* authority to regulate train speed. Rather, they may only present proposals to the IDOT for train speed regulation. *See* Iowa Code § 327F.31. It is the IDOT, through its review process, which has authority to stamp those proposals with the force and effect of law by issuing administrative orders. *See* Iowa Code § 327F.31; 761 IAC 800.15. Before that time, the proposals of counties and cities are just that -- mere proposals.

We recognize that widely variant and confusing safety rules would defeat the express goal of Congress to establish, as far as practicable, nationally uniform train standards. *See* 49 U.S.C. §§ 20101, 20106; *Sisk v. Nat'l R.R. Passenger Corp.*, 647 F.Supp. 861, 865 (D. Kan. 1986). By creating the second exception, however, Congress recognized some leeway for states to diverge from those standards. *See* Dempsey & Thoms, *supra*, at ix ("[t]he reports of regulation's death, like that of Mark Twain, are highly exaggerated"); Note, 58 Mo. L. Rev. 359, 365 (1993) ("Congress did not intend the FRSA to cover the entire field of railway safety"). We do not believe that the two-step process established by section 327F.31 will create widely variant and confusing safety rules in Iowa and frustrate the express goal of Congress. First, a locally proposed regulation on train speed would have to satisfy the test of reasonableness. *See Larkin v. Burlington C.R. & N. Ry.*, 85 Iowa 492, 52 N.W. 480, 481-82 (1892); 1910 Op. Att'y Gen. 272, 272. Second, it would need to satisfy the multi-factor test fashioned by the IDOT in its administrative rules. *See generally* 761 IAC 800.15(4). Third, it would need to satisfy the requirements set forth in the second exception of section 20106: (1) it must be *necessary to eliminate or reduce an essentially local safety hazard*; (2) it must not be *incompatible with* a federal law, regulation, or order; and (3) it may not *unreasonably burden* interstate commerce.

Thus, a proposal to establish a single speed limit for trains throughout the breadth of a municipality that differs from federal regulations would not likely survive either administrative or judicial scrutiny. *See* 761 IAC 800.15 (political subdivision may propose regulation on train speed for "an area" within its jurisdiction); *Landrum v. Norfolk S. Corp.*, 836 F.Supp. at 375 (state regulation of train speed must target specific hazard and not apply across-the-board). *Compare Earwood v. Norfolk S. Ry.*, 845 F.Supp. 880, 888 (N.D. Ga.1993) ("essentially local safety hazard" does not encompass condition present at many intersections, such as multiple tracks with rail cars that may obstruct view) *with In re Speed Limit for the Union Pac. R.R.*, 610 N.W.2d at 684-85 ("essentially local safety hazard" may encompass one-mile segment of track that has common hazards in running between opposing traffic lanes down middle of downtown street).

Whether a specific proposal on train speed satisfies either the IDOT's administrative rules or the second exception of section 20106 requires the making of factual determinations, a task that lies outside the proper scope of an opinion. *See generally* 61 IAC 1.5(3)(c). Nevertheless, we caution the IDOT to tread carefully in its review of a proposal, because the three requirements of the second exception provide but the tiniest of openings for escaping federal preemption. *See Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1553 n. 3 (11th Cir. 1991), *aff'd*, 507 U.S. 658 (1993). The opening is tiny for a reason. As explained by the Federal Railroad Administration, which has expertise in the area of railway safety:

> *[Local] speed limits may result in hundreds of individual speed restrictions along a train's route, increasing safety hazards and causing train delays. The safest train maintains a steady speed. Every time a train must slow down and then speed up, safety hazards, such as buff and draft forces, are introduced. These kinds of forces can enhance the chance of derailment with its attendant risk of injury to employees, the traveling public, and surrounding communities.*
>
> . . . .
>
> [T]here are significant safety reasons for facilitating the fastest transit of trains throughout the railroad system. For example, the risk of releases of hazardous materials is reduced by minimizing the time such shipments spend in transportation. It would be poor public policy to allow local governments to attempt to lower their risk by raising everyone's risk and by clogging the transportation system. . . .
>
> [In recent years communities along railroad rights-of-way have proposed] to set slower train speeds on main tracks located in

> urban areas. They typically cite the inherent [danger] of grade crossings . . . .
>
> [This danger] is a separate issue from train speed. The physical properties of a moving train virtually always prevent it from stopping in time to avoid hitting an object on the tracks regardless of the speed at which the train is traveling. Prevention of grade crossing accidents is more effectively achieved through the use of adequate crossing warning systems and through observance by the traveling public of crossing regulations and precautions.

63 Fed. Reg. 33992, 33998-99 (June 22, 1998) (emphasis added). *See* U.S. Dep't of Transp., *Railroad-Highway Safety -- Pt. I: A Comprehensive Study of the Problem* (1972); U.S. Dep't of Transp., *Railroad-Highway Safety -- Pt. II: Recommendations for Resolving the Problem* (1972). With regard to the immediately preceding paragraph, we point out that the federal government through the Federal Railway-Highway Crossings Program provides funds for constructing projects that eliminate hazards of railway-highway crossings. *See* 23 U.S.C. § 130; 23 C.F.R. § 646.214(b); *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344, 348-49, 120 S. Ct. 1467, 146 L. Ed. 2d 374 (2000).

III. Summary

The IDOT may only issue an order approving a locally proposed regulation for train speed if, in addition to meeting the requirements in its administrative rules and the test of reasonableness, the proposal satisfies the requirements of 49 U.S.C. § 20106, *viz.*, (1) it must be necessary to eliminate or reduce an essentially local safety hazard; (2) it must not be incompatible with a federal law, regulation, or order; and (3) it may not unreasonably burden interstate commerce. An opinion, which determines matters of law, cannot determine as a matter of fact whether a specific proposal satisfies either the administrative rules or 49 U.S.C. § 20106.

Sincerely,

Bruce Kempkes
Assistant Attorney General

APPROPRIATIONS; COUNTIES: Transfer from special fund for unrelated program. 2001 Iowa Acts, 79th G.A., ch. ___, § ___ (S. F. 65); Iowa Code §§ 25B.2, 455E.11 (2001). The General Assembly in Senate File 65 can divert money from the groundwater protection fund to the Low-Income Home Energy Assistance Program before the end of the fiscal year as long as the diversion impairs no contractual obligation. The State Mandates Act, which may excuse local entities from paying administrative fines or penalties levied by the State, does not apply to a legislative scheme in which the State provides financial benefits to local entities that achieve waste-reduction goals. (Kempkes to Jackson, Des Moines County Attorney, 9-6-01) (#01-9-1)

September 6, 2001

Mr. Patrick C. Jackson
Des Moines County Attorney
215 Columbia St.
Burlington, IA 52601

Dear Mr. Jackson:

You have requested an opinion on the validity and impact of recent legislation that became effective on February 7 with the Governor's signature. Pointing to Senate File 65, you ask whether the General Assembly can divert money before the end of the fiscal year on June 30 from the groundwater protection fund to a different state program and, if so, whether this diversion can relieve a county regional solid waste commission from paying administrative fines or penalties levied by the State for failure to achieve waste-reduction goals. You acknowledge that the Supreme Court of Iowa in 1993 upheld a diversion of money at the end of the fiscal year from the groundwater protection fund to the general fund. Your questions invite examination of Iowa Code chapters 25B and 455E (2001) as well as Senate File 65.

I. Applicable law

Senate File 65 describes itself as an act providing supplemental funding for the Low-Income Home Energy Assistance Program. *See* S.F. 65, 79th G.A., 1st Sess. (Iowa 2001). It provides money for that program by appropriating unencumbered or unobligated money from three funds, including the groundwater protection fund. *See* S.F. 65, §§ 1-3.

Chapter 455E is entitled Groundwater Protection. Section 455E.11(1) establishes the groundwater protection fund, which represents charges collected by landfill entities, and provides in part:

> Notwithstanding section 8.33 [which generally provides for automatic reversion to the state treasury every August 31 of unencumbered or unobligated balances of appropriations], any unexpended balances in [the fund] and in any of the accounts within [the fund] at the end of each fiscal year shall be retained in the fund and the respective accounts within the fund . . . . The fund may be used for the purposes established for each account within the fund [*viz.*, solid waste, agriculture management, household hazardous waste, and storage tank management].

Section 455E.11(2) provides that money collected from fees relating to those accounts shall be deposited in its respective account and shall be appropriated, used, or expended for specified purposes, none of which relate to low-income home energy assistance.

Iowa Code chapter 25B is entitled State Mandates – Funding Requirements. It only applies to a "political subdivision," specially defined as "a city, county, township, or school district" (or, for some purposes, a community college and area education agency). *See* Iowa Code §§ 25B.2(3), 25B.3(1). Section 25B.2(3) provides in part:

> If, on or after July 1, 1994, a state mandate is enacted by the general assembly, or otherwise imposed, on a political subdivision and the state mandate requires a political subdivision to engage in any new activity, to provide any new service, or to provide any service beyond that required by any law enacted prior to July 1, 1994, and the state does not appropriate moneys to fully fund the cost of the state mandate, the political subdivision is not required to perform the activity or provide the service and the political subdivision shall not be subject to the imposition of any fines or penalties for the failure to comply with the state mandate unless the legislation specifies the amount or proportion of the cost of the state mandate which the state shall pay annually.

See generally Iowa Code § 25B.3(2) (defining "state mandate").

II. Analysis

You have asked whether the General Assembly can divert money before the end of the fiscal year on June 30 from the groundwater protection fund to a different state program and, if so, whether this diversion can relieve a county regional solid waste commission from paying administrative fines or penalties levied by the State for failure to achieve waste-reduction goals. We understand that the "county regional solid waste commission" arose through the joint exercise of governmental powers. *See generally* Iowa Code ch. 28E.

(A)

Before this year, the General Assembly specified that money deposited in the groundwater protection fund be appropriated, used, or expended for matters relating to solid waste, agriculture management, household hazardous waste, and storage tank management. *See* Iowa Code § 455E.11. Earlier this year, however, the General Assembly took unencumbered and unobligated money in that fund and applied it to a matter clearly constituting a public purpose, but, as well, clearly unrelated to solid waste, agriculture management, household hazardous waste, and storage tank management. *See* S.F. 65. You have questioned the authority of the General Assembly to do so.

Your question necessitates a limited review, because the General Assembly may enact any law not expressly (or by clear implication) prohibited by the United States or Iowa Constitution. Courts indulge in every presumption in favor of validating a legislative enactment. *See Frost v. State,* 172 N.W.2d 575, 578 (Iowa 1970). They reluctantly interfere with the budgetary process. *Polk County v. Iowa St. App. Bd.*, 330 N.W.2d 267, 276 (Iowa 1983).

In *Des Moines Metropolitan Area Solid Waste Agency v. Branstad*, 504 N.W.2d 888 (Iowa 1993), the Supreme Court of Iowa considered whether the General Assembly had authority to divert money from the groundwater protection fund to the general fund. The supreme court upheld the diversion and concluded that the General Assembly may divert money from a fund so long as the diversion does not "conflict with a provision of the constitution controlling such fund, or would impair the obligation of a contract to constitute a breach of trust . . . ." *Des Moines Metro. Area Solid Waste Agency v. Branstad,* 504 N.W.2d at 890 (*quoting Michigan Sheriffs' Ass'n v. Michigan Dep't of Treasury*, 255 N.W.2d 666, 672 (Mich. App. 1977)). *Compare id. with* 1992 Iowa Op. Att'y Gen. 8, 12 (legislature may divert funds so long as diversion does not "conflict with a constitutional provision or impair a contractual relationship such as arises where the [S]tate holds trust or retirement funds, holds funds obtained to repay a specific indebtedness such as revenue bonds, or holds funds obtained for a specific [purpose] and no other purpose"); 1992 Iowa Op. Att'y Gen. 119, 120. *See generally* U.S. Const. art. I, § 10 (no state shall pass any law impairing obligation of contracts); Iowa Const. art. I, § 21 (1857) (legislature shall not pass law that impairs obligation of contracts). *Des Moines Metropolitan Area Solid Waste Agency v. Branstad* thus sets the parameters for legislative diversion of funds.

We see nothing in the state constitution that controls the groundwater protection fund. Thus, unless Senate File 65 impairs a contractual obligation, the General Assembly in Senate File 65 could divert money from this fund to the Low-Income Home Energy Assistance Program. *See generally* 1980 Iowa Op. Att'y Gen. 882, 887 (federal constitutional provision protecting against impairment of contracts only applies "to a state law enacted *after* the making of a contract whose obligation is asserted to have been impaired").

That the General Assembly diverted money from the groundwater protection fund before the end of the fiscal year, and thus possibly hindered compliance with waste-reduction goals, has no relevance to the analysis enunciated in *Des Moines Metropolitan Area Solid Waste Agency v. Branstad*. *See generally* Iowa Const. art. III, § 24 (1857) ("[n]o money shall be drawn from the treasury but in consequence of appropriations made by law"); *City of Des Moines v. Iowa Dist. Ct.*, 241 Iowa 256, 264, 41 N.W.2d 36, 40 (1950) ("[w]hat the [State] gives it can as readily, take away"); 1982 Iowa Op. Att'y Gen. 63, 64 (legislature, which has "exclusive constitutional authority to appropriate funds from the state treasury," may "specify how [an appropriation] shall be spent").

(B)

You have asked whether the diversion of money from the groundwater protection fund can, pursuant to section 25B.2(3) in the State Mandates Act, relieve a county regional solid waste commission from paying administrative fines or penalties levied by the State for failure to achieve waste-reduction goals. Section 25B.2(3) excuses the payment of state-imposed "fines" or "penalties" when the General Assembly does not "fully fund" the cost of a "state mandate."

Preliminarily, we have no means of determining the existence of a state mandate. Section 25B.3(2) defines "state mandate" as requiring a political subdivision to establish, expand, or modify its activities "in a manner which necessitates additional expenditures of local revenue by all affected political subdivisions of at least [$100,000], or additional combined expenditures of local revenue by all affected political subdivisions within five years of enactment of [$500,000] or more . . . ." This language necessitates estimation. The Legislative Service and Fiscal Bureaus each have duties regarding this accounting, *see* Iowa Code §§ 25B.4-.5, but, upon inquiry, these agencies do not have any records on whether a state mandate exists here.

Similarly, questions of "full," "sufficient," or "adequate" funding of legislative programs necessarily involve factual determinations, which lie outside the proper scope of an opinion. *See* 1989 Ark. Op. Att'y Gen. 77; 1996 Okla. Op. Att'y Gen. 21. *See generally* 61 Iowa Admin. Code 1.5(3)(c) (Attorney General opinions determine matters of law or statutory construction or interpretation). We have previously stated that our office "cannot resolve accounting issues as a matter of law." 1992 Iowa Op. Att'y Gen. 55, 60.

In any event, we cannot accept the premise of your question that the State levies administrative fines or penalties for failure to achieve waste reduction goals. Rather, the General Assembly has provided financial incentives linked with waste reduction: a "planning area" pays a lower tonnage fee to the State if it meets or exceeds waste reduction goals, Iowa Code § 455D.3(3); and a "sanitary landfill operator" retains more of its tonnage fees normally transferred to the State if its updated comprehensive plan receives approval from the Iowa Department of Natural Resources (DNR), Iowa Code § 455B.310(3). *See generally* Iowa Code § 455B.311 (DNR director "may" make "grants" to a combination of cities, counties, and central

planning agencies from funds reserved under and for the purposes specified in section 455E.11(2)(a)). We cannot properly characterize the failure to receive these benefits as a fine or penalty. *See* Black's Law Dictionary 632 (6th ed. 1990) ("fine" means a pecuniary punishment or mulct; "penalty," an elastic term, generally means pecuniary punishment). *See generally* Iowa Code § 4.1(38) (undefined words in statutes shall be construed according to context and approved English usage). Nor can we properly characterize a legislative scheme which does not require waste reduction, but merely establishes waste-reduction goals for local entities, as a state "mandate." *See* Iowa Code § 25B.3(2) ("state mandate" means a statutory requirement or appropriation which requires a political subdivision to perform an activity); *see also* Webster's Ninth New Collegiate Dictionary 692 (1979) ("mandate" signifies a command).

III. Summary

The General Assembly in Senate File 65 can divert money from the groundwater protection fund to the Low-Income Home Energy Assistance Program before the end of the fiscal year as long as the diversion impairs no contractual obligation. The State Mandates Act, which may excuse local entities from paying administrative fines or penalties levied by the State, does not apply to a legislative scheme in which the State provides financial benefits to local entities that achieve waste-reduction goals.

Sincerely,

Bruce Kempkes
Assistant Attorney General

CONSTITUTIONAL LAW; CITIES: Home inspections. Iowa Const. art. III, § 38A (amend. 25); Iowa Const. art. I, § 6 (1857); Iowa Code § 364.1 (2001). Cities have home rule authority to pass ordinances requiring home inspections only for homes sold on contract. Such an ordinance would not, on its face, violate constitutional guarantees of equal protection, even if it only applied to persons or entities selling a minimum number of homes per year on contract. (Kempkes to Deluhery, State Senator, 9-20-01) #01-9-2

September 20, 2001

The Honorable Pat Deluhery
State Senator
State Capitol
LOCAL

Dear Senator Deluhery:

You have requested an opinion on the validity of proposed city ordinances that relate to real property. You ask whether a city has home rule authority to pass an ordinance requiring home inspections. If so, you ask whether an ordinance requiring home inspections only for homes sold on contract, and not for homes acquired through mortgages, would violate constitutional guarantees to equal protection of the laws.

I. Applicable law

Municipal home rule rests in the Iowa Constitution as well as in Iowa statutes. The Iowa Constitution provides that a municipality may pass ordinances to determine its "local affairs and government" as long as they are "not inconsistent with" statutory provisions. Iowa Const. art. III, § 38A (amend. 25). Iowa Code chapter 364 (2001) is entitled Powers and Duties of Cities. Section 364.1 codifies constitutional home rule:

> A city may, *except as expressly limited by the Constitution, and if not inconsistent with the laws of the [G]eneral [A]ssembly*, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents . . . .

(emphasis added). *See generally* Iowa Code § 364.2(3) ("inconsistent" means "[a]n exercise of . . . power [that] is irreconcilable with the state law").

The federal constitution provides that a State shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The state constitution provides that "[a]ll laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. art. I, § 6.

II. Analysis

(A)

You have asked whether a city has home rule authority to pass an ordinance requiring home inspections.

Such an ordinance obviously purports to protect consumers. *See Cincinnati Bd. of Realtors, Inc., v. City of Cincinnati,* 353 N.E.2d 898, 907 (Ohio App. 1975), *affirmed*, 346 N.E.2d 666 (Ohio 1976). A house is the single largest investment most consumers will ever make. We believe that the broad language of section 364.1 -- that a city may protect and preserve the rights and property of its residents and preserve and improve the safety, health, welfare, comfort, and convenience of its residents -- properly encompasses regulations on housing in general and home inspections in particular. At least one court has held:

> [A city generally has] the power to require an inspection before a home owner may sell his one- or two- family residence. Such an inspection deters fraud and helps enforce the city's building code. Both the means and goals are validly within [the city's] police power. The home rule act by itself is specific enough to grant [cities] the authority to enact such an ordinance.
>
> . . . .
>
> The particular inspection method challenged here is aimed at the specific practice of fraudulent conveyance of homes with serious structural and other deficiencies. . . . Such fraudulent transactions pose an obvious threat to the health and welfare of [the city's residents], and an ordinance directed against them is within the [home rule] authority of the [city] . . . .

Butcher v. City of Detroit, 347 N.W.2d 702, 705, 706 (Mich. App. 1984). *See Cincinnati Bd. of Realtors, Inc., v. City of Cincinnati,* 353 N.E.2d at 903 (upholding city ordinance requiring persons selling property intended for residential use to have property inspected before entering into contract for sale). *See generally* 6A E. McQuillin, The Law of Municipal Corporations § 24.22, at 66, 66-67 (1997) ("the privilege of every citizen to use his or her property according

to his or her own will is both a liberty and a property right, but these rights are always subordinate to the interests of the public welfare"; thus, a city "may impose new and burdensome restrictions on private property" designed to protect the public welfare).

In addition, we see no constitutional or statutory provision that prevents cities from passing an ordinance requiring home inspections. *See generally* Iowa Code ch. 558, 364. Chapter 558, entitled Real Estate Disclosures, does require persons intending to transfer property to make a disclosure statement containing "information relating to the condition and important characteristics of the property and structure located on the property, including significant defects in the structural integrity of the structure . . . ." Iowa Code § 558A.4(1). This requirement, however, does not preclude passage of a city ordinance requiring home inspections. *See generally* 7 E. McQuillin, The Law of Municipal Corporations, § 24.323, at 273 (1997) ("that a state has enacted regulations governing an [activity] does not of itself prohibit a municipality from exacting additional requirements; so long as there is no conflict between the two, both the statute and the ordinance will stand"). Indeed, the two requirements would complement each other.

(B)

You have asked whether a city ordinance requiring home inspections for homes sold on contract *vis-a-vis* homes acquired through mortgages violates constitutional guarantees to equal protection of the laws.

The Supreme Court of Iowa typically equates the state constitution with the federal constitution for purposes of equal protection and engages in the same analysis for both. *See, e.g., Harden v. State*, 434 N.W.2d 881, 885-86 (Iowa), *cert. denied*, 493 U.S. 869 (1989); *Duncan v. City of Des Moines*, 222 Iowa 218, 268 N.W. 547, 551 (1936); *see also* 1966 Iowa Op. Att'y Gen. 95, 102-03; Note, 67 Iowa L. Rev. 309, 309 (1982). *See generally* Iowa Const. art. I, § 6 (1857).

As a threshold matter, only laws that treat "similarly situated" classes of individuals differently trigger equal protection analysis. *Klinger v. Department of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994), *cert. denied*, 513 U.S. 1185 (1995). Obviously, laws that treat differently situated classes of individuals differently cannot, by definition, offend equal protection. *See id.* Challengers to a classification bear the burden to prove that they are similarly situated to the class allegedly receiving favorable treatment under the law. *Id.*

We believe that a city ordinance requiring a home inspection for homes sold on contract *vis-a-vis* homes acquired through mortgages does not treat similarly situated individuals differently. Even if it did, we do not believe that such an ordinance violates equal protection on its face. To violate equal protection "on its face" means that a law by its own terms improperly classifies persons for different treatment.

A challenger to the ordinance would bear the burden to prove that its classification "is arbitrary and bears no rational relationship to a legitimate government interest." *In re Williams*, 628 N.W.2d at 452. A court would strongly presume its validity. *See Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). The court would invalidate the ordinance only if it rested on grounds wholly irrelevant to the achievement of its objective. *Id.* at 321. The challenger would have to negate every conceivable basis which might support the ordinance's classification. *Id.* at 320. The court would uphold the ordinance if any conceivable state of facts provided a rational basis for its classification. *Id.*

A constitutionally justifiable reason for passing an ordinance requiring home inspections only for homes sold on contract would be to protect unknowing buyers from acquiring homes with serious deficiencies. State law requires city housing codes to include a program for the regular inspection of rental houses. *See* Iowa Code § 364.17; *see also* Iowa Code § 403A.3(8). A contract sale of a home bears some resemblance to the renting of a house in that the buyer, who lacks ownership of the property until final payment, makes installment payments. As a practical matter, financially strapped persons who cannot obtain mortgages can only acquire a house by purchasing one on contract. These persons may have limited knowledge of the housing market and lack the protections afforded to persons acquiring homes through the use of real estate agents, lawyers, financial institutions, and mortgages. Some landlords could attempt to circumvent inspections of rental houses by ostensibly "selling" them (often to their own tenants) on contract:

> Under the installment land contract, the purchaser typically [makes] monthly payments for a long term, but [does] not build up any equity with these payments and [does] not receive title until all payments [are] complete. The installment land contract [has] important economic advantages for poor purchasers. Down payments [are] often low, closing costs [are] minimal, and immediate occupancy [is] possible.
>
> . . . [I]nstallment land contracts[, however, have been] systematically more open to abusive practices than mortgages . . . . Unlike a mortgage, installment contracts [do] not involve a third-party lender to require inspections and appraisals and thus assure a fair purchase price. There [is] no counsel at the time of sale because title [passes] only years later, if and when installment payments [are] completed. In addition, and perhaps most importantly, a missed payment [can] and often [does] trigger forfeiture -- the "owner" [can] be evicted summarily, without the procedural protections of mortgage foreclosure.

Swire, "The Persistent Problem of Lending Discrimination: A Law and Economics Analysis," 73 Tex. L. Rev. 787, 801-02 (1995).

A city could conclude that a landlord owning rental houses may attempt to avoid housing inspections and the cost of remedying any deficiencies noted therein by entering into contract sales with unsophisticated buyers who, unable to comply with onerous contractual terms and conditions, will inevitably default and leave ownership of the houses with the landlord. Indeed, this concern was expressed in a report, provided to us by the City of Davenport, on land sales contracts, housing quality, and predatory lending practices. We therefore believe that a city has a constitutionally justifiable ground for requiring a home inspection only for sales of homes on contract. *Cf. Butcher v. City of Detroit*, 347 N.W.2d at 706 (holding that city ordinance requiring home inspections for contract sales of certain residences did not constitute unconstitutional taking of property without due process).

A city could certainly choose to treat all homesellers the same by passing an ordinance requiring that all homes undergo a proper home inspection upon conveyance and that all prospective homebuyers receive a copy thereof. A city could also choose to limit home inspections to persons or entities selling a minimum number of homes on contract per year on the ground that multiple home sales within a limited time frame indicate the existence of a business.

The city could rationally distinguish between an owner who sells a home on an individual basis and an owner who sells houses as part of a business. *Cf. Bain Peanut Co. v. Pinson,* 282 U.S. 499, 501, 51 S. Ct. 228, 75 L. Ed. 482 (1931) (no violation of equal protection where law gave more extensive venue for actions against corporations than that fixed for individual); *Cincinnati Street Ry. Co. v. Snell*, 193 U.S. 30, 35-36, 24 S. Ct. 319, 48 L. Ed. 604 (1904) (no violation of equal protection where law gave greater right to transfer a case to an individual than to a corporation). *See generally* 7 McQuillin, *supra*, § 24.334, at 302-03. For example, a mother may give her son a haircut without a barbering license, but if she engages in the business of barbering, she must obtain such a license and comply with all statutory and administrative requirements. *See generally* Iowa Code ch. 158.

Indeed, government has broad authority to regulate activities when conducted as trades or businesses:

> Commerce, business, industry, trades, occupations and vocations carried on within a municipal corporation are subject to reasonable regulation by the municipal corporation under its police power. Moreover, they are subject to licensing as a suitable means of regulation. They are [also] subject to regulation to prevent or suppress nuisances . . . .

> Municipal competency to regulate business rests on municipal . . . power to prevent businesses, industries, trades and occupations from injuring or menacing the public health, safety, morals, order, welfare and convenience, to prevent them from becoming public nuisances and to suppress them when they do. The power extends to all businesses and it extends to these evils whether they arise from the inherent nature of a business, the manner in which it is conducted or its location or surroundings. Otherwise stated, businesses, professions and occupations affected with a public interest are subject to reasonable regulation for the common good. . . . [Accordingly, cities] may place conditions on the operation of a business enterprise in the exercise of their police powers . . . .

7 McQuillin, *supra,* § 24.321, at 267-68, § 24.322, at 268-69 (footnotes omitted).

III. Summary

Cities have home rule authority to pass ordinances requiring home inspections. Ordinances requiring home inspections only for homes sold on contract, and not for homes acquired through mortgages, do not facially violate constitutional guarantees of equal protection even if they apply only to persons or entities selling a minimum number of homes per year.

Sincerely,

Bruce Kempkes
Assistant Attorney General

CONSTITUTIONAL LAW: Denial of nonprofessional weapons permit. U.S. Const. amend. II; Iowa Const. art. I, §1, 6 (1857); Iowa Const. art. I, § 1 (amend. 45); Iowa Code §§ 724.4, 724.7, 724.8, 724.11 (2001). Section 724.11, which provides the ninety-nine county sheriffs with discretion to issue nonprofessional weapons permits to individuals residing in their counties, does not facially offend the state constitutional guarantee to defend life and liberty and protect property. Section 724.11 does not implicate a violation of the state constitutional guarantee to equal protection of the law. (Kempkes to Boddicker, State Representative, 10-2-01) #01-10-1

October 2, 2001

The Honorable Dan Boddicker
State Representative
State Capitol
LOCAL

Dear Representative Boddicker:

Historically, state governments have regulated the carrying of weapons by individuals. 79 Am. Jur. 2d *Weapons & Firearms* § 7, at 12 (1975); *see* 1920 Iowa Op. Att'y Gen. 629, 630. Not long after the Civil War, the General Assembly passed a statute permitting the carrying of concealed weapons only by police officers and those persons having the duty to execute processes or warrants or to make arrests. *See* Iowa Code § 3879 (1873). Just before World War I, the General Assembly enacted the first comprehensive statute governing weapons. Among other things, the General Assembly vested the county sheriff with discretion to issue a permit to a person wishing to carry a concealed revolver, pistol, or pocket billy. *See* 1913 Iowa Acts, 35th G.A., ch. 297, § 3.

You have requested an opinion on the constitutionality of the current version of this statute, which provides that each county sheriff has discretion to issue "nonprofessional weapons permits" to individuals desiring to carry weapons. Pointing to the possibility that Iowa's ninety-nine sheriffs in the exercise of their discretion might not use the same criteria for issuing such permits, you ask whether the statute offends the state constitution. Your letter, however, narrows this broad question to whether the statute offends the guarantees to equal protection of the law and to defend life and liberty and protect property.

I. Applicable law

Iowa Code chapter 724 (2001) is entitled Weapons. Section 724.4 criminalizes the act of carrying weapons:

> (1). Except as otherwise provided in this section, a person who goes armed with a dangerous weapon concealed on or about the person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor.
>
> . . . .
>
> (4). [Subsection 1 does] not apply to . . .
>
> . . . .
>
> (i). A person who has in the person's possession and who displays to a peace officer on demand a valid permit to carry weapons which has been issued to the person, and whose conduct is within the limits of that permit. . . .

Sections 724.7, 724.8, and 724.11 govern issuance of nonprofessional weapons permits:

> Any person who can reasonably justify going armed may be issued a nonprofessional permit to carry weapons.

Iowa Code § 724.7.

> No person shall be issued a . . . nonprofessional permit to carry weapons unless:
>
> (1). The person is eighteen years of age or older.
>
> (2). The person has never been convicted of a felony.
>
> (3). The person is not addicted to the use of alcohol or any controlled substance.
>
> (4). The person has no history of repeated acts of violence.
>
> (5). *The issuing officer reasonably determines that the applicant does not constitute a danger to any person.*

> (6). The person has never been convicted of any crime defined in chapter 708, except "assault" as defined in section 708.1 and "harassment" as defined in section 708.7.

Iowa Code § 724.8 (emphasis added).

> *Applications for permits to carry weapons shall be made to the sheriff of the county in which the applicant resides.* Applications from persons who are nonresidents of the state, or whose need to go armed arises out of employment by the state, shall be made to the commissioner of public safety. In either case, *the issuance of the permit shall be by and at the discretion of the sheriff* or commissioner, who shall, before issuing the permit, determine that the requirements of sections 724.6 to 724.10 have been satisfied. . . .

Iowa Code § 724.11 (emphasis added).

II. Analysis

You have suggested that section 724.11 offends the state constitution. We, like a court, have a limited review in determining the constitutionality of statutes:

> It is fundamental that the [General Assembly] has the power to legislate on all subjects, unless it is expressly or impliedly prohibited from so doing by the Constitution, and the [statute] which is assailed must be plainly at variance with the Constitution before the court will so declare it. All doubtful questions will be resolved in favor of [its] validity . . . .

Shaw v. City Council of Marshalltown, 131 Iowa 128, 104 N.W. 1121, 1124 (1905).

The challenger to a statute such as section 724.11 bears the burden to negate every conceivable basis supporting its constitutionality and to show that the statute violates the constitution beyond a reasonable doubt. *State v. Keene*, 629 N.W.2d 360, 364 (Iowa 2001); *Iowa Dept. of Transp. v. Iowa Dist. Court*, 592 N.W.2d 41, 43 (Iowa 1999).

(A)

You assert that individuals have three options in protecting themselves in cases of assault: "escape; passive acceptance; or active response, without any tools or with tools (weapons)." You also assert that section 724.11 impinges upon the third option of an individual who applies

for, but does not receive, a nonprofessional weapons permit. You imply that the General Assembly cannot pass such a law, because an individual has an absolute right to keep and bear arms under the state.

The Second Amendment to the United States Constitution provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. This language does not create a right on the part of individuals to keep and bear arms. *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir. 1988); *Olympic Arms v. Magaw*, 91 F. Supp.2d 1061, 1071 (E.D. Mich. 2000). *See generally* Annot., "Right to Bear Arms," 37 A.L.R.Fed. 696, 701 (1978). Similarly, our state constitution does not expressly recognize an individual right to keep and bear arms. Kopel, Cramer & Hattrup, "A Tale of Three Cities: the Right to Bear Arms in State Supreme Courts," 68 Temp. L. Rev. 1177, 1177 & n. 13 (1995). With regard to arms, the state constitution provides only that "[t]he militia of this state . . . shall be armed, equipped, and trained, as the [General Assembly] may provide by law" and that "[n]o person or persons conscientiously scrupulous of bearing arms shall be compelled to do military duty in time of peace . . . ." Iowa Const. art. VI, §§ 1, 2.

You suggest, however, that an individual right to keep and bear arms may inhere in another provision of the state constitution: "All men and women are, by nature, free and equal, *and have certain inalienable rights* – among which are those of enjoying *and defending life and liberty*, acquiring, possessing *and protecting property*, and pursuing and obtaining safety and happiness." Iowa Const. art. I, § 1 (amend. 45) (emphasis added).

We do not believe, however, that the words "defend" (life and liberty) or "protect" (property) presuppose an individual right to keep and bear arms. Nothing in their common meanings necessarily implicates the keeping and bearing of arms. *See* Black's Law Dictionary 419 (1991); Webster's Ninth New Collegiate Dictionary 294, 919 (1979). As you acknowledge, persons may certainly defend life and liberty and protect property without resorting to arms. We have previously indicated that persons protect their property by resorting to the legal system. *See* 1976 Iowa Op. Att'y Gen. 451, 452, 453 (right of individual to protect property "is a basic inviolable right" that is "protected by affording individuals the right to due process of law, and equal protection of the laws").

Even if there were a state constitutional right on the part of an individual to keep and bear arms, the State can impose reasonable regulations upon it. Rights, though inalienable, are "subject . . . to such reasonable regulations as the peace, comfort and welfare of society may demand." *State v. Osborne*, 171 Iowa 678, 154 N.W. 294, 300 (1915). *Accord Gibb v. Hansen,* 286 N.W.2d 180, 185 (Iowa 1979). As legal historians have explained, no constitutional right in England or America "was absolute in the modern sense, that is, unqualifiable." W. Nelson & R. Palmer, *Constitution and Rights in the Early American Republic* 66 (1987). Qualification of rights "was merely the realization of the rights of others in society." *Id. See Des Moines Joint*

Stock Land Bk. v. Nordholm, 217 Iowa 1319, 253 N.W. 701, 727 (1934) (Claussen, C.J., dissenting). Iowa's judiciary reached this realization quite some time ago. *See In re Ruth*, 32 Iowa 250, 252-53 (1871).

We conclude that the state constitutional guarantee to the inalienable right to defend life and liberty and protect property does not prohibit the State from reasonably regulating the carrying of weapons. *See* Annot., "Gun Control -- State Constitutions," 86 A.L.R.4th 931, 937 (1991) (state constitutional guarantees to keep and bear arms generally interpreted to grant right "that is limited rather than absolute"). *Cf.* 79 Am. Jur. 2d *Weapons & Firearms* § 4, at 8, (1975) (common law did not recognize absolute right to keep and bear arms). Were it otherwise, children, ex-felons, or prisoners could go about carrying weapons and anyone could carry sawed-off shotguns, AK-47s, or machine guns. We also conclude that requiring a permit to carry a weapon constitutes reasonable regulation.

(B)

You have indicated that section 724.11 may offend the state constitutional guarantee to equal protection of the law on the basis that it may treat persons differently depending upon the county in which they reside. *See generally* Iowa Const. art. I, § 6; *In re Morrow,* 616 N.W.2d 544, 547 (Iowa 2000). Case law from other jurisdictions points to a different conclusion. *See Mecikalski v. Wyoming Att'y Gen.*, 2 P.3d 1039, 1046-47 (Wy. 2000); *San Jose Police Officers Ass'n. v. City of San Jose*, 245 Cal.Rptr. 728, 733 (App. 1988); *City of Cape Girardeau v. Joyce*, 884 S.W.2d 33, 35 (Mo. App. 1994). Any equal-protection argument attacking the county-by-county determination sanctioned by section 724.11 suffers from at least three flaws.

First: To maintain a *prima facie* case, challengers to section 724.11 must show that a recognizable, distinct class has been singled out for different treatment under the law. *See, e.g., Castaneda v. Partida*, 430 U.S. 482, 493, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977).

Section 724.11 does not, on its face, create any class or classes of people. At the very most, by allowing the sheriff in each county to decide whether to issue a nonprofessional weapons permit, it creates the possibility that applicants may receive different treatment from county to county. In an analogous case, *Shackleford v. Catlett*, 244 S.E.2d 327, 330 (W. Va. 1978), a court found no violation of equal protection in considering a statute that permitted each county court in the state to elect against subscribing to a worker compensation fund. An employee of a county court electing against subscription asserted a violation of equal protection on the ground that employees of other county courts, which had subscribed to the fund, received worker compensation benefits. The court held that the equal protection guarantee only encompassed the employees of a single county court and did not require equal treatment of all employees of all county courts. What happened in other counties had no relevancy to the question of equal protection.

We thus disagree that unsuccessful applicants residing in one county can maintain an equal-protection action premised upon the treatment accorded applicants residing in other counties.

Second: To establish a *prima facie* case, unsuccessful applicants would also have to show that they and the successful applicants from other counties constitute "similarly situated" classes under the law. *See In re Morrow,* 616 N.W.2d at 547*; Klinger v. Nebraska Dep't of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994), *cert. denied*, 513 U.S. 1185 (1995).

Issuing or denying a permit will involve an assessment of the facts and conditions peculiar to a geographic area. No two counties are alike -- their differing crime rates and differing demographics may have an impact on the decision to issue nonprofessional weapons permits. *See Galvan v. Superior Court*, 452 P.2d 930, 938 (Cal. 1969) ("[t]hat problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority"). We recently observed in analogous circumstances:

> 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. . . .
>
> > [T]here 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."

2000 Iowa Op. Att'y Gen. ___ (#00-2-1) (citation omitted). Similarly, the United States Supreme Court has observed:

> Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government.
>
> . . . The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. . . . If diversities of

> laws . . . may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State.

Missouri v. Lewis, 101 U.S. 22, 30-31, 31-32, 25 L.E. 989 (1879).

We thus conclude that unsuccessful applicants residing in one county likely cannot show that they and successful applicants from other counties constitute "similarly situated" classes. *See Salsburg v. Maryland*, 346 U.S. 545, 552, 74 S. Ct. 280, 98 L. Ed. 281 (1954) (when territorial differences exist, "[t]erritorial uniformity is not a constitutional requisite").

Third: That a county sheriff might erroneously deny issuing a nonprofessional weapons permit in a given case does not transform such a simple and common instance of decision-making into a violation of equal protection. *See Village of Willowbrook v. Olech,* 528 U.S. 562, 565, 120 S. Ct. 1073, 145 L. Ed. 1060 (2000) (Breyer, J., concurring). One federal appeals court has observed that "[t]he concept of equal protection is trivialized when it is used to subject every decision made by state or local government to constitutional review . . . ." *Indiana St. Teachers Ass'n v. Indianapolis Bd. of School Comm'rs*, 101 F.3d 1179, 1181 (7th Cir. 1996).

We seriously doubt that an unsuccessful applicant for a nonprofessional weapons permit can maintain an equal-protection action based solely upon a faulty decision by the county sheriff. *See New Burnham Prairie Homes, Inc. v. Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990), *cert. denied*, 498 U.S. 1039 (1991) (discrimination based merely on individual *rather than group* reasons will not suffice to maintain a claim of unequal treatment); *Hayden v. Grayson*, 134 F.3d 449, 454 (1st Cir.), *cert. denied*, 524 U.S. 953 (1998) (same). Were it otherwise, every unsuccessful applicant for a governmental permit, license, contract, or job to assert "that the decision was arbitrary and an arbitrary decision treats likes as unlike and therefore denies the equal protection of the laws." *Indiana St. Teachers Ass'n v. Indianapolis Bd. of School Comm'rs*, 101 F.3d at 1181.

Finally, we point out that the lack of an equal-protection basis for challenging decisions by county sheriffs does not insulate them from judicial review. Section 724.11 requires county sheriffs to exercise discretion, and unsuccessful applicants may use that requirement as a basis for challenging the denial of a nonprofessional weapons permit. As we have previously explained, if a county sheriff

> would categorically refuse or deny the issuance of any permits whatsoever, the discretionary or decision making power vested in him by the legislature would be rendered a nullity and the responsibility conferred under the language of the statute to render

> a judgment would be abrogated. This a sheriff cannot do. The legislature has not said that *no* person may carry a concealed weapon, but rather citizens may be so armed if the sheriff in his judgment finds it to be warranted. . . .

1976 Iowa Op. Att'y Gen. 767, 768 (citations omitted).

III. Summary

Section 724.11, which provides the ninety-nine county sheriffs with discretion to issue nonprofessional weapons permits to individuals residing in their counties, does not facially offend the state constitutional guarantee to defend life and liberty and protect property. Section 724.11 does not implicate a violation of the state constitutional guarantee to equal protection of the law.

Sincerely,

Bruce Kempkes
Assistant Attorney General

ECONOMIC EMERGENCY RESERVE FUND; CASH RESERVE FUND: Use of funds for cash flow purposes. Iowa Code §§ 8.55(1), (3), 8.56(1), (3), (4) (2001). Moneys from the economic emergency fund and the cash reserve fund may be used for cash flow purposes to pay legal obligations of the State for which the Legislature has made appropriations. Moneys so used from the cash reserve fund must be returned by the end of the fiscal year. The law does not state when moneys used from the economic emergency fund must be returned. (Johnson to Eisenhauser, Director, Iowa Department of Management, 10-5-01) #01-10-2

October 5, 2001

Cynthia Eisenhauser
Director
Department of Management
State Capitol
L O C A L

Dear Ms. Eisenhauer:

You have requested a formal opinion of the Attorney General regarding use of the State's reserve funds for cash flow purposes. In the letter requesting our opinion, you state that "the Governor and the Legislature are required to use the revenue estimate of the State's Revenue Estimating Conference." You further advise us that "the official estimate for March 14, 2001, coupled with legally enacted appropriations," projected "a positive ending balance for Fiscal Year 2001" according to "both the Legislative Fiscal Bureau and the Department of Management."

You indicate that the State's largest source of revenue, the personal income tax, is not received until late in the fiscal year. Because of this, on April 1, when the final quarterly allotments are made to departments and other entities, actual cash on hand in the general fund is not sufficient to make those allotments. You further advise us that, historically, the Department of Management has utilized money for cash flow purposes from the economic emergency fund, pursuant to Iowa Code section 8.55(3) (2001), and from the cash reserve fund, pursuant to section 8.56(3), until the anticipated tax revenues are received. In keeping with this practice, the Department of Management made the allotments for the final quarter of Fiscal Year 2001 to pay the State's legal obligations for which appropriations were made by the Legislature.

According to your letter, it now appears that the actual general fund revenues were not sufficient to cover these legally allotted expenses.

You have posed two questions:

1. "Does the language in 8.55 and 8.56 allow the Economic Emergency Fund and the Cash Reserve Fund to be used for determining the cash position of the State, and, when official revenue estimates and other budget assumptions show a positive General Fund ending balance for the fiscal year, may those funds be used during the fiscal year for making allotments to pay obligations for which appropriations have been made?"

2. "If, when actual revenue collections, transfers, accruals, and standing appropriations are finalized and the General Fund is found to not have had sufficient resources to pay all legally allotted and appropriated items, do these statutes direct how the State should account for the actual payment of these obligations?"

APPLICABLE LAW

The Iowa economic emergency fund is created by Iowa Code section 8.55. The statute creating this fund was enacted in 1984. 1984 Iowa Acts, 70th G.A., ch.1305, § 21. The fund is considered separate from the general fund of the State. Iowa Code § 8.55 (1)(2001). Money in the economic emergency fund may be appropriated only in the fiscal year for which the appropriation is made and only for emergency expenditures. Iowa Code § 8.55(3)(2001). The statute contains one exception to these restrictions on the use of money in the fund:

> However, . . . the balance in the Iowa economic emergency fund may be used in determining the cash position of the general fund of the state for the payment of state obligations.

Iowa Code § 8.55(3)(2001).

The cash reserve fund is created by Iowa Code section 8.56. It was adopted in 1992. 1992 Iowa Acts, 74th G.A., ch. 1227, § 6. The cash reserve fund is also separate from the general fund of the State. Iowa Code § 8.56 (1). The statute creating the cash reserve fund contains a number of restrictions on the use of money in the fund. *See* Iowa Code §§ 8.56(1), (3), (4)(2001). The statute contains the same exception for the use of money in the fund that is found in the economic emergency fund:

> However, . . . the balance in the cash reserve fund may be used in determining the cash position of the general fund of the state for payment of state obligations.

Iowa Code § 8.56(3)(2001).

Section 8.56(3) contains an additional requirement regarding the use of money in the cash reserve fund that is not found in the economic emergency fund:

> Moneys in the cash reserve fund may be used for cash flow purposes provided that any moneys so allocated are returned to the cash reserve fund by the end of each fiscal year.

Iowa Code § 8.56(1)(2001).

ANALYSIS

I.

Your first question is whether sections 8.55(3) and 8.56(3) authorize the use of money from the economic emergency fund and the cash reserve fund for cash flow purposes until anticipated tax revenues are received, specifically, to make allotments to pay legal obligations for which appropriations have been made by the Legislature.

Both section 8.55(3) and section 8.56(3) contain restrictions on the use of reserve funds. Both of these statutes contain precisely the same exception to these restrictions:

> However, . . . the balance in the . . . reserve fund may be used in *determining the cash position* of the general fund *for the payment of state obligations*.

Iowa Code §§ 8.55(3), 8.56(3)(2001). (Emphasis added).

The precise meaning of this statutory exception, standing alone, is ambiguous. It is unclear what is meant by the language of the statute which allows reserve funds to be used in "determining" the cash position of the State, and the phrase "cash position" is not defined in the statute.

Where the language of a statute is ambiguous or where reasonable persons would be uncertain as to its meaning, it is necessary to interpret it according to rules of statutory construction. *Holiday Inns Franchising, Inc. v. Branstad*, 537 N.W.2d 724, 728 (Iowa 1995). The primary goal of statutory construction is to ascertain the intent of the legislature. *Miller v. Westfield Insur. Co.*, 606 N.W.2d 301, 303 (Iowa 2000). In determining the legislative intent, a statute should not be read in isolation; rather, all parts of the statute should be considered together. *General Electric Co. v. Iowa State Bd. of Tax Review*, 492 N.W.2d 417, 420 (Iowa 1992). In interpreting the words of a statute, every attempt should be made to give effect to every

word in the statute and to avoid rendering any part of it superfluous or meaningless. *Iowa Dep't of Transportation v. Nebraska-Iowa Supply Co.*, 272 N.W.2d 6, 11 (Iowa 1978).

Applying these principles of statutory construction, we believe that a reasonable construction of sections 8.55(3) and 8.56(3), when read in their entirety, is that the reserve funds may be used for cash flow purposes. These sections state that the reserve funds "may be used in determining the cash position of the state for the payment of state obligations." The phrase "for the payment of state obligations" implies that the funds can be used for the precise purpose of paying, on a cash basis, the State's legal obligations for which appropriations were made by the Legislature. Any interpretation to the contrary would render the phrase "for the payment of state obligations" superfluous or meaningless, contrary to accepted rules of statutory construction.

It is our understanding that the Department of Management has interpreted sections 8.55(3) and 8.56(3) in this manner since those statutes were adopted. It is also our understanding that the Department of Management has routinely utilized the reserve funds for cash flow purposes since the 1980s. This long-standing practice is very significant in interpreting sections 8.55(3) and 8.56(3). The Legislature is presumed to know the construction of a statute given to it by the executive department of government. *John Hancock Mutual Life Insur. Co. v. Lookingbill,* 218 Iowa 373, 253 N.W. 604, 611 (1934). *See Lever Bros. v. Erbe*, 249 Iowa 454, 87 N.W.2d 469, 474 (1958) (There is a presumption that the Legislature was aware of federal regulations interpreting an act when it adopted a similar state statute). Where there has been a long-standing interpretation of a statute and the Legislature has left it materially unchanged, the presumption exists that the Legislature has acquiesced in the interpretation. *Smith v. Iowa Liquor Control Comm'n,* 169 N.W.2d 803, 807 (Iowa 1969). Indeed, the courts readily acknowledge that they will "give weight to the administrative interpretation of statutes, particularly when they are long-standing." *General Electric Co. v. State Bd. of Tax Review*, 492 N.W.2d 417, 420 (Iowa 1992).

In 1992, eight years after the economic emergency fund had been established, the Legislature created the cash reserve fund. 1992 Iowa Acts, 74th G.A., ch. 1227, § 6. At the same time, the Legislature amended portions of section 8.55(3) relating to the use of money in the economic emergency fund. 1992 Iowa Acts, 74th G.A., ch. 1227, § 5. Notably, in amending the statute governing the economic emergency fund, the Legislature did not in any way restrict the use of the fund for cash flow purposes, even though the funds had been used for cash flow purposes prior to the amendments. This is further evidence of legislative acquiescence in the Department of Management's interpretation of the statutes.

As noted above, when the cash reserve fund was created in 1992, it included the same exception to the restrictions on the use of funds as the economic emergency fund and allowed the fund "to be used in determining the cash position of the general fund of the state for the payment of state obligations." However, one additional restriction on the use of the funds for cash flow

purposes was included: the requirement that "any moneys so allocated [be] returned to the cash reserve fund by the end of each fiscal year." Iowa Code § 8.56(1).

In contrast, there is no requirement that moneys from the economic emergency fund which are used for cash flow purposes must be returned by the end of the fiscal year: the statute is silent on when these funds must be returned. This is significant because the statute governing the economic emergency fund was amended in the same year that the cash reserve fund was created. *See* 1992 Iowa Acts, 74th G.A., ch. 1227, §§ 5, 6. When the Legislature wanted to require that money used for cash flow purposes be returned to the fund by the end of the fiscal year, it certainly knew how to say so. The omission of such a requirement from section 8.55(3) is an indication that the legislature did not intend to impose such a requirement on the use of moneys from the economic emergency fund. *See State v. Carpenter*, 616 N.W.2d 540, 543 (Iowa 2000) ("We acknowledge the rule of statutory construction that legislative intent can be 'expressed by omission as well as by inclusion'.")

We conclude that sections 8.55(3) and 8.56(3) authorize the Department of Management to use moneys from the economic emergency fund and the cash reserve fund for cash flow purposes, specifically, to pay the State's legal obligations for which appropriations have been made by the Legislature. Monies used from the cash reserve fund for this purpose must be returned to the cash reserve fund by the end of the fiscal year. The statute is silent as to when monies used from the economic emergency fund must be returned.

II.

Your second question is whether the statutes in question explain how the State should account for the use of the reserve funds for cash flow purposes when the general fund is found to have insufficient resources to pay all legally allotted and appropriated items.

We are unable to answer this question in an Attorney General's opinion. As we have noted on a prior occasion:

> This office can only render an opinion on issues of law, meaning those issues which can be answered by statutory construction or legal research. 1972 Op. Att'y Gen. 686. If resolution of a question is dependent on factors other than legal issues, it must be resolved by other entities as provided by law. . . . *This office cannot resolve accounting issues as a matter of law.*

1992 Iowa Op. Att'y Gen. 60. (Emphasis added).

We believe that your question as to the proper method of accounting in this situation should be resolved by your accountants, applying the principles of law we have set forth above.

CONCLUSION

A reasonable construction of sections 8.55(3) and 8.56(3) is that moneys from the economic emergency fund and the cash reserve fund may be used for cash flow purposes, specifically, to pay legal obligations of the State incurred as a result of legislative appropriations . The long-standing interpretation of these statutes by the Department of Management, as well as that Department's routine practice under these statutes, support this conclusion. The Legislature has acquiesced in this practice and has not amended the statutes to prevent it. Although moneys used from the cash reserve fund for cash flow purposes must be repaid at the end of the fiscal year, the statutes contain no such requirement for funds used from the economic emergency fund.

We are unable to advise you, as a matter of law, as to the proper method of accounting for these practices.

Very truly yours,

Dennis W. Johnson
Solicitor General

CONFLICTS OF INTEREST; CIVIL SERVICE: Civil service commissioners, city and county attorneys, union representation on appeal. Iowa Code §§ 341A.12, 341A.16, 362.5, 400.2, 400.26, 400.27 (2001). Depending upon the surrounding facts and circumstances, (1) civil service commissioners may have a conflict of interest if they conduct business with their respective city or county and (2) city or county attorneys may have a conflict of interest when serving as legal counsel to their respective civil service commissions. Union members without licenses to practice law may not provide legal representation to employees in appeals to civil service commissions. (Kuhn and Kempkes to Connors, State Representative, 12-5-01) #01-12-1

December 5, 2001

The Honorable John Connors
State Representative
Statehouse
LOCAL

Dear Representative Connors:

You have requested an opinion on the laws governing the civil service for county and city employees. You ask (1) whether members of a civil service commission have a conflict of interest if they conduct business with their respective city or county; (2) whether city or county attorneys have a conflict of interest if they serve as legal counsel to their respective civil service commissions; and (3) whether union members without licenses to practice law can provide legal representation to employees in appeals to civil service commissions. These questions primarily require an examination of Iowa Code chapters 341A and 400 (2001).

I. Applicable law

Chapter 341A is entitled Civil Service for Deputy County Sheriffs and applies to counties. Section 341A.5 provides that "[a]ll commission meetings shall be public meetings." Section 341A.12 specifies the procedure for appeals to county civil service commissions after the imposition of disciplinary sanctions and provides that an employee "shall be entitled to appeal personally, produce evidence, and to have counsel." Section 341A.16 provides that the county civil service commission "shall be represented in such suits by the county attorney."

Chapter 400 is entitled Civil Service and applies to cities. Its provisions "shall be strictly carried out" by each city civil service commission and any person charged with carrying them out. Iowa Code § 400.30. Under section 400.2, city civil service commissioners "shall not sell to, or in any manner become parties, directly, to any contract to furnish supplies, material, or labor to the city in which they are commissioners except as provided in section 362.5." After

defining "contract" as "any claim, account, or demand against or agreement with a city, express or implied," section 362.5 provides that "[a] city officer or employee shall not have an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the officer's or employee's city" unless one of twelve exceptions applies.

Chapter 400 also specifies the procedures for appeals to city civil service commissions after the imposition of disciplinary sanctions. Section 400.26 provides that "[t]he trial of all appeals shall be public, and the parties may be represented by counsel." Section 400.27 provides that a city civil service commission has jurisdiction to hear and determine matters involving the rights of employees and that "[t]he city attorney or solicitor shall be the attorney for the commission . . . ."

II. Analysis

(A)

You have asked whether civil service commissioners have a conflict of interest if they conduct business with their respective city or county. In this state, the common law as well as statutory provisions govern conflicts of interest for those serving government. 1994 Iowa Op. Att'y Gen. 125, 125. Our discussion focuses upon the statutory provisions governing county and city civil service commissioners, who serve by appointment and receive no compensation for their services. *See* Iowa Code §§ 341A.2, 400.1, 400.2.

Regarding *city* civil service commissioners, section 400.2 expressly refers to section 362.5 on matters relating to their public contracts. As a result, city civil service commissioners may not have "an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for [their] city" unless one of twelve exceptions applies. Iowa Code § 362.5.

Regarding *county* civil service commissioners, no provision in chapter 341A expressly refers to section 331.342, which applies to contracts between a county and any "officer or employee of [the] county." Similar to section 362.5, section 331.342 prohibits such officer or employee from having "an interest, direct or indirect, in a contract with [the] county" unless one of ten exceptions applies.

A question thus exists whether a county civil service commissioner constitutes a county "officer" or "employee" – terms undefined by statute -- for purposes of section 331.342. Whatever the precise scope of those terms, we believe that a county civil service commissioner falls within that scope and that, accordingly, section 331.342 governs their public contracts. This conclusion rests on three arguments.

First: The common law presumably would not treat a county civil service commissioner differently from a city civil service commissioner with regard to their public contracts. *See generally* Iowa Code § 4.6(4) (court may consider laws upon same or similar subject in determining legislative intent); *Farmers Co-op. Co. v. DeCoster,* 528 N.W.2d 536, 538 (Iowa 1995) ("[w]hen statutes relate to the same subject matter or to closely allied subjects they are said to be in pari materia and must be construed, considered and examined in light of their common purpose and intent so as to produce a harmonious system or body of legislation"; "we presume a legislature does not deliberately enact inconsistent provisions when it is cognizant of them both, without expressly recognizing the inconsistency").

Second: We see no reason for the General Assembly to distinguish between the two positions and create disharmony in the law. *See generally Farmers Co-op. Co. v. DeCoster,* 528 N.W.2d at 538; *Metier v. Cooper Transport Co.,* 378 N.W.2d 907, 913 (Iowa 1985) ("a legislative enactment presumes a reasonable result is intended, . . . and our interpretation should avoid impractical or absurd results").

Third: Laws governing conflicts of interest "have a practical focus," 1998 Iowa Op. Att'y Gen. ___(#98-5-3), not a technical one, 1994 Iowa Op. Att'y Gen. 119, 123-24. *See generally* 1996 Iowa Op. Att'y Gen. 30, 31 (identifying fundamental principle that "the construction of any statute must be reasonable"). "Public policy tends to suggest an all-inclusive definition of ['officer' and 'employee']." 1994 Iowa Op. Att'y Gen. 119, 124. Courts have gone beyond the letter to the spirit of statutes governing conflicts of interest. 1994 Iowa Op. Att'y Gen. 119, 123. Accordingly, we have concluded that the term "officer" -- partially defined in a general conflict-of-interest statute as a person serving a fixed term -- "might [still] encompass persons having all the attributes of statutorily defined officers except for their serving fixed terms, particularly since no reason exists for treating [such persons] differently for purposes of conflicts-of-interest laws than those persons statutorily defined as officers." *Id.*

We therefore conclude (1) city civil service commissioners may not sell to, or in any manner become parties, directly, to any contract to furnish supplies, material, or labor to the city unless one of the exceptions in section 362.5 applies and (2) county civil service commissioners may not sell to, or in any manner become parties, directly, to any contract to furnish supplies, material, or labor to the county unless one of the exceptions in section 331.342 applies. Commissioners should seek advice from the county or city attorney, as the case may be, when they believe they may have a conflict of interest by virtue of a public contract.

(B)

You have asked whether city or county attorneys have a conflict of interest if they serve as legal counsel to their respective civil service commissions. Such service does not *per se* constitute a conflict of interest, because it falls squarely within their statutory duties: section 341A.16 provides that a county civil service commission "shall be represented by the county

attorney," and section 400.27 provides "[t]he city attorney or solicitor shall be the attorney for the [city civil service] commission." *See generally* Iowa Code § 4.1(30)(a) (unless otherwise defined, "shall" in statutes imposes a duty).

Nevertheless, specific facts and circumstances may give rise to a conflict of interest in a given case. *See generally* Iowa Code § 400.27 ("the commission may hire a counselor or an attorney on a per diem basis to represent it when in the opinion of the commission there is a conflict of interest between the commission and the city council"). For example, a city attorney may have a spouse who has appealed a disciplinary sanction to the city civil service commission, or a county attorney may have advised the sheriff on the specific action underlying an appeal before the county civil service commission. *See generally* 1994 Iowa Op. Att'y Gen. 21 (#93-6-4(L)); 1980 Iowa Op. Att'y Gen. 580, 582.

(C)

You have asked whether union members without licenses to practice law can provide legal representation to employees in appeals to civil service commissions. We understand that no collective bargaining agreement has any applicable terms and conditions governing such representation, and we limit our analysis to the specific context of civil service appeals.

The General Assembly has not specifically affirmed the right of employees to have anyone other than a lawyer represent them in those appeals. Section 341A.12 provides that a city employee "shall be entitled to . . . have counsel," and section 400.26 provides that a county employee "may be represented by counsel."

In a 1980 opinion, we concluded that "counsel" in section 400.26 "comprehends *only* duly licensed practitioners of the law *and no others*." 1980 Iowa Op. Att'y Gen. 30 (#79-3-8(L)) (emphasis added). *See* 1976 Iowa Op. Att'y Gen. 461, 462 (county supervisors may not provide or pay for counsel to represent employee before county civil service commission). The General Assembly presumably knew of our 1980 opinion and could have amended section 400.26 and its corollary provision, section 341A.12, if it disagreed with it. *See* 1994 Iowa Op. Att'y Gen. 114 (#94-6-5(L)); 1992 Iowa Op. Att'y Gen. 1, 3 (that the legislature has not directly negated a prior opinion by subsequent legislation "strongly indicates acquiescence by the legislature"). Moreover, we will not withdraw or modify a prior opinion unless the underlying law has changed or subsequent review reveals that the opinion has a "clearly erroneous" conclusion. 1986 Iowa Op. Att'y Gen. 125 (#86-11-1(L)).

Another consideration lends support to our 1980 opinion. The General Assembly has provided that an individual claiming unemployment benefits "may be represented by counsel or other duly authorized agent" in administrative proceedings. *See* Iowa Code § 96.15(2); *see also* Iowa Code § 311.14 (providing that interested party to proposed secondary road assessment district may appear in person "or by authorized agent"). *Cf.* 5 U.S.C. § 555(b) (under federal

Administrative Procedure Act, party in administrative proceeding entitled to counsel "or, if permitted by the agency, by other qualified representative"); Model State Admin. Proc. Act § 4-203(b) (party in administrative proceeding entitled to counsel "or, if permitted by law, other representative"). That the General Assembly expressly provided for nonlawyer representation in the context of unemployment benefit proceedings tends to suggest that it did not intend for nonlawyer representation to exist in the context of civil service proceedings. *See generally* Iowa Code § 4.6(4) (statutory construction may take into account statutory provisions on similar subjects).

We therefore conclude that, in the absence of specific legislation authorizing nonlawyer representation, only duly licensed lawyers may provide legal representation to employees in proceedings before civil service commissions.

III. Summary

City and county civil service commissioners may not conduct business with their respective city or county unless a statutory exception applies. City or county attorneys may have a conflict of interest when serving as legal counsel to their respective civil service commissions. Union members without licenses to practice law may not provide legal representation to employees in civil service appeals.

Sincerely,

Cristina Kuhn

Cristina Kuhn
Assistant Attorney General

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

LOESS HILLS ALLIANCE; CONSERVATION EASEMENTS; ENVIRONMENTAL LAW; REAL PROPERTY: Permanent conservation easements. Iowa Code §§ 161D.6, 457A.2 (2001). The Loess Hills Alliance -- in cooperation with the DNR, county conservation boards, cities, or private, nonprofit organizations -- may acquire permanent conservation easements from private landowners in the Loess Hills by making single payments thereto. (Kempkes to Warnstadt, State Representative, 12-19-01) #01-12-3

December 19, 2001

The Honorable Steven Warnstadt
State Representative
Statehouse
LOCAL

Dear Representative Warnstadt:

Glaciers covered a large portion of the northern United States, including northern Iowa, around 14,000 to 24,000 years ago. When warm summer air melted them, tremendous flows of water ran down the valleys, and the Missouri River valley in particular. With cooler air, the melting ceased, and the receding water left large mud flats in the Missouri River valley, especially where it separates Iowa from Nebraska. Westerly winds sorted the exposed sediments on these flats, swept the finer materials into clouds of dust, and deposited them on the east side of the river. Highly erodible bluffs formed. Since that time, wind and water have carved these bluffs into steep, sharply ridged hills that run in a narrow band – totaling about a thousand square miles in Iowa -- along the Missouri River valley.

Known as Iowa's Loess Hills, these formations

> are rare[,] as the only other known loess site in the world with equal geological and ecological significance is along the Yellow River in Northern China. Additionally, these lands hold cultural significance to American Indians. Finally, these lands represent some of the last fragments of unplowed, mixed-grass prairie land.

Ansson & Hooks, "Protecting and Preserving Our National Parks in the Twenty-first Century," 62 Mont. L. Rev. 213, 268 n. 337 (2001). We understand that about ninety-five percent of this fragile and unique ecosystem remains in private hands.

You have requested an opinion on the powers of the Loess Hills Alliance, which the General Assembly created two years ago. You ask whether the Alliance -- in cooperation with the Iowa Department of Natural Resources (DNR), county conservation boards, cities, or private, nonprofit organizations -- may acquire permanent conservation easements from private landowners in the Loess Hills by making single payments thereto. This question, which invites an examination of Iowa Code chapter 161D (2001), assumes that any cooperative agreement has been approved by the Loess Hills Development and Conservation Authority.

I. Applicable law

In 1993, the General Assembly passed chapter 161D and created the Authority. *See* 1993 Iowa Acts, 75th G.A., ch. 136. Members from twenty-two counties in western Iowa comprise the Authority. *See* Iowa Code § 161D.1(1). Its mission "is to develop and coordinate plans for projects related to the unique natural resource, rural development, and infrastructure problems of counties in the deep loess region of western Iowa," taking into account issues of soil erosion and water quality. Iowa Code § 161D.1(2). Under 161D.1(3), the Authority shall administer the Loess Hills development and conservation fund and expend moneys in the fund "for the planning, development, and implementation of development and conservation activities or measures in the member counties."

In 1999, the General Assembly passed an act establishing the Alliance. *See* 1999 Iowa Acts, 78th G.A., ch. 119. Members from seven of the twenty-two counties in the Authority comprise the Alliance. Section 161D.4 provides that its mission "is to create a common vision for Iowa's loess hills, protecting special natural and cultural resources while ensuring economic viability and private property rights of the region." Section 161D.6(1) identifies the responsibilities of the Alliance's board of directors. These responsibilities include:

> (a). To prepare and adopt a comprehensive plan for the development and conservation of the loess hills area subject to the approval of the [Authority]. The plan shall provide for the designation of significant scenic areas, the protection of native vegetation, the education of the public on the need for and methods of preserving the natural resources of the loess hills area, and the promotion of tourism and related business and industry in the loess hills area.
>
> (b). *To apply for, accept, and expend public and private funds for planning and implementing projects, programs, and other components of the mission of the alliance subject to approval of the [Authority].*

> (c). To study different options for the protection and preservation of significant historic, scenic, geologic, and recreational areas of the loess hills including but not limited to a federal or state park, preserve, or monument designation, fee title acquisition, or restrictive easement.
>
> (d). To make recommendations to and coordinate the planning and projects of the alliance with the [Authority].
>
> (e). To develop and implement pilot projects for the protection of loess hills areas with the use of restrictive easements from willing sellers and fee title ownership from willing sellers subject to approval of the [Authority].

Iowa Code § 161D.6(1) (emphasis added).

II. Analysis

You have asked whether the Alliance -- in cooperation with the DNR, county conservation boards, cities, or private, nonprofit organizations -- may acquire permanent conservation easements from private landowners in the Loess Hills by making single payments thereto.

Under the common law, an "easement" signifies a nonpossessory interest in land that generally entitles the holder to use another's land or to control its use. Although easements typically grant affirmative rights to their holders, conservation easements -- also known as "scenic" or "open space" easements -- convey negative restrictions on landowners who, typically, voluntarily agree to limit their use of the land to conserve its resources or preserve its unique character. Conservation easements function much like negative servitudes in gross. Morrisette, "Conservation Easements and the Public Good: Preserving the Environment on Private Lands," 41 Nat. Resources J. 373, 380 (2001); Jordan, "Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs," 43 Case W. Res. L. Rev. 401, 407-08 (1993). *See generally* Black's Law Dictionary 782, 1370 (6th ed. 1990) ("servitude" has relation to the estate burdened -- in contrast to an easement, which refers to the benefit or advantage or the estate to which it accrues -- and is termed "negative" when it restrains the servient proprietor from making certain use of his property that impairs the easement enjoyed by the dominant tenement; "in gross" is such as is neither appendant nor appurtenant to land, but is annexed to a man's person and usually terminates with the grantee's death).

According to statute, a "conservation easement" signifies

> an easement in, servitude upon, restriction upon the use of, or other interest in land owned by another [to preserve scenic beauty, wildlife habitat, riparian lands, wet lands, or forests, promote outdoor recreation, or otherwise conserve for the benefit of the public the natural beauty, natural resources, and public recreation facilities of the state].

Iowa Code § 457A.2(1) (incorporating Iowa Code § 457A.1). *See* Note, 4 Drake J. Agric. L. 357, 361 (1999).

Under a typical conservation easement,

> [t]he owner retains title to the land -- a conservation easement is a nonpossessory interest in the land -- and may continue to use the land subject to restrictions imposed by the easement. Thus, the owner retains all rights to the property that the owner possessed prior to the easement subject to the restrictions imposed by the easement. The owner may continue to exclude the public from lands protected under a conservation easement, unless the easement provides for public access. The owner may also sell the property or pass it onto heirs, but the property remains bound by the terms of the conservation easement – conservation easements run with the land and are usually perpetual unless the easement stipulates otherwise.
>
> Typically, a conservation easement prohibits any further development of the land unless it is related to a use of the land that is permitted by the easement.

See Morrisette, *supra*, 41 Nat. Resources J. at 379. The holder of a permanent conservation easement thus can preserve in perpetuity the scenic or recreational value of land and, in some circumstances, halt "urban sprawl," *viz.*, the geographical growth of cities, particularly in the form of residential subdivisions and retail shopping centers.

With this understanding of property law, we turn to the scope of authority conferred upon the Alliance by the General Assembly. State agencies such as the Alliance have only those powers and duties which the General Assembly by express language (or by necessary implication from express language) confers upon them. *See Quaker Oats Co. v. Cedar Rapids Human Rights Comm'n*, 268 N.W.2d 862, 868 (Iowa 1978); *but see* 3 Sutherland's Statutory

Construction § 65:03, at 402-03 (2001) (noting modern judicial trend of according liberal construction to agency enabling acts).

The General Assembly has specified six responsibilities of the Alliance in section 161D.6(1). Section 161D.6(1)(b) authorizes the Alliance to expend funds, subject to the approval of the Authority, for planning and implementing "projects, programs, and other components" of its mission. The General Assembly chose not to define or otherwise qualify these terms. *Compare* Iowa Code ch. 161D *with* Iowa Code § 419.1(12) (providing detailed definition of "project" for purposes of municipal support thereof).

Undefined words in statutes "shall be construed according to the context and the approved usage of the language . . . ." Iowa Code § 4.1(38). We know that "project" and "program," in common usage, can encompass many things. *See* Webster's Ninth New Collegiate Dictionary 912, 913 (1979) ("project" signifies a specific plan or design, a planned undertaking; "program" signifies a plan or system under which action can be taken toward a goal). We also understand that federal agencies and conservation groups have used the term "project" to signify the acquisition of permanent conservation easements from private landowners. Moreover, we can properly characterize chapter 161D as remedial, general welfare, or environmental legislation. Words and phrases in these types of legislation receive a liberal construction in order to permit public entities (such as the Alliance and the Authority) to carry out their statutory responsibilities. *See State ex rel. Miller v. DeCoster*, 596 N.W.2d 898, 902 (Iowa 1999); *McCracken v. Iowa Dep't of Human Servs.*, 595 N.W.2d 779, 784 (Iowa 1999); *State ex rel. Iowa Dep't of Water, Air & Waste Management v. Grell*, 368 N.W.2d 139, 141 (Iowa 1985); 3 Sutherland's Statutory Construction § 60:2, at 183, 192-93 (2001); 3A Sutherland's Statutory Construction § 71.01, at 233, § 75.06, at 430 (1992).

We therefore conclude that the broad language of section 161D.1(6)(b) permits the Alliance -- in cooperation with the Iowa Department of Natural Resources, county conservation boards, cities, or private, nonprofit organizations -- to make single payments to private landowners in return for permanent conservation easements. *Cf. National Parks & Conservation Ass'n v. Riverside County*, 50 Cal. Rptr. 2d 339, 345 (Ct. App. 1996) (for purposes of statute requiring environmental impact reports, term "project" should be broadly interpreted to maximize protection of the environment); *Burbank-Glendale-Pasadena Airport Authority v. Hensler*, 284 Cal.Rptr. 498, 506 (Ct. App. 1991) (noting broad definition of "project" in environmental statute as the whole of an action which has a potential for resulting in a physical change in the environment, directly or ultimately); 1984 N.Y. Op. Atty. Gen. 51 (#84-F15) (statute authorizing contributions to the conservation fund "for fish and wildlife purposes" contemplates broad range of conservation programs and wildlife activities). As this generation's trustees for the Loess Hills, the Authority and the Alliance have some degree of discretion in determining how to carry out their various responsibilities and preserve this environmentally and culturally important area for future generations.

Indeed, our conclusion comports with the Alliance's, and the Authority's, fundamental purposes. *See generally* Iowa Code § 4.2 (all statutes "shall be liberally construed with a view to promote [their] objects"). The Authority has the mission "to develop and coordinate plans for projects related to the unique natural resource, rural development, and infrastructure problems of counties in the deep loess region of western Iowa . . . ." Iowa Code § 161D.1(2). The Alliance has the mission "to create a common vision for Iowa's loess hills, protecting special natural and cultural resources while ensuring economic viability and private property rights of the region." Iowa Code § 161D.4.

We recognize that section 161D.6(1)(e) vests the Alliance with the responsibility to develop and implement pilot projects for the protection of the Loess Hills with the use of restrictive easements and that section 161D.6(2) prescribes certain terms and procedures for those easements. We do not view these directives as excluding the use of permanent conservation easements pursuant to section 161D.6(1)(b). We have a duty to harmonize statutory provisions. *See March v. Pekin Ins. Co.*, 465 N.W.2d 852, 854 (Iowa 1991). We thus construe section 161D.6(1)(b) as imposing upon the Alliance the responsibility (subject to approval from the Authority) to expend funds for planning and implementing projects and programs that may include the use of permanent conservation easements. We construe sections 161D.1(e) and 161D.2 as imposing upon the Alliance the responsibility to develop and implement pilot projects using restrictive easements and, in fulfilling this responsibility, to comply with the prescribed terms and procedures.

Finally, as you note, the federal Farmland Protection Policy Act of 1981, Pub. L. No. 97-98, 95 Stat. 1341 (1981) (codified as amended at 7 U.S.C. §§ 4201-09 (1981)), may serve as a source of funds to assist in the purchase of permanent conservation easements. Although federal law may impose terms and conditions upon the Alliance's use of such funds, we see nothing in chapter 161D that prohibits their use by the Alliance to purchase conservation easements. Indeed, section 161D.6(1)(b) expressly authorizes the Alliance, with approval from the Authority, to "apply for, accept, and expend public funds for planning and implementing projects, programs, and other components of" its mission.

III. Summary

The Loess Hills Alliance -- in cooperation with the DNR, county conservation boards, cities, or private, nonprofit organizations -- may acquire permanent conservation easements from private landowners in the Loess Hills by making single payments thereto.

Sincerely,

Bruce Kempkes
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