State of Iowa

1976

FORTY-FIRST BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1976

RICHARD C. TURNER
Attorney General

Published by
THE STATE OF IOWA
Des Moines
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ATTORNEYS GENERAL OF IOWA

1853 - 1972

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1957
Norman A. Erbe	Boone	1957-1961
Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
Richard C. Turner	Pottawattamie	1967-

PERSONNEL OF THE DEPARTMENT OF JUSTICE

RICHARD E. HAESEMEYER ..... Solicitor General
Solicitor General and First Ass't. Atty. Gen. B. April 11, 1928, Tipton, Iowa; B.S., University of Illinois; L.L.B., Harvard Law School; married, three children; American Airlines, Inc., N.Y.C., 1956-1962; Monsanto Company, Textile Div. (formerly the Chemstrand Corp.), N.Y.C. 1962-1967; App't. Solicitor General and First Ass't. Atty. Gen. February 20, 1967.

JOHN E. BEAMER ..... Special Assitant Attorney General
B. September 23, 1939, Abilene, Texas; B.A., Cornell College; J.D., S.U.I.; Agent F.B.I., 1964-1970; married, two children; App't. Ass't. Atty. Gen. 1970, App't. Spec. Ass't. Atty. Gen., 1972.

GEORGE W. MURRAY ..... Special Assistant Attorney General
B. June 1, 1920, Chicago, Illinois; Coe College 2 years; L.L.B., Drake University; married, one child; Appt. Spec. Ass't. Atty. Gen. 1961-1965 and also 1967.

STEPHEN C. ROBINSON ..... Special Assistant Attorney General
B. September 7, 1935, Des Moines, Iowa; A.A., Graceland Junior College; B.A., S.U.I.; L.L.B., Drake University; married, two children; private practice, 1962-1967; App't Ass't. Atty. Gen. January 3, 1967; Secretary Executive Council of Iowa May 1, 1967; Executive Secretary Republican Party of Iowa, November 1, 1969; App't. Ass't. Atty. Gen., August 15, 1973; App't. Spec. Ass't. Atty. Gen. September 19, 1975.

ASHER E. SCHROEDER ..... Special Assistant Attorney General
B. May 12, 1925, Maquoketa, Iowa; married, three children; B.A., J.D., S.U.I.; App't. Ass't. Atty. Gen. 1969, App't. Spec. Ass't. Atty. Gen. 1971.

JOHN I. ADAMS ..... Assistant Attorney General
B. July 11, 1926, Des Moines, Iowa; B.A., L.L.B., S.U.I.; Agent F.B.I., 1953-1955; Legal Department, Continental Western Insurance Company, 1958-1968; App't. Ass't. Atty. Gen. 1969.

JOHN W. BATY ..... Assistant Attorney General
B. October 5, 1942, Monticello, Iowa; B.S., Iowa State University; J.D., Drake University; Ass't. Marshall County Atty. 1968-1969; married; App't. Ass't. Atty. Gen. 1972.

JOSEPH S. BECK ..... Assistant Attorney General
B. January 3, 1944, Spencer, Iowa; B.B.A., University of Iowa; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1973.

MARK STEPHEN BECKMAN ..... Assistant Attorney General
B. November 20, 1950, Council Bluffs, Iowa; B.A., Drake University; J.D., Creighton University; married. App't. Ass't. Atty. Gen. 1976.

LARRY M. BLUMBERG ..... Assistant Attorney General
B. September 8, 1946, Omaha, Nebraska; B.A., University of Minnesota; J.D., Drake University; married, two children; App't. Ass't. Atty. Gen. 1971.

THEODORE R. BOECKER ..... Assistant Attorney General
B. November 20, 1947, Des Moines, Iowa; B.A., Creighton University; J.D., Drake University; married, three children; App't. Ass't. Atty. Gen. 1973.

DOUGLAS R. CARLSON ..... Assistant Attorney General
B. December 6, 1942, Des Moines, Iowa; B.A., J.D., Drake University; single; App't. Ass't. Atty. Gen. 1968.

C. JOSEPH COLEMAN, JR. ..... Assistant Attorney General
B. October 11, 1946, Fort Dodge, Iowa; B.A., Creighton University; Loyola University of Rome, Italy; J.D., Creighton University Law School; married, one child; App't. Ass't. Atty. Gen. 1972.

ROXANNE BARTON CONLIN ..... Assistant Attorney General
B. June 30, 1944, Huron, South Dakota; B.A., J.D., Drake University; married, two children; private practice 1966; Deputy Industrial Commissioner 1966-1968; App't. Ass't. Atty. Gen. 1969.

BRUCE L. COOK ..... Assistant Attorney General
B. July 16, 1949, Sac City, Iowa; B.A., Buena Vista College; J.D., Drake University; married, one child; App't. Ass't. Atty. Gen. 1975.

MICHAEL W. CORIDEN ..... Assistant Attorney General
B. June 3, 1948, Sioux City, Iowa; B.G.S., University of Iowa; J.D., Creighton University Law School; married; App't. Ass't. Atty. Gen. 1975.

GEORGE COSSON ..... Assistant Attorney General
B. August 18. 1947, Des Moines, Iowa; B.A., J.D., University of Iowa; married, two stepchildren; App't. Ass't. Atty. Gen. 1976.

JAMES C. DAVIS ..... Assistant Attorney General
B. February 23, 1937, Bloomington, Indiana; Oregon State College 2 years; Greenville College 1 year; B.A., J.D., S.U.I.; divorced, one child; private practice 1962-1970; Justice of the Peace 1967-1970; App't. Ass't. Atty. Gen. 1970.

JOHN R. DENT ..... Assistant Attorney General
B. January 15, 1947, Denver, Colorado; B.A., Colorado College; J.D., Drake University; married, four children; App't. Ass't. Atty. Gen. 1973.

RICHARD H. DOYLE, IV ..... Assistant Attorney General
B. August 8, 1949, Elgin, Illinois; B.A., J.D., Drake University; married; App't. Ass't. Atty. Gen. 1976.

JEAN L. DUNKLE ..... Assistant Atotrney General
B.A., J.D., State University of Iowa; married; App't. Ass't. Atty. Gen. 1975.

CAROL S. EGLY ..... Assistant Attorney General
B. June 27, 1949, Creston, Iowa; B.A., St. Olaf, J.D., Drake University; App't. Ass't. Atty. Gen. 1975.

WILLIAM G. ENKE ..... Assistant Attorney General
B. March 22, 1947, Monett, Missouri; B.B.A., J.D., University of Iowa; married; App't. Ass't. Atty. Gen. 1975.

BRUCE FOUDREE ..... Assistant Attorney General
B. March 27, 1947, Des Moines, Iowa; B.A., J.D., Drake University; LL.M., University of Pennsylvania; married; App't. Ass't. Atty. Gen. 1976.

JULIAN B. GARRETT ..... Assistant Attorney General
B. November 7, 1940, Des Moines, Iowa; B.A., Central College; J.D., S.U.I.; single; App't. Ass't. Atty. Gen. 1967.

ROBERT W. GOODWIN ..... Assistant Attorney General
B. June 25. 1943, Indianola, Iowa; B.S., J.D., Drake University; Agent F.B.I. 1967-1971; married, two children; App't. Ass't. Atty. Gen. 1970.

HARRY M. GRIGER ..... Assistant Attorney General
B. March 13, 1941, Des Moines, Iowa; B.A., J.D., S.U.I.; married; App't. Ass't. Atty. Gen. 1967.

FRED M. HASKINS ..... Assistant Attorney General
B. October 18, 1947, Des Moines, Iowa; B.B.A., J.D., University of Iowa; single; App't. Ass't. Atty. Gen. 1972.

GARY HAYWARD ..... Assistant Attorney General
B. June 27, 1951, Mason City, Iowa; B.A., J.D., University of Iowa; single; App't. Ass't. Atty. Gen. 1976.

DENNIS D. HOGAN ..... Assistant Attorney General
B. February 13, 1944, Des Moines, Iowa; B.A., J.D., Drake University; married, one child; App't. Ass't. Atty. Gen. 1975.

FRANCIS C. HOYT, JR. ..... Assistant Attorney General
B. June 14, 1949, Park Ridge, Ill.; B.A., J.D., University of Iowa; single, App't. Ass't. Atty. Gen. 1975.

JOHN D. HUDSON ..... Assistant Attorney General
B. February 1, 1948, Des Moines, Iowa; B.A., J.D., University of Iowa; single; App't. Ass't. Atty. Gen. 1973.

ROBERT R. HUIBREGTSE ..... Assistant Attorney General
B. January 24, 1934, Hull, Iowa; B.S.C., State University of Iowa; J.D., Drake University; married, three children; App't. Ass't. Atty. Gen. 1975.

LEE MARGARET JACKWIG ..... Assistant Attorney General
B. January 2, 1950, Chicago, Illinois; B.A., Classics, Loyola University; J.D., DePaul University; single; App't. Ass't. Atty. Gen. 1976.

RONALD M. KAYSER ..... Assistant Attorney General
B. January 6, 1942, Independence, Iowa; B.A., Loras College, Dubuque; J.D., St. Louis University, St. Louis, Mo.; private practice 1969-1975; Ass't. Marshall County Atty. 1969-1971; Marshall County Atty. 1972-1975; App't. Ass't. Atty. Gen. 1975.

ROBERT E. KEITH ..... Assistant Attorney General
B. November 19, 1948, Fort Dodge, Iowa; B.A., J.D., University of Iowa; App't. Ass't. Atty. Gen. 1975.

JOSEPH S. KELLY, JR. ..... Assistant Attorney General
B. August 27, 1949, New York City, N.Y.; B.A., University of Iowa; J.D., Drake University; married, one child; App't. Ass't. Atty. Gen. 1974.

DOROTHY KELLEY ..... Assistant Attorney General
B. February 22, 1946, Pittsburgh, Penn.; R.T., A.R.R.T., Mercy Hospital; B.A., J.D., Drake University; App't. Ass't. Atty. Gen. 1974.

GERALD A. KUEHN ..... Assistant Attorney General
B. September 23, 1938, Hastings, Nebraska; B.B.A., State University of Iowa; J.D., Drake University; married, two children; private practice, 1967-1969, 1970-1971; Ass't. City Atty., Des Moines, Iowa, 1969-1970; App't. Ass't. Atty. Gen. 1971.

JACK W. LINGE ..... Assistant Attorney General
B. September 14, 1941, Ottumwa, Iowa; L.L.B., University of Iowa; married; App't. Ass't. Atty. Gen. 1974.

KEVIN MAGGIO ..... Assistant Attorney General
B. May 25, 1949, Fort Dodge, Iowa; B.A., J.D., University of Iowa; App't. Ass't. Atty. Gen. 1975.

THOMAS D. McGRANE ..... Assistant Attorney General
B. November 2, 1940, Waverly, Iowa; B.A., U.N.I.; J.D., University of Iowa; married, three children; U.S.A.F. 1961-1964; App't. Ass't. Atty. Gen. 1971.

JOHN GRANT MULLEN ..... Assistant Attorney General
B. October 17, 1949, Tucson, Arizona; B.A., University of Illinois; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1975.

MICHAEL P. MURPHY ..... Assistant Attorney General
B. January 13, 1945, Ida Grove, Iowa; B.A., J.D., University of Iowa; married; App't. Ass't. Atty. Gen. 1974.

ELIZABETH A. NOLAN ..... Assistant Attorney General
B. Des Moines, Iowa; B.S., St. Mary's College, Notre Dame, Indiana; J.D., S.U.I.; U.S. Dept. of Interior, 1955-1962; private practice, Washington, D. C., 1962-1963; App't. Ass't. Atty. Gen. 1967.

JOHN R. PERKINS ..... Assistant Attorney General
B. April 1, 1943, Des Moines, Iowa; B.A., J.D., University of Iowa; married, one child; App't. Ass't. Atty. Gen. 1972.

HUGH J. PERRY ..... Assistant Attorney General
B. July 7, 1946, Creston, Iowa; B.A., Iowa State University; J.D., University of Iowa; single; App't. Ass't. Atty. Gen. 1973.

CLIFFORD E. PETERSON ..... Assistant Attorney General
B. June 30, 1921, Ellsworth, Iowa; B.A., J.D., S.U.I.; Agent F.B.I. 1952-1956; two children; App't. Ass't. Atty. Gen. 1968.

WILLIAM RAISCH ..... Assistant Attorney General
B. June 3, 1949, Waterloo, Iowa; B.A., Drake University; J.D., Drake University; married; Securities Examiner, Iowa State Insurance Comm., 1974-1975; App't. Ass't. Atty. Gen. 1975.

CHERYL STRATTON RAMEY ..... Assistant Attorney General
B. March 25, 1948, Lamar, Missouri; B.A., Bradley University; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1975.

JIM P. ROBBINS ..... Assistant Attorney General
B. August 29, 1949, Iowa Falls, Iowa; B.S., J.D., Drake University; married, one child; App't. Ass't. Atty. Gen. 1974.

FRANKLIN W. SAUER ..... Assistant Attorney General
B. February 16, 1941, Central City, Iowa; B.A., J.D., S.U.I.; private practice, 1966; U.S. Army, 1966-1968; married, one child; App't. Ass't. Atty. Gen. 1970.

MICHAEL E. SHEEHY ..... Assistant Attorney General
B. December 3, 1947, New Hampton, Iowa; A.B., Marquette University; J.D., University of Iowa; married; App't. Ass't. Atty. Gen. 1976.

DOUGLAS R. SMALLEY ..... Assistant Attorney General
B. January 21, 1946, Centralia, Washington; B.A., University of Iowa; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1971.

CHRISTIAN SMITH ..... Assistant Attorney General
B. February 7, 1945, Galesburg, Illinois; B.A., Dartmouth; J.D., Iowa University; married, one child; App't. Ass't. Atty. Gen. 1976.

RAYMOND W. SULLINS ..... Assistant Attorney General
B. February 4, 1945, Princeton, Indiana; B.A., Los Angeles Baptist College; J.D., Drake University; married, App't. Ass't. Atty. Gen. 1972.

GARY H. SWANSON ..... Assistant Attorney General
B. October 26, 1939; B.A., Drake University; J.D., Drake University; single; App't. Ass't. Atty. Gen. 1972.

MARSHA A. SZYMCZUK ..... Assistant Attorney General
B. November 22, 1948, Marshalltown, Iowa; B.A., M.A., Iowa State University; J.D., Drake University; married; App't. Ass't. Atty. Gen. 1975.

ROBERT TANGEMAN ..... Assistant Attorney General
B. April 14, 1924, Hardwick, Minnesota; B.S., L.L.B., St. Paul College of Law, St. Paul, Minnesota; married, five children; Minnesota Mutual Life Insurance Company, 1947-1965; Iowa State Travelers Mutual Insurance Company, 1965-1972; App't. Ass't. Atty. Gen. 1973.

J. E. TOBEY, III ..... Assistant Attorney General
B. June 21, 1946, Columbus, Ohio; B.A., Ohio Northern University; J.D., University of Iowa; married; App't. Ass't. Atty. Gen. 1976.

W. RICHARD WHITE ..... Assistant Attorney General
B. November 24, 1946, Newton, Iowa; B.A., University of Iowa; J.D., Drake University; married, one child. App't. Ass't. Atty. Gen. 1976.

LORNA L. WILLIAMS ..... Assistant Attorney General
B. February 9, 1915, Gaylord, Kansas; B.A., J.D., Drake University; two children; private practice, 1941-1967; App't. Spec. Ass't. Atty. Gen. 1967.

RICHARD A. WILLIAMS ..... Assistant Attorney General
B. August 30, 1941, San Francisco, Calif.; B.A., J.D., University of Iowa; married, two children; App't. Ass't. Atty. Gen. 1975.

RICHARD N. WINDERS ..... Assistant Attorney General
B. April 13, 1945, Milwaukee, Wisconsin; B.A., J.D., Drake University; married; App't. Ass't. Atty. Gen. 1970.

GARRY D. WOODWARD ..... Assistant Attorney General
B. April 18, 1926, Muscatine, Iowa; B.A., L.L.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen. 1972.

CURT YOCOM, JR. ..... Assistant Attorney General
B. November 22, 1949 ,Chariton, Iowa; B.B.A., University of Iowa; J.D., Drake University; single; App't. Ass't. Atty. Gen. 1976.

GORDON M. YOUNG ..... Assistant Attorney General
B. September 9, 1943, Houston, Texas; B.A., J.D., Southern Methodist University; married; App't. Ass't. Atty. Gen. 1976.

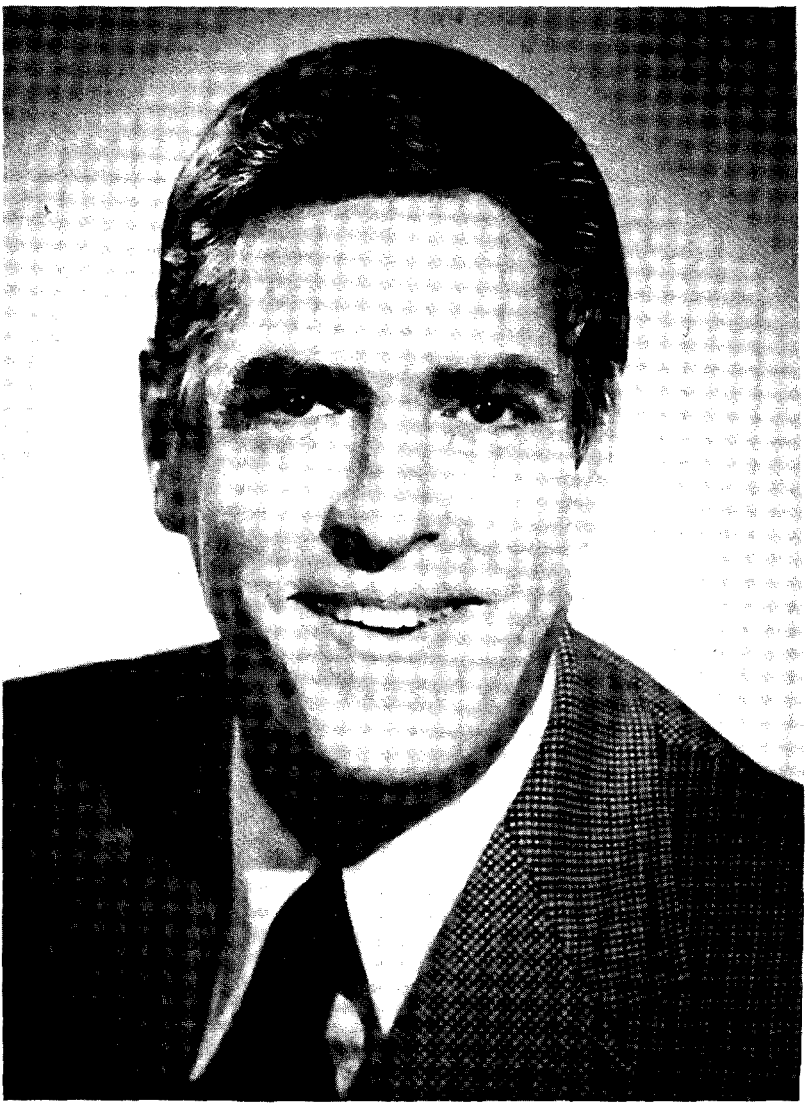
HAROLD A. YOUNG ..... Assistant Attorney General
B. May 14, 1940, Minneapolis, Minnesota; B.S., J.D., Drake University; single; Asst. Polk County Atty. 1967-1970 and 1973-1975; private practice, 1970-1973; App't. Ass't. Atty. Gen. 1975.

VAN D. ZIMMER ..... Assistant Attorney General
B. November 15, 1947, Vinton, Iowa; B.A., J.D., University of Iowa; married; App't. Ass't. Atty. Gen. 1975.

MYRON E. LIGHT ..... Administrator
B. May 25, 1921, Deep River, Iowa; BCS; married, three children; F.B.I. 1941-1972; App't. Chief Investigator 1972; App't. Administrator 1975.

PHYLLIS J. WISE ..... Administrative Assistant
B. September 13, 1932, Ottumwa, Iowa; married, two children; App't. Admin. Ass't. 1973.

MARJORIE J. BURGESS ..... Administrative Assistant
B. July 6, 1928, Des Moines, Iowa; three children; Bookkeeper 1967-1974; App't. Admin. Ass't. 1975.



RICHARD C. TURNER ..... Attorney General

B. September 30, 1927, Avoca, Iowa; B.A., J.D., S.U.I.; married, three children; private practice 1953-1967; State Senator from Pottawattamie County 1960-1964; Ass't. Pottawattamie County Attorney 1954-1956; Avoca Town Clerk 1953-1960; Elected Attorney General 1966, 1968, 1970, 1972 and 1974.

REPORT OF THE ATTORNEY GENERAL

April 12, 1977

The Honorable Robert D. Ray
Governor of Iowa
State Capitol Building

Dear Governor Ray:

In accordance with the requirements of Sections 13.2(6) and 17.6, Code of Iowa, 1975, I am pleased to submit the following report of the condition of the office of the Attorney General, opinions rendered and business transacted of public interest.

OPINIONS

During 1975 and 1976, the Iowa Department of Justice prepared, pursuant to Section 13.2(4), 461 written opinions. This compares with 504 opinions prepared in 1973 and 1974, 488 opinions prepared in 1971 and 1972, 443 opinions written during the 1969-1970 biennium and 607 opinions furnished in 1967 and 1968. Of the 461 opinions issued during the last two years, 206 were furnished in response to requests from members of the general assembly, 145 in response to questions from state officers and 110 in answer to inquiries from county attorneys.

The preparation and furnishing of these opinions constitutes one of the more important and time-consuming functions which the Department of Justice is required to perform. With the continuing growth in the size and complexity of government, it is clear that an increasing portion of Department of Justice staff resources will have to be devoted to writing these attorney general's opinions.

CONSUMER PROTECTION

During the years 1975 and 1976, the Consumer Protection Division of the Attorney General's Office received 10,329 complaints and closed 9,434. Thirty-nine lawsuits were filed and $2,070,383 was saved for complainants by getting contracts cancelled or through money refunds. In addition, the Consumer Protection Division has been involved in a number of programs whose impact on the State cannot be readily measured. The fact that the Attorney General has an active Consumer Protection Division which will investigate complaints and file lawsuits where necessary undoubtedly has a great deterrent effect on persons who might be tempted to engage in fraudulent practices. However, there is no way to measure the losses which might have occurred had this Division not existed. In addition, the office attempts to inform the public as much as possible with respect to common schemes and available consumer laws. Of course, it is also impossible to

measure the amount of money saved or the number of schemes that are thwarted because the public is better informed.

In the last two years, the Consumer Protection Division has engaged in more preventative activity than ever before.

For example, a program has been established where this office works with the mass media in attempting to screen advertising to cut out some of the more fraudulent ads. In addition, to the extent that resources allow, ads are monitored and inquiries are made of those using advertising techniques commonly used to initiate fraudulent schemes.

New emphasis has also been placed on schemes affecting the agricultural community. Investigations have led to both criminal actions and civil actions against livestock dealers who are alleged to have swindled Iowa farmers in the sale of livestock. In addition, certain herbicide and fertilizer companies have been investigated and some products have been taken off the market where claims were being made which could not be substantiated.

Business opportunity ads have been monitored to a much greater extent than before. An expanded program of getting information to the public has been adopted working with radio, television and the print media.

Many questions have been answered and a number of seminars have been held regarding the Iowa Consumer Credit Code. This division has worked hard to inform the business community and the consuming public of their rights and responsibilities under the Credit Code. In addition, recommendations have been made to the Legislature, some of which have been adopted, to correct or clarify certain provisions of the Credit Code.

As in previous years, this Division has been involved in a number of lawsuits involving the interests of thousands of Iowans under the Consumer Fraud Act, the Consumer Credit Code and other consumer laws. These lawsuits have involved such things as: (1) fraudulent land sales; (2) investment schemes; (3) lightning rod sales; (4) business opportunity schemes; (5) deceptive charitable solicitations; (6) excessive interest rates; (7) magazine sales; (8) home improvements; (9) debt collection practices; (10) fraud in the sale of feeder cattle; (11) violations of the 3-day Door-to-Door sales law and (12) health spas.

CRIMINAL APPEALS

In the years 1975-1976, approximately 830 criminal appeals were taken to the Iowa Supreme Court from the Iowa District Court. This figure includes: (1) direct appeals in criminal cases; (2) certiorari proceedings related to criminal cases; and (3) appeals in postconviction relief cases under Chapter 663A.

During 1975-1976, there were approximately 730 final dispositions by the Iowa Supreme Court in cases within the classifications enumerated above. Approximately 400 of those final dispositions involved cases in which briefs had been written by members of this division.

The division also represents the State of Iowa in conviction related federal habeas corpus cases. In 1975-1976, there were 34 decisions in the Federal District Court in such cases. Eight cases in this area were decided in the United States Court of Appeals. Members of the division also wrote three briefs for cases in the United States Supreme Court.

During 1975-1976, the criminal appeals division disposed of 320 extradition cases.

During 1975-1976, members of this division wrote 54 opinions for the Iowa Beer and Liquor Control Department hearing board (a member of the division sits on the board). In addition, members of the division participated on an adversary basis in approximately 40 cases in the Iowa District Court, and before the Liquor Commissioner, involving liquor license denials, suspensions and revocations.

In addition to the review of extraditions and its work in the state and federal courts, the Criminal Appeals Division gives legal assistance to the Iowa Beer and Liquor Control Department, the Iowa Board of Parole, the Iowa Department of Labor, the Iowa Board of Pharmacy Examiners, the Iowa Industrial Commissioner and the Iowa Law Enforcement Academy. During 1975-1976, one division member devoted her entire time to work for the Industrial Commissioner. Another division member sits as a member of the Iowa Law Enforcement Academy Council.

In addition to all of the above, division members have written many Attorney General opinions and participated in the legal research for many they did not write.

The effort to eliminate the backlog of criminal appeals in the Iowa Supreme Court continued during 1975-1976 with much progress. Approximately 115 more cases were disposed of than were filed. The backlog was reduced to within 50 cases. In August of 1973 the backlog numbered about 300 cases.

CRIMINAL PROSECUTIONS

The Criminal Prosecutions Division now consisting of the Area Prosecutors Section, Special Prosecutions Section, and Prosecution Research and Training Section, was originally formed with the assistance of a federal grant awarded through the Law Enforcement Assistance Administration in July of 1971.

Funding from the state and a new reduced federal grant was

achieved before July 1 for the 1975-1976 fiscal year on an approximate 50-50 federal grant share basis.

The Special Prosecutions Section maintained a staff of four attorneys and one investigator throughout the two year period, except part-time temporary services of another investigator were added near the end of this biennial period. Also an attorney from the Civil Rights Division assisted them on certain cases.

Area prosecutors are assigned to territories. There are presently eight territories. Territories are not so rigid as to prohibit temporary assignment elsewhere and backup prosecutors from Des Moines aid the man assigned to a territory when required. Presently, five area prosecutors live in the area of the territory assigned to them. The strength of the Area Prosecutors Section consists of nine prosecutors at the end of 1976. This includes two attorneys obtained under funding by other state departments.

Arrangement was made with the Iowa Social Services Department to pay the salary of one area prosecutor and the division in turn took on the responsibility of prosecuting crimes in state penal institutions. A like arrangement has been worked with the Iowa Revenue Department where the salary of one area prosecutor is paid in exchange for prosecution of income tax violations.

Members of the Criminal Prosecutions Division have been assigned as liaison men in various areas of expertise with the following units of the Department of Public Safety: Bureau of Criminal Investigation, Division of Vice Enforcement, Division of Narcotic and Drug Enforcement, and the Iowa State Patrol. The liaison men in turn develop expertise in these fields to specially assist county attorneys in cases needing such expertise.

Activities of the sections within the division are as follows:

Special Prosecution Section

I. Calendar Year—1975			
Pending cases, January 1, 1975			18
New cases opened in 1975:			
Investigation only	24		
For court action	12		
Total		36	
Cases closed in 1975:			
From prior years	10		
From cases opened—1975	13		
Total		23	
Case load **gain**			13
Pending cases, December 31, 1975			31

II. Calendar Year—1976			
Pending cases, January 1, 1976			31
New cases opened in 1976:			
Investigation only	13		
For court action	23		
Total		36	
Cases closed in 1976:			
From prior years	2		
From cases opened—1976	10		
Cases lost and appealed	2		
Total		14	
Case load **gain**			22
Cases pending at end of 1975-1976 biennial period			53

Also during the biennial 1975-1976, the Special Prosecutions Section appealed two cases and have five other cases on appeal. The Section wrote eight Attorney General's opinions and handled approximately 1200 phone calls concerning complaints.

In addition, the section contributed about 300 hours of work on the new criminal code and the antitrust bill.

Additional work load is anticipated for this section in the area of multi-district litigation and as a result of the new antitrust act which became effective January 1, 1977. A new brochure has been printed and distributed by this section on the new antitrust law.

Area Prosecutors Section

I. Calendar Year—1975			
Pending cases, January 1, 1975			98
New cases opened in 1975:			
Investigation only	42		
For court action	126		
Total		168	
Cases closed in 1975:			
Investigations	46		
Filed cases	85		
Total		131	
Case load **gain**			37
Pending cases, December 31, 1975			135

II. Calendar Year—1976

Pending cases, January 1, 1976		135
New cases opened in 1976:		
Investigation only	36	
For court action	147	
Total		185
Cases Closed in 1976:		
Investigations	28	
Filed cases	143	
Total		171
Cases pending at end of 1975-1976 biennial period		149

In addition, the Area Prosecutors Section did the following:

(1) Area prosecutors in territories outside Des Moines gave legal advice to county attorneys and state law enforcement officers.

(2) The section provided one man for about four months in 1976 to work on an appeal to the United States Supreme Court.

(3) Members of the section provided approximately one hundred hours work on the new criminal code.

(4) Members of the section prepared and gave four lectures for County Attorney Association meetings.

(5) Various other lectures were given by section members before law enforcement groups.

Prosecution Research and Training Section

Accomplishments of this section during the calendar year 1975 were as follows:

(1) It prepared two articles for **Iowa Police Journal.**

(2) The section presented two seminars to the Department of Corrections.

(3) Members of the section gave six lectures to civic groups on criminal law enforcement.

(4) Section members made a presentation to the Public Safety Department at the Iowa Law Enforcement Academy.

(5) The section made a presentation to the following divisions of the Department of Public Safety: Bureau of Criminal Investigation, Division of Vice Enforcement, and the Fire Marshal.

(6) It published twelve editions of the **Criminal Law Bulletin.**

(7) The section published a **Criminal Law Dictionary.**

(8) Members of the section provided 24 hours legal service to the Department of Public Safety at the Iowa State Fair.

(9) The section made an analysis of the proposed criminal code containing over 300 typewritten pages.

(10) It acted as legal counsel to: (1) the Division of Vice Enforcement (Iowa Department of Public Safety), (2) Iowa Drug Abuse Authority, (3) Iowa Board of Accountancy, (4) Iowa Campaign Finance Disclosure Commission, and (5) the Iowa Department of Revenue.

(11) The section handled approximately 950 phone calls from Iowa law enforcement officials and county attorneys.

(12) It prepared 36 legal briefs and memoranda for county attorneys and division prosecutors.

(13) Members of the section wrote 22 Attorney General Opinions.

Accomplishments of this section during the calendar year 1976 were as follows:

(1) It made a six hour presentation to the Iowa State Patrol.

(2) A member prepared an article for the state American Legion newspaper.

(3) The section gave eight lectures to civic groups.

(4) The section successfully prosecuted four forfeiture of vehicle cases.

(5) It made a presentation on the Iowa Criminal Code to the Iowa County Attorneys' Association spring conference.

(6) It made a presentation to the Iowa County Attorneys' Association fall conference on the subject of gambling and a second presentation on the new criminal case law.

(7) A section member prepared an article for the **Iowa Police Journal.**

(8) It made a presentation to the Iowa Highway Patrol on altered VIN numbers.

(9) It provided instructors at the Iowa Law Enforcement Academy on the elements of a crime.

(10) The section provided legal assistance to: (1) the Division of Vice Enforcement (Department of Public Safety), (2) Iowa Board of Accountancy, (3) Iowa Drug Abuse Authority,

(4) Iowa Voter Registration Commission, (5) Iowa Campaign Finance Disclosure Commission, and (6) the Iowa State Patrol.

(11) It prepared over 25 legal briefs and memoranda for county attorneys and division prosecutors.

(12) The section answered 1400 phone calls from law enforcement officials (with the aid of the division director).

(13) The section wrote 30 Attorney General Opinions.

(14) The section continued to analyze the new criminal code and along with other sections in the division provided research and legal advice to the legislature concerning the new code. It prepared amendments to the code when it was being considered in the legislature.

(15) The section published eleven issues of the **Criminal Law Bulletin.**

(16) One man in this section contributed about two months' work on an appeal to the United States Supreme Court.

By way of explanation, the **Criminal Law Bulletin** is the latest digest of important criminal law cases and developments. It is sent to all county attorneys, judges and magistrates in the state. The **Bulletin** also goes to all state and local law enforcement agencies and others interested in the criminal law.

The Criminal Law Dictionary compiles and organizes in text form recent case law and other developments in criminal law for use in Iowa by prosecutors, judges, magistrates and others.

These two publications greatly assist the administration of criminal justice in Iowa.

The foregoing listing of accomplishments by section of the division is not exhaustive of the work done by the division during this biennial period. For example, the Prosecution Research and Training Section frequently provided research assistance for other divisions and special projects of the Attorney General and the director of the division handled two appeals to the Iowa Supreme Court.

The 50% federal grant expires at the end of the 1976-1977 fiscal year and the State of Iowa is being asked to assume the federal share for continuation of the activities of this division.

The value of the Criminal Prosecutions Division is more fully understood when viewed in the light that each election results in about one-third of the county attorneys being new and inexperienced. About 10% of the county attorneys are replaced for various reasons between elections.

The division attempts to provide aid to county attorneys much in the same manner as the Bureau of Criminal Investi-

gation (and to some extent other divisions of the Iowa Department of Public Safety) provides support and expertise to sheriffs and police departments. Its purpose is in no way to replace local prosecution, but to train the local prosecutor and maintain better county attorneys in office. The criminal law has become a highly complicated and somewhat specialized area. No person directly out of law school or even an experienced lawyer in general practice is competent to assume the office of county attorney without assistance such is provided by this division.

In this respect, the emphasis is upon more specialization within the division. The distinction between the Special Prosecutions Section and the Area Prosecutors Section may ultimately disappear as each prosecutor becomes specialized in one or two areas in each section. Also, there are advantages to more flexibility in manpower where section lines are not restrictive.

The Special Prosecutions Section under the new anti-trust act may call on county attorneys to do trial work and may look in certain cases for experienced trial attorneys elsewhere within the division, but in any event, anti-trust has become more specialized with the new act.

Securities regulation, institutional crimes (penal), welfare fraud, Iowa income tax evasion, child abuse, violent crimes, official misconduct and special trial expertise are all being developed as specialized areas at this time.

Another trend taking place is that the division is getting not only substantially more cases but more complicated and serious cases. Less serious cases are presently accepted from county attorneys only where a conflict of interest requires another and often an outside prosecutor. However, the Area Prosecutors Section has worked with a new county attorney on his first trial even though that case was not a serious one.

Presently 87 of Iowa's 99 counties have utilized the services of the Area Prosecutor Section and all counties have received services from the Prosecution Research and Training Section. It is anticipated that all counties within the next biennial period will have used the services of the Area Prosecutor Section. The Criminal Prosecutions Division has demonstrated it can offer trial assistance and other assistance with greater expertise and less cost than any substitute for it in providing a more efficient criminal justice system in Iowa.

ENVIRONMENTAL PROTECTION

The Environmental Protection Division represents the Department of Environmental Quality, Natural Resources Council, State Conservation Commission, Department of Soil Conservation, Real Estate Commission, Commission on the Aging,

and various other state boards and officials concerned with environmental quality.

During the biennium, abstracts of title to 63 tracts of land acquired by the State Conservation Commission were examined and a total of 72 title vesting certificates were reviewed and approved. In addition, 11 appeals in condemnation proceedings were tried, leaving 3 such cases pending in the district court. Twenty cases, principally quiet title actions, involving the State Conservation Commission, were disposed of during the period, leaving 26 such cases pending.

Boundary disputes along the Missouri River and other meandered streams and lakes continue to require a great deal of time. Work continued on the U.S. condemnation suit involving land along the Missouri River claimed by the Winnebago Tribe of Indians, the State of Iowa and others, and on other cases involving Indian land claims.

Agency orders relating to water quality were enforced in 17 district court actions leaving 8 district court cases pending.

Agency orders relating to air quality were enforced in 4 district court actions, leaving 3 such cases pending. Six district court cases involving solid waste disposal were tried or settled during the period, leaving 3 such cases pending.

Three cases involving the Department of Soil Conservation were disposed of during the period, leaving two such cases pending and three cases involving flood plan activities regulated by the Natural Resources Council were tried, leaving five such cases pending.

In summary, litigation handled by this division this biennium included 60 new cases opened and 66 cases closed, leaving 50 cases pending. In addition to this litigation, and probably of even greater importance, a great deal of time continues to be spent in participation in the meetings and administrative hearings of the assigned agencies and in counseling and advising the agencies and their staff personnel with regard to existing statutes, proposed legislation, rules and regulations, implementation and enforcement of environmental protection laws and general agency functions.

HEALTH

The Health Facilities Division of the Health Department has begun active implementation of Chapter 119 of the Acts of the 66th General Assembly (1975 Session), modifying and adding to Chapter 135C of the Code, relating to regulation of health care facilities. It is expected that the program, which will issue citations and levy fines against facilities that violate departmental rules, will result in up to twenty hearings per month in addition to the hearings currently held on licensure revocations and denials.

Other routine work which has increased rapidly in volume includes representing the department in appeals taken to district court from administrative hearings, in fair hearings for the State Health Planning and Development Agency (SHPDA), in injunctive actions relating to migrant camps and mobile home courts, and in legal work relating to the illegal practice of health care professions. There is an especially sharp increase in work for the SHPDA hearings on appeal from the Health Facilities Construction Review Committee, which reviews all health facility capital expenditures in the State of Iowa in excess of $100,000. Increased numbers of hospital improvement projects and the expansion in the number of nursing home beds throughout the State account for this upturn.

An improved system for handling complaints about nursing homes has resulted in more complaints being lodged by the public, more complaint investigations being conducted, and more legal actions filed. In the near future, implementation of P.L. 93-641 will involve the Health Department more deeply in comprehensive health planning and thus further increase the number of contested cases to be handled.

INSURANCE

The position of Assistant Attorney General assigned to the Insurance Department was first funded by the 66th General Assembly and the position was filled September 1975.

The assistant appears on behalf of the Insurance Department in all matters (except for securities matters) brought by or against the Department in state and federal court. The Department presently has one case pending before the Iowa Supreme Court and two cases pending in state and federal district courts. During the biennium, the assistant also drafted all Department §17A.9 declaratory rulings (6), wrote Attorney General Opinions when assigned (5), represented the Attorney General at Chapter 521 reinsurance hearings (10), analyzed all original and amended articles of incorporation and bylaws (50), approved acceptable articles, represented the Department at administrative hearings brought by the Department (10) and drafted related legal instruments including notices, stipulations, briefs and orders. The assistant also served as the chief legal researcher for the Department and drafted memos on submitted issues (125).

The most complex cases we are now handling for the Department involves allegations of insurance tie-in requirements by an Iowa savings and loan association. The question of whether the Department has jurisdiction over the federally chartered institution is presently being litigated.

PROSECUTING ATTORNEYS TRAINING COORDINATOR COUNCIL

The Prosecuting Attorneys Training Coordinator Council was created by the 66th General Assembly on July 1, 1975, and has been funded by a grant from the Law Enforcement Assistance Administration. The Council consists of five members; the Attorney General, the president of the Iowa County Attorneys Association, and three members elected by the County Attorneys Association. The chief administrative officer is the executive director who is a regular employee of the Department of Justice and appointed by the Council. The Council meets four times a year; its members serve without compensation and receive only their actual expenses in attending meetings and performance of their duties.

The Prosecuting Attorneys Council is the only state agency providing full time continuing legal education and training for the 99 county attorneys and their 150 assistants. The objectives of the office are as follows: (1) to provide a center for communications which mirror or reflect the attitudes and concerns of all the county attorneys; (2) to provide programs of continuing legal education for prosecutors and their staff utilizing experts in such fields as trial tactics, criminal law, and management assistance which are conducted at seminars and annual meetings; (3) to develop a realistic, comprehensive training program; (4) to provide a clearinghouse for the collection and dissemination of materials and information pertaining to prosecution and criminal law; (5) to develop minimum standards for facilities, staffing, and office management (screening at post-arrest and pre-trial stages, pre-trial diversion programs); (6) to develop uniform prosecutorial procedures; (7) to develop and maintain current procedural manuals (forms, pleadings, outlines) to be incorporated with the preservice basic informational manual; (8) to coordinate technical assistance from the state level (i.e., expert witnesses, directories of state departments, their assigned responsibilities, personnel rosters, and telephone numbers); (9) to develop and establish continuing liaison at a policy making level between prosecutors, public defenders, court personnel, judiciary, law enforcement agencies, and correctional personnel; (10) to monitor the legislative process to establish the county attorney's credibility as the legal arm of the county government and the criminal justice system; (11) to participate in national associations such as the National Association of Prosecutor Coordinators in a productive and meaningful way, gaining benefit of systems and techniques used in other places.

The Council provides a minimum of 30 hours of formal continuing legal education training to the state's prosecutors during the year. Two training conferences are scheduled each year, one in June and the other in November. An average of

127 prosecuting attorneys and law enforcement personnel have attended the conferences since the inception of the grant to hear noted experts in such subjects as Trial Tactics, Constitutional Law, Corrections and Penalogy, Management and Criminal Law. The conferences are basically live speaker presentations, supplemented from time to time with video taped presentations on highly specialized methods of training. Each registrant at the conference receives a conference notebook consisting of directories of all state criminal justice and law enforcement agencies, outlines of speakers' presentations, resource materials, and various forms. The conference notebooks are designed to be used on a daily basis by the prosecutors for reference purposes.

A bi-weekly prosecutor newsletter is published by the Council with approximately 250 copies being mailed to the state prosecutors, law enforcement people and other members of the criminal justice system, in addition to copies mailed to coordinators in 30 other states. The newsletter is designed to provide current information to the county attorneys, changes in the criminal law, and procedure affecting their offices. Since the training coordinator office receives publications from well over 30 other training coordinator offices around the country, this office is able to serve as central clearinghouse for information from other states to the county attorneys. This method reduces significantly the cost of mailing publications and needless duplication. Included with the newsletter are articles dealing with civil rights litigation for public officials, articles on new trends in criminal law, Attorney General opinions, new legislation, grants of assistance, and, of course, notice of upcoming training seminars.

In addition to training conferences and newsletters, the training coordinator office gathers data affecting the county attorney's salary and other aspects of the prosecutor's office. Since the office has been in existence, surveys have been made on the training needs of the county attorney, the county attorney budgets, the compensation schedules established for elected county officers of the state, and a survey of county engineers. Coupled with the above surveys, a survey was made of the responsibilities of the county attorney, all of which had been requested by the legislature in developing solutions to the increasing numbers of county attorneys resigning from their offices due to increasing workloads and lack of adequate pay. The Prosecuting Attorney Council has been used by the legislature as a clearinghouse for information, and requests for information are handled as expeditiously as possible.

The Council provides county attorneys with a legislative summary of legislation affecting county attorneys' offices throughout the time the legislature is in session. The summary is a digest of those laws which are proposed and the digest is constantly updated during the session to enable county

attorneys to provide input to their own legislators regarding proposed laws.

A prosecutor's desk manual is currently being developed which will address four areas: Administrative, Civil, Criminal and Trial Practice. The handbook is being designed so that the material may be constantly updated in the future with the addition of supplemental chapters. The handbook will be completed during 1977 and it will be standard issue for all new prosecutors. The handbook will replace many outdated publications which are currently being utilized in county attorneys' offices.

Written advice or information was provided to the public and other public agencies on more than 70 occasions during the biennium.

REVENUE

The Attorney General performs a variety of legal services for the Iowa Department of Revenue involving the corporate and personal income taxes, franchise tax on financial institutions, sales and use taxes, cigarette and tobacco taxes, motor vehicle fuel taxes, property taxes, inheritance tax, chain store tax, and gambling licenses.

Since the Iowa Administrative Procedure Act (IAPA) became effective on July 1, 1975, there has been a new emphasis upon and deeper involvement in tax audits by the assistant attorneys general assigned to the tax division. In the past two years, 280 protests were filed by taxpayers pursuant to Iowa Department of Revenue Rule 730-7.8, IAC, in which the Revenue Department requested legal advice pursuant to its Rule 730-7.10. In addition, 21 protests were disposed of between January 1, 1975 and July 1, 1975, by the administrative hearing process then in effect. Of the 280 protests, informal proceedings under Rule 730-7.10 have been completed for 148 which, except for 23, were totally resolved. The 23 protests mentioned have gone through contested case proceedings before a Department of Revenue Hearing Officer. Both the informal and contested case proceedings have been as time consuming as court cases. In addition, 13 Revenue Department declaratory rulings issued pursuant to the IAPA were either drafted by my staff or they had input into the results reached.

Fifty-three administrative contested case proceedings were heard by the State Board of Tax Review during the past two years, of which 40 were won, 7 were lost and 6 were settled. My staff also represented the Director of Revenue in 4 contested case proceedings before the State Merit Employment Commission.

A total of 98 civil tax cases were tried or settled at the Iowa District Court level. Of the 34 cases tried, 24 were won and

10 were lost. Sixty-four cases were settled. An additional 43 cases are pending trial. In addition, the staff handled 126 cases involving mortgage and other lien foreclosures, partition actions, quiet title actions, and the like where the subject property was impressed with a tax lien. While most of the cases simply required the filing of an answer, 16 did require substantial work, resulting, at times, in collection of amounts represented by the tax liens. Five bankruptcy cases arose and were settled in the Federal bankruptcy courts. Six cases were submitted in the Iowa Supreme Court of which 5 were won and 1 was lost. An additional 7 cases are pending for submission.

This office is also involved with the Iowa Crime Commission Coalition, a relatively new concept in the criminal justice field. The goal of the coalition is to make citizens more conscious of crime prevention, through the attitude and level of communication between the public and police or basically to harden the crime target. The long range effects of this coalition will be felt in the reduced crime rate and better bases for prosecutors.

In addition, this office is working with the Iowa Law Enforcement Academy to develop curriculum for their state agents, and the executive director will again be teaching classes this year: four hours in Evidence, three hours in Law of Identification, and two hours in Prosecutor-Law Enforcement Relations. This office is also involved with the Iowa Law Enforcement Academy in developing a plan for instruction on the new Criminal Code revision for this state. Although the Law Enforcement Academy is primarily concerned with the police agencies in the state, much of the material that will be developed for this course will be utilized in the training of prosecutors for the implementation of the new Criminal Code revision, which is scheduled for January 1, 1978.

The Prosecuting Attorneys Council continues to serve as a central clearinghouse and referral service for county attorneys' inquiries. This office assists in job placements, scholarships for schooling, crime commission grants for various projects throughout the state, forms, resource material, trial tactics information, trial tactics casettes and video tapes and many other resource materials obtained from other training coordinator offices around the country.

PUBLIC SAFETY

Although the motor vehicle regulatory functions were transferred from the Department of Public Safety, the Department's legal problems presented to and resolved by the Attorney General have continued to increase.

During the biennium, the Assistant Attorney General who offices within the Department, provided counsel to the Department and its divisions of Narcotic and Drug Enforcement, Vice,

Communications, Bureau of Criminal Investigation and Fire Marshal on numerous legal issues including approval of contracts (44), representation in contested cases (17), court cases (19 District, 2 Supreme Court), and advice on laws and rules regarding privacy and security, fire safety, private detectives, administrative law and other matters within the jurisdiction of the Department. Counseling the Department about its employment functions to assure that those practices are fair, non-discriminatory and unlikely to result in legitimate complaints against the State is considered the most significant assistance provided by the Attorney General.

The criminal tax fraud prosecution program which began in the spring of 1973, has continued to be successful. During the past two years, 31 convictions for willful failure to file Iowa income tax returns or pay Iowa income taxes were procured. These cases are prepared by my staff and Department of Revenue personnel and are generally prosecuted by county attorneys. Because of the time consuming nature of this program and with the view of expanding it to other types of taxes. I have hired an additional Assistant Attorney General to take charge of it.

In addition to informal and contested case administrative proceedings and litigation, a substantial amount of time was spent by the staff in advising the Director of Revenue and his staff on legal tax problems, drafting tax opinions of the Attorney General, aiding with the drafting of tax legislation, and assisting the Revenue Department in promulgating its rules and regulations.

SOCIAL SERVICES

The Attorney General performs legal services for the Department of Social Services pursuant to §13.6, Code of Iowa, 1975, requiring a Special Assistant Attorney General to serve in such capacity. In addition, there are five other Assistant Attorneys General assigned full time to the work of this department.

Among the services which these attorneys provide to the Department of Social Services are: (1) consultations on a daily basis with respect to statutes, judicial decisions, policy and state and federal regulations; (2) advising with regard to proposed legislation, manual materials, and regulations; (3) defending suits brought against the Department of Social Services, commissioner or employees of the department in state and federal courts, including prisoner litigation; (4) inspecting and approving contracts and leases, and handling real estate matters involving the department; (5) representing the State of Iowa and Iowa Department of Social Services before the Iowa Supreme Court in matters such as juvenile court cases which had been handled by the county attorneys at the district

court levels; (6) researching and preparing drafts of proposed Attorney General opinions; (7) representing the claimant, Department of Social Services, in all estates of decedents and conservatorships in which claims have been filed seeking reimbursement of medical assistance and in connection with winding up the trust division of the department; (8) representing the department in appeals to the district courts from administrative hearings; and (9) representing the department in all matters involving the mental health and correctional State institutions.

Following is a listing of the number of cases closed on this office's docket over the last two years (excluding Child Support Recovery cases):

United States Supreme Court	6
Eighth Circuit Court of Appeals	10
United States District Court (Iowa)	121
Iowa District Courts	121
Iowa Supreme Court	46
Out of State	2

Monies in which this office assisted in recovering for the State of Iowa during the last biennium (excluding Child Support Recovery) are:

Estates	$ 731,941.28
Collections	27,322.41
Nursing Home Overpayments	324,093.79
TOTAL	$1,083,357.48

Authority is also vested in Chapter 151, Laws of the 66th General Assembly (Chapter 252B, pocket parts ICA) for the Attorney General to perform the legal services for the child support recovery program and enforce all laws for the recovery of child support from responsible relatives. There are eight assistant attorneys general assigned to work full time in this area. These attorneys are assigned to regional offices throughout the state. Four additional appointments are contemplated during 1977.

Among the services which these attorneys provide to the Department of Social Services in addition to those stated above are: (1) child support collections, including contempt of court proceedings, garnishments, arrangements for wage assignments, etc.; (2) paternity determinations, including screening cases, filing complaints, pre-trial discovery, and trial of cases in the district and appellate courts; (3) initiation and prosecution of suits to collect support from the absent parents of welfare recipients pursuant to Chapter 252A, Code of Iowa, 1975; (4) intervention in dissolution proceedings to secure adequate support orders or modifications where the children concerned are welfare recipients; (5) filing informations charging deser-

tion under the provisions of Chapter 731, Code of Iowa, 1975; (6) securing extradition of fugitives charged with violations under Chapter 731, Code of Iowa, 1975.

Recovery of child support owed to recipients of dependent children's aid has greatly increased since the Attorney General's Office became involved in the program in the fall of 1975. Collections are in excess of six million dollars per year with increases reported in some divisions of twenty to fifty percent over the previous fiscal year. Similar improvement is expected in the future, particularly in those areas where no effective prosecution program was available prior to the involvement of the Attorney General's Office.

Approximately two thousand (2,000) cases have been filed by the seven regional prosecutors during the past year. These include over two hundred (200) paternity suits. In many additional cases, paternity has been established by voluntary admissions.

STATE DEPARTMENTS

As anticipated at the outset of the 1975-1977 biennium, the volume of matters handled in relation to the legal questions presented by the various state departments has continued to increase. As lawyers across the state become more aware of the advantages and appellate remedies available under the state administrative procedure's act, more and more state department decisions are being questioned and a growing body of administrative law is being developed. The various applications of the Iowa open meetings law and recent federal legislation on the subject of freedom of information have increased the interest of the public in general in these matters. Other legislation giving rise to an increased workload includes the revisions of the state library system and the mandate of library services through a new regional system. The authorization of electronic fund transfers by financial institutions and a new mandate for schools to provide special education services to the handicapped added other new questions of legal importance.

The office has continued to counsel and advise, to review and give opinions on a wide variety of legal documents as needed.

During the biennium, 105 requests for opinions were received and disposed of. Thirty-six formal opinions were released. There were 27 cases in litigation. Nineteen applications for escheats were filed, recovering for the benefit of the school fund an amount of $48,821.33 in the years 1975 and 1976.

TORT CLAIMS

In 1975, the Tort Claims Division presented tort claims to the State Appeal Board in the amount of $14,647,634.49, of

which $41,627.70 was paid. General claims of $528,644.08 were presented and $458,942.91 was paid. In 1976, $1,418,905.56 in tort claims were presented and $402,744.64 was paid. General claims of $589,683.03 were presented, and $476,760.77 was paid.

In 1975, a total of $223,904.13 was paid as the result of judgments. Settlements totaled $219,928.01. One judgment of $1,000.00 was awarded the State. The judgments awarded and paid in 1976 were $1,921,265.78. Settlements totaled $208,930.00. This division instituted an action for $250,000.00 to recover damages to facilities of the Iowa Law Enforcement Academy. As of December 31, 1976, there were three appeals to the Supreme Court totaling $783,300.94.

The Tort Claims Division began representing the Public Employment Relations Board in 1975 and is currently involved in twenty lawsuits. This division also is representing one of the parties in the several appeals on the new property tax relief law. The attorneys of this division represent numerous state boards and agencies, and have instituted actions on behalf of said boards and agencies to revoke or suspend licenses of professionals, and prevent individuals from practicing a profession without a license.

As of December 31, 1976, this division was handling 144 active lawsuits, of which 105 were seeking damages against the State of over $31,825,000.00. At the end of the biennium, this division was handling tort claims for the Appeal Board totaling over $37,000,000.00.

DEPARTMENT OF TRANSPORTATION

Legal services are furnished to the Iowa Department of Transportation by the Attorney General through a staff of six attorneys and one investigator, with offices at DOT headquarters in Ames and three attorneys with offices in Des Moines assigned to handle drivers license revocation and suspension. In addition to providing legal counsel for the Highway Division of the DOT, legal counsel is also now provided for the expanded DOT Railroad Division, Public Transit Division, Administration Division, Aeronautics Division, Motor Vehicle Division, and River Transportation Division.

At the end of the biennium, there were 127 pending district court actions involving both condemnation appeals and a wide variety of miscellaneous litigation, as well as an increased number of tort claim actions and damage suits, being defended by the staff.

A total of 236 cases were disposed of during the biennium with $74,401.00 being recovered in damages for the State to property under its jurisdiction, and a savings of $3,603,793.00

in defense of the adjudication of condemnation awards, and a savings of $4,813,925.00 in the defense of tort actions.

The staff is also active in providing advisory opinions to the DOT Commissioners, and Commission departments and offices, as well as reviewing proposed legislation, preparing rules and regulations, and aiding in the implementation of new legislation and rules and regulations.

ADMINISTRATION AND BUDGET

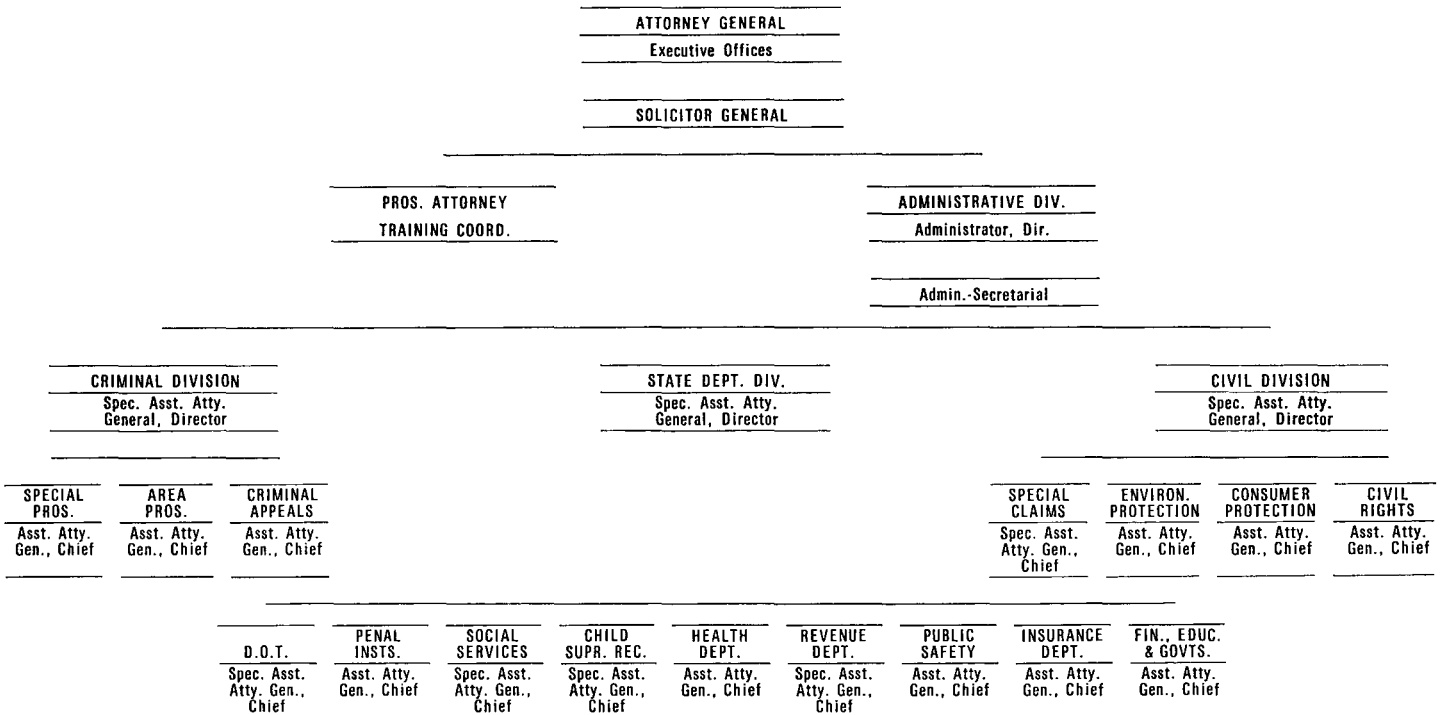
The most urgent need of the Department of Justice during the next biennium period will be to effectively dispose of a continually increasing workload. This can partially be accomplished by employing an adequate number of able employees with sufficient funding to fulfill our statutory obligations.

Since late 1969, the Department has received or initiated nearly 9,700 court cases. As of December 30, 1976, 3,311 cases were pending in court. New court cases are being opened at the rate of 100-120 each month with an increase of 10.4% in such cases during the 6-month period ending December 1, 1976. There was no increase in the number of full-time authorized employees during the corresponding period; in fact, some attrition currently exists.

The foregoing is only the "tip of the iceberg". Our attorneys, on a daily basis, must cope with time consuming and recurring encroachments upon their time in furnishing written opinions, answering legal inquiries telephonically and in person, conducting legal research, preparing briefs and other documents, participating in administrative hearings and making appearances in court.

We are fully cognizant that adequate staff and sufficient appropriations will only partially solve our workload problem. Certainly, there is a need to adopt and exercise effective principles of management, streamline our operations and improve efficiency. It is our plan to improve upon these administrative and management principles when various segments of the Department of Justice are consolidated into a central location following a projected move into the new Hoover Building scheduled for completion during fiscal year 1978. In this connection, we are considering a reorganization of the Department by establishing four divisions along lines set forth in the organizational chart attached hereto.

IOWA DEPARTMENT OF JUSTICE
Proposed Reorganization Chart



State of Iowa

1976

FORTY-FIRST BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1976

RICHARD C. TURNER
Attorney General

Published by
THE STATE OF IOWA
Des Moines
H6465

ATTORNEYS GENERAL OF IOWA

1853 - 1972

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1957
Norman A. Erbe	Boone	1957-1961
Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
Richard C. Turner	Pottawattamie	1967-

PERSONNEL OF THE DEPARTMENT OF JUSTICE

RICHARD E. HAESEMEYER ..... Solicitor General
Solicitor General and First Ass't. Atty. Gen. B. April 11, 1928, Tipton, Iowa; B.S., University of Illinois; L.L.B., Harvard Law School; married, three children; American Airlines, Inc., N.Y.C., 1956-1962; Monsanto Company, Textile Div. (formerly the Chemstrand Corp.), N.Y.C. 1962-1967; App't. Solicitor General and First Ass't. Atty. Gen. February 20, 1967.

JOHN E. BEAMER ..... Special Assitant Attorney General
B. September 23, 1939, Abilene, Texas; B.A., Cornell College; J.D., S.U.I.; Agent F.B.I., 1964-1970; married, two children; App't. Ass't. Atty. Gen. 1970, App't. Spec. Ass't. Atty. Gen., 1972.

GEORGE W. MURRAY ..... Special Assistant Attorney General
B. June 1, 1920, Chicago, Illinois; Coe College 2 years; L.L.B., Drake University; married, one child; Appt. Spec. Ass't. Atty. Gen. 1961-1965 and also 1967.

STEPHEN C. ROBINSON ..... Special Assistant Attorney General
B. September 7, 1935, Des Moines, Iowa; A.A., Graceland Junior College; B.A., S.U.I.; L.L.B., Drake University; married, two children; private practice, 1962-1967; App't Ass't. Atty. Gen. January 3, 1967; Secretary Executive Council of Iowa May 1, 1967; Executive Secretary Republican Party of Iowa, November 1, 1969; App't. Ass't. Atty. Gen., August 15, 1973; App't. Spec. Ass't. Atty. Gen. September 19, 1975.

ASHER E. SCHROEDER ..... Special Assistant Attorney General
B. May 12, 1925, Maquoketa, Iowa; married, three children; B.A., J.D., S.U.I.; App't. Ass't. Atty. Gen. 1969, App't. Spec. Ass't. Atty. Gen. 1971.

JOHN I. ADAMS ..... Assistant Attorney General
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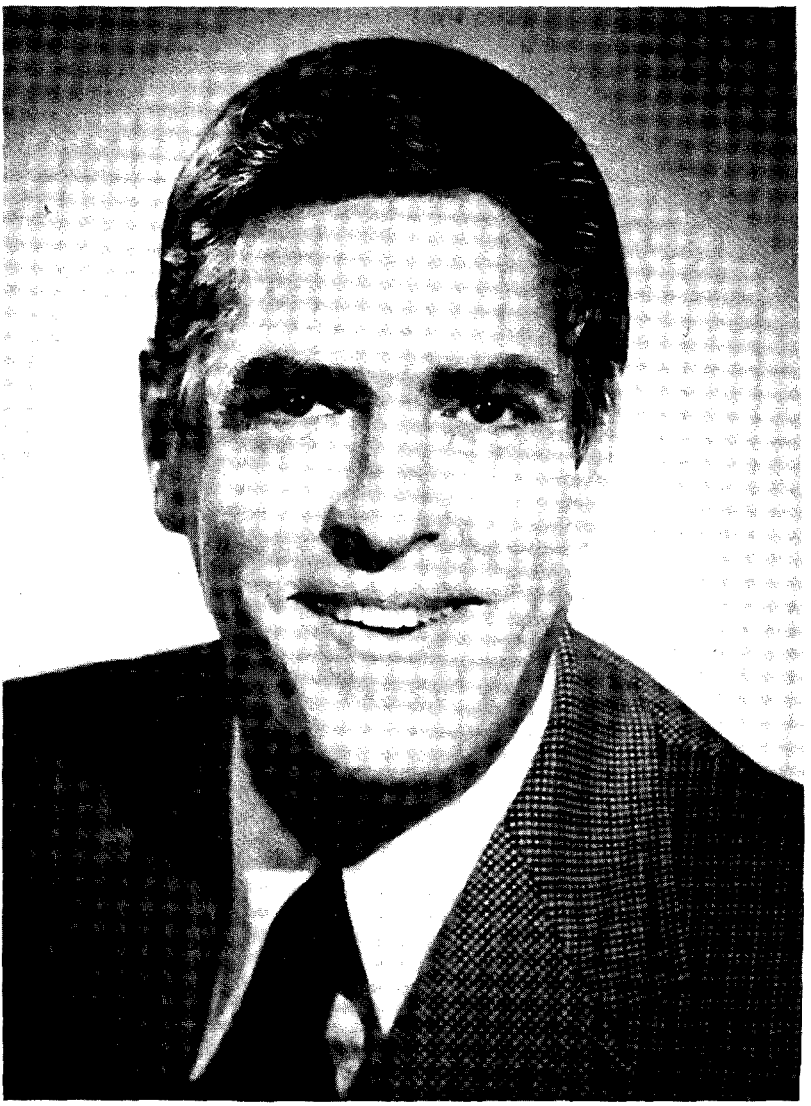

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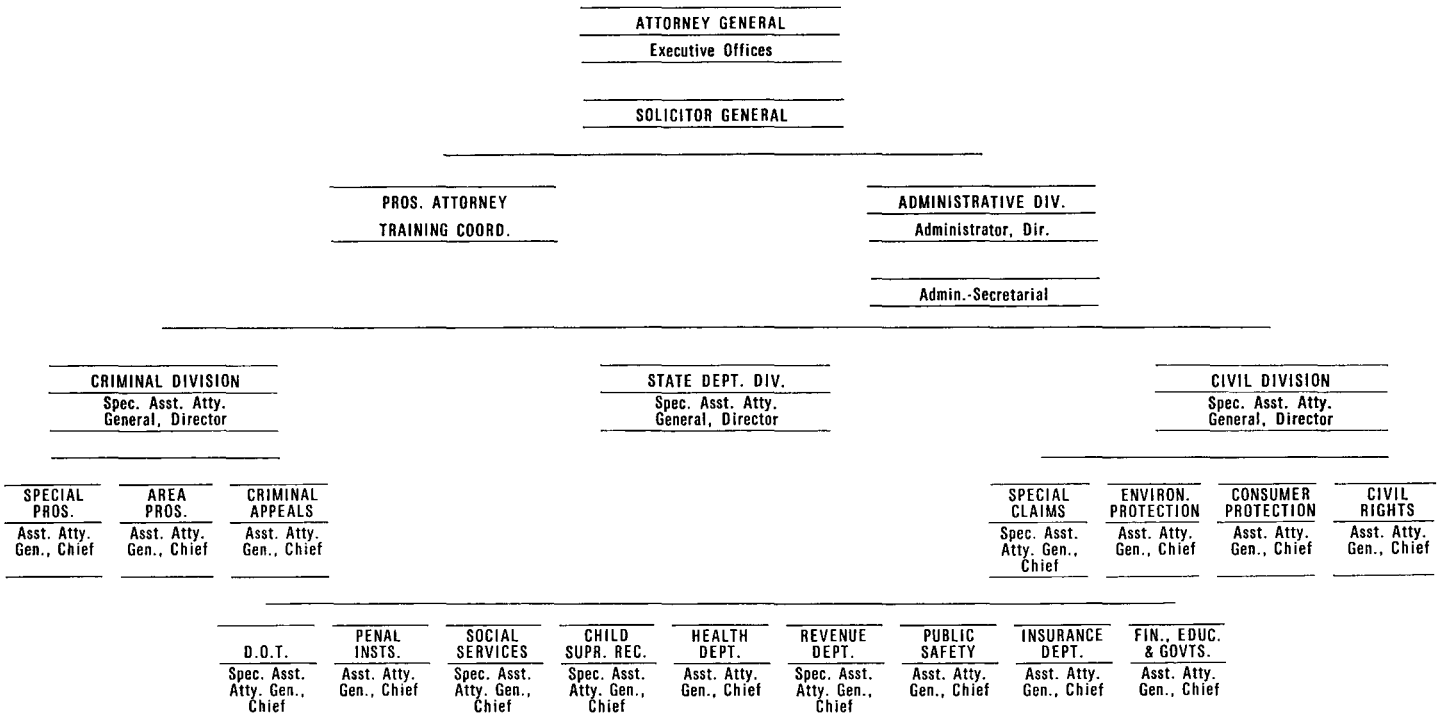
IOWA DEPARTMENT OF JUSTICE
Proposed Reorganization Chart



THE

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

FOR

BIENNIAL PERIOD

1974 - 1976

CONTENTS

	Page
Accountancy, Board of	895
Aging, Commission on the	895
Agriculture, Department of	895
Air Quality Commission	895
Alcoholism, Iowa Commission on	895
American Revolution Bicentennial Commission	895
Anti-Trust	895
Architectural Service, Board of	895
Assessor, County	895
Attorney, County	895
Auditor, County	896
Banks and Banking	896
Blind, Commission for the	896
Capitol Planning Commission	896
Citizens Aide	896
Civil Rights	896
Civil Defense Council	896
Civil Service	896
Code Editor	896
Compatibility	896
Comptroller, State	896
Conflict of Interest	896
Constitutional Law	897
Consumer Fraud	897
Controlled Substances	897
Corporations	898
Counties	898
Courts	899
Court of Appeals	900
Criminal Law	900
Drainage Districts	900
Elections	900
Employment Opportunity Board	901
Employment Security Commission	901
Eminent Domain	901

CONTENTS (Cont.)

	Page
Engineering Examiners, Board of	901
Environmental Protection	901
Executive Council	901
Fair Board, State and County	901
Gambling	901
General Assembly	901
General Services, Department of	902
Governmental Subdivisions	902
Governor	902
Handicapped	902
Health	902
Highways	902
Home Rule	902
Hospitals	902
Incompatibility	903
Insurance	903
Iowa Consumer Credit Code	903
Iowa Public Employment Relations Board	903
IPERS	903
Judges	903
Judicial Magistrates	903
Law Enforcement	903
Legislature	903
Libraries	904
Licensing	904
Liquor, Beer and Cigarettes	904
Mental Health	904
Merit Employment Department	904
Motor Vehicles	904
Municipalities	904
Natural Resources Council	906
Nursing, Board of	906
Obscenity	906
Open Meetings	906
Optometry Examiners, Board of	907

CONTENTS (Cont.)

	Page
Participle	907
Penal Institutions	907
Per Diem	907
Physicians and Surgeons	907
Physical Therapy	907
Policemen and Firemen	907
Political Subdivisions	907
Psychology, Board of	907
Public Employees	907
Public Employment Relations Board	907
Public Records	908
Public Safety, Department of	908
Regents, Board of	908
Revenue, Department of	908
Schools	908
Secretary of State	909
Separation of Powers	909
Sheriff	909
Social Security	909
Social Services, Department of	909
Spanish Speaking Peoples Commission	909
State Officers and Departments	909
Statutes	911
Statutory Construction	911
Statutes Construed	911
Supervisors	920
Supreme Court	920
Taxation	920
Townships	920
Transportation, Department of	921
Utilities	921
Veterinary Medicine	921
Vietnam Veterans Bonus	921
Weapons	921

January 6, 1975

COUNTIES AND COUNTY OFFICERS: Hospital Trustees — §347.9, Code of Iowa, 1973. A licensed nurse may not be a county hospital trustee. (Blumberg to Newell, Muscatine County Attorney, 1-6-75) #75-1-1

Mr. David W. Newell, Muscatine County Attorney: We have received your opinion request of December 17, 1974, regarding qualifications of hospital trustees. The facts, as you have indicated, are that a registered nurse, who has not practiced for six years, has been elected as a trustee of a county hospital. You question whether the nurse is qualified to be a trustee.

Section 347.9 of the Code provides that hospital trustees shall not be physicians or "licensed practitioners". In prior opinions of this office, 1962 O.A.G. 234, 1970 O.A.G. 738 and one dated November 25, 1974 (No. 74-11-21) our office has held that a nurse falls within the classification of "licensed practitioner" and cannot qualify as a trustee. Your question centers around the fact that this nurse has not practiced for six years. If that nurse has renewed his or her license each year and is current as of the time of taking office, we are of the opinion that he or she would fall within the classification of "licensed practitioner." We believe that the term "licensed practitioner" puts emphasis on the fact that the person be licensed rather than actually practicing at the time. However, if the nurse's license has lapsed or has been surrendered, he or she would be able to take office.

Accordingly, we reaffirm our prior ouinions. If the nurse in question is currently licensed, he or she would not be qualified to take office. Thus, the position should be treated as if a vacancy occurred. If the nurse is not currently licensed, then the prohibition of §347.9 would not apply.

January 6, 1975

STATE OFFICERS AND DEPARTMENTS: Board of Examiners for Nursing Home Administrators — Ch. 1086, Acts of the 65th G.A., (1974) and §147.127, Code of Iowa, 1973. The Board of Examiners for Nursing Home Administrators have the authority to require continuing education. (Blumberg to Gannon, Chairman, Board of Examiners for Nursing Home Administrators, 1-6-75) #75-1-2

James Gannon, M.D., Chairman, Board of Examiners for Nursing Home Administrators: We have received your opinion request of November 27, 1974, regarding continuing education for nursing home administrators. You specifically asked whether continuing education is required for nursing home administrators in view of an opinion issued by this office regarding the Board of Accountancy Examiners (#74-10-15).

The prior opinion held that only the Board of Accountancy Examiners had the authority to require continuing education, and made reference to §32, Ch. 1086, Acts of the 65th G.A. (1974). Chapter 1086 is an Act relating to the establishment and administration of professional and occupational licensing boards. Section 32 of Ch. 1086 specifically provided for continuing education for accountants where none existed previously. The provisions of Ch. 1086 relating to nursing home examiners, §§99 through 105, do not mention continuing education. However, such

is not necessary since the Board of Examiners for Nursing Home Administrators specifically have the authority in §147.127 of the Code. Said section was not amended or repealed by Ch. 1086.

Accordingly, we are of the opinion that the Board of Examiners for Nursing Home Administrators has the authority to require continuing education. The prior opinion (#74-10-15) is modified to the extent expressed in this opinion.

January 13, 1975

ALCOHOLISM; STATE OFFICERS AND DEPARTMENTS: Commission on Alcoholism — Ch. 1131, §§7, 9, 37, Acts of the 65th G.A., 2nd Sess. Prior approval of the Commission on alcoholism must be obtained before the Director of the Division on Alcoholism can enter into contracts which involve the expenditure of division funds. However, the director may hire, supervise, and fire personnel and enter into cooperative agreements with other agencies without the approval of the commission. (Haskins to Poncius, Acting Director, Division on Alcoholism, 1-13-75) #75-1-3

Juris Poncius, Acting Director, Division on Alcoholism: You ask us whether the Director (the "director") of the Iowa Division on Alcoholism (the "division") needs the prior approval of the Iowa Commission on Alcoholism (the "commission") before he can enter into contracts which involve the expenditure of funds of the division. You also ask whether the director has the power to hire, supervise, and fire personnel and enter into cooperative agreements with public and private agencies without approval of the commission.

Under the New Alcoholism Act (the "act"), the director is required to enter into agreements with qualified treatment facilities to pay a portion of their costs. *See* Ch. 1131, §37, Acts of the 65th G.A., 2nd Sess. However, the division is the sole agency which may allocate division funds. §7 of the Act states:

"Duties of the commission. The commission shall:

"1. *Act as the sole agency to allocate state, federal and private funds which are appropriated or granted to, or solicited by the division.*

"2. Approve the comprehensive alcoholism program developed by the division pursuant to sections one (1) through thirty-three (33) of this Act.

"3. Establish policies governing the performance of the division in the discharge of any duties imposed on it by law.

"4. Establish policies governing the performance of the director in the discharge of his duties.

"5. Advise or make recommendations to the governor and the general assembly relative to alcoholism treatment programs in this state.

"6. Promulgate rules necessary to carry out the provisions of this Act, subject to review in accordance with the provisions of chapter seventeen A (17A) of the Code.

"7. Investigate the work of the division, and for this purpose it shall have access at any time to all books, papers, documents, and records of the division.

"8. Submit to the governor an annual report covering the activities of the division." [Emphasis added]

Does §7 of the Act mean that the director must obtain prior approval of the commission before he enters into contracts which involve the expenditure of division funds? We believe that it does. All contracts which involve the expenditure of division funds necessarily entail the allocation of these funds and such allocation is the sole responsibility of the commission. Accordingly, the prior approval of the commission is needed before the director can enter into contracts which involve the expenditure of division funds.

However, the director does have certain independent powers which do not require the approval of the commission for their exercise. Among these is the power to employ necessary staff and to enter into cooperative agreements with public and private agencies. §9 of the Act states:

"Powers of director. The director may:

"1. Plan, establish, and maintain treatment programs as necessary or desirable with the approval of the commission.

"2. *Make contracts necessary or incidental to the performance of his duties and the execution of his powers, including contracts with public and private agencies, organizations, and individuals to pay them for service rendered or furnished to alcoholics or intoxicated persons.*

"3. Solicit and accept for use any gift of money or property made by will or otherwise, and any grant of money, services, or property from the federal government, the state, or any political subdivision thereof or any private source, and do all things necessary to cooperate with the federal government or any of its agencies and the commission in making an application for any grant.

"4. Coordinate the activities of the division and cooperate with alcoholism programs in this and other states, and *make contracts and other joint or cooperative arrangements with state, local, or private agencies in this and other states for the treatment of alcoholics and intoxicated persons and for the common advancement of alcoholism programs.*

"5. Keep records and engage in research and the gathering of relevant statistics.

"6. *Employ staff necessary to carry out the duties assigned to him.*

"7. Do other acts and things necessary or convenient to execute the authority expressly granted to him." [Emphasis added]

The power to employ staff implies the power to hire, supervise, and fire personnel. (Of course, such personnel would be subject to the merit system). Nothing in the Act gives the commission any veto over the employment of staff by the director or the entering into cooperative agreements with public or private agencies. Except for the power to allocate division funds and to investigate the division — which is not the power to supervise the administration of the division — the powers of tho commission are policy making and not administrative.

In sum, prior approval of the commission must be obtained before the director can enter into contracts which involve the expenditure of division funds. However, the director may hire, supervise, and fire personnel and enter into cooperative agreements with other agencies without the approval of the commission.

January 14, 1975

STATE OFFICERS AND DEPARTMENTS: Vietnam Veterans Bonus; Residency Requirements. §2, Chapter 64, Acts 65th G.A., First Session or Ch. 35C, The Code. The six month residency requirement for recipients of the Vietnam Veterans Bonus means six calendar months and may not be shortened to 5½ months even though compensation under the act may be paid under certain circumstances for a fraction of a month. (Robinson to Wyckoff, State Representative, 1-14-75) #75-1-4

Honorable Russell L. Wyckoff, State Representative: In your recent letter you asked:

"The Vietnam Veteran Bonus Bill H.F. 656 that was enacted into law during the 65th General Assembly states that a 6 month residency requirement must be met in order to be eligible for compensation under this act.

"Also contained in Sec. 2 of this act is the requirement that 16 days service must be met to be counted as a months service.

"My question is; Does the 16 day requirement also pertain to the 6 mos. requirement? Could a Veteran who otherwise qualified be considered eligible if his residency was for a period of 5 mos. and 16 days immediately prior to entering service?"

Our understanding of the law requires a negative answer to your question.

It has long been recognized that the legislature may be its own lexicographer, *Graham v. Worthington*, 1966, 259 Iowa 845, 146 N.W.2d, 626, and thus, define words according to their own desires. This was done to a degree when the legislature directed that compensation not be paid for a fraction of a month unless it be sixteen days or more. (See Paragraph 4 of Section 2, Chapter 64, Acts of the 65th G.A., First Session, which will be Chapter 35C, the Code.) This modifies the word "month" as defined in Section 4.1(11) of the Code.

There are, of course, many other rules of statutory construction. Our Supreme Court has ruled that if a statute contains both a general and a specific provision, the specific controls over the general, and if there is an express mention in the statute of one thing, this implies the exclusion of others. *Ritter v. Dagel*, 1968, 261 Iowa 870, 156 N.W.2d 318, *In re Wilson's Estate*, Iowa 202 N.W.2d, 41 (1972).

These rules, however, do not apply to your question because there is no specific provision pertaining to the six month residency requirement. The specific provision applies only to when compensation would be paid in regard to what constitutes a single month. Thus, §4.1(2) would apply, to-wit:

"*Words and phrases.* Words and phrases shall be construed according to the context and the approved usage of the language; * * * "

Since a similar specific reference was not made in regard as to what constitutes a six month residency requirement, then we must conclude that the ordinary meaning of the term "six months" must prevail. This is consistent with how the Supreme Court has interpreted six months in other situations. That is, for the purpose of computing the time within which an appeal must be taken which is limited by statute to six months,

calendar months are counted from a given day to a day of the corresponding number in the sixth month. *Parkhill v. Town of Brighton,* 1883, 61 Iowa 103, 15 N.W. 853. In probate, claims may be filed against the estate for a six month period after the Notice of Appointment of the Administrator or Executor has been completed. This period is based on full calendar months. *St. Paul Mercury Indem. Company v. Nyce,* 1950, 241 Iowa 550, 41 N.W. 2d 682.

We believe these authorities to be persuasive and adopt the same reasoning in answering your question in the negative.

January 15, 1975

IOWA STATE FAIR BOARD: The Secretary and Treasurer of the Fair Board do not have to be elected from those members established under Section 173.1, Subsections one and two. The secretary's salary is set by the General Assembly. Public policy prohibits the treasurer of the Fair Board from voting on his own salary. Chapter 173 Code of Iowa (1973). (Kelly to Harlan, Dept. of Agriculture, Administrative Assistant, 1-15-75) #75-1-5

James I. Harlan, Administrative Assistant, Iowa Department of Agriculture: This opinion is in response to your request dated December 27, 1974, regarding the Iowa State Fair Board. After quoting Section 173.1 of the Code of Iowa (1973), you asked:

"1. Are the Secretary and Treasurer positions elected from the existing members of the State Fair Board or shall they be individuals separate and apart from the existing Fair Board and by virtue of 173.1(4) become members of the Board?

"2. Are the Secretary and Treasurer of the State Fair Board entitled to a vote on Board matters when the Board fixes the duties and compensation for services of these respective positions?"

Your first question may be answered by utilizing the Latin expression, "expressio unius est exclusio alterius", which means, the express mention of one thing implies the exclusion of others. Section 173.1 states:

"1. The governor of the state, the state secretary of agriculture, and the president of the Iowa State University of science and technology.

"2. One director from each congressional district and three directors at large, to be elected at a convention as hereinafter provided.

"3. A president and vice-president to be elected by the state fair board from the nine elected directors.

"4. A secretary and a treasurer to be elected by the state fair board."

You'll note subsection 3 provides that the president and vice-president are elected from the "nine elected directors." Subsection 4 does not contain this specific direction. If the Legislature wanted to place this added requirement on the secretary and treasurer of the Fair Board they would have so provided. Therefore, it is this Office's opinion that the secretary and treasurer of the Fair Board do not have to be elected from "existing" members of the Fair Board.

In response to your second question, Section 173.10 states:

"The secretary shall receive such salary as fixed by the general assembly."

This section clearly provides that the Fair Board does not fix the secretary's salary.

The treasurer's salary is covered by Section 173.12, which provides:

"The treasurer shall receive such compensation for his services as the board may fix, not to exceed five hundred dollars a year, and necessary traveling and hotel expenses."

Even though the treasurer is a member of the Fair Board under Section 173.1, common sense and public policy would forbid him from voting on his own salary.

January 16, 1975

CONSTITUTIONAL LAW: General Assembly; Legislator on Alcoholism Commission and Capitol Planning Commission, lucrative office, office of profit; seperation of powers; incompatibility of offices; eligibility for office; vacancy in office. Art. III, §§1, 21 and 22; Ch. 18A, Code of Iowa, 1973; Ch. 124, 65th G.A., 1st, 1973; Ch. 1131, §3, 65th G.A., 2nd, 1974. A Senator cannot constitutionally serve as a public officer on either the alcoholism commission or the Capitol Planning Commission. To be a public office (1) the position must be created by constitution or statute; (2) a portion of the sovereign power of government must be delegated to that position; (3) the duties and powers must be defined directly or impliedly by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law; and (5) the position must have some permanency and continuity and not be only temporary and occasional. Any non-military office which yields a compensation of $40 per diem in addition to expenses is both a "civil office of profit" and a "lucrative office." A legislative member of the Capitol Planning Commission is called upon to exercise executive functions contrary to the prohibition of Article III, §1, Constitution of Iowa, pertaining to separation of powers. Iowa has adopted the common law rule that an officer who, while holding one office, accepts another incompatible with the first, **ipso facto** vacates the first office. When an officer takes an incompatible second office, his subsequent resignation of the latter cannot restore his right or title to the first office. A section of a statute requiring that a legislator be appointed to the Capitol Planning Commission is unconstitutional and void, and creates no office, so acceptance of an appointment thereunder does not amount to abandonment of the legislative office. (Turner to Plymat, State Senator, 1-16-75) #75-1-6

The Honorable William N. Plymat, State Senator: You have requested an opinion of the attorney general as to whether you as a member of the General Assembly are or were prohibited from serving on either the Alcoholism Commission or the Capitol Planning Commission by the provisions of Article III, §22, Constitution of Iowa, which provides:

"*No person holding any lucrative office* under the United States, or this State, or any other power, *shall be eligible to hold a seat in the General Assembly*: but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative." (Emphasis added).

It appears from the bare language of Section 22, taken alone, that the question is not only whether you can serve on either of those commissions, assuming such service to be in a lucrative office, but whether such service has destroyed your "eligibility" to hold a seat in the General

Assembly. So one of the first questions, apparent from Section 22, is whether such service on either of those commissions is a "lucrative office."

Before resolving the questions of what is a "lucrative office" and whether your Senate seat has been vacated, it should be pointed out that two other constitutional prohibitions are also relevant to the question you raise.

Article III, §1, Of the Distribution of Powers, provides:

"The powers of the government of Iowa shall be divided into three separate departments — the Legislative, the Executive, and the Judicial: and *no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others*, except in cases hereinafter expressly directed or permitted." (Emphasis added.)

This hallowed and fundamental prohibition, considered the cornerstone of the republican form of government is found in one form or another in the Constitutions of every State as well as in the U.S. Constitution and doubtless does more to inhibit tyranny and enhance freedom than any other single concept of representative government. "The First Maxim of a Free Society is that the Laws be Made by One Set of Men and Administered by Another", is another way of at least partially expressing it, attributed to the great English clergyman and philosopher, William Paley. That maxim, incidentally, is painted on a wall of the Polk County Courthouse.

Thus §1 prohibits a legislator from "exercising *any* function appertaining" to the Executive Department, regardless of compensation therefore or even whether he holds an office. So a second question, apparent from §1, is whether either of these commissions perform functions pertaining to the Executive Department.

Again,before resolving this second question, let us consider still a third pertinent prohibition enjoined by the people of Iowa upon their elected representatives:

Article III, §21, Constitution of Iowa, provides:

"No senator or representative shall, *during the time for which he shall have been elected, be appointed to any civil office of profit* under this State, which shall have been *created, or the emoluments of which shall have been increased during such term*, except such offices as may be filled by elections by the people."

Thus, a senator or representative could by resigning his office, even during his term, be appointed by the governor to fill a vacancy in the office of Iowa attorney general, or even United States Senator, notwithstanding an increase in the emoluments of those offices during the legislator's term, because those offices are filled by election and fall within the exception to the prohibition. Moreover, the office of a United States Senator from Iowa may not be considered a civil office of profit "under this State." But no legislator could even by resigning be appointed *during the term for which he was elected* to *any* civil office of profit of

this state if that office was created, or its emoluments increased, *during the legislator's term.* So a third question, apparent from §21, is whether, assuming service on either commission is holding a civil office of profit, the office was created or the emoluments increased, during your term.

As I understand it, you are now considered a "hold-over" Senator; that is, you were elected in November, 1972, to serve a four year term in the Iowa Senate commencing in January, 1973. You qualified for that office then and were not required to be re-sworn with those Senators elected or re-elected on Novmber 5, 1974, who took office on January 13, 1975.

The alcoholism study commission to which you were appointed in 1973, during your term as Senator, was created by statute in 1961 prior to your term. Ch. 104, 59th G.A., p. 136. Moreover, it does not appear that there was any salary or per diem fixed, at least by law or appropriation, until that commission was repealed in 1974 and a new one created. §§51 and 3, Ch. 1131, 65th G.A., 2nd Session, 1974, pp. 428 and 409. Accordingly, your service on the old alcoholism commission did not violate *either* Article III, §§21 or 22, because it was neither a civil office of profit nor a lucrative office. But, as we shall see, your service in that office would nevertheless have been constitutionally incompatible with service in the General Assembly under Art. III, §1.

On the other hand, the new alcoholism commission created in 1974, and effetcive July 1, 1974, during your term but to which you were not appointed, provides that each member of the commission receive $40 per day plus expenses. §6, Ch. 1131, 65th G.A., 2nd, 1974, p. 409. As we shall see, such a salary made that a "civil office of profit" or a "lucrative office", (if it is an office) forbidden to any legislator then serving his term even if he resigned in order to accept appointment thereto. Article III, §21 prohibits a legislator from taking an office created during his term, during the term for which he was elected.

It is interesting that §123A.2, Code of Iowa, 1973, the section creating the former alcoholism commission on which you served, required that one of its 9 members be "a member of the general assembly" and that you were that member. But the new alcoholism commission does not require that any of the 9 commissioners be legislators. §3, Ch. 1131, 65th G.A. Fortunately, the Governor wisely refrained from appointing a legislator thereto because, as will become apparent, had he done so the legislator (if eligible to take the office) accepting the appointment would ipso facto resign and vacate his office in the General Assembly whether he intended to or not.

The Capitol Planning Commission to which you were also appointed in 1973 and your term on which does not expire until April 30, 1975, was created by statute in 1959, also prior to your term in the Senate. Ch. 424, 58th G.A., 1959, p. 554. §1 of what is now Ch. 18A, Code of Iowa, 1973, provided that the commission be composed of 9 members, including 2 from the house appointed by the speaker and two from the senate appointed by the lieutenant governor. §5 provided for payment of expenses but for no salary, per diem or other compensation until it was amended in 1973, *during your term,* to provide commissioners §40 per

diem in addition to expenses. §2, Ch. 124, 65th G.A., 1st, 1973, p. 163. Indeed, Chapter 124 was entitled "An Act raising the compensation paid to members of certain boards and commissions" including several on which senators and representatives served and still serve as members. I am informed by the State Comptroller that these legislators have been accepting the per diem therein specified.

Thus, the Capitol Planning Commission has, during your Senate term, become a "civil office of profit" or a "lucrative office", (if it is an office). Whether the emoluments were raised as a partial result of your own vote or act is of no consequence. They were raised *during your term* in the Senate. Thus, in this instance, your service on the commission is constitutionally incompatible with Article III, §21, as well as Article III, §1.

CIVIL OFFICE OF PROFIT

What is a "civil office of profit under this State" (Article III, §21) or a "lucrative office" (Article III, §22), and are the terms synonymous? The Iowa Constitution itself helps answer this question because the sections are together, one following the other in Article III, and must be construed together, in pari materia. Our constitution is construed as a whole. *Gallarno v. Long*, 214 Iowa 805, 243 NW 719. Our Supreme Court has a duty, if fairly possible, to harmonize constitutional provisions. *Newby v. District Court of Woodbury County*, 1967, 259 Iowa 1330, 147 NW2d 886.

Article III, §22, specifically exempts "offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public" from being "deemed lucrative." Presumably, were it not for this exception, a notary public, being entitled to charge fees ranging from ten cents to two dollars for his services (§77.19, Code of Iowa, 1973) would be considered to hold a lucrative office. Citation infra, p. 10. It is common knowledge that few if any offices of profit are less lucrative than that of notary public.

In the context of §§21 and 22, "*civil* office" is mentioned merely to distinguish that office from a "military office".* Black's Law Dictionary, Fourth Edition, 1951, defines civil office:

"An office, not merely military in its nature, that pertains to the exercise of the powers or authority of civil government. State ex rel. Landis v. Futch, 122 Fla. 837, 165 So. 907, 909. Requisites are continuity, creation and definition of powers and duties by Constitution or Legislature, or their authority, possession of governmental power, and independence unless controlled by superior officers. State ex rel. McIntosh v. Hutchinson, 187 Wash. 61, 59 P.2d 1117, 1118, 105 ALR 1234."

Several decisions by our Iowa Supreme Court consider the elements of public office or public officer, the latest apparently being *Vander Linden v. Crews*, 1973 Iowa, 205 NW2d 686. See also, *State v. Spaulding*, 1897, 102 Iowa 639, 72 NW 288, perhaps the leading Iowa case, which

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* As bearing on this, see *Bryan v. Cattell*, 1864, 15 Iowa 538, in which it was held that by accepting a commission as Captain in the military service, a District Attorney ipso facto resigned his office.

after considering numerous dictionaries, treatises, and other authorities concludes:

"From all the authorities, we think the following rules may properly be laid down for determining whether one is a public officer, within the contemplation of our statute relating to embezzlement of such officers (Code 1873, §3908): (1) The office itself must be created by the constitution of the state, or authorized by statute. (2) If authorized by statute, its creation may be by direct legislative act; or the lawmaking power, when not inhibited by the constitution or public policy from so doing, may confer the power of creating an office upon official boards or commissions which are themselves created by the legislature, when such office is necessary to the due and proper exercise of the powers confrred upon them, and the rightful discharge of duties enjoined. (3) A position so created by the constitution, or by direct act of the legislature, or by a board of commissions duly authorized so to do, in a proper case by the legislature is a public office. (4) To constitute one a public officer, at least within the purview of the criminal law, so that he may be liable for the misappropriation of the public funds, his appointment must not only have been made or authorized as above stated, but his duties must either be prescribed by the constitution or the statutes of the state, or necessarily inhere in and pertain to the administration of the office itself. (5) In any event the duties of the position must embrace the exercise of public powers or trusts; that is, there must be a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public. (6) The following among other requirements are usually though not necessarily attached to a public office: (a) An oath of office; (b) salary or fees; (c) a fixed term of duration or continuance."

The thread of the foregoing definition of public officer then runs through *Smith v. Van Buren County*, 1904, 125 Iowa 454, 101 NW 186; *In Re Assessment of Farmer's Loan & Trust Co.*, 1912, 155 Iowa 536, 136 NW 543; *In re McIntosh's Estate*, 1916, 182 Iowa 23, 159 NW 223; *State v. Conway*, 1935, 219 Iowa 1155, 260 NW 88; *McKinley v. Clarke Co.*, 1940, 228 Iowa 1185, 293 NW 449; *Whitney v. Rural Independent School District*, 1942, 232 Iowa 61, 4 NW2d 394, 140 ALR 1376; *Hutton v. State*, 1944, 235 Iowa 52, 16 NW2d 18; *Heiliger v. City of Sheldon*, 1945, 236 Iowa 146, 18 NW2d 182; *State v. Elmore*, 1955, 246 Iowa 1318, 70 NW2d 166; *Francis v. Iowa Employment Security Commission*, 1959, 250 Iowa 1300, 98 NW2d 733; and *State v. Taylor*, 1966 Iowa, 144 NW2d 289.

In *State v. Taylor*, supra, our high court said:

"It will be noted that, in determining the status of one holding a public position, consideration is also given to such matters as the term of office, requirement of oath and bond, although these elements, we have said, are not deemed essential to a public office. Francis v. Iowa Emp. Sec. Comm., supra. With these rules and basic elements in mind, we turn to the showing here, for *in the end it must be said each case turns upon its own circumstances*. Hutton v. State, supra." (Emphasis added.)

Vander Linden v. Crews, supra, and *State v. Taylor*, the two latest Iowa cases on point summarize by stating that the five essential elements to make a public employment a public office are:

"(1) the position must be created by the constitution or legislature; (2) a portion of the sovereign power of government must be delegated to that position; (3) the duties and powers must be defined directly or impliedly by the legislature or through legislative authority; (4) the

duties must be performed independently and without control of a superior power other than the law; and (5) the position must have some permanency and continuity and not be only temporary and occasional."

See also 53 ALR 595, 93 ALR 333, 140 ALR 1076 and 5 ALR2d 415.

Many of the cases distinguish officer from employee for purposes of determining coverage in pension or workmen's compensation cases. Some determine whether embezzlement or some other offense has been committed by a public officer, a more serious crime than the ordinary embezzlement or offense. Except for the second of the essential elements — whether a portion of the sovereign power of government has been delegated to a position — it is usually not difficult to apply the other elements in a given case. For example, if a position has been created by Executive Order of the Governor, we know it is not a public office because it was not created by the constitution or the legislature as required in the first essential element. But a question we need not decide here is whether creation by "the legislature" means creation by law. Can one house or both, by mere resolution, and not subject to the Governor's approval or veto, create a public office? I would think not, and that *Spaulding* requires a law.

In *Hutton v. State*, supra, the focal question was whether the statutes delegated to the state conservation director sovereign powers, to be exercised by him, *independently*, for the benefit of the public and it was held that although in some areas he acted only under the authorization and direction of the conservation commission, in others he could act independently and thus was a public officer, not an employee.

Applying these elements to the former alcoholism study commission, Chapter 123A, Code 1973 (now repealed), it appears that the commissioners were public officers: (1) they were created by statute enacted by the legislature; (2) they were delegated a portion of the sovereign power of government — the power to contract on behalf of the State for designated purposes and expend funds pursuant to the contracts (§123A.7) and the power to "furnish grants" from available funds to private or public treatment centers, etc. (§123A.8); and while not entirely clear, the duties and powers were defined directly or impliedly by the legislature (1968 OAG 132); (4) the commission's duties were performed independently and without control of any power other than the law; and (5) terms of four years were fixed by law. Appropriations were made to that commission (Chs. 1 and 111, 65th G.A., 1973 Session) and they together with federal grants were presumably expended by the former commission while it existed. 1968 OAG 132.

Similarly, there is no question but that the commissioners of the new alcoholism commission created by Ch. 1131, 65th G.A. 2nd, 1974, clearly meet every criteria or element of public officers. The new statute is detailed and clear. The commission appoints employees, has terms of office, is compensated and expends funds. $1,250,000 has been appropriated to carry out the powers and duties of the commission. §§49 and 50, p. 428. But fortunately, no legislators have been appointed to it nor does the statute call for such members. §3, p. 409.

The more difficult question is whether the members of the Capitol

Planning Commission are public officers. Chapter 18A, Code 1973, pertaining to that commission, confers all essential elements of public office with the possible exception of delegation of the sovereign power of the state. If, for example, the commission's only duty is to make recommendations, to whatever department of government, it is very doubtful that it has any sovereign power.* §18A.3, with reference to duties, provides:

"It shall be the duty of the commission to advise upon the location of statues, fountains and monuments and the placing of any additional buildings on the capitol grounds, the type of architecture and the type of construction of any new buildings to be erected on the state capitol grounds as now encompassed or as subsequently enlarged, and repairs and restoration thereof, and it shall be the duty of the officers, commissions, and councils charged by law with the duty of determining such questions to call upon the commission for such advice.

"The commission shall, in co-operation with the director of the department of general services, *develop and implement* within the limits of its appropriation, a five-year modernization program for the capitol complex." (Emphasis added.)

It may be questioned whether the words "develop and implement" convey any real sovereign power upon the commission, but in my opinion they do. Chapter 97, 65th G.A., 1st, 1973 Session, p. 106, appropriates $100,000 to the commission for planning a state office building and $100,000 for planning a state agricultural building, including the architectural fees for both. Presumably, the commission will exercise, or has, the sovereign power to contract in the State's name for this planning and these architectural fees. You have conceded to me that in addition to helping appropriate these funds to this commission as a state senator, you are charged with the responsibility of actually expending them. Thus, in my opinion, members of the Capitol Planning Commission are public officers, if the statute is constitutional. *Bramlette v. Stringer*, 1938 South Carolina, 195 S.E. 257.

LUCRATIVE OFFICE

We have found no Iowa cases defining a "lucrative" office although there are a number of opinions of the attorney general, including 1960 OAG 218, Strauss to Loveless, concluding that per diem compensation in addition to expenses make an office "obviously lucrative." In the Strauss opinion it was determined that a member of the Natural Resources Council receiving $25 per day plus expenses could not remain on the Council after being elected State Senator. See also 1968 OAG 711, Haesemeyer to Kleve, to the same effect, where a director of the state fair board was required to relinquish his public office before being permitted to take the oath as State Senator. Black's Law Dictionary defines a lucrative office:

"One which yields a revenue (in the form of fees or otherwise) or a fixed salary to the incumbent; according to some authorities, one which

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* Mere ascertainment of facts is ancillary to legislation and within the law making power, and service by legislators on commissions for that purpose alone, may not violate separation of powers. *Parker v. Riley*, 1941, 18 Cal.2d 83, 115 P.2d 873.

yields a compensation supposed to be adequate to the services rendered and in excess of the expenses incidental to the office. See State v. Kirk, 44 Ind. 405, 15 Am. Rep. 239; Crawford v. Dunbar, 52 Cal. 39; Hodge v. State, 135 Tenn. 525, 188 SW 203, 206. One the pay of which is affixed to performance of duties of office. Holman v. Lutz, 132 Or. 185, 284 P. 825, 827."

According to Black's, lucrative means yielding gain or profit; profitable; bearing or yielding a revenue or salary. And according to Webster, lucrative means "producing wealth; profitable." It derives from a French word meaning "to gain".

Indiana cases define "lucrative office" as one to which there is attached a compensation for services rendered. *Book v. State Office Building Commission*, 1958, Ind. , 149 NE2d 273. That case and all others we have found, hold, however, that an officer or commissioner who is paid only his actual expenses does not hold a lucrative office. Thus in *Whitehead v. Julian*, 1972, Texas , 476 SW2d 844, it was held that a $50 per month expense allowance "for secretarial work, etc." did not make the mayor's office a "lucrative office" or the mayor ineligible for the legislature, so as to prohibit the mayor from being a candidate for State Representative. The Texas court, however, cited an earlier case, *Willis v. Potts*, 1964 Texas, 377 SW2d 622, in which a city councilman was ineligible because he drew $10 per day for attending each regular meeting of the City Council of Fort Worth and in addition received all necessary expenses.

In *Milwaukee County v. Halsey*, 1912, Wis. , 136 NW 139, it was held that allowance of $400 per year to circuit judges of Wisconsin, for necessary expenses in addition to their salaries provided by law, was not a part of the "compensation" of the judges within a constitutional prohibition against increasing or diminishing the compensation of a public officer during his term.

In *State ex rel Little v. Slagle*, 1905 Tennessee, 89 SW 326, a deputy sheriff was held to hold a lucrative office contrary to a constitutional prohibition against holding more than one such office at the same time. The court held: "A lucrative office is one whose pay is affixed to the performance of its duties (citing an Indiana case) and, when the duties of the office are fixed by statute, it is immaterial that the compensation of the officer is fixed by some other board or officer."

We are able to ascertain no distinction between an "office of profit" and a "lucrative office". As noted earlier, but for the exception in Article III, §22, a notary public would doubtless be deemed to hold a "lucrative office". In *Moser v. Board of County Commissioners*, 1964, 235 Md. 279, 201 A.2d 365, the Maryland Court of Appeals held that the office of notary public is an "office of profit" within Maryland's Declaration of Rights providing that no person shall hold, at the same time, more than one "office of profit" created by the constitution or laws of Maryland. Thereunder, a member of the County Metropolitan Commission was held to have vacated his office by accepting appointment and qualifying as notary public!! And in *Romney v. Barlow*, 1970, 24 Utah 2d 226, 469 P. 2d 497, it was held that Utah's Legislative Council was an

"office of profit" within constitutional prohibition against legislators, during their terms, being appointed or elected to an office created, or the emoluments of which have been increased during their terms. In that case a statute providing $25 per diem plus expenses to each member of the Legislative Council was found unconstitutional. Therein the Utah court said:

"Since the Legislative Council is an office of profit, no member thereof is eligible to be a legislator; but since all members of the Council are to be selected from membership in the House and Senate, they become ineligible to be legislators as soon as they accept their appointment to the Council, and thus they will make themselves ineligible to serve on the Council.

"Such a result was occasioned by the enactment of Chapter 71, Laws of Utah 1967, making the office one of profit. We do not think this result was ever contemplated or intended by the Legislature, and this is but another reason why we must hold Chapter 71, Laws of Utah, 1967, to be unconstitutional and void."

For these reasons, it is my opinion that any non-military office which yields a compensation of $40 per diem in addition to expenses is both a "civil office of profit" and a "lucrative office", a conclusion that I'm reasonably certain will not surprise many Iowans.

Accordingly, your service upon the Capitol Planning Commission, violates Article III, §21, because the emoluments were increased during your term in the Senate. As a further consequence, by holding a lucrative office, your eligibility to hold your seat in the General Assembly must now also be considered because of the proscriptions of Article III, §22.

FUNCTION APPERTAINING TO EXECUTIVE DEPARTMENT

Quite aside from whether you even hold an office of any kind, lucrative or otherwise, in addition to your seat in the Senate, there arises the question of whether as a member of the Capitol Planning Commission you exercise functions appertaining to the Executive Department in violation of Article III, §1, on distribution of powers.

In *State v. Bailey*, 1966, . W.Va. . , 150 S.E.2d 449, a state building commission, with planning duties and more detailed and extensive statutory powers, was held to violate the state's constitutional separation of powers provision (similar to our Article III, §1), because leaders of the West Virginia legislature were ex officio members of the commission. In that case, the court said, quoting an Indiana case on which it relied (*Book v. State Office Building Commission*, 238 Indiana 120, 149 NE2d 273):

"If members of the Legislature may be appointed as members of Boards which exercise *functions* within the executive-administrative department of Government, the door is then open for the Legislature to enter and assume complete control thereof. In fact, if the present provisions for membership on the Commission are valid, the Legislature, by having six of its members on the Commission, could control its every act, and thus completely usurp the authority of the Governor to 'faithfully execute' the laws enacted by the Legislature. Article 5, §16, Constitution of Indiana.

"For the reasons above stated no member of the Legislature, including those presently serving as members of the State Budget Committee, is eligible to serve as a member of the Commission."

The above West Virignia and Indiana cases, and also *State ex rel Black v. Burch*, 1948 Indiana, 80 NE2d 294, take the position that whether or not a legislator is appointed to a public office, he can nevertheless exercise no "function" of either of the other two departments of government. Article III, §1, in our Iowa constitution, pertaining to distribution of powers, makes no reference to "public office" either, but merely proscribes the exercise of a *function* of another department, whether as an officer or not.

In *People v. Tremaine*, 1929, 252 NY 27, 168 NE 817, it was held that appropriations for erection of public buildings which were to be expended by a statutorily created state office site and building commission and composed of the Governor, temporary President of the Senate, Speaker of the Assembly, chairman of the Senate finance committee, chairman of the ways and means committee, and others, were unconstitutional because the legislative members could not be appointed to spend money appropriated by the legislature, the power to expend being an Executive Department function. In a brilliant and exhautsive decision appropriate to the problems confronting me here, the great Justice Pound writing for the majority said inter alia at page 822 of 168 NE:

"The Legislature has not only made a law — i.e., an appropriation — but has made two of its members ex officio its *executive agents* to carry out the law; i.e., to act on the segregation of the appropriation. This is a clear and conspicuous instance of *an attempt by the Legislature to confer administrative* power upon two of its own members. *It may not engraft executive duties upon a legislative office* and thus usurp the executive power by indirection. Springer v. Philippine Islands, 277 US 189, 48 S. Ct. 480, 72 L. Ed. 845." (Emphasis added).

And in an equally excellent concurring opinion, Justice Crane says at page 828:

"There is one thing, however, it cannot do, and that is implied, if not expressed, in our Constitution. It cannot exercise the *functions* of the executive. It cannot administer the money after it has been once appropriated. If it makes lump sum appropriations, whatever conditions it may attach to its expenditure, it cannot make one of those conditions the approval by one of its own members; that is, to confer upon him the duties of an administrative office. Therefore, while I differ with my learned brother as to his reasons, I arrive at the same conclusion." (Emphasis added).

As do all states, Iowa has a constitutional provision, Article III, §24, which says: "No money shall be drawn from the treasury but in consequence of appropriations made by law." The legislature may attach conditions to its appropriations but, once having done so, it cannot further extend its long arm of control by assigning its own members to the agencies charged with the actual administration and expenditure of money appropriated. Once it has expressed its control through conditions expressed in the words of the law, it must at that point "let go" and relinquish further control.

Incidentally related and perhaps helpful in understanding the legal

philosophy underlying the doctrine of separation of powers are those authorities concerning direct control by the legislature of executive action by requiring approval of the action by an entirely legislative committee. For example, the extent to which a legislative rules review committee may subject to its approval rules and regulations properly or improperly made by an executive department agency under express or implied authority, is a crepuscular zone. There have been many instances in which Congress has required the President, and legislatures their Governors, to submit to them or their committees for their approval, proposed executive action. Sometimes executive action is *constitutionally* subject to legislative approval, i.e., the power to declare war, or approve appointments, just as legislative action is constitutionally subject to executive approval, i.e. the veto power. Our Article III, §1, on distribution of powers, permits one department to exercise functions appertaining to the other "in cases *herein*after expressly directed or permitted." (Emphasis added.) *Herein*after refers to the Iowa Constitution. But apart from such constitutional authority an enlightening article in 66 Harvard Law Review 569, notes at page 608:

"The arguments against the validity of statutory provisions vesting in legislative committees the power to approve or disapprove proposed actions of ex officers * * * seem to be overwhelming."

The Harvard Law Review, aforesaid, notes at pages 600 to 603, instances in which Presidents Wilson, Roosevelt and Truman vetoed acts of Congress on grounds, in whole or in part, that the acts vested executive functions in congressional committees. In one veto message, President Truman is quoted at p. 603 of 66 HLR:

"I am concerned by what appears to me to be a gradual trend on the part of the legislative branch to participate to an even greater extent in the actual execution and administration of the laws. Under our system of government it is contemplated that the Congress will enact the laws and will leave their administration and execution to the executive branch."

"Leave the driving to us!" is the often unspoken reaction of judicial and administrative officers alike, many of whom think whether justifiably or not, that lawmakers unduly intrude upon their prerogatives. See "Should Legislators Supervise Administrators?", 41 California Law Review 565.

In *Springer v. Government of the Philippine Islands*, 1928, 277 U.W. 189, 48 S.Ct. 480, 72 L.Ed. 845, and cases cited therein, the United States Supreme Court distinguished legislative power from executive power by saying the former is authority to make laws but not to enforce them or appoint agents charged with the duty of such enforcement, the latter being executive functions. There the high court held:

"Whether the members of the 'board' or the 'committee' are public officers in a strict sense, we do not find it necessary to determine. They are public agents at least, charged with the exercise of executive functions and, therefore, beyond the appointing power of the Legislature."

In *The Federalist Papers* (No. 51), James Madison said:

"In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is

admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.

"* * * the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

"This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other — that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State."

All of these considerations convince me that as a member of the Capitol Planning Commission you are called upon to exercise executive functions contrary to the prohibition of Article III, §1, Constitution of Iowa. This is true regardless of whether you hold a "civil office of profit" or a "lucrative office."

INCOMPATIBILITY OF OFFICES

In *State exrel LeBuhn v. White*, 1965, 257 Iowa 606, 133 NW2d 903, our Supreme Court reaffirms the "well settled common law rule":

"If a person, while occupying one office, accept another incompatible with the first, he *ipso facto* vacates the first office, 'and his title thereto is thereby terminated without any other act or proceeding.' State ex rel Crawford v. Anderson, 155 Iowa 271, 272, 136 NW 128, 129, Bryan v. Cattell, 15 Iowa 538, 550."

The Court also notes:

"Appellee on his cross appeal concedes Iowa has thus far followed the general rule that when a person accepts appointment to a second office he vacates or by implication resigns the first." (Citing Iowa cases and note 100 ALR 1164.)

While *White* was concerned with a case of common law incompatibility, rather than incompatibility of offices arising out of the Constitution, there seems to be no difference in the consequences: qualifying for the second office ipso facto vacates the first. 100 ALR 1170 generalizes as follows:

"Hence, if the holding of two offices by the same person, at the same time, is inhibited by the Constitution or statute, a forbidden incompatibility is created similar in its effect to that of the common law and, as in the case of the latter, it is well settled by an overwhelming array of authority that the acceptance of a second office of the kind prohibited operates, ipso facto, to absolutely vacate the first office."

Over the years, the attorney general has written dozens of — perhaps more than one hundred — opinions with reference to incompatible offices, the majority of which, as in *White*, have dealt with common law incompatibility, put many also with constitutional incompatibility. See, for example, opinions cited supra and compare *1970 OAG 763*, Haesemeyer to Representative Norpel. Almost all such opinions are in response to requests from those concerned about the qualifications of one to take, and the consequences of his taking, a second office and are issued prior to the taking of the second office. The officeholder then has a choice of acting in accordance with the opinion and his desires. But the circumstances which impelled you into your current posture one month after taking office in the Senate are unusual in Iowa and the consequences were apparently unforeseen by anyone.

Statutes requiring service by legislators on non-legislative boards and commissions are a relatively recent development. And apparently, until enactment of Chapter 124 (H.F. 704), 65th G.A., 1st, 1973, effective on July 1, 1973, less than two years ago, legislative service on such boards and commissions was without compensation, a legislator receiving only reasonable and necessary out-of-pocket expenses. Such extraordinary service was generally unquestioned and in fact was considered by most as being in the public interest. So it was not unnatural that service of this nature came to be expected more and more and that the increasing demands on legislators' time led them to provide compensation for such extraordinary services.*

In any case the law:

". . . presumes the officer did not intend to commit the unlawful act of holding both offices, and a surrender of the first is implied." *State ex rel Walker v. Bus*, 1896, 135 Mo. 325, 36 SW 636, 100 ALR 1172.

Martin v. Grandview Independent School Dist., 1924 Texas Civ. App. 266 SW 607, says that the question of abandonment of a prior office by the acceptance of another office is one of law and not dependent on actual renunciation of claim to the prior office, nor upon ceasing to act as such;

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* In *Bonnett v. Vallier*, 1908, 136 Wis. 193, 116 NW 885, the court quoted "the greatest constitutional lawyer of our country during its early history" as saying, 'Good intentions will always be pleaded for every assumption of power, but they cannot justify it. The Constitution was made to guard the people against the dangers of good intentions. When bad intentions are boldly avowed the people will promptly take care of themselves. They will always be asked why they should resist or question the exercise of power which is so fair in its object, so plausible and patriotic in appearance and which has the public good alone confessedly in view. Human beings we may be assured will generally exercise power when they get it and they will exercise it most undoubtedly under a popular government under the pretense of public safety or high public interest. * * * They think there need be little restraint upon themselves'."

that the acceptance of the second office and legal qualification therein are acts of no greater dignity than the acceptance of the prior oflice and legal qualification therein, the former being given legal precedence merely because they are latest in point of time, and are therefore held to constitute a conclusive election between the two constitutionally incompatible offices. 100 ALR 1173.

The fact that the second office is inferior to the first does not affect the general rule. *Milward v. Thatcher,* 1787, 2 T.R. 81, 100 English Reprint 45, 7 Eng. Rul. Cas. 320; *Hiday v. State,* 1917, 64 Ind. App. 159, 115 NE 601; 100 ALR 1167-68. As noted supra, at page 10 of this opinion, a member of the County Metropolitan Commission in Maryland was held to have vacated his office by accepting appointment and qualifying as notary public.

When an officer has been once inducted, under his election or appointment, into the second office, his subsequent resignation of the latter can in no manner serve to restore his right or title to the first office, for it is evident that when a public office becomes vacant, a former incumbent cannot be restored to it by his own act. *Bishop v. State,* 1898, 149 Ind. 223, 48 NE 1038, 39 LRA 278, 63 Am. State Rep. 279, 100 ALR 1182. See also *State v. Bus,* 1896, 1896 Mo., 36 SW 636. And bearing upon the matter of withdrawal of resignation by signed statement (rather than by taking a second office), *Board of Directors of Menlo Consolidated School Dist. v. Blakesley,* 1949, 240 Iowa 910, 36 NW2d 751, held that the leaving of signed statements of resignation with the secretary of the school board, by four members of the board, in substance as follows: "I tender my resignation from the Board of the Menlo Consolidated School"; "I wish to resign from the board"; "I hereby hand in my resignation as a member of the School Board of the Menlo Consolidated School, effective April 7, 1948"; effected an immediate vacancy by those members in their offices, which would not permit a subsequent withdrawal of the resignations. Accordingly, the resigning members had no authority to act in filling any vacancies on the board. The resignations were held immediately effective, and the offices vacant, notwithstanding a statute which provided that they "shall hold office for the term for which elected and until their successors are elected or appointed and qualified * * *". See also *State ex rel Lebuhn v. White,* supra, at page 906-907.

Two offices are incompatible where the holder cannot, *in every instance,* discharge the duties of each. *Rex v. Tizzard,* 17 Eng. C.L. 193. So of course, if a legislator can exercise no function appertaining to the Executive Department any office he holds in the latter is incompatible with the office of legislator. Article III, §1.

Does this mean, then, that you have by accepting a "lucrative" or "civil office of profit" on the Capitol Planning Commission ipso facto vacated your Senate seat? Superficially, it would seem so. And, being a hold-over you have not been re-elected so as to render the Senate your second office. Even if you had been re-elected subsequent to taking your office on the Planning Commission, Article III, §22 would appear to make you *ineligible* to be re-sworn to a seat in the General Assembly unless you first resigned your lucrative office.

Nevertheless, in my opinion you have not vacated your Senate seat

because *you have never lawfully taken office on the Capitol Planning Commission!* This is not merely because Article III, §21, prohibits a legislator during his term from taking an office of profit the emoluments of which have been increased during his term. Your appointment was made on February 6, 1973, before the Commission became an office of profit — before the $40 per diem was enacted effective July 1, 1973. §2, Ch. 124, 65th G.A., 1st, 1973, p. 163. Of course, had you been appointed after July 1, 1973; that is, after it had become an office of profit and after the emoluments had been raised, your appointment would have been forbidden by Article III, §21, and you would have been ineligible to appointment on the commission. *Romney v. Barlow,* 1970 Utah, 469 P2d 497, 499.

But, contrary to the express prohibition of Article III, §1, on separation of powers, you were appointed to an office, whether for profit or not, in the Executive Department, the functions of which you could not exercise because you were a Senator. And you were appointed as a Senate member by virtue of a statute (§18A.2, Code of Iowa, 1973) which required appointment of two senators and two representatives from the General Assembly. That portion of that section of the statute requiring appointment of legislators to an office in the Executive Department was unconstitutional and void. Article III, §1. An unconstitutional provision cannot create an office. Thus there was no office for you to take. Moreover, you have never as a consequence of appointment to that commission abandoned your Senate seat. Rather, you have continued to occupy it at all times, at the same time acting as a de facto officer of the Commission. *Bryan v. Cattell,* 1864, 15 Iowa 538.

Of course, had the statute not required appointment of a legislator, it would have been constitutional, and had you been appointed and qualified under that circumstance, you would have taken a lawful second office and ipso facto vacated and resigned your Senate seat regardless of your intentions or desires. Article III, §21, would not have saved your seat because when you were appointed, the Commission was not an office of profit. *State ex rel Johnson v. Nye,* 1912 Wisconsin, 135 NW 126, 130.

There is some authority which suggests that even if the statute creating the second office is unconstitutional, the taking of that office nevertheless vacates the prior office. In 100 ALR 1168 I find:

"It is also immaterial whether the title to the second office is valid or invalid, for the acceptance of an office to which a person has no title operates as a surrender of the former office on the principle that a person should not take advantage of his own wrong.

"*Pombo v. Fleming,* 1933, 32 Hawaii, 818, in which the court says that the acceptance of a second office incompatible with one already held vacates the first, even though the title to the second office fails, as where the election is void."

See also *Caldwell v. Lyon,* 1935, 168 Tenn. 607, 80 SW2d 80, 100 ALR 1152, which seems to hold that even where an officer prohibited from holding two offices is tricked into taking a second created by an unconstitutional act repealing the first and creating the second, he vacates his first office by taking the second although under a reservation to himself of the right to attack the constitutionality of the act with a statement

of an intention that if the law is unconstitutional he retains his first office. There the court said:

"The fact that appellant accepted the office of chairman with reservations stated by him to the county court cannot prevent the application to him of the rule that his acceptance of the office of chairman vacated the office of county judge. There is no room in our jurisprudence for a qualified or conditional tenure of office. Appellant was under the necessity of either accepting the office to which he had been elected or rejecting it. The county court was without right or power to acquiesce in reservations with respect to appellant's tenure of office. Public interest requires that all possible certainty exist in the election of officers and the beginning and expiration of their terms, and forbids that either be left to the discretion or vacillation of the person holding the office, or body having the appointive power. State v. Grace, 113 Tenn. 9, 16, 82 SW 485, 487. The court said in that case (one having to do with the withdrawal of an accepted resignation with the consent of a city council): 'Official robes cannot be put off and assumed at the pleasure of individuals or officers.' Appellant could not, we think, take the office of chairman under an understanding that he might, if he so elected, stand aside and attack the legal existence of the office he held."

See also *People exrel Stephen v. Hanifan*, 1880, 96 Ill. 420, and *Shell v. Cousins*, 1883, 77 Va. 328, in which latter case the court said that if the acceptance of an incompatible office to which the party elected has a good title operates as a surrender or deprivation of the former office, the acceptance of an office to which he has no title will have the same legal effect. In *Rex v. Hughes*, 1826, 5 Barn. & C. 886, 108 Eng. Reprint, 329, 8 Dowl. & R. 708, it was held that although the election of a capital burgess to the office of alderman was void, and he was ousted therefrom, he was not thereby restored to the office of capital burgess, which was irrevocably vacated by his acceptance of the office of alderman.

On the other hand, unless an officer was "*duly* appointed" to a second office he never filled it, and consequently could not, by reason of his acceptance of that office, have vacated an office already held. *Rex v. Day*, 1829, 9 Barn. & C. 702, 109 Eng. Reprint, 261. I agree. I can't see how an officer can be considered *duly* appointed to an office which is not constitutional.

Rex v. Day seems to me more logical, particularly as applied to a legislator constitutionally elected by constituents who, in addition to himself, do not reasonably expect that his good faith service in that high office will somehow result in his unforeseen ouster. This issue should if possible be resolved as it was in *Ablett v. Hartzer*, 1945, 237 Iowa 1, 20 NW2d 877, where the Des Moines city animal collector did not regard himself as a regular police officer, and the temporary duties he performed as such upon return from military service did not alter his civil service status as animal collector. The court concluded, under the circumstances, that partly because he did not pay membership or assessment for the policemen's fund, he did not really become a civil service patrolman.

Our Supreme Court said in *Security Sav. Bank of Valley Junction v. Connell*, 1924, 198 Iowa 564, 200 NW 8:

"It has been often said of an unconstitutional legislative act that it is 'is not a law; it confers no right; it imposes no duties; it affords no protection; *it creates no office;* it is, in legal contemplation, as in opera-

tive as though it had never been passed.' (Citations). 'Where a statute is adjudged to be unconstitutional it is as if it had never been. Rights cannot be built up under it.' Cooley's Con. Lim. (7th Ed.)" (Emphasis added).

If that portion of the statutory section requiring service by legislators on the Capitol Planning Commission is, as I believe, unconstitutional, your office thereon was never created.

Perhaps the case which best supports my theory that the portions of the statute requiring legislators to serve on the Capitol Planning Commission are unconstitutional is *Fulkerson v. Refunding Board*, 1941, 201 Ark. 957, 147 SW2d 980. The Arkansas legislature provided by statute for creation of a Refunding Board to refund its outstanding bonded road indebtedness by issuance and sale of bonds for that purpose. The law provided that 3 Senators and 5 Representatives be among the members of the Board. The Court held the legislators ineligible to serve because of their membership in the General Assembly "which enacted the legislation."

"It is thought to be contrary to both the spirit and the letter of the Constitution for the General Assembly to create an office or board or other State agency, and then to fill the place thus created with one or more of its own members. The recent case of [citation] announces the policy of the Constitution and laws of this State to separate and keep distinct the departments of government.

"Now, of course, the General Assembly has the right to appoint such committees or commissions, to be composed, in part or wholly, of its own members, to make investigation and report upon any matter related to the discharge of their legislative duties. But the discharge and performance of the details of Act No. 4 is not a legislative matter. * * * and we think it is beyond the power of the General Assembly to confer executive powers upon its members, and we think the appointment of members of the General Assembly to membership on the Refunding Board is in contravention of the spirit, if not the letter, of the sections of the Constitution above referred to. [Four separate provisions of the Arkansas constitution were claimed violated.] The General Assembly has the power to name the persons, whether officials or not, who shall execute the laws it may pass. For instance, it was held in the case of Cox v. State, 72 Ark. 94, 78 S.W. 756, 105 Am. St. Rep. 17, that the Act providing that the members of the Board of State Capitol Commissioners should be elected by the two Houses of the Legislature is constitutional. But it is a different matter to say that the Legislature might create a capitol or other commission, and thereafter elect its members to the places created. * * * "

Fulkerson then went on to hold that because of a severability clause in the Act, the constitutional ineligibility of the legislators to serve did not affect or invalidate the Act and the remaining persons named "will constitute the Board, with all the powers conferred upon it."

Fulkerson was followed in *Smith v. Faubus*, 1959 Ark., 327 SW2d 562, which upheld an Act creating a State Sovereignty Commission in which the speaker of the House of Representatives was specified to be an ex officio member, 2 state senators were to be appointed by the president of the Senate, and 3 representatives appointed by the speaker of the House. In all there were 12 members of the Commission, the Governor, Attorney General and Lieutenant Governor, also being named

as ex officio members. The legislative members were "removed" by the unconstitutionality of the provision requiring their appointment:

"Thus, the Commission is left composed of the Governor, the Attorney General, and the Lieutenant Governor, as ex officio officers, and the three citizens appointed by the Governor under §2(b) of the Act."

The successful challenge to the portion of the statute naming legislative members in *Faubus* was based on Art. V, §10, of the Arkansas Constitution: "No Senator or Representative shall, during the term for which he shall have been elected, be appointed or elected to any civil office under this State."

Under a similar provision of the Tennessee Constitution, a provision of an Act of the Tennessee legislature providing for appointment of one legislator to a 5 member road commission was held unconstitutional in *State v. Phillips*, 1929 Tenn., 21 SW2d 4:

"Membership in a commission vested with power to locate public roads and expend public money is a place of trust, in the ordinary meaning of the term. (Citation). It follows, in our opinion, that the General Assembly was prohibited by the Constitution from designating one of its members as one of the road commissioners named in the act under consideration.

"It does not follow, however, that the act itself must be struck down as unconstitutional. The result is only that one of the designated members of the road commission is ineligible to serve. Power to appoint or elect another in his stead is vested by the act in the quarterly county court, by the provision that "any change" in the commission shall be made by that body. This power could be exercised if one or more of the members of the commission named in the act should refuse to serve or become ineligible for any cause, and we see no reason why it should not be exercised to replace a person ineligible under the Constitution because of his status at the time he was named by the General Assembly."

Our Iowa Code contains a severability clause applicable to every Act of the General Assembly:

"4.1 *Acts or statutes are severable.* If any provision of an Act or statute or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act or statute which can be given effect without the invalid provision or application, and to this end the provisions of the Act or statute are severable."

For these reasons, the provisions of §§18A.1 and 18A.2 requiring appointment of two members of the senate and two members of the house to the Capitol Planning Commission are unconstitutional and may be excised and severed therefrom without rendering the remainder of these sections, or the statute, invalid. This means the size of the Commission is reduced ipso facto from 9 members to 5: 3 residents of the state appointed by the governor, and the director of general services or his designee and the state architect as ex officio members.

Had the §§18A.1 and 2 *not* required service of senators and representatives on the Capitol Planning Commission, they would have been fully constitutional. Article III, §21, would not have operated to make you ineligible to that office because, at the time of your appointment, it was not an "office of profit" and the emoluments thereof had not been raised during your term. Had you accepted appointment under those circum-

stances, you would have ipso facto vacated or impliedly resigned your senate seat. Nor did Article III, §1, prevent your acceptance of appointment to the Commission if you resigned from the General Assembly, but merely made that office incompatible with your Senate seat.

If I am wrong in my conclusion that §§18A.1 and 2 are partially unconstitutional, you have unwittingly vacated your seat in the General Assembly and, for reasons which will appear, you could not lawfully take your seat without first being re-elected thereto and resigning the lucrative office you would, in that event, hold on the Commission — an office which has become lucrative since your appointment. But I think you did not take an unconstitutional office and hence did not vacate your Senate seat.

INELIGIBILITY

Let us look again at Article III, §§21 and 22. They provide:

§21. "No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this State, *which shall have been created, or the emolumnts of which shall have been increased during such term*, except such offices as may be filled by elections by the people. (Emphasis added.)

§22. *"No person holding any lucrative office* under the United States, or this State, or any other power, *shall be eligible to hold a seat in the General Assembly*: but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative." (Emphasis added.)

Article III, §21, makes a legislator *ineligible* to take an office of profit during his term *only* if the office was created, or its emoluments were increased, during the legislator's term. In this respect it is unlike similar constitutional prohibitions in many states which unqualifiedly prohibit a legislator from taking any other office during his term (or from holding two offices at the same time) whether or not the second office was created, or its emoluments increased, during his term (perhaps unless elected to the second). In those states the legislator is *always* ineligible to take the other office during his term even if he resigns in order to do so, (at least unless he is *elected* to the second office). In your case, had the emoluments of office on the Capitol Planning Commission been increased during your term, you would not have been eligible to take that office of profit during your term *whether you resigned your term or not* (unless perhaps the legislature *reduced* the emoluments to a level equal to or less than they were prior to your term in the Senate— as I understand Congress did in the case of the appointment of Attorney General William Saxbe from the U.S. Senate). In other words, Article III, §21, of the Iowa Constitution becomes an "eligibility statute" only if the office was created or the emoluments increased during the legislator's term. Otherwise, our constitution does not prevent a legislator from resigning and taking another office even during the term to which he was elected.

In this respect, Article III, §21, is unlike constitutional provisions applicable to Judges of the Supreme and District Courts. Article V, §18, Constitution of Iowa, as amended in 1962, provides in pertinent part:

"Judges of the Supreme Court and District Court shall be *ineligible* to any other office of the state while serving on said court and for two years thereafter, except that District Judges shall be eligible to the office of Supreme Court Judge." (Emphasis added.)

Article III, §21, does not contain the word "ineligible" although that is nevertheless its meaning if the office was created or the emoluments increased during the legislator's term. And even if a legislator *is* ineligible on that account during his term, the ineligibility ends with his term — not two years after the term as in the case of the Judges. As we have previously noted, the provisions of our constitution are in pari materia and construed together.

On the other hand, Article III, §*22*, is always an "eligibility to take office provision" and it in fact uses that word. No person holding any lucrative oqice is *eligible* to hold a seat in the General Assembly. This does not mean he cannot run for and be elected to the General Assembly while holding a lucrative office, but only that he cannot hold a seat in the General Assembly while holding a lucrative office. To take a seat in the General Assembly, he must not only be elected but he must vacate the lucrative office before he takes it. In my opinion, by qualifying, and being sworn, for a seat in the General Assembly he ipso facto vacates the lucrative office if, indeed, the lucrative office is constitutional. But I could be wrong and there is no reason why any legislator should take the risk of my possible error on this point if he is more interested in his legislative seat than the lucrative office. He should, in that event, file a formal resignation from the latter. That is what I myself would do if elected to the legislature. It can't hurt a legislator to do so because he cannot perform functions in both the legislative and executive departments anyway. And such a formal resignation prior to qualifying could possibly save the legislative seat if I am wrong and the lucrative office is constitutional. Of course, If I am right that a statute creating an office to which a legislator must be appointed is unconstitutional in that respect, resignation is implied by qualifying after re-election.

Conversely, of course, Article III, §22, operates with Article III, §1, to prohibit a legislator from taking a lucrative office without resigning.

CONCLUSION

All of the logic and consequences of this opinion, most of which is directed toward the Capitol Planning Commission, apply with equal force to the Alcoholism Commission and to any other agency, board or commission in the Executive Department. I have attempted insofar as possible to explain the law herein in a way that any legislator appointed to any such commission can apply it to the known facts of his own circumstances.

For the benefit of all concerned, last week I asked State Comptroller Marvin Selden to temporarily withhold issuance of warrants in payment of per diem to any legislator serving on any such agency, board or commission in the Executive Department until these matters could be resolved. I believe he should continue to withhold such warrants.

In *Saxby v. Sonnemann*, 1925, 318 Ill. 600, 149 NE 526, the attorney general of Illinois contracted to employ a legislator as a deputy or

assistant attorney general in the executive department of Illinois government. The Court held this a violation of a separation of powers provision of the Illinois constitution similar to our Article III, §1, stating that "the people intended to provide, and did provide, a complete separation of the branches, and completely deprived a member of one branch of authority to exercise any power properly belonging to the other two branches" and found that the legislator "was in nowise entitled to compensation" for his services in the attorney general's office. He was thus compelled to repay $3,541.61 in warrants drawn in his favor as compensation. The Court held:

"The appellant [legislator-deputy attorney general] contends that if he was an officer he was a de facto officer only, and having actually performed the duties, the salary which has been paid to him during the time he was in that position cannot be recovered by or for the state. This is the rule in the case of a de facto officer. People v. Schmidt, 281 Ill. 211, 117 NE 1037, LRA 1918C, 370. The provision of the Constitution is that one who is a member of one department of the state government cannot exercise the *powers* of another department. *There are no circumstances under which a member of the legislature could become a de facto officer of the executive department.*" (Emphasis added.)

63 Am Jr 2d 940, Public Officers and Employees §511 says:

"The courts are agreed that in the absence of statutory permission, salary which has been paid a de facto officer cannot be recovered by the public authorities, at least where, acting in good faith, he actually rendered the services for which he was paid. But where the compensation was received without right or authority of law, it appears that a recovery may be had, as where authorities created an office without statutory authority to do so, or payment was made without authority of law and no services were rendered."

In *Monaghan v. School District No. 1, Clackamas County*, 1957 Oregon, 315 P. 2d 797, a member of the Oregon state house of representatives who was also a teacher in the public schools was a "person charged with official duties" as legislator and also exercised the "functions" (as distinguished from "powers") of the executive department of the state in his capacity as a school teacher (a mere employee and not a public officer) in violation of a constitutional provision almost identical in both number and name to the provisions of Article III, §1, of the constitutions of Indiana and Iowa:

"The powers of the Government shall be divided into three seperate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the *functions* of another, except as in this Constitution expressly provided." (Emphasis added.)

The court held that the teacher exercised "functions" of the executive department and thus was not eligible for employment as a school teacher so long as he held his position as a member of the house of representatives.

In *State ex rel Mitchell v. Holmes, State Auditor*, 1954, Montana, 274 P.2d 611, an injunction was upheld enjoining the State Auditor from approving claims, and issuing warrants therefor, and the state treasurer from paying same, as made by 8 members (4 from each house) of the

Thirty-third Legislative Assembly of the State of Montana, "assuming to act as the '*Montana Legislative Council,*' and enjoining the members from acting as such council. The Court held that the Act creating the Legislative Council was violative of the oath of office taken by the legislators as well as *six* specific prohibitions of the Montana Constitution! Among these, two were similar to our Article III, §§1 and 21. Justice Anderson, later to become attorney general and Governor of Montana wrote a dissent persuasive to another Justice who concurred therein. But the Act creating the council was held unconstitutional and the legislators not to be able to serve thereon or to be compensated for their services. See also *Romney v. Barlow*, a Utah 1970 case cited supra at pages 10 and 19 of this opinion.

Quite naturally, questions arise pertaining to the recovery by the State of compensation paid to you in the past for your services on the Capitol Planning Commission, and to other legislators for their services on various boards and commissions, as well as the validity of their votes and actions, and the actions of the boards and commissions, while they were performing as members of such.

So too, questions arise with reference to school teachers and other governmental employees serving in the General Assembly, as well as the very validity of Iowa's 16 member legislative council itself. §§2.49 to 2.66, Code 1973. Doubtless many others not mentioned will also arise herefrom.

These questions were not raised in your opinion request nor do I venture any opinion on them because they are beyond the scope of what you have asked. But upon examining these other issues in the context of the many authorities we have considered in answering your questions, and in the light of my duty as attorney general, we became concerned with the myriad complex issues and ramifications they present. My reference to these last authorities bearing on some of these ancillary questions, and my need to examine them and others further, may help explain why issuance of this opinion was so long delayed after your request was called to my attention two weeks ago. It was essential that we be as accurate as possible.

The questions go to the very foundation of our government and are as important as any we've ever considered. I would hope that we can cooperate with you and the General Assembly to review these issues and make our government work properly within the confines of the constitutional mandates and prohibitions we are all sworn to uphold.

January 27, 1975

MOTOR VEHICLES — Trailers. §§321.1(9), 321.1(10), 321.123(5), Code of Iowa, 1973. Trailers of the "gooseneck" or "5th wheel" variety must be registered for the combined gross weight of the trailer and towing vehicle. (Voorhees to Branstad, State Representative, 1-27-75) #75-1-7

Terry E. Branstad, State Representative: You have requested an attorney general's opinion concerning §321.123(5), Code of Iowa, 1973, as amended by HF 1091, Acts of the 65th General Assembly, Second Session. Specifically, you asked whether motor trucks registered at six tons or less

pulling "goose neck" or "5th wheel" trailers must be registered for the combined gross weight of the truck and trailer combination.

Section 321.123(5), as amended by HF 1091, provides:

"5. Motor trucks *or truck tractors* pulling trailers or *semitrailers* shall be registered for the combined gross weight of the motor truck *or truck tractor* and the trailer *or semitrailer;* except that motor trucks registered for six tons or less pulling trailers, *as defined in section three hundred twenty-one point one (321.1), subsection nine (9), of the Code,* registered as provided in this section shall not be subject to registration for the gross weight of such trailer." (Emphasis added to portion added by HF 1091)

Section 321.1(9) provides:

"9. 'Trailer' means every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that no part of the weight rests upon the towing vehicle."

It would appear that "goose neck" or "5th wheel" varieties of trailers do not fall within the above definition since part of the trailer's weight rests upon the towing vehicle. These types of trailers appear to be of the "semitrailer" variety. "Semitrailer" is defined by §321.1(10) as ". . . every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that some part of its weight and that of its load rests upon or is carried by another vehicle."

The legislature has specifically provided an exemption to the requirements of §321.123(5) for trailers as defined by §321.1(9). This exemption does not apply to semitrailers. Since the goose neck or 5th wheel trailer is not a trailer as defined by §321.1(9), it is our opinion that pickup trucks pulling goose neck trailers must be registered at their combined gross weight.

January 29, 1975

STATE OFFICERS AND DEPARTMENTS: Secretary of Agriculture; licensing; slaughter houses, dealers, brokers and operators. Chapter 172A, Code of Iowa, 1975. Each plant of a company engaged in the business of slaughtering live animals or receiving or buying live animals for slaughter must be separately licensed. Any persons purchasing animals for a broker or dealer is therefore an "agent" and is required to comply with Chapter 172A. A subsidiary corporation is a separate entity and the parent is not liable for its debts. Each plant must furnish the proof of financial responsibility required by §172A.4. (Turner to Lounsberry, 1-29-75) #75-1-8

The Honorable Robert H. Lounsberry, Secretary of Agriculture: You have requested an opinion of the attorney general with respect to the provisions of §172A.2, Code of Iowa, 1975, providing for the licensing of persons to act as dealers, brokers or operators of slaughter houses. Specifically, you inquire:

"1. Does a parent company whose home office is outside the state of Iowa have to have a license for each of its subsidiaries operating in Iowa? I would like to specifically ask about the plants of American Beef Packers, Inc., operating at Oakland, Iowa, and their subsidiaries Beef Land, Inc., at Council Bluffs, Iowa, and American Pork, Inc., at Harlan, Iowa.

"2. Does the Iowa law require each plant to have an operator's license and does it also require each person who acts as a buyer of cattle, calves, swine or sheep as that term is used in the industry to obtain a license?

"3. Under 172A.4 PROOF REQUIRED. Is the parent company whose office is located outside the state of Iowa responsible for the debts of each of its subsidiaries operating in Iowa?

"4. Pursuant to 172A.4 is separate financial proof required from the main office for a specific operation separate from their overall financial operation?"

§172A.1(2) states:

"2. 'Person' means an individual, partnership, association or corporation, or any other business unit."

§172A.1(3) states:

"3. 'Dealer' or 'Broker' means any person determined by the department of agriculture to be engaged in the business of slaughtering live animals or receiving or buying live animals for slaughter."

Finally, §172A.2 states that "no person shall act as a dealer or broker without first being licensed."

It appears that the plants located in Council Bluffs, Oakland and Harlan are independent "business units" within the meaning of §172A.1 (2). Each plant maintains separate records and operates independently of the others. Each plant is therefore a "person" within the meaning of §172A.1(2) and a "dealer" or "broker" within the meaning of §172A.1 (3). Each plant must therefore be licensed under §172A.2.

§172A.1(4) defines "agent" as a "person engaged in the business of buying livestock for slaughter on behalf of any dealer or broker." This is in reference to the persons known in the cattle industry as cattle buyers. It should be noted that the word livestock includes "calves, swine or sheep." §172A.1(1). Any persons purchasing these animals for a broker or dealer is therefore an "agent" and is required to comply with Chapter 172A of said Code.

§172A.2 requires that the "agent" of a dealer-broker obtain a license. This statute states in relevant part:

"No agent shall act for any dealer or broker unless such dealer or broker is licensed, has designated such agent in his behalf, and has notified the department of the designation in his application for license or has given official notice in writing of the appointment of the agent and requested the department to issue to the agent an agent's license."

Thus, in answer to your first two questions, it is my opinion that under Chapter 172A the plants operated by American Beef Packers in Council Bluffs, Oakland and Harlan, Iowa, *each* require a separate license. Chapter 172A also requires each person who acts as a "buyer" of cattle, calves, swine or sheep as that term is used in the industry to obtain a license.

In answer to your third question, as to the liability of the parent corporation of a wholly owned subsidiary (whether located inside or outside Iowa — it makes no difference where located), the general rule is that a subsidiary corporation or a corporation owned by one person is

a separate entity and the parent and sole owner is not liable for the debts of the subsidiary. The leading Iowa case regarding the liability of a parent corporation for the subsidiary is *Fairbanks Morse and Co. v. District Court in and for Palo Alto County*, 1933, 215 Iowa 703, 247 NW 203. *Fairbanks* holds that a "subsidiary corporation" is a corporation in which another corporation owns at least a majority of the shares. Ownership of the majority of shares in one corporation by another corporation does not make the latter liable for contracts of the former. Subsidiary corporations of common parent corporations are not liable on each others' contracts. To make a parent corporation or one of its subsidiaries liable on employment contracts of another, subsidiary or agency relationship must exist. The power of one corporation to make employment contracts as agent of its parent corporation and of an allied corporation may be shown by oral or written contract of the agency, either express or implied. *Randolph Food Inc. v. McLaughlin*, 1962, 253 Iowa 1258, 115 NW2d 868.

In addition there are other times when the parent is liable. If the parent does not itself treat the subsidiary as a separate entity by maintaining separate records and not intermingling funds there is no reason why third parties should be required to treat it as a separate organization. Some cases have held that they will not respect the separate entities when there has been an artificial division of a unity of a business as when a single economic unit is divided into several separate corporations. Courts have sometimes stated that they will "pierce the corporate veil" on the basis of inadequate capitalization, a failure to provide a sufficient *quid pro quo* for limited liability. Since in instances of inadequate capitalization the shareholder is attempting to throw all of the risks of loss onto the creditors while attempting to keep the gains, there is a good theoretical basis for denying him the privilege of limited liability. Nevertheless, those cases which purport to be decided on this theory always seem to have other grounds for disregarding the separate corporate entity, such as intermingling of funds, failure to comply with the corporate formalities, etc. Therefore, the written guarantee by a parent for the payment of the purchase price of all livestock purchased by its wholly owned subsidiary, executed by the parent's president is not in and of itself a sufficient financial statement guarantee that could be used in lieu of a bond or deposit. Therefore, the department should request a financial statement of the subsidiary specifically or require a bond or deposit. Then in answer to your third question it is my opinion, that a subsidiary corporation is a separate entity and the parent is not liable for its debts and, therefore, the guarantee by the parent is not acceptable. If the Department allowed the parent corporation to guarantee the debts of a subsidiary then a greater burden of proof would be imposed on the Department of Agriculture to "pierce the corporate veil" in the future for the purposes of proof of financial responsibility.

We have previously concluded that each plant is a person for the purposes of licensing under Chapter 172A and each must separately apply for a license as a dealer or broker. It is the plant which is the applicant and as such each plant must furnish the proof of financial responsibility required by §172A.4.

February 6, 1975

COUNTIES AND COUNTY OFFICERS: County Hospital Board of Trustees — Chaps. 75 and 347A, Code of Iowa, 1973. The mere fact that a trustee is a bank president and shareholder where the hospital deposits some of its money, and where hospital bonds are purchased and sold is not sufficient to create a conflict of interest. (Blumberg to Allison, Ass't. County Attorney for Muscatine County, 2-6-75) #75-2-1

Mr. Gary Allison, Assistant County Attorney: We have received your opinion request of December 20, 1974, regarding a possible conflict of interest with a member of the Board of Trustees of the County Hospital. According to your facts, one of the trustees is the President and shareholder of a bank in the county. The hospital has deposited some of its funds in that bank as it has with all banks in the county. In addition, the bank in question purchases and sells bonds on behalf of the hospital. Your question is whether this fact situation generates a conflict of interest.

We can find no statute including those within Chapter 347A of the Code (under which the hospital was created) which would prohibit the above activity. The Legislature has obviously not seen fit to prohibit this activity. The mere fact that hospital funds are deposited in that bank is of no consequence since the hospital deposits funds in each bank in the county. Nor does the fact that the bank purchases and sells hospital bonds create a prohibited conflict since such bonds are sold upon notice and bidding procedures, and in some instances upon an election. See, Chap. 75 and §347A.2, Code of Iowa, 1973. Unless there is substantial evidence that a conflict exists, we are not about to declare the above facts a prohibited conflict.

Accordingly, we are of the opinion that the facts, as stated above, do not constitute a conflict of interest.

February 6, 1975

CITIES AND TOWNS: Donations — Iowa Const. Art. III, §31. A city may not donate money for a private purpose. (Blumberg to Casjens, Lyon County Attorney, 2-6-75) #75-2-2

Mr. David W. Casjens, Lyon County Attorney: We have received your opinion request of November 1, 1974, relative to Home Rule for municipalities. According to the facts, as given by you, the residents of Rock Rapids are conducting a fund drive to raise money for a private hospital and clinic. You ask whether the Board of Trustees of the Rock Rapids Municipal Utilities may donate city funds for that hospital.

A similar question was handled by this office in 1972 O.A.G. 395. There, we held that a city could not make a donation to a private recreation facility based upon case law and Article III, Section 31 of the Iowa Constitution. Said provision states that no public money shall be appropriated for local or private purposes unless approved by a two-thirds vote of the General Assembly. The fact that Home Rule is applicable

makes no difference. Public policy along with the Constitution prohibit such expenditures.

Accordingly, we reaffirm our prior opinions. A city may not donate money for a private purpose.

February 11, 1975

PODIATRISTS; PHYSICIANS AND SURGEONS; HOSPITALS: — §149.5, 1973 Code of Iowa, as amended by Ch. 1143, §1, Acts of the 65th G.A., 2nd Sess. Apodiatrist may perform surgery on the foot, not amounting to amputation thereof, where a general anesthetic is given to the patient by a physician or other authorized licensed person. However, the podiatrist may not himself administer a general anesthetic to the patient but may administer a local one on the foot. (Haskins to Kelly, 2-11-75) #75-2-3

Honorable Kevin Kelly, State Senator: You request our opinion on the following matter:

"Chapter 149 of the 1973 Code of Iowa relates to the Practice of Podiatry. Code Section 149.5 reads, in relevant part, as follows:

"'A license to practice podiatry shall not authorize the licensee to amputate the human foot or perform any surgery on the human body at or above the ankle, or use any anesthetics other than local.'

"An amendement to that section, which was enacted during the last session of the Legislature (House File 325) is not relevant to this inquiry.

"A question has now been raised concerning the definition and interpretation of the phrase, 'or use any anesthetic other than local,' and so, thereby request an opinion of the Attorney General of Iowa concerning said language; specifically, does 149.5 of the 1973 Code of Iowa, as amended.

"(1) Prohibit any allowable surgery to be performed by a podiatrist in a hospital operating room where any general anesthetic is given to the patient:

(a) Anesthetic administered by medical doctor?

(b) Anesthetic administered by other licensed person?

"(2) Prohibit the podiatrist from administering any type of any anesthetic other than local?"

As you indicate, Ch. 149, 1973 Code of Iowa, relates to podiatrists. §149.5, 1973 Code of Iowa, as amended (in a here immaterial way) by Ch. 1143, §1, Acts of the 65th G.A., 2nd Sess., states in relevant part:

"Amputations—general anesthetics. A license to practice podiatry shall not authorize the licensee to amputate the human foot or perform any surgery on the human body at or above the ankle, or use any anesthetics other than local."

Clearly, the above section permits a podiatrist to perform surgery on the foot but may not amputate the same. And neither the above section nor any other section prohibits a podiatrist from performing such surgery where a general anesthetic is given to the patient by a physician or other authorized licensed person. (We make no attempt here to define the exact scope of the class of other authorized licensed persons). However, the section does serve to prohibit the podiatrist himself from administering a general anesthetic. We interpret the words of the section "anesthetic other than local" to include a general anesthetic.

The podiatrist may, though, under the section, administer a local anesthetic on the foot.

In sum, a podiatrist may perform surgery on the foot, not amounting to amputation of the foot, where a general anesthetic is given to the patient by a physician or other authorized licensed person. However, the podiatrist may not himself administer a general anesthetic to the patient but may administer a local one on the foot.

February 11, 1975

STATE DEPARTMENTS — General Services. Director of General Services has implied power to lease necessary office space for state departments and to contract for reasonable lease terms although funds to pay such rentals have not been appropriated. (Nolan to Munson, Legislative Fiscal Bureau, 2-11-75) #75-2-4

Charlotte Munson, Legislative Fiscal Bureau: This is written in response to your request for an opinion on a lease of office space in the Liberty Building, Des Moines, Iowa, by General Services for the use of the State Banking Department. You stated your inquiry is prompted by a question raised by Senator Willits and Representative Griffee, Co-Chairmen of the State Departments Appropriations Committee, as to whether such lease can be broken because, due to the three year term of the lease, it commits funds not yet appropriated.

In *Kersten Co., Inc. v. Department of Social Services,* 1973, 207 N.W.2d 117, the Iowa Supreme Court has held that the state may be sued for an alleged breach of contract. There, the Court has said at page 120:

". . . Of course, the State expects the other contracting parties to honor these obligations. It can-and does-seek redress when they fail to do so.

"Just as certainly they expect faithful performance by the State; but they have been left without adequate recourse when these expectations are unfulfilled. We do not consider a request for legislative allowance to be a satisfactory remedy for breach of a contractual duty. We agree with those courts which say the State, by entering into a contract, agrees to be answerable for its breach and waives its immunity from suit to that extent. To hold otherwise, these courts say, is to ascribe bad faith and shoddy dealing to the sovereign. They are unwilling to do so; and we are too."

The authority to enter into a lease of office space for state departments is premised on necessary and implied powers as indicated by the Attorney General in an opinion of April 30, 1929:

"While no express authority is given by statute to the Executive Council to rent quarters for departments of government outside of the buildings owned by the State of Iowa yet, as the administrative body of the state government, it is my notion that if it is impossible to house the various departments of state government within the building owned by the state, it becomes the duty of the council as a matter of business to see that all departments are so housed that they may function as intended by legislative enactment, and for this purpose would have the right to incur the necessary expense if funds are provided that can be used to rent quarters, if necessary, to house the departments." 1930 O.A.G., 101, 102.

The Director of General Services has been given the statutory duty of assigning office space in the state capitol and other buildings for all

executive state agencies. §19B.8, Code of Iowa, 1975. Accordingly, he has implied power to make determinations as to the reasonableness of a term of lease, the necessity for the acquisition of any such leased premises and may bind the state as its agent by entering into such lease. It should be noted that the rent for leased state office space is not paid in advance. Consequently although state revenues may be effectively encumbered thereby there is not a prohibited expenditure of funds in excess of appropriations within the meaning of §8.38, Code of Iowa, 1975.

February 12, 1975

CONSTITUTIONAL LAW: Art. VII, §1, Art. III, §24 — Constitution of Iowa; §§7.9, 29C.1, 29C.9, 251.3 and Chap. 251, 29C, Code of Iowa, 1973. The civil defense department has statutory authority to accept federal funds made available to aid in civil defense. An appropriation of state matching funds required by the terms of the federal Disaster Relief Act of 1974 to meet disaster related necessary expenses or needs of individuals or families adversely affected by a major disaster may not be implied from Chapter 29C or Chapter 251. (Beamer to Mezvinsky, U.S. Representative and Hinman, Acting Director, Iowa Civil Defense Division, 2-12-75) #75-2-5

Honorable Edward Mezvinsky, United States Representative; Mr. Donald C. Hinman, Acting Director, Iowa Civil Defense Division: Each of you has requested an opinion of the Attorney General as to:

1. May the state legally grant money to individuals or families?

2. May the state legally borrow money from the Federal Government?

The questions asked relate to PL 93-288, the federal "Disaster Relief Act of 1974", specifically §408 which reads in part:

"(a) The President is authorized to make a grant to a State for the purpose of such State making grants to meet disaster-related necessary expenses or serious needs of individuals or families adversely affected by a major disaster in those cases where such individuals or families are unable to meet such expenses or needs through assistance under other provisions of this Act, or from other means. The Governor of a State shall administer the grant program authorized by this section.

"(b) The Federal share of a grant to an individual or a family under this section shall be equal to 75 per centum or the actual cost of meeting such an expense or need and shall be made only on condition that the remaining 25 per centum of such cost is paid to such individual or family from funds made available by a State. Where a State is unable immediately to pay its share, the President is authorized to advance to such State such 25 per centum share, and any such advance is to be repaid to the United States when such State is able to do so. No individual and no family shall receive any grant or grants under this section aggregating more than $5,000 with respect to any one major disaster."

The question you pose in regard to §408 of the Act is of concern to many states. The problem centers on prohibitions in various state constitutions and statutes with respect to state financial participation in federal programs. In considering your first question regarding monetary grants to private individuals, it should be remembered that:

"Constitutional questions cannot be controlled or decided by reference to the amount of money which the state stands to gain or lose. Economic benefits, in quantitative terms, are not entitled to weight in determinations of a strictly legal nature. Moreover, constitutional questions do not

depend on the wisdom of the project, or the good or evil effects of the program proposed." (1967 O.A.G. 132)

It should also be kept in mind that although we are dealing with the federal government that the state is not exempt from the direction of its constitution and operation of its statutes. 1967 O.A.G. 132 citing *State, ex rel. Western Bridge and Construction Co. v. Marsh State Auditor,* et al., 111 Nebr. 185, 196 N.W. 130 (1923); *State v. Lucas,* et al., 390 Ohio 519, 85 N.E.2d 154 (1949).

PL 93-288, §408 provides that the governor of a state shall administer the federal grant. §7.9, 1973 Code of Iowa authorizes the governor to designate an agency of the state to administer funds provided by Congress. §7.9 provides as follows:

"The governor is authorized to accept for the state, the funds provided by any Act of Congress for the benefit of the State of Iowa, or its political subdivisions, provided there is no agency to accept and administer such funds, and he is authorized to administer or designate an agency to administer the funds until such time as an agency of the state is established for that purpose."

Chapter 29C, 1973 Code of Iowa, established the civil defense division in the State of Iowa. That division has statutory authority to accept federal money for use in civil defense. §29C.1 provides as follows:

"* * * The civil defense division shall be responsible for the administration of civil defense matters, to include emergency resource planning, in the state of Iowa and co-ordinate available services in the event of major man-made disasters or in the event of natural disasters including, but not limited to, hurricanes, tornadoes, windstorms or floods."

§29C.9 is a statute through which federal funds may be made available to aid in civil defense. §29C.9 provides in relevant part as follows:

"Whenever the federal government or any agency or officer thereof shall offer to the state, or through the state to any political subdivision thereof, services, equipment, supplies, materials, or funds by way of gift, grant or loan, for purposes of civil defense and emergency planning, the state, acting through the governor, or such political subdivision, acting with the consent of the governor and through its executive officer or governing body, may authorize any officer of the state or of the political subdivision, as the case may be, to receive such services, equipment, supplies, materials, or funds on behalf of the state or such political subdivision, and subject to the terms of the offer and the rules and regulations, if any, of the agency making the offer."

Although §29C.9 enables the division of civil defenses to receive benefits provided by the federal government, it does not provide for a direct appropriation of state money to match federal funds for the purpose of disaster-related expenses of private individuals as referred to in §408 of the federal Act.

Authority must be found to support a request to grant state funds to private individuals. A conflict immediately arises because of Article VII, Section I of the Iowa Constitution. Said section provides:

"The credit of the State shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation; and the State shall never assume, or become responsible for, the debts or liabilities of any individual, association, or corporation, unless incurred in time of war for the benefit of the State."

The Iowa Constitution provides the authority for appropriation of state funds. Article III, §24, of the Constitution of Iowa reads as follows:

"Appropriations. No money shall be drawn from the treasury but in consequence of appropriations made by law."

§29C.9 does contain language which raises a question as to legislative intent in creating an implied appropriation. That section provides that the offer of funds, services, and the like, must be taken "subject to the terms of the offer." The terms of the offer in §408 require the state to provide twenty-five percent of the expense in order to participate in the program. Could this requirement be construed as an implied authorization to use state money to meet the obligations under the federal Act?

As background for examining this possibility, the general rules with respect to appropriations and disbursements of public funds are cited in 1967 O.A.G. 132:

"Authority of law is necessary to an expenditure of public funds. As a rule, money cannot be drawn from the treasury of a state except in pursuance of a specific appropriation made by law. The power of the legislature with respect to the public funds raised by general taxation is supreme, and no state official, from the highest to the lowest, has any power to create an obligation of the state, either legal or moral, unless there has first been a specific appropriation of funds to meet the obligation. State Constitutions frequently contain provisions to the effect that no money shall be paid out of the treasury of the state, or from any of its funds, or from any of the funds under its management, except in pursuance of an appropriation by law. The object of such provisions is to prohibit expenditures of the public funds at the mere will and caprice of those having the funds in custody, without direct legislative sanction therefor. Am.Jur. Public Funds, §42. See also Mason-Walsh-Atkinson-Kier Co. v. Dept. of Labor and Industries, et al., 5 Wash.2d 508, 105 P.2d 832, 835.

"In specific terms, an 'appropriation' may be defined as an authority of the legislature, given at the proper time and in legal form to the proper officers, to apply a distinctly specified sum from a designated fund out of the treasury, in a given year, for a specified object or demand against the state. In general terms, an appropriation is the act of setting money apart formally or officially for a special use or purpose by the legislature in clear and unequivocal terms in a duly enacted law. . . . Id. §43.

"No particular form of words is necessary to constitute a valid appropriation, but the legislative intent to appropriate funds must be clear and certain; it cannot be inferred by a construction of doubtful acts or ambiguous language. It is sufficient if an intention to make an appropriation is clearly evinced by the language of the statute, or that no effect can be given to the statute unless it is considered as making the necessary appropriation. . . . Id. §45.

"It is apparent from the foregoing that in certain situations, an appropriation may be inferred. Thus an appropriation may, in some states, be implied where 'an intention to make an appropriation is clearly evinced by the language of the statute, or that no effect can be given to the statute unless it is considered as making the necessary appropriation'."

The closest case of giving judicial recognition to the doctrine of implied appropriation is *Graham v. Worthington,* 259 Iowa 845, 145 N.W.2d 626 (1966). In this case, which deals with the constitutionality of the Iowa Tort Claims Act, Chapter 25A, 1973 Code of Iowa, upholding the consti-

tutionality of the Act, the court treats §25A.11 as amounting to an express appropriation and limited itself to deciding that an appropriation to be constitutional need not be specific in amount. Section 25A.11 provides in relevant part as follows:

". . . but any such amount or part thereof which cannot be paid promptly from such appropriations shall be paid promptly out of any money in the state treasury not otherwise appropriated."

This language was held to be sufficient to constitute an appropriation under Iowa law.

In *Prime v. McCarthy,* 92 Iowa 568, 61 N.W. 220 (1894) the statute in question granted to the executive council the authority to pay "such other necessary and lawful expenses as are not otherwise provided for." Although the statute did not contain the word "appropriations" the court held that where expenses were shown to be necessary and lawful the authority of the council to pay these expenses was an appropriation of funds not otherwise appropriated.

After reviewing the *Worthington* case and the *Prime* case, the following conclusion was made in 1967 O.A.G. 132 as to the implications of §7.9, 1973 Code of Iowa:

"Certainly it would require extending *Worthington* well beyond its holding to conclude therefrom that §7.9, which makes no mention of state funds or the purposes or sources thereof, and contains no direction of payment, nevertheless impliedly appropriates from the state treasury the unlimited sums necessary for the Governor to participate in any and all federal programs requiring matching funds."

Applying the above discussion to the situation at hand, we find that §29C.9 is similar to §7.9, 1973 Code of Iowa, in that it also makes no mention of state funds or the source thereof. Furthermore, like §7.9, §29C.9 also does not contain any limitation on the funds that would be used from the state treasury. The language of §29C.9 is insufficient to create an appropriation or implied appropriation as is the language of §7.9.

Chapter 251, 1973 Code of Iowa, dealing with the State Emergency Relief Administration also provides a procedure for accepting and administering funds for emergency relief. The Emergency Relief Administration is established in the Department of Social Services. The role of that administration in relation to the civil defense department is unclear since both divisions of government deal with emergency resource planning and funding.

The purposes of Chapter 251 are set forth in Section 251.3, 1973 Code of Iowa. In relation to state funding, the state directors of the Emergency Relief Administration are to use the following procedure found in Section 251.3(3):

"* * *

"3. Make such reports of budget estimates to the governor and to the general assembly as are required by law, or are necessary and proper to obtain appropriations of funds necessary for relief purposes and for all the purposes of this chapter."

Section 251.3(3) merely requires a report of a budget estimate as to what funds are necessary for relief purposes. Chapter 251 does not contain any language evincing an intention to make an appropriation.

Neither Chapter 29C, Chapter 251, nor any other provision of the Iowa law authorizes an appropriation for disaster relief for private individuals or infers such an appropriation.

In absence of such an appropriation, the governor or any governmental agency is without authority to provide the state funds required by PL 93-288.

Inasmuch as it has been determined that the state cannot legally grant money to individuals or families, it is not necessary to resolve your second question regarding whether the state may legally borrow from the federal government.

February 12, 1975

CITIES AND TOWNS: Low-Rent Housing Agencies — §§403A.2, 403A.5 and 403A.10, Codes of Iowa, 1973 and 1975. A low-rent housing agency may not make payments to a municipality in lieu of special assessments. Such an agency may make payments in lieu of taxes to the state or a state public body. (Blumberg to Junkins, State Senator, 2-12-75) #75-2-6

The Honorable Lowell Junkins, State Senator: We have received your opinion request of January 30, 1975, regarding Chapter 403A of the Code. In your fact situation a low rent housing agency entered into an agreement with the City of Fort Madison. In that agreement is a statement that the Housing Agency would be exempt from special assessments by the city. In another provision, the Housing Agency agreed that in consideration of the city putting in streets, it would pay to the city what it would have been assessed if the land had been privately owned. You specifically asked:

"My question then is, under Chapter 403A.10 can the City expect the Housing Agency to pay special assessments if the Agency has, as apparently happened, agreed to do so in the cooperation agreement or does Chapter 403A.10 forbid the Agency from paying or, in other words, forbids the City from assessing those special assessments and, if so, the agreement to pay in the cooperation agreement would be null and void as being in conflict with the State law?"

Section 403A.10 in both the 1975 and 1973 Codes, provides:

"The property acquired or held pursuant to this Chapter is declared to be public property . . . and such property is hereby declared to be exempt from all taxes and special assessments of the state or of any state public body. In lieu of taxes on such property a municipality may agree to make payments to the state or a state public body (including itself) as it finds consistent with the maintenance of the low-rent character of housing projects . . ."

The first part of the above section provides that property within a low-rent housing project is exempt from *all* taxes and special assessments. Therefore, the city cannot require the Housing Agency to pay a special assessment. The Legislature has used both "taxes" and "special assessment" in the section, which normally would imply a distinction between the two. Special assessments are local taxes for a specific benefit, and in

that vein they are taxes. However, the Supreme Court of Iowa has held that there is a distinction between "taxes" and "special assessments" when they are both used in the same context. See, *In re Trust of Shurtz*, 1951, 242 Iowa 448, 454, 46 N.W.2d 559; *Bennett v. Greenwalt*, 1939, 226 Iowa 1113, 1133-1134, 286 N.W. 722. Thus, even though a special assessment is a local and specific tax, when used within §403A.10 it means something different than "taxes."

Pursuant to your facts, low-rent housing is administered by an agency separate from the city and county. This is permissable under §403A.5. The last part of §403A.10 provides that a *municipality* may make payments in lieu of taxes. "Municipality" is defined in §403A.2(1) as a city or county. Obviously, a Low-Rent Housing Agency is not a municipality under a strict interpretation of that definition. However, under §403A.5, such an agency is vested with all the powers that a municipality has regarding Chapter 403A. In addition, it is apparent that a municipality may make payments to itself in lieu of taxes if said municipality exercised the powers of Chapter 403A. This means that the municipality may take from one fund (low-rent housing) and give to another fund. If a municipality exercising the powers of Chapter 403A may make such payments then a low-rent housing agency acting in place of the municipality must be able to do the same.

Accordingly, we are of the opinion that a low-rent housing agency may not make payments to a municipality (a city or county) in lieu of special assessments. However, such an agency may make payments in lieu of taxes to the state or a state public body as defined in §340A.2(2).

February 12, 1975

CITIES AND TOWNS: Authority of Mayor to Vote — §366.4, Code of Iowa, 1973; §§362.2(18), (20), 372.4, and 380.4, Code of Iowa, 1975. Under a Mayor-Council form of government pursuant to §372.4, 1975 Code of Iowa, a mayor may vote to break a tie only on motions. An ordinance and resolution may only pass upon a vote of the majority of the entire council. Where there are six on the council a majority would constitute four. (Blumberg to Griffee, State Representative, 2-12-75) #75-2-7

Honorable William B. Griffee, State Representative: We have received your opinion request of January 14, 1975, regarding the authority of a Mayor to break a tie vote of the Council. Under your facts, the city in question has adopted Division IV of the New City Code (Chapter 372, 1975 Code of Iowa), and has a Mayor-Council form of government. However, Division VI of the New City Code has not been adopted. Therefore, Chapter 366, 1973 Code of Iowa, controls. You specifically asked:

"The question is, therefore, what powers does the Mayor of a City have when the vote of the entire membership of the City Council results in a tie?

"My second question is, therefore, is the majority vote of the entire membership of the City Council of this town required before a resolution or ordinance may be adopted?"

The city in question has a council consisting of two councilmen elected at large and one councilman from each of four wards, making a total of six councilmen.

Section 372.4, 1975 Code of Iowa, provides in part:

"A City governed by the mayor-council form composed of a mayor and a council consisting of two councilmen elected at large, and one councilman from each of four wards, may continue until the form of government is changed . . . While a City is thus operating with an even number of councilmen, the mayor may vote to break a tie vote on *motions.*" [Emphasis added]

Section 366.4, 1973 Code of Iowa, provides that no resolution or ordinance, except as otherwise provided, shall be adopted without a concurrence of a majority of the entire council. Section 380.4, 1975 Code of Iowa, requires that the passage of an ordinance, amendment or resolution requires a majority vote of the council.

In a mayor-council form of government under the new City Code, the mayor may only vote to break a tie vote on motions. This is from a direct reading of the second paragraph of that section (quoted above), and the last sentence of the third paragraph which reads that the mayor is not a member of the council and may not vote as one. In connection with §366.4, 1973 Code, or §380.4, 1975 Code, which require a majority vote of the *council* for the passage of a resolution, or ordinance, it is obvious that a mayor in the Mayor-Council form of government may not vote on resolutions or ordinances.

An ordinance is defined in §362.2(18), 1975 Code, as a City law of a general and permanent nature. See also, *Cascaden v. City of Waterloo*, 1898, 106 Iowa 673, 77 N.W. 333. "Resolution" and "Motion" are defined in §362.2(20), 1975 Code, as a council statement of policy or a council order for action to be taken. The vote on a motion, however, need not be recorded. There is a discussion in 5 E. McQuillan, Municipal Corporations §§15.02-15.07 (1969) regarding Motions and resolutions. There it is stated that a resolution is less formal than an ordinance, deals with matters of a temporary or special nature, and is simply an expression of opinion or mind concerning some particular item of business within the municipality's official cognizance. It is usually ministerial in nature, relating to the administrative business of the municipality. A motion confers authority to do a specific act. Generally there is little difference between a resolution and a motion, and the terms are sometimes synonymous. For example, proceedings in the form of a motion duly carried and entered on record are frequently held to be equivalent to a resolution. *Mill v. Denison*, 1946, 237 Iowa 1335, 25 N.W.2d 323.

Accordingly, we are of the opinion that a mayor in the Mayor-Council form of government may only vote to break a tie on a motion. Even though motions and resolutions are synonymous, where a statute provides (either directly or indirectly) for a resolution or a recorded vote a mayor may not vote. On all matters concerning ordinances or resolutions there must be a majority vote of *all* the council members, which excludes the mayor, before passage. In your case where there are six council members a majority for passage would constitute four.

February 18, 1975

MOTOR VEHICLES — Trailers. §§321.1(16), 321.18(3), 321.123(5), Code of Iowa, 1975. A goose neck trailer is not an "implement of husbandry". (Voorhees to Freeman, State Representative, 2-18-75) #75-2-8

Representative Dennis L. Freeman: You have requested an Attorney General's opinion on the following question:

"Chapter 1186, Laws of the 65th G.A., 1974 session, page 682, attempts to combine trailers and tractors for licensing under gross weight. However, section 321.18, sub 3, specifically exempts implements of husbandry.

"The facts are that a farmer owns goosemeck (sic) trailer which is pulled behind his pickup. The trailer is used *exclusively* by the owner in the conduct of his agricultural operations.

"The question is, can the state through the county treasurer insist upon licensing gooseneck trailers under gross weight of pickup and trailer if the trailer is used solely by the owner in the conduct of his agricultural operations."

In a recent opinion, we held that pickup truck and gooseneck trailer combinations must be registered at their combined gross weight. (See Voorhees to Branstad, State Rep. 1-27-75; #75-1-7). However, we did not consider the applicability of the "implement of husbandry" exception contained in §321.18(3), Code of Iowa, 1975.

Section 321.1(16) defines "implement of husbandry" as:

". . . every vehicle which is designed for agricultural purposes and exclusively used, except as herein otherwise provided, by the owner thereof in the conduct of his agricultural operations. . . ."

From this definition, we conclude that a goose neck trailer is not an implement of husbandry since it was not "designed for agricultural purposes". It would appear that these trailers are designed to haul property generally, and are not limited by design to agricultural use. Thus a goose neck that was used by a farmer would no more be exempted from registration than would his car or truck. The test is whether the vehicle was designed for agricultural purposes — not what its use in any particular case happens to be.

February 6, 1975

COUNTIES AND COUNTY OFFICERS: Court Expense Fund; permissable under §444.10, Code of Iowa, 1973. Where the Polk County Board of Supervisors has been ordered by the district court to provide space in the Polk County Courthouse for all court related services required by the Uniform Trial Court Act, the court expense fund may be used to supplement the amount budgeted from the general fund to pay the expenses of the custodial staff, maintenance, and repair, including boiler repairs (but not boiler replacement) in the courthouse building which will be used exclusively for the courts and court related functions. (Haesemeyer to Holliday, Judge of the District Court, 2-6-75) #75-2-9

The Honorable Gibson C. Holliday, Judge of the District Court, Fifth Judicial District of Iowa: Reference is made to your letter of December 17, 1974, in which you request an opinion of the Attorney General and state:

"Since the enactment of the Uniform Trial Court bill, Polk County has experienced great difficutly in providing for the courts out of the general fund levy.

"Presently Polk County is paying the City of Des Moines $50,000.00 for the use of the Municipal Court building and the City Jail. Polk County must vacate said building on or before July 1, 1975. Space for

the Associated District Court and Magistrates must be made available in the present Polk County Courthouse which will necessitate the moving of all non-court related offices from the courthouse which funding from the general fund for rent, utilities, etc., presents one of our serious problems.

"Since the courts will utilize the entire space of the courthouse along with the Sheriff, County Attorney, and Clerk, it would appear reasonable to me that the court expense fund and would be the proper fund to pay the expense of operating the building. The Sheriff and County Attorney would still be paid from the general fund.

"We are fully aware of the Attorney General's Opinion of 1948 and others subsequent pertaining to the court expense fund, but we feel that the Unified Trial Court bill puts a different light upon the use of the court expense fund levy. Quite obviously the general fund levy of 3 mills in this county is insufficient to pay all expenses incidental to the maintenance and operation of the courts.

"In reading the language of the statute, it appears quite definite that the additional court fund levy is necessary to pay all court expenses chargeable to the county. We feel that this statute overrides Code Section 332.9 and 332.10 which are cited in the 1948 opinion in view of the fact that nothing in said sections relates to the courts.

"Since the 1975-1976 budget must be certified on or before February 15, 1975, we urgently need an immediate re-examination of your prior opinions and a current opinion with reference to the following question:

"'May Polk County, Iowa, whose Board of Supervisors has been ordered by the District Court to provide space in the Polk County Courthouse for all court related services required by the Uniform Trial Court Act pay the expenses of the custodial staff, maintenance, and repair, including boiler repairs to the courthouse building which will be used exclusively for the courts and court related functions from the court expense fund?'

"Also, may the salaries of the District Court Bailiff be paid from the court expense fund?

"It is further requested that you review the matter of paying salaries of the District Court Bailiff from the court expense fund since prior to the enactment of the Unified Trial Court Act the county was authorized under the provisions of Code Section 602.49 of the 1971 Code to pay one-half the salaries of Municipal Judges, Clerks, Bailiffs, and all deputies from the court expense fund.

"Would it not be logical that bailiff's salaries for District Courts likewise be paid from the court expense fund?"

Section 444.10, Code of Iowa, 1973, which authorizes the creation of the court expense fund, provides:

"In any county where the rates herein fixed for ordinary county revenue are found to be insufficient to pay all expenses incident to the maintenance and operation of the courts, the board of supervisors may create an additional fund to be known as court expense fund, and may levy for such fund such rate of taxes as shall be necessary to pay all court expenses chargeable to the county. Such fund shall be used for no other purposes, and the levy therefor shall be dispensed with when the authorized levy for the ordinary county revenue is sufficient to meet the necessary county expenditures including such court expenses."

This statutory provision in one form or another has been in the Code since 1909, and over the years has been the subject of a number of opinions of the Attorney General interpreting and construing its pro-

visions. As originally enacted by Chapter 79, 33rd G.A. (1909) what is now §444.10 provided:

"(I)n any county where by reason of extraordinary or unusual litigation the rates herein fixed for ordinary county revenue are found to be insufficient to pay the same, the board of supervisors may create an additional fund to be known as 'court expense fund', and may levy for such fund, such rate of taxes, as shall be necessary to pay all court expenses chargeable to the county. Such funds shall be used for no other purpose, and the levy therefor shall be dispensed with, when the authorized levy for the ordinary county revenue is sufficient to meet the necessary county expenditures including such court expenses. Provided, further, that the levy for the purpose of providing an additional fund shall not exceed three mills on a dollar."

According to 1925-26 O.A.G., p. 207, the county attorneys' commission and fines collected cannot be paid out of the court expense fund. Under 1932 O.A.G., p. 81, ordinary expenditures payable by a county for any purpose in connection with any particular piece of litigation may be taxed against the court expense fund, but the cost of routine business of the court such as furnishing quarters therefor, equipment thereof, and the payment of salaries of court officials, would not be taxable against the fund. According to 1932 O.A.G., p. 117, the sheriff's mileage and expense, including expense of maintaining prisoners in the county jail, county attorney's expenses and fees of justices of the peace and constables in connection with enforcement of the criminal laws cannot be paid from the court expense fund but must be paid from the county general fund. 1938 O.A.G., p. 166, holds that the cost of installing steel filing cases in the clerk's office was chargeable against the general fund rather than the court expense fund. It should be noted however that all of these opinions of the Attorney General preceded the 1943 amendments which in our view substantially changed the meaning of the provision and liberalized the permissible uses to which the court expense fund could be put.

In 1943, the 50th General Assembly enacted Chapter 217, §1 of which provides:

"Section seven thousand one hundred seventy-two (7172), Code 1939, is amended by striking from line two (2) the following: 'by reason of extraordinary or unusual litigation', and by striking from line four (4) the following: 'the same,' and inserting in lieu thereof the following: 'all expenses incident to the maintenance and operation of the courts'."

In 1948 O.A.G., p. 224, the 1943 amendment was extensively discussed and the conclusion reached that,

"Though this language standing alone, would indicate that all court expense necessary to the maintenance and operation of the courts was to be paid out of this fund, it appears clear when reading the whole act and amended statute that no fundamental change in the law was intended or effected."

With this conclusion, we do not agree. Some meaning and purpose must be given to the legislative deletion of the words "extraordinary or unusual litigation" and the addition of the words "all expenses incident to the maintenance and operation of the courts". In our opinion, whereas prior to 1943, use of the court expense fund was limited to costs arising by reason of extraordinary or unusual litigation; subsequent to 1943, the court expense fund could be used for any purpose incident to the main-

tenance and operation of the courts. However, we do agree with the conclusion reached in the 1948 opinion that,

"It was not the intention of the legislature to permit use of the court expense fund as an aid to or a part of the general county fund, but it was to be used as an auxiliary fund, and only when necessary to supplement the county general fund appropriated for court use . . . ."

We also concur in the following condition placed on the court expense fund by the 1948 opinion:

"In any county where the rates herein fixed for ordinary county revenue are found to be insufficient to pay all expenses incident to the maintenance and operation of the courts. This means that part ordinarily budgeted for the courts."

Accordingly, in answer to your specific questions, it is our opinion that notwithstanding the provisions of §332.9 and 332.10, Code of Iowa, 1975, relating to the duty of the board of supervisors to furnish office space and supplies to the various county offices, where, as here, the Polk County Board of Supervisors has been ordered by the district court to provide space in the Polk County Courthouse for all court related services required by the Uniform Trial Court Act, the court expense fund may be used to supplement the amount budgeted from the general fund to pay the expenses of the custodial staff, maintenance, and repair, including boiler repairs (but not boiler replacement) in the courthouse building which will be used exclusively for the courts and court related functions.

It is true of course, as you point out, that under §602.49 of the 1971 Code, one-half of the salaries of municipal judges, clerks, bailiffs and all deputies were payable from the court expense fund. However, no corresponding provision was made in the Unified Trial Court Act and we must conclude that had the legislature intended that the salaries, or part of them, of district court bailiffs were to be paid from the court expense fund they would have so provided in that Act. Under §337.7, Code of Iowa, 1975:

"The sheriff shall attend upon the district court judges, district associate judges, and judicial magistrates of his county, and while they remain in session he shall be allowed the assistance of such number of bailiffs as the judge or magistrate may direct. They shall be appointed by the sheriff and shall be regarded as deputy sheriffs, for whose acts the sheriff shall be responsible."

The bailiffs are appointed by the sheriff and are regarded as deputy sheriffs and they should be paid from the same funds as other deputy sheriffs, notwithstanding the fact that their duties are principally court related.

February 24, 1975

TAXATION: Military Service Tax Exemption: Servicemen on active duty during Vietnam Conflict: §§427.3 and 427.5, Code of Iowa, 1973, Chapter 1231, §128, Acts of 65th General Assembly (1974). Section 427.3(4), as amended by §128 of Chapter 1231, requires, as a prerequisite for the military service property tax exemption on account of active military duty during the time period of the Vietnam Conflict, that the exemption claimant be an honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged soldier, sailor, marine, or nurse of the Vietnam Conflict beginning August 5, 1964, and ending

on June 30, 1973. (Griger to Bittle, State Representative, 2-24-75) #75-2-10

Hon. Edgar H. Bittle, State Representative: You have requested an opinion of the Attorney General on the question of whether an Iowa resident who had served on active duty in the military forces of the United States during the Vietnam Conflict and who is currently so serving, having never been terminated from an active duty status, is eligible in the year 1975 to receive the military service property tax exemption contained in §427.3(4), Code of Iowa, 1973, as amended by §128(4) of Chapter 1231, Acts of the 65th General Assembly (1974). You state that the Department of Revenue has advised assessors that the exemption claimant must be "separated" from the military service at the time he or she files an exemption application. You contend that the Department's advice is erroneous, particularly in view of certain portions of §427.5, Code of Iowa, 1973, which provide:

"In case the owner of the property is in active service in any of the armed forces of the United States or of this state, including the nurses corps of the state or of the United States, said claim may be executed and delivered or filed by the owner's spouse, parent, child, brother, or sister, or by any person who may represent him under power of attorney."

On February 13, 1975, the Department of Revenue revised its position concerning separation from military service in a communication sent to all assessors, a copy of which is enclosed with this opinion. In its communication, the Department states:

"The important fact to keep in mind is that such claimants must have been actually separated from the service for an identifiable period of time. In spite of the presence of a valid discharge document, an individual would not be eligible if he is on active duty at the time of filing application and was never actually separated from active duty.

Example 1: John Jones served on active duty from January 1, 1965, to January 1, 1972. Jones was honorably discharged. In January, 1975, Jones reentered the service. John Jones *is eligible* to claim a military service exemption although he is on active duty at the time of application for the exemption.

Example 2: Bob Smith entered the service January 1, 1965, served four years and re-enlisted and is presently still on active duty having never actually been physically separated from the service. Although Smith may possess the same documentation of completed active duty as John Jones (Example 1), he is *not eligible* because he has never actually been separated from active duty."

Based upon our discussions with Revenue Department personnel, the Department's position now is that one who claims the military exemption on the basis of active duty in the United States military forces during the time period of the Vietnam Conflict must have been separated from such active duty as distinguished from being totally separated from the United States military forces. Based upon your opinion request, you would contend that the Department's position is correct with reference to example 1, but erroneous with reference to example 2. Accordingly, this opinion will deal with that issue. In doing so, it will be helpful to trace the pertinent legislative history of §§427.3 and 427.5 of the Iowa Code.

Prior to 1949, the military exemption contained in §427.3 was limited to honorably discharged soldiers, sailors, marines or nurses of specifically enumerated wars and conflicts, the last of these being the second world war. Section 427.5 required the claimant to file his or her honorable discharge with the county recorder of the county in which the exemption was claimed.

In 1949, the legislature enacted Chapter 196, Acts of 53rd General Assembly, which amended §427.3(4) and which expanded eligibility for the exemption for those who served in the active military service during specifically enumerated wars and conflicts, commencing after World War I and ending with World War II, by allowing the exemption for an "honorably separated, retired, furloughed to a reserve, placed on inactive status, or" discharged soldier, sailor, marine or nurse. Chapter 196 also amended §427.5 by allowing the filing with the county recorder of the military "certificate of satisfactory service, order transferring to inactive status, reserve, retirement, or order of separation from service," as well as the honorable discharge.

Section 427.3(4), Code of Iowa, 1950 and 1954, as amended, was the subject for interpretation by the Iowa Supreme Court in *Jones v. Iowa State Tax Commission*, 1956, 247 Iowa 530, 74 N.W.2d 563. The Court stated at 247 Iowa 536:

"The conclusion is inescapable that plaintiff was never on what is known as 'active service' so that he comes within the letter of the statute."

Further, the Court stated at 247 Iowa 538-9:

"The language of our statute herein involved is also quite indicative of what is intended. *The exemption is quite evidently meant to benefit those who have been in the military or naval service, but have been in some manner released or terminated therefrom.* Plaintiff does not contend that he is now a soldier, but only that he was so during a part of the period of the second world war. *The statute recognizes certain situations which change the status from that of a present soldier to that of a former soldier.* Thus one who has been a soldier and who has been honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged may claim the exemption. Implicit in the statute is the thought that one who is 'placed on inactive status' is no longer a soldier." (emphasis supplied).

Consequently, it is clear that the military exemption created in §427.3(4) of the 1950 and 1954 Codes was not available to those who had never been released or terminated from active duty in the armed forces of the United States.

In 1955, the legislature amended §427.3(4) and expanded the military exemption to include those honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged soldiers, sailors, marines or nurses of "the Korean conflict at any time between June 27, 1950 and July 27, 1953, both dates inclusive." See Chapter 218, Acts of 56th General Assembly. That same legislature amended §427.5 to allow the exemption claim to be filed by the "property owner's spouse, parent, child, brother, or sister, or by any person who may represent him under power of attorney," provided the property owner was serving in the active service in the armed forces of the United States or the State of Iowa. See Chapter 219, Acts of 56th General Assembly. However, this amend-

ment to §427.5 did not, in our opinion, create a new class of eligible military service tax exemption for several reasons. First, those eligible for the exemption must have been military personnel as defined in §427.3. Second, we take judicial notice of the fact that many "honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged "soldiers, sailors, marines, or nurses of the second world war were again serving on active duty during and after the Korean conflict and, as such, were faced with a physical impossibility or great inconvenience in applying for their World War II exemption. The legislature, therefore, quite evidently wanted to assure that these second world war veterans could obtain their tax exemptions by reason of military service in that war and, thus, §427.5 was amended to allow others to claim the exemptions on these veterans' behalf. In the construction of statutes, the object to be accomplished and the evils and mischiefs to be remedied must be ascertained in reaching a reasonable interpretation which best effectuates the purpose of the law. *Iowa National Industrial Loan Co. v. Iowa Department of Revenue*, 1974, Iowa, 224 N.W.2d 437.

In 1967, the legislature enacted Chapter 351, Acts of 62nd General Assembly. This legislation amended §427.3(4) by changing the ending date of the Korean conflict to January 31, 1955, and also expanded the military service exemption to honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged soldiers, sailors, marines, or nurses of "the Vietnam Conflict beginning August 5, 1964, and ending on the date the armed forces of the United States are directed by formal order of the government of the United States to cease hostilities, both dates inclusive." In an opinion of the Attorney General, found in 1968 O.A.G. 925, it was opined that for 1968 property taxes, payable in 1969, one who was serving honorably on active duty in Vietnam, but who had never been honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged from military service was not eligible for the military exemption.

In 1969, the legislature amended §427.3(4) when it enacted Chapter 253, Acts of the 63rd General Assembly, First Session, and extended the military service exemption to "those serving honorably on active military duty during the time of the Vietnam Conflict." Consequently, it is clear that, by enacting Chapter 253, the legislature gave the exemption to not only former soldiers, sailors, marines and nurses who had served on active duty during an enumerated war or conflict, including the Vietnam Conflict, but also to those soldiers, sailors, marines and nurses, whether or not having been previously terminated or released from active duty, who were presently serving on active military duty during the Vietnam Conflict. See 1970 O.A.G. 199, 1970 O.A.G. 293. To our knowledge, this 1969 amendment was the first attempt by the legislature to grant the military exemption to those who had *never* been released or terminated from active military duty. Obviously, the legislature never considered that §427.5, as previously amended in 1955, granted the tax exemption to those who had never been separated from active duty. To say otherwise, is to make Chapter 253 superfluous. However, statutes are not normally construed so as to be rendered superfluous. *Georgen v. Iowa State Tax Commission*, 1969, Iowa, 165 N.W.2d 782.

In 1974, the legislature again amended §427.3(4) by its enactment of §128 of Chapter 1231, Acts of the 65th General Assembly, Second Session, to be effective on January 1, 1975. Prior to this amendment, the relevant portion of §427.3(4) of the 1973 Code provided for the Vietnam Conflict military exemption as follows:

"The property, not to exceed five hundred dollars in taxable value of any honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged soldier, sailor, marine, or nurse of . . . or the Vietnam Conflict beginning August 5, 1964, and ending on the date the armed forces of the United States are directed by formal order of the government of the United States to cease hostilities, both dates inclusive, as well as those serving honorably on active military duty during the time of the Vietnam Conflict."

Section 128 of Chapter 1231 amended §427.3(4) in relevant part to now provide for the exemption as follows:

"The property, not to exceed *one thousand eight hundred fifty-two* dollars in taxable value of any honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged soldier, sailor, marine, or nurse of the second World War . . . or *those who served on active duty during* the Vietnam Conflict beginning August 5, 1964, and ending on *June 30, 1973, both dates inclusive, and as defined in chapter sixty-four (64), section three (3), Laws of the Sixty-fifth General Assembly, 1973 Session.*" (emphasis supplied on language of amendment in Session Laws).

Section 128 of Chapter 1231 clearly accomplishes several purposes. First, it converts the value of the exemption to conform to the provisions of Chapter 1231 which make the assessed value of taxable property one hundred percent of actual value. Second, an ending date is now stated for the Vietnam Conflict of June 30, 1973. Third, "active duty" is defined by reference to the Vietnam Veterans Bonus Act, now found in Chapter 35C, Code of Iowa, 1975. This definition of "active duty" is found in §35C.2 of the 1975 Code and it excludes from the term "active duty for training purposes only." As a consequence those reservists and national guardsmen who were considered to be eligible for the military service tax exemption for the Vietnam Conflict, as stated in §427.3(4) of the 1973 Code solely because of their participation in "active duty for training in federal status" will lose this exemption commencing in the year 1975. See 1970 O.A.G. 293 for a discussion of this active duty for training concept and eligibility for the military service exemption.

Based upon the legislative history of §427.3(4), the military exemption, since 1949, with the exception of the Vietnam Conflict, has been historically made available to those who were honorably terminated from military service or active duty and was not available to those who had never been transferred from an active duty status. Moreover, it is clear that the active military service must have been during an enumerated war or conflict as listed in §427.3(4). Section 128 of Chapter 1231 did not change the requirement that the active military service must have been performed during an enumerated war or conflict. However, the question is whether §128 of Chapter 1231 now requires the exemption claimant to be an honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged soldier, sailor, marine or nurse of the Vietnam Conflict beginning August 5, 1964, and ending June 30, 1973.

In this regard, we are of the opinion that the language "those who served on active duty during the Vietnam Conflict" is vague and ambiguous. Hence, this language, considered in isolation from the general purpose of the exemption, might mean that in the event that the claimant served on active duty during the Vietnam Conflict, the exemption is available, notwithstanding that the claimant has, in no manner, been terminated or separated from the United States armed forces or placed in an inactive status as defined in §427.3(4). On the other hand, the legislature might have intended to revert to the original purpose of the §427.3(4) exemption, as previously noted in *Jones v. Iowa State Tax Commission*, supra. After all, when the legislature, in 1969, departed from the historical purpose of the military exemption as only available to those who had formerly served on active duty during an enumerated war or conflict, it did so clearly by expressly making the exemption available to those who had formerly served on active duty and to those currently on active duty during the Vietnam Conflict. It is reasonable to assume that in the event that the legislature, in enacting §128 of Chapter 1231, intended to continue the departure from the historical purpose of the exemption, it would have clearly so stated.

Section 427.3 is a tax exemption statute. The Iowa Supreme Court has strictly construed this exemption and resolved all doubts against the exemption claimant. *Jones v. Iowa State Tax Commission*, supra; *Lamb v. Kroeger*, 1943, 233 Iowa 730, 8 N.W. 2d 405; *Cress v. Iowa State Tax Commission*, 1953, 244 Iowa 974, 58 N.W. 2d 831. In *Lamb v. Kroeger*, supra, the Court stated at 233 Iowa 733:

"This law is a tax exemption law. As such it must be strictly construed to the end that no property shall be exempt except that which clearly and fairly falls within the express terms of the law."

In *Jones v. Iowa State Tax Commission*, supra, the Court stated at 247 Iowa 535:

"It will be noted the claim for exemption must be within both the letter and the spirit of the statutes; a showing that it is within the spirit only will not suffice."

As noted, §128 of Chapter 1231 is ambiguous. As such, it is proper to consider the legislative history of the military service tax exemption and its historical purpose. See §4.6, Code of Iowa, 1975. Applying the various rules of statutory construction, heretofore discussed herein, it is the opinion of this office that §128 of Chapter 1231 requires, as a prerequisite for the exemption on account of active military duty during the time period of the Vietnam Conflict, that the exemption claimant be an honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged soldier (includes members of United States air force), sailor, marine, or nurse of the Vietnam Conflict beginning August 5, 1964, and ending on June 30, 1973. As a consequence, it is our opinion that the Department of Revenue has properly stated that the serviceman, as depicted in its Example 2 per its communication, dated February 13, 1975, is not eligible for the military exemption.

February 24, 1975

STATE OFFICERS AND DEPARTMENTS: ALCOHOLISM: NEPOTISM, MERIT EMPLOYMENT; IPERS: — §§19A.3, 71.1, 97B.1, 97B.2,

97B.41(2), 97B.41(3), 125.12(4), 125.13(1), 125.13(4), 125.13(5), 125.18, 125.27, 125.28, 1975 Code of Iowa. Officers and employees of private alcoholism treatment facilities under Ch. 125, 1975 Code of Iowa, are not subject to the state Nepotism Act, the Merit Employment Act, or the Public Employees' Retirement Act. (Haskins to Voskans, Director, Division on Alcoholism, 2-24-75) #75-2-11

Jeff Voskans, Division on Alcoholism, State Department of Health: You request our opinion as to whether officers and employees of alcoholism treatment facilities under Ch. 125, 1975 Code of Iowa, are subject to the Nepotism Act, the Merit Employment Act, and the Public Employees Retirement Act. It is our opinion that officers and employees of private facilities are not so subject.

Ch. 125, 1975 Code of Iowa, provides for a comprehensive state alcoholism treatment program through local facilities. A facility may not be operated until it is approved by the state commission on alcoholism. *See* §123.13(1), 1975 Code of Iowa. Once approval is obtained, the director of the division enters into a written agreement with the facility to provide part of the funding of the facility. *See* §125.27, 1975 Code of Iowa. The counties are responsible for the remainder of the funding. *See* §125.28, 1975 Code of Iowa. Facilities are required to file with the director, upon his request, data, statistics, schedules, and information on their operation. *See* §125.13(4), 1975 Code of Iowa. The approval by the commission of a facility may, after hearing, be suspended or revoked. *See* §125.13(5), 1975 Code of Iowa. Facilities can be either public or private. *See* §125.13(11), 1975 Code of Iowa ("a public or private alcoholism treatment facility or program"). It is only the private facilities with which we are here concerned. §125.12(4), 1975 Code of Iowa, obligates the director to "maintain, supervise, and control" all facilities operated by him. We interpret this section to apply only to public facilities, and not to private facilities, because only the public facilities can be operated by the director. The private facilities are operated by independent contractors and are subject only to regulation by the director and the division. Private facilities are organized by groups of private citizens and positions in them are not created by specific statutes. However, commitment of alcoholics may be made to both public and private facilities. *See* §125.18, 1975 Code of Iowa.

The Nepotism Act, §71.1, 1975 Code of Iowa, applies only to the holder of a "public office or position", elected or appointed. That section states:

"It shall hereafter be unlawful for any person elected or appointed to any *public office or position under the laws of the state* or by virtue of the ordinance of any city in the state, to appoint as deputy, clerk, or helper in said office or position to be paid from the public funds, any person related by consanguinity or affinity, within the third degree, to the person elected, appointed, or making said appointment, unless such appointment shall first be approved by the officer, board, council, or commission whose duty is to approve the bond of the principal; provided this provision shall not apply in cases where such person appointed receives compensation at the rate of six hundred dollars per year or less, nor shall it apply to persons teaching in public schools, nor shall it apply to the employment of clerks of members of the general assembly." [Emphasis added]

The holder of a "public office or position" is a "public officer." *See State v. State Road Dept.*, 173 So.2d 693, 696 (Fla. 1965). The term "public officer" is defined in *Vander Linden v. Crews*, 205 N.W.2d 686, 688 (Iowa 1973) as follows:

"This court considered fully the question of the status of one holding a public position in our early case of State v. Spaulding, 102 Iowa 639, 72 N.W. 288, 289. Also, in State v. Taylor, 260 Iowa 634, 144 N.W.2d 289, 292, we said five essential elements are required by most courts to make a public employment a public office, namely: (1) the position must be created by the constitution or legislature, or through authority conferred by the legislature; (2) a portion of the sovereign power of government must be delegated to that position; (3) the duties and powers must be defined directly or impliedly by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law; and (5) the position must have some permanency and continuity and not be only temporary and occasional. See also cases cited in State v. Taylor, supra."

As indicated, positions in private facilities are not created pursuant to specific statutes. And a portion of the sovereign power is not delegated to such positions. The fact that alcoholics can be committed to private facilities does not mean that the facilities exercise sovereign power. *See Galeon v. House of Good Shepherd*, 122 N.W. 631, 633 (Mich. 1909). Nor do officers of private facilities act independently of superior power other than the law, for at all times, they are subject to the regulation of the director and division. Hence, the officers of private facilities are not "public officers" and thus are not subject to the Nepotism Act.

The Merit Employment Act (or the "merit system") applies only to "employees of the state and to all positions now existing or hereafter established" subject to certain exceptions not here applicable. *See* §19A.3, 1973 Code of Iowa. The Public Employees' Retirement Act (IPERS) is applicable only to employees of the state, counties, municipalities, school districts, and their subdivisions, *see* §§98B.41(2), 97B.41(3), 1975 Code of Iowa, that is, "public employees", *see* §§97B.1, 97B.2, 1975 Code of Iowa. Are employees of private facilities "employees of the state" or "public employees?" The question is not quite the same as for the Nepotism Act, because there is a distinction between "public employees" and "public officers". *See* 63 Am. Jur.2d *Public Officers and Employees*, §11, at 633. However, the distinction does not produce a different result in the present case. In order for employees of a private facility to be "public employees" or "employees of the state", the private facilities themselves would have to be governmental agencies, in the case of the Public Employees' Retirement Act, or state agencies, in the case of the Merit Employment Act. In order for a body to be a governmental or state agency, it must exercise sovereign or governmental functions. *Cf.* 73 C.J.S. *Public Administrative Bodies and Procedure*, §6, at 299. Merely because the facilities may serve a public purpose does not mean that they exercise governmental functions. *See Bush v. Aiken Electric Cooperative*, 85 S.E.2d 716, 718 (So. Car. 1955); *Audubon Park Commission v. Board of Commissioners*, 153 So.2d 574, 579 (La. 1963). And the mere fact that private facilities are regulated by the director and division does not make them governmental agencies. Under the Fourteenth Amendment of the United States Constitution, "state action" does not arise

merely by reason of extensive state regulation of an entity. *See Jackson v. Metropolitan Edison Co.*, U.S. , 95 S.Ct. 449, 453, L. Ed.2d (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-177, 92 S.Ct. 1965, 1973, 39 L. Ed.2d 627 (1972). Nor does the receipt of funds by the facilities from the division necessarily make them governmental or state agencies. *See Kerr v. Enoch Pratt Free Library*, 54 F.Supp. 514, 525 (D. My. 1944). As indicated, private facilities are independent contractors, and independent contractors do not become state agencies simply because they receive state funds for services rendered. Significantly, such facilitis are not created by a specific statute and are not operated by the state commission, division, director, or a county or municipality. Rather, they are privately founded and operated and are subject only to regulation by the division and director. Any public functions of the facilities are fully consistent with their being private facilities. Thus, we conclude that they are not governmental or state agencies so as to make their employees subject to the merit system and IPERS.

In conclusion, officers and employees of private alcoholism treatment facilities under Ch. 125, 1975 Code of Iowa, are not subject to the state Nepotism Act, the Merit Employment Act, or the Public Employees' Retirement Act.

February 28, 1975

CITIES AND TOWNS: Annexation — Chapter 362, Code of Iowa, 1973; §§4.5 and 4.13, and Chapter 368, Code of Iowa, 1975. A municipality proceeding under Chapter 362, 1973 Code for annexation prior to July 1, 1975, may complete that procedure even though Chapter 368, 1975 Code, becomes effective on July 1, 1975. (Blumberg to Henke, Director, Division of Municipal Affairs, Office for Planning and Programming, 75-2-28) #75-2-12

Mr. Kenneth C. Henke, Jr., Director, Division of Municipal Affairs, Office for Planning and Programming: We have received your opinion request of February 19, 1975, regarding Annexation of territory by a municipality. You asked:

"If a city is undertaking annexation using the old law [362.26-362.27, 1973 Code], but all required steps have not been completed by July 1, 1975, will the city be required to comply with the new law [Chapter 368, 1975 Code]?"

Section 199, Chapter 1088, Acts of the 64th General Assembly (1972) repealed Chapter 362, 1973 Code, effective July 1, 1975. At the same time, Chapter 368, 1975 Code, which replaces Chapter 362, becomes effective. The procedures for annexation under Chapter 368, 1975 Code, are different than under Chapter 362, 1973 Code. You wish to know whether a city must comply with Chapter 368, of 1975 Code for annexation if it has already begun the process for annexation under Chapter 362, 1973 Code.

Section 4.5, 1975 Code, provides that a statute is presumed to be prospective in its operation unless expressly made retrospective. We can find no indication in Chapter 1088, Acts of the 64th General Assembly, as amended, or in Chapters 362 through 420, 1975 Code, that any of its provisions, especially Chapter 368, are to be applied retrospectively. In addition, §4.13, 1975 Code, provides that the reenactment, revision, amend-

ment, or repeal of a statute does not affect the prior operation of the statute or any prior action taken thereunder.

Accordingly, we are of the opinion that if a municipality begins a procedure for annexation under Chapter 362, 1973 Code, prior to July 1, 1975, it may complete that procedure after July 1, 1975, even though Chapter 368, 1975 Code, becomes effective on July 1, 1975.

February 28, 1975

EMINENT DOMAIN: §471.4(2), Code of Iowa, 1975. Land condemned by landlocked owner becomes a public way. The lane may be taxed to the condemnee. The lane is a public way and the county should maintain it as it does other county roads. (Schroeder to Swift, Iowa County Attorney, 2-28-75) #75-2-13

Mr. H. W. Swift, Iowa County Attorney: This opinion is in response to your request dated January 20, 1975, regarding Section 471.4(2) of the Code of Iowa (1975). You state that the landowner condemned some land pursuant to §471.4(2), that the county taxed the land after the condemnation, and that the land was sold at tax sale and a tax deed was issued. You then ask four questions:

1. Did this lane become property of the landowner who caused the condemnation?

2. Did the lane become a public road to the extent that anyone has the right to use it?

3. Should this lane be taxed?

4. When this lane became a "public way", did it become a public road to the extent that the county must maintain it?

Section 471.4(2) reads as follows:

"The right to take private property for public use is hereby conferred: . . . 2. Owners of land without any way thereto. Upon the owner or lessee of lands, which have no public or private way thereto, for the purpose of providing a public way, not exceeding forty feet in width, which will connect with some existing public road. Such condemned roadway shall be located on a division, subdivision, or "forty" line (or immediately adjacent thereto) and along the line which is the nearest feasible route to an existing public road. Such road shall not interfere with buildings, orchards, or cemeteries. When passing through enclosed lands, such roads shall be fenced on both sides thereof by the condemnor."

As can be seen from the first sentence in §471.4(2), the taking for the road is for a public use. The first sentence of the subsection 2 also refers to providing a "public way". Any taking must be for a public way and cannot be for a private way. *Bankhead v. Brown*, 1868, 25 Iowa 540.

This statute or similar statutes have previously been considered by the Iowa Supreme Court. In all the cases the Court has stated that the land condemned is not property for the private use of the landowner but is a public way or road for the use of the entire public. *Phillips v. Watson*, 1874, 63 Iowa 28, 18 NW 659; *Jones v. Mahaska County Coal Company*, 1877, 47 Iowa 35; *Miller v. Kramer*, 1910, 148 Iowa 460, 126 NW 931.

With the above cited cases as authority, the answers to your questions are as follows:

1. The lane did not become the property of the landowner who caused the condemnation.

2. The lane became a public road and the public has a right to use it.

3. The lane may be taxed. It should be taxed to the condemnee.

4. The lane is a public way and the county has a responsibility to maintain it the same as it has a responsibility to maintain other county roads.

It should be noted that the Tax Deed conveyed fee simple subject to the easement. The purchaser owns the underlying fee.

February 28, 1975

POLICEMEN AND FIREMEN: A general cost of living increase to a police department's members must be computed in the pension compensation of retired personnel. A step increase is not included in pension compensation. (Kelly to Representative Joseph Rinas, 2-28-75) #75-2-14

Honorable Joseph Rinas, House of Representatives: This opinion is in response to your request dated January 21, 1975, regarding pension recomputations under Chapter 411 of the Code of Iowa. Your request was prompted by a letter from the City Attorney in Marion, Iowa, which stated:

"Under the city of Marion pay plan, the rank of Police Chief is designated as grade 34. There are five positions within grade 34 which are listed as '34A, 34B, 34C, 34D and 34E.' Each position of A through E are scheduled in a progressively larger amount of money. Upon retirement, Police Chief Ford was being paid at the top scheduled rate listed in position 34E. Police Chief Ford's retirement was effective December 23, 1973. Assistant Chief Richard Cayler was appointed Police Chief by the Mayor after competitive examinations had been conducted, and he was appointed to grade 34 at the first scheduled position 'A' at a starting salary of $1,156.00. On January 1, 1975, Police Chief Cayler was moved to step 'B' and the basis of the increase was merit for length of service; but was not due to any general cost of living increase given to city employees.

"On February 1, 1975, Police Chief Cayler will be increased from $1,214.00 to $1,250.00 a month; and this is based on a general cost of living increase. The amount of the increase is $36.00, and the percentage would be 2.965 percent. He will also receive another $36.00 cost of living on July 1, 1975.

"The question is under the application of Section 411.6(14) of the Iowa Code, should the annual recomputation of retired Police Chief Ford's pension include the merit for length of service increase and the cost of living increase, both increases or neither of them."

The resolution of your questions will entail a close look at section 411.6(14)(a) of the 1975 Code of Iowa. That section provides:

"As of the first of July of each year, the monthly pensions authorized in this section payable to each retired member and to each beneficiary, except children, of a deceased member shall be recomputed. The formula authorized in this section which was used to compute the retired member's or beneficiary's pension at the time of retirement or death, *including all amendments to the formula which may be adopted subsequent to the member's retirement or death, shall be used in the recomputation except the pension compensation shall be used in lieu of the average final com-*

pensation which the retired or deceased member was receiving at the time of retirement or death. The adjusted monthly pension shall be the amount payable at the member's retirement or death, adjusted by one-half of the difference between the recomputed pension and the amount payable at the member's retirement or death. At no time shall the monthly pension or payment to the beneficiary be less than the amount which was paid at the time of the member's retirement or death." [Emphasis mine]

A general cost of living bonus is an "amendment" to the computation formula for pension benefits envisioned in Chapter 411. See O.A.G., November 16, 1950, p. 191. The definition of "pension compensation" found in section 411.1(25) supports this conclusion. That section states:

" 'Pension compensation' shall mean the member's average final compensation adjusted in the ratio of the earnable compensation payable on each July 1 to an active member having the same or equivalent rank or position as was held by the retired or deceased member at the time of retirement or death to the earnable compensation of such member at his retirement or death."

Because the cost of living increase will be applied across the board in the Marion Police Department, retired members are also entitled to their fair percentage of such an increase.

In regards to the present Chief's "step increase", it is our opinion that the retired chief would not be entitled to a pension recomputation on this basis. Merely because a member of the force moves up a step in his particular rank would not require pension recomputations for all those officers who retired at that particular rank. Pension statutes are to be liberally construed, but the language of Chapter 411 does not permit that type of construction. However, if there is an increase in the particular step or rank as a whole once held by a retired officer, then his pension compensation should be adjusted accordingly.

February 28, 1975

COUNTIES AND COUNTY OFFICERS: County Hospitals — §§347.9 and 347A.1, Code of Iowa, 1975. The provisions of §347.9 do not apply to chapter 347A hospitals. (Blumberg to Rabedeaux, State Senator, and Drake, State Representative, 2-28-75) #75-2-15

Honorable William Rabedeaux, State Senator; Honorable Richard Drake, State Representative: We have received your opinion request of February 19, 1975, regarding Chapter 347A of the Code. You ask whether §347.9 of the Code and its prohibitions apply to Chapter 347A.

We have held in several opinions that §347.9 prohibits various licensed practitioners from being trustees of Chapter 347 County hospitals. See, 1958 O.A.G. 90, 1962 O.A.G. 234, 1970 O.A.G. 738, #74-11-21 (1974), #74-12-11 (1974), #75-1-1 (1975), and #75-2-1 (1975). The question now is whether those same prohibitions apply to boards of trustees of Chapter 347A hospitals. Section 347A.1 sets forth the requirements for membership on such a board. However, nowhere in the chapter is there a prohibition similar to that in §347.9. In addition, there is no indication that §347.9 is made a part of Chapter 347A. We reach this conclusion by way of §347A.5 which specifically incorporates §347.18. This is the only indication that any part of Chapter 347 is made a part of Chapter 347A.

If the legislature had intended that Chapter 347 or any of its sections in addition to §347.18 were to be made a part of Chapter 347A, it would have so provided.

Accordingly, we are of the opinion that the provisions of §347.9 do not apply to Chapter 347A hospitals. This means that there is no statutory prohibition against physicians and other licensed practitioners from membership on the board of trustees of a Chapter 347A hospital. However, it should be pointed out that a common law conflict of interest may arise, dependent, of course, on each set of facts.

February 28, 1975

NONPROFIT CORPORATIONS, Chapter 504's application to nonprofit corporations in Iowa has been limited by the passage of Chapter 504A. Chapter 504 and 504A, Code of Iowa (1975). (Kelly to Vogel, County Attorney, 2-28-75) #75-2-16

Richard P. Vogel, Poweshiek County Attorney: This opinion is in response to your request regarding nonprofit corporations. Your letter posed two questions for our consideration, they are:

"1. Have Sections 504.1 and 504.2 of the 1973 Code of Iowa been repealed, and if so to please advise us of the Section number of the repealer.

"2. If a Section of the 1973 Code of Iowa has not been repealed is it not still the law in this State?"

It is this office's opinion that sections 504.1 and 504.2 have been partially repealed by implication. Our relatively new Nonprofit Corporation Act, Chapter 504A, contains the repealer. Section 504A.100, subsections one through eight roughly provide: that banking corporations formed under other chapters of the Code of Iowa are not affected by chapter 504A; domestic corporations organized or existing under chapter 504 at the time chapter 504A came into effect were not affected by the new legislation; domestic and foreign corporations existing or organized under chapter 504 may voluntarily elect to go under the provisions of chapter 504A; and, lastly, the directives of chapter 504A became mandatory upon all domestic corporations organized after the effective date of the new Nonprofit Corporation Chapter.

Therefore, sections 504.1 and 504.2 would appear to apply only to those corporations not eliminated by section 504A.100. These two sections have not been expressly repealed, but their application to Iowa's nonprofit corporations has been greatly limited. Where the terms of a statute clearly indicate an intention to overrule another statute, the presumption against repeal of existing statutes is overcome and the intention of the Legislature must prevail. See for example, *Grant v. Norris,* 85 N.W.2d 261, 249 Iowa 236 (Iowa 1957). The language of section 504A.100 plainly evidences an intention to change the procedure of incorporation of nonprofit corporations in Iowa and this expression must be followed. Chapter 504 still has a place in our corporate law, but its application is restrained to the policing of nonprofit corporations organized or existing prior to the passage of chapter 504A.

February 28, 1975

LIQUOR, BEER & CIGARETTES: Barrel tax rebate. Section 123.146, 1975 Code of Iowa. A qualified class "A" permittee is entitled to a barrel tax rebate on the beer he sells directly to Iowa retailers. (Coriden to Gallagher, Director, Iowa Beer & Liquor Control Dept., 2-28-75) #75-2-17

Mr. Rolland A. Gallagher, Director, Iowa Beer & Liquor Control Department: You have requested a clarification of §123.146, 1975 Code of Iowa. Section 123.146 provides that:

"1. Any class 'A' permittee which owns and operates a brewery located in Iowa and which manufactures less than fifty thousand barrels annually is entitled to and may apply for the barrel tax rebate provided in subsection 2.

"2. Upon application a class 'A' permittee qualified under subsection 1 shall receive a rebate of fifty percent of the barrel tax paid by the permittee pursuant to this chapter for each barrel manufactured in this state.

"3. The rebate provided by this section shall apply only to barrel tax paid for beer manufactured after June 30, 1974."

You asked:

"Suppose a class 'A' permittee who owns and operates a brewery in Iowa which manufactures less than fifty thousand barrels annually sells his beer to buyers outside Iowa, to other Iowa class 'A' permittees, and to Iowa permittees who sell beer at retail. He pays a barrel tax only on that beer which he sells directly to Iowa retailers. Is he entitled to any barrel tax rebate?"

The answer is that he would get a tax rebate on the barrel tax he has paid for beer sold to Iowa retailers after June 30, 1974.

February 28, 1975

STATE OFFICERS AND DEPARTMENTS; RENAL DISEASE: — §§135.45, 135.47(4), 135.47(6), 1975 Code of Iowa; Health Dept. Reg. 112.1(1), 1973 I.D.R., p. 457. Whether a person is a "resident" of the state for purposes of receiving assistance under the state renal disease program depends upon his intent to remain in Iowa. (Haskins to Pawlewski, Commissioner of Public Health, 2-28-75) #75-2-18

Mr. Norman L. Pawlewski, Commissioner Public Health: You have requested our opinion on the following question:

"The Department [of Health] has received an application for assistance under the renal disease program from a person who is from a foreign country and is not a United States citizen. He is a graduate assistant at one of the state universities in Iowa. He has resided in Iowa for two years, in the United States for a total of four years, and has applied for a permanent visa. * * *

"Will you please render an opinion concerning whether a person who is not a United States citizen, but has resided in Iowa two years and intends to remain in Iowa, meets the residence requirements to receive assistance under the renal disease program."

The Commissioner of Public Health is authorized to establish within the Iowa Department of Health a program for the care and treatment of persons suffering from chronic renal (kidney) disease. *See* §135.45, 1975 Code of Iowa. Financial aid is available for residents of Iowa who need

dialysis treatment for such disease. *See* §135.47(4), 1975 Code of Iowa. The Commissioner is empowered to promulgate regulations regarding residency requirements for receipt of financial aid. *See* §135.47(6), 1975 Code of Iowa. The following regulation, Health Dept. Reg. 112.1(1), 1973 I.D.R., p. 457, has been promulgated.

"To be eligible for assistance from the renal disease program, a person shall be a resident of the state of Iowa except as provided in 112.1(2). Residence is that place in which a person is living for other than a temporary purpose. Residence once acquired continues until the individual abandons it and acquires residence elsewhere. Temporary absence is the absence of a person during which time he intends to return or because of a change in intent, he does return. A temporary absence from the state shall not be deemed to interrupt residence requirements."

(Health Dept. Reg. 112.1(2) deals with emergency treatment for transients, a situation with which we are not here concerned.) The question is whether the person you have described is a "resident" of Iowa for purposes of the renal disease assistance program.

The term "resident" has many meanings and has been defined in a multitude of ways, depending on legal context. *See Goodsell v. State Auto and Cas. Under.*, 261 Iowa 135, 153 N.W.2d 458, 460 (1967); *Howe Savings and Loan Ass'n. v. Iowa City Inn, Inc.*, 260 Iowa 1321, 152 N.W.2d 588, 590 (1967). Under the above regulation, the concept of a "resident" is drawn in terms of intent. Residence is defined to be the place in which a person is living for other than a temporary purpose. (The regulation properly assumes that in order to be a "resident", one must have a residence.) Residence, under the regulation, is not affected by temporary absence from the state. The notion of a "resident" in the regulation is in accordance with common law definitions.

Under the common law, the issue of whether a person is a "resident" is also governed by intent, specifically, intent to remain in the state. The following formulations have been made under the common law. A "resident" is one who lives at a place with no present intention of removing therefrom. *See Fowler v. Fowler*, 22 So.2d 817, 818 (Fla. 1946). To constitute a person a "resident" of a state, he must intend to make, and actually make, such state his home, but he need not have determined to always make it such. *See Thompson v. Mundheim*, 43 N.Y.S.2d 632, 633 (N.Y. 1943). Residents are somewhere between persons just passing through a place and persons who are permanently inhabitants thereof. *See In Re Yap*, 241 N.Y.S.2d 976, 978 (N.Y. 1963). Significantly, an alien — a person without United States Citizenship — can be a resident of a state. *See Ex Parte Blumer*, 27 Tex. 734, 736 (Tex. 1865); *Arndt-Ober v. Metropolitan Opera Co.*, 169 N.Y.S. 944 (N.Y. 1918). Of course, the question of whether a particular person is a "resident" depends upon the facts and circumstances of each case.

Turning to the facts of the present case, the person in question appears to have an intent to remain in Iowa. This is evidenced by the fact that he has lived in Iowa for two years already, has applied for a permanent visa, and presently has a responsible position as a graduate assistant at a state university. His lack of United States citizenship does not preclude him from being a resident. Accordingly, we conclude that he is such for purposes of the renal disease assistance program.

To reiterate, the question of whether a person is a "resident" of Iowa for present purposes is contingent on the circumstances of each case. The general principle that governs the question is whether the person has an intent to remain in Iowa.

February 28, 1975

CONSTITUTIONAL LAW: Delegation of Legislative Power — §§2.49 and 3.7, Code of Iowa, 1975. The Legislature may require that the Legislative Fiscal Bureau determine the fiscal impact of an Act, to see whether it falls within the guidelines of the proposed amendment to §3.7 of the Code. Such is not an illegal delegation of Legislative power. (Blumberg to Spear, State Representative, 2-28-75) #75-2-19

Honorable Clay Spear, State Representative: We have received your opinion request of February 7, 1975, regarding a proposed amendment to §3.7 of the Code. You ask whether the Legislature by law may let the effective date of an Act be determined by a fiscal note prepared by the Legislative Fiscal Director.

The proposed amendment modifies §3.7 by adding that the effective date of an act will be delayed a year if there is a fiscal note which shows that the Act will increase the expenses of counties or municipalities by $250,000. The amendment provides that §3.7 shall not apply to:

"4. An Act or resolution of a public nature which will increase the expenses of the counties or the cities and towns of the state a total of two hundred fifty thousand dollars or more. A legislative bill or resolution which will have a fiscal impact upon the operations of counties or cities and towns shall have a fiscal note attached by the legislative fiscal bureau when the bill or resolution is reported out by a standing committee of either house and after it is finally approved by both houses of the general assembly. If the last fiscal note issued indicates that the bill or resolution will increase expenses of the counties, or the cities and towns a total of two hundred fifty thousand dollars or more, the bill or resolution, if approved, shall not take effect until July first of the year next following the year of its passage, unless otherwise specified by the general assembly."

This means that if the Legislative Fiscal Bureau determines that the expenses of a county or municipality will increase by $250,000 or more, the effective date of the Act will be delayed for one year unless otherwise specified. This presents a question of an illegal delegation of power to an administrative body.

Generally, the constitutional prohibition against delegating legislative powers to an administrative body is given a liberal interpretation in favor of constitutionality of legislation. There is no invalid delegation of power where the standards set by the legislature are sufficiently defined and definite. *Miller v. Schuster*, 1940, 227 Iowa 1005, 289 N.W. 702. Power can be delegated to an administrative body to fill in the details of a statute if there are sufficient standards and guidelines. *Elk Run Telephone Co. v. General Telephone Co.*, 160 N.W.2d 311 (Iowa 1968). Thus, it is the general rule in delegating powers to an administrative body that the legislature must set out a policy and guidelines within which the policy will be effectuated, and the body must not be vested with uncontrolled discretion. See, *State v. Rivera*, 1967, 260 Iowa 320, 149 N.W.2d 127; *Lewis Consol. School Dist. v. Johnston*, 1964, 256

Iowa 236, 127 N.W.2d 118; *Burlington Trans. Co. v. Iowa State Commerce Comm'n.*, 1947, 230 Iowa 570, 298 N.W. 631.

The above discussion has particular relevance to administrative agencies such as the Highway Commission, Department of Social Services and the like. While the Act in question does delegate some power and authority to an administrative body (Legislative Fiscal Bureau) it is not as much as that spoken of above. and allowed by case law. The Legislature has stated that the effective date of an act will be delayed if it increases the expenditures of a county or municipality by a specified amount. The only delegation to the Fiscal Bureau is the duty of determining for the Legislature the financial impact of proposed legislation. That is no more than what the Bureau is currently doing. See, §2.49, 1975 Code. The proposal is definite, and states sufficient standards and guidelines.

Accordingly, we are of the opinion that the Legislature may require that the Legislative Fiscal Bureau determine the fiscal impact of an Act, to see whether that Act falls within the guidelines of §3.7, as amended by this proposal. Such is not an illegal delegation of legislative authority.

March 4, 1975

PHYSICAL THERAPY: Chiropractors; Physical Therapy by chiropractors. §§147.2, 148A.1, 148A.3(1), 151.1(2), 1973 Code of Iowa; H.F. 299, §1, Acts, 65th G.A., 2nd Session (1974). Chiropractors may perform physical therapy without a license only to the extent that they are engaged in the proper scope of their profession. (Haskins to Doderer, State Senator, 3-4-75) #75-3-1

Minnette Doderer, State Senator: You have requested our opinion on the following question:

"My concern relates to a bill recently passed and designated as House File 299 regarding the chiropractic profession. Basically, this statute expands the activities and practices which may be undertaken by the chiropractic profession. It permits treatments utilizing heat, cold, exercise and supports, all of which are known professionally as 'modalities.'

"Section 148A.1 of the Iowa Code, however, defines 'physical therapy' as the treatment of disease or injury by the application of 'the modalities, and rehabilitation procedures incident to the practice of physical therapy for the alleviation of human ailments and maintenance or restoration of health as prescribed by a physician . . . .' Section 148A.3, however, provides that chiropractors may not practice physical therapy. When reading sections 148A.1 and 148A.3 together, the result is that chiropractors are precluded from applying modalities and rehabilitation procedures incident to the practice of physical therapy.

"House File 299 allows chiropractors to implement principles related to heat, cold, exercise and supports, all of which are 'modalities and rehabilitation procedures incident to the practice of physical therapy'. Thus, it appears that the new statute, House File 299, is in direct conflict with Chapter 148A which limits the use of these principles only to physical therapists.

"I would appreciate an Attorney General's Opinion as to whether or not chiropractors may now treat disease or injury by the application of

such modalities and rehabilitation procedures as outlined above, in direct contradiction of Chapter 148A. I will appreciate this opinion at your convenience. I thank you in advance for the same."

No person shall practice "physical therapy" without a license. *See* §147.2, 1973 Code of Iowa. "Physical therapy" is defined as follows in §148A.1, 1973 Code of Iowa:

"For the purposes of this chapter, physical therapy is defined as that branch of science that deals with the treatment of disease or injury by the application of the modalities and rehabilitation procedures incident to the practice of physical therapy for the alleviation of human ailments and the maintenance or restoration of health as prescribed by a physician licensed as such in Iowa."

However, there are certain exceptions to the scope of §148A.1. One of these is for chiropractors (and other professionals) practicing their profession. Section 148A.3(1), 1973 Code of Iowa, states:

"Section 148A.1 shall not be construed to include the following classes of persons:

"Licensed physicians and surgeons, osteopaths, osteopathic physicians and surgeons, podiatrists, *chiropractors*, nurses, dentists, cosmetologists, and barbers, *who are engaged in the practice of their respective professions.*" [Emphasis added].

The fiction is adopted in §148A.3(1) that other licensed professionals properly practicing their professions are not engaged in "physical therapy" as defined in §148A.1. In reality, of course, they are so engaged, because their activities fall within the broad definitions of "physical therapy" in §148A.1. The statute might simply have exempted from the licensing requirement licensed professionals acting within the scope of their professions. But the legislature chose instead to achieve the same effect by exempting such professionals from the broad definition of "physical therapy." Since such professionals are not performing "physical therapy", they cannot be doing so unlawfully if they do not have a license to practice physical therapy. It can then be said that in effect, physical therapy may be performed without a physical therapy license by other professionals, including chiropractors, who are engaged in the proper practice of their profession. The question then becomes the scope of the lawful, and hence proper, practice of chiropractic. Section 151.1(2), 1973 Code of Iowa, as amended by H.F. 299, §1, Acts of the 65th G.A., 2nd Session, delimits the lawful scope of the practice of chiropractic. It states:

"For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of chiropractic. * * *

"2. Persons who treat human ailments by the adjustment of the musculoskelatal structures, primarily spinal adjustments by hand, or by other procedures incidental to said adjustments limited to heat, cold, exercise and supports, the principles of which chiropractors are subject to examination under the provisions of section one hundred fifty-one point three (151.3) of the Code, but not as independent therapeutic means."

As can be seen, chiropractors are confined to adjustment of the musculo-

skelatal structures incidental to said adjustments by hand, or by other procedures incidental to said adjustments limited to heat, cold, exercise and supports, the principles of which chiropractors are subject to official examination, but not as independent therapeutic means. To this extent and this extent only may chiropractors practice physical therapy without a license therefor. If they trespass these boundaries by, for example, performing the permitted modalities as independent therapeutic means, they are engaged in the unlawful practice of physical therapy. It should be noted that there is no contradiction between §148A.3 and the amended §151.1(2). Rather, the two sections work together to allow chiropractors to perform what would otherwise be unlawful, namely, the unlicensed practice of physical therapy. As indicated, no person may perform "physical therapy" without a license. But §148A.3 acts to exempt from the scope of "physical therapy" those services which chiropractors are authorized to perform, which are set out in the amended §151.1(2). §148A.3(1) does not set out a class of persons who are prohibited from performing physical therapy. On the contrary, it permits them to perform it without a license.

In sum, chiropractors may perform physical therapy without a license only to the degree that they are engaged in the proper scope of their profession.

March 4, 1975

ALCOHOLISM; DECEDENTS' ESTATES; STATE OFFICERS AND DEPARTMENTS; COUNTIES AND COUNTY OFFICERS: §§125.31, 125.34, 125.36, 1975 Code of Iowa. §633.425, 1973 Code of Iowa. The estate of a deceased alcoholic is liable to the division on alcoholism and the county of legal settlement of the alcoholic for the cost of treating him at an approved facility. The resulting claim of the division and county against the estate would be of the second class. (Haskins to Williams, Humboldt County Attorney, 3-4-75) #75-3-2

Richard A. Williams, Humboldt County Attorney: You have requested our opinion on the following question:

"What liability is there on the part of the estate of a deceased alcoholic who has received treatment which has been paid for by the county and the Commission on Alcoholism "

Ch. 125, 1975 Code of Iowa, provides for the treatment of alcoholics at facilities approved by the state division on alcoholism. Payment to an approved facility for the cost of treating an alcoholic is made jointly by the division on alcoholism and the county of the alcoholic's legal settlement in the proportion of 75% by the division and 25% by the county. The alcoholic then becomes liable to the division and the county for the cost of his treatment. §125.31, 1975 Code of Iowa, states:

"The alcoholic and any person, firm, corporation, or insurance company bound by contract to provide support, hospitalization, or medical services for the alcoholic shall be legally liable to the county of the alcoholic's legal settlement for twenty-five percent of the total amount and to the division for seventy-five percent of the total amount of the cost of providing care, maintenance, and treatment for the alcoholic while a voluntary or committed patient in a facility, except when the

state pays the total cost of care in which case liability of one hundred percent shall be to the state. Nothing in this section shall prohibit any individual from paying any portion of the cost of treatment."

Assume an alcoholic who has received treatment at an approved facility dies. Is his estate liable to the division and the county? The answer is "yes".

On the death of a person who receives assistance under Ch. 125, the amount paid for his care is allowed as a claim against the person's estate. §125.36, 1975 Code of Iowa, states:

"On the death of the person who receives assistance under the provisions of this chapter, the total amount paid for his care, maintenance, and treatment shall be allowed as a claim of the second class against the estate of such person."

Clearly an alcoholic who is treated at an approved facility is a "person who receives assistance" under Ch. 125. Hence his estate is liable to the division and county of legal settlement for the cost of his treatment at such a facility. It should be noted that under the above section the claim of the division and the county against the estate of the alcoholic for the cost of treatment would be of the second class. *Cf.* §633.425, 1973 Code of Iowa. In addition, there is other statutory authority for liability on the part of the estate of a deceased alcoholic. §125.34, 1975 Code of Iowa, authorizes the county attorney to accept a lesser amount than that owed from the estate of an alcoholic in settlement of the county's claim. §125.35, 1975 Code of Iowa, states:

"The board of supervisors shall collect the total amount of all such claims and direct the county attorney to proceed with the collection of such claims as part of the duties of his office. The county shall be entitled to keep the total amount of all such claims collected. The county attorney, with the consent of the board of supervisors, may execute an agreement providing for the acceptance of a lesser amount owed by an alcoholic, his spouse, or *estate* to the county. The execution of such agreement may provide that the same is in satisfaction of all moneys owed the county." [Emphasis added]

The clear implication of the above section is that the estate of the alcoholic is liable for the cost of treatment. This accords with common law. The valid obligations of a decedent are enforceable against his estate. *See* 34 C.J.S. *Executors and Administrators* §367, at 93; Cf. 31 Am. Jur.2d. *Executors and Administrators* §316, at 151; *In Re Leigh's Estate*, 186 Iowa 931, 173 N.W. 143, 146 (1919). As indicated, the deceased alcoholic himself had a legal obligation to the division and county prior to his death to pay the division and county for the costs of his treatment, hence making his estate liable.

In sum, the estate of a deceased alcoholic is liable to the state division on alcoholism and the county of the legal settlement of the alcoholic for the cost of treating him at an approved facility. The resulting claim of the division and the county against the estate would be of the second class.

March 4, 1975

COUNTIES: Supervisors. §§69.8, 69.12, Code of Iowa, 1975. (1) Vacancy

on board of supervisors is filled by appointment not special election; (2) Supervisor removed from office may not be appointed to any office for at least one year after removal. (Nolan to Norland, State Representative, 3-4-75) #75-3-3

The Honorable Lowell Norland, State Representative: Your letter requesting an opinion concerning the filling of a vacancy on the Worth County Board of Supervisors has been received. The questions you submitted are as follows:

"1. Please advise if there are any provisions for holding a special election to fill the office and whether or not Mr. Arnold Buechele would be eligible to run if there were an interim appointment so that he would not succeed himself in the event that he were elected again.

"2. According to Iowa Code #75 Section 69.9, *No person can be appointed to fill a vacancy who has been removed from office within one year next preceding.*

"Would this in fact allow Mr. Buechele to be appointed to the Board after one years time? . . ."

First, there is no statute authorizing a special election to be held to fill the vacancy created by Mr. Buechele's removal from office.

The provisions of the Iowa law for filling vacancies in the office of the board of supervisors are found in §69.8, Code of Iowa, 1975, which states as follows:

"Vacancies shall be filled by the officer or board named, and in the manner, and under the conditions, following: * * *

"5. Board of supervisors. In the membership of the board of supervisors, by the clerk of the district court, auditor, and recorder."

An officer appointed to fill such a vacancy and qualifying therefore, will continue to hold the office "until the next election at which such vacancy can be filled, as provided in section 69.12, and until a successor is elected and qualified". (§69.11)

Mr. Buechele was elected to the board of supervisors for a four-year term, commencing January 2, 1975. He was removed from office on January 2, 1975.

The vacancy occurs more than forty days prior to the next pending election at which the voters of Worth County will cast ballots to determine any county office or public question. Therefore, under §69.12, the vacancy must be filled by appointment until such election is held in 1976. The code sections referred to above are the only provisions of law for filling such a vacancy. Accordingly, Mr. Buechele cannot be returned to the board of supervisors by a special election.

The answer to your second question depends, of course, on whether or not a vacancy will exist after one year's time to which Mr. Buechele could be appointed. A person removed from office on statutory grounds may not, subsequently, hold the same office by being re-appointed thereto, if statutory grounds for the removal exist. *State v. Baughn*, 1913, 162 Iowa 308, 143 N.W. 1100. However, the statute does not bar Mr. Buechele from holding public office indefinitely and his right as a citizen to seek office at some future date has not been forfeited.

March 5, 1975

COUNTIES AND COUNTY OFFICERS: Collective Bargaining Responsibilities of County Board of Supervisors and County Elected Officials. Chapter 20, Code of Iowa, 1975; §332.3(10), Code of Iowa, 1975. The employer of county employees for purpose of all matters pertaining to the Collective Bargaining agreement is the county board of supervisors. County elected officials are also public employers and they retain the right to hire, fire and direct the work of their employees within the context of the Collective Bargaining agreement. (Robinson to Miller, State Representative, 3-5-75) #75-3-4

Representative Kenneth D. Miller, House of Representatives: In your recent letter you presented four questions for our consideration:

"The following are questions of clarification on S.F. 531, Collective Bargaining for Public Employees, as requested by the Black Hawk and Buchanan County Boards of Supervisors:

"(1) A complete definition of [County] supervisors responsibilities as required by bill.

"(2) Who does bargaining with county employees such as, treasurer, clerk, auditor, sheriff, etc., when these elected officials are held responsible by statute for individual offices? They are responsible for hiring, firing, and delegation of duties with no control of budget.

"(3) Who is responsible for the affirmative action requirements to recruit minorities, blacks, etc., to work in these offices?

"(4) Can supervisors classify all county employees, such as clerks, deputies, cashiers, janitors, etc., into work categories and require these elected officers to accept their determination?"

Before answering your questions specifically, some general observations seem appropriate. The Collective Bargaining Bill (S.F. 531) is now Ch. 20, the Code, 1975, and is known as the Public Employment Relations Act. It was passed by the legislature upon the recommendation of the governor with the decision of the Iowa Supreme Court in *Board of Regents v. United Packing House*, Iowa, 175 N.W.2d 110 (1970) as a major motivating factor. Here the court held that the Board of Regents had no authority to enter into collective bargaining agreements and that public employees do not have the right to strike but that they do have the right to organize and join labor organizations. It is out of this context that this legislation was passed.

Section 20.1, the Code, 1975, states:

"20.1 *Public policy.* The general assembly declares that it is the public policy of the state to promote harmonious and cooperative relationships between government and its employees by permitting public employees to organize and bargain collectively; to protect the citizens of this state by assuring effective and orderly operations of the government in providing for their health, safety, and welfare; to prohibit and prevent all strikes by public employees; and to protect the rights of public employees to join or refuse to join and to participate in, or refuse to participate in, employee organizations."

While this legislation is controversial, few will complain with these objectives. For an excellent article with a section by section commnetary see Pope, Analysis of the *Iowa Public Employment Relations Act*, 24 Drake L. Rev. 1 (1974).

The deeper question that underlies all of your inquiries is: who is the employer of county employees and how is this relationship affected by collective bargaining vis-a-vis the power of duly elected county officers to hire deputies, and other employees to assist them in the performance of their official duties?

The Collective Bargaining Act defines a "public employer" and a "governing body," to-wit:

"20.3 *Definitions.* As used in this chapter unless the context otherwise requires:

"1. *'Public employer'* means the state of Iowa, . . . and its political subdivisions . . ."

"2. *'Governing body'* means the board, council or commission whether elected or appointed of a political subdivision of this state . . . which determines the policies for the operation of the political subdivision."

The Act does not define the rights of elected officials. Thus the solution to the question of what is the legislative intent when construing various statutes is not an easy matter. The Michigan Supreme Court in *Civil Serv. Com'n for Co. of Wayne v. Board of Sup'rs, Mich.*, 184 N.W.2d 201, 203 said this was "a first class vexer."

Nevertheless, it is our view, that for purposes of all matters pertaining to the collective bargaining agreement and the collective bargaining process the "employer" in this instance is the county board of supervisors. County elected officials, however, are also public employers and they retain the right to hire, fire and direct the work of their employees, etc., within the context of the collective bargaining agreement once it is established. We believe these powers, rights, duties and responsibilities of multiple public employers can be harmonized into a workable solution. See *Regents of Univ. of Mich. v. Michigan Emp. Rel. Com'n.*, Mich., 204 N.W.2d 218 (1973), *Civil Serv. Com'n for Co. of Wayne v. Board of Sup'rs.*, supra.

We were not asked and we do not now decide what the relationship would be between two boards at the same level of government such as the board of supervisors and the trustees of a county hospital when the employees of the hospital initiate the collective bargaining process. Perhaps it will be a dual role but the details of the responsibilities of each may be determined better at a later time on a case by case basis. See *County of Erie v. Board of Trustees*, 308 N.Y.S.2d 515 (1970).

We have also considered the following cases: *City of Biddeford v. Biddeford Teachers Ass'n.*, Me., 304 A.2d 387 (1973); *Board of Control of E. Mich. U. v. Labor Mediation Bd.*, Mich., 184 N.W.2d 921 (1971); *Hillsdale Community Sch. v. Mich. Labor Med. Bd.*, Ct. of App. Mich., 179 N.W.2d 661 (1970); and *Assoc. of N.J. St. Col. Fac. v. Board of High Ed.*, N.J. Super., 270 A.2d 745 (1970). All of these case authorities are helpful but none of them are controlling on the Iowa Supreme Court. One must remember also that Iowa law may vary somewhat from that in these jurisdictions.

Now to consider your specific questions:

1. The responsibilities of county supervisors under the Act vary greatly depending on whether or not the county employees elect to be represented by an exclusive bargaining representative. If they do choose this right, it would be well for the county to hire (full or part-time) competent assistance in this specialized labor management area. Until such time, the county supervisors and all others in a management capacity should refrain from any activity that would interfere with the employees right to organize and bargain collectively. It may be that public employees especially at the county level of government will decide not to organize. They must, however, be free to make this decision on their own. Officials in government should not be fearful of collective bargaining. They should not abrogate their duties for the rights of the public employer are preserved as are the rights of their employees, to-wit:

"20.7 *Public employer rights.* Public employers shall have, in addition to all powers, duties, and rights established by constitutional provision, statute, ordinance, charter, or special act, the exclusive power, duty, and the right to:

1) Direct the work of its public employees.

2) Hire, promote, demote, transfer, assign, and retain public employees in positions within the public agency.

3) Suspend or discharge public employees for proper cause.

4) Maintain the efficiency of governmental operations.

5) Relieve public employees from duties because of lack of work or for other legitimate reasons.

6) Determine and implement methods, means, assignments and personnel by which the public employer's operations are to be conducted.

7) Take such actions as may be necessary to carry out the mission on the public employer.

8) Initiate, prepare, certify, and administer its budget.

9) Exercise all powers and duties granted to the public employer by law.

"20.8 *Public employee rights.* Public employees shall have the right to:

1) Organize, or form, join, or assist any employee organization.

2) Negotiate collectively through representatives of their own choosing.

3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this Act or any other law of the state.

4) Refuse to join or participate in the activities of employee organizations, including the payment of any dues, fees, or assessments or service fees of any type."

While at first blush, it might appear that the duty to collectively bargain may impose a tremendous task on local government, it should be remembered that the primary duty of government is to serve the people. Too often in the past, time and energy has been wasted on internal matters concerning employee activities. Now, these activities can be

delegated to those who specialize in the field and thus freeing government officials to devote more time to public service.

2. Before it can be determined who bargains with county employees an appropriate bargaining unit must be established. Section 20 provides that the PER Board shall determine (upon petition filed by the public employer, employee or employee organization) the appropriate bargaining unit. In establishing this unit the board will consider:

"* * * In defining the unit, the board shall take into consideration, along with other relevant factors, the principles of efficient administration of government, the existence of a community of interest among public employees, the history and extent of public employee organization, geographical location, and the recommendations of the parties involved." 20.13(2).

After the unit has been established the employee organization will file a petition with the board for certification. The Board will then submit two questions to the public employees at an election.

"* * * The first question on the ballot shall permit the public employees to determine whether or not such public employees desire exclusive bargaining representation. The second question on the ballot shall list any employee organization which has petitioned for certification or which has presented proof satisfactory to the board of support of ten percent or more of the public employees in the appropriate unit. 20.15(1)

"(2) If a majority of the votes cast on the first question are in the negative, the public employees shall not be represented by an employee organization. If a majority of the votes cast on the first question is in the affirmative, then the employee organization receiving a majority of the votes cast on the second question shall represent the public employees in an appropriate bargaining unit." 20.15(2).

If the employees decide that they desire exclusive bargaining representation and then select an organization to perform this function, the procedures to be followed are set forth in §20.17. Attention is drawn to §20.17(2) which provides for the appointment by the governing board of the employer of an authorized representative. Again, we urge a specialist to perform this function. All other functions of the various offices at the county level will remain the same.

3. The affirmative action requirement to recruit minorities, blacks, etc., is not affected by Chapter 20, the Code, 1975. Even if the county employees should choose the collective bargaining procedures, we refer to the public employer rights section (§20.7) and, especially to subsection 2, quoted above, which gives to the employer the exclusive power, duty, and the right to hire, promote, demote, transfer and retain employees. It is hoped that county elected officials will continue to affirmatively recruit minorities, blacks, etc.

4. The supervisors may classify county employees into work categories for the purpose of fixing their compensation in accordance with §332.3 (10), the Code, 1975. This power will be affected by the Public Employment Relations Act. It must be remembered that the same Board of Supervisors would appoint the employer authorized representative [§20.17 (2), the Code] in those counties, if any, where the employees elect to use collective bargaining procedures under Ch. 20. At this time, county

supervisors should not become overly concerned. Their statutory powers are preserved.

"(6) No collective bargaining agreement or arbitrators' decision shall be valid or enforceable if its implementation would be inconsistent with any statutory limitation on the public employer's funds, spending, or budget or would substantially impair or limit the performance of any statutory duty by the public employer. A collective bargaining agreement or arbitrators' award may provide for benefits conditional upon specified funds to be obtained by the public employer, but the agreement shall provide either for automatic reduction of such conditional benefits or for additional bargaining if the funds are not obtained or if a lesser amount is obtained." §20.17(6)

The duty to bargain collectively arises when the employee organization has been certified as the exclusive bargaining representative for that unit. See §20.16. The grievance apparatus outlined in the Code is quite complete. It provides for the impasse procedures, mediation, fact finding and binding arbitration. Strikes are strictly prohibited in §20.12.

In conclusion, it appears to us that the rights of the public, the public employers and employees are adequately protected either under existing procedures or under collective bargaining.

March 12, 1975

COUNTIES AND COUNTY OFFICERS: Public funds; use for private purposes. §§710.1 and 740.20, Code of Iowa, 1975. Expenditure of public funds for parties for public employees is improper and unlawful. (Turner to Smith, Auditor of State, 3-12-75) #75-3-5

Honorable Lloyd R. Smith, Auditor of State: You have requested an opinion of the attorney general as follows:

"There appears to be a growing tendency throughout the State for Hospital Trustees, School Boards, City Councils and/or similar agencies to authorize and pay for out of public funds such affairs as parties, banquets and entertainment for employees of the agencies involved.

"Your opinion is respectfully requested as to whether or not Hospital Trustees, School Boards, City Council and/or similar agencies of the State have authority to expend public moneys in payment for social functions, parties, or other forms of entertainment for employees of the agency making or proposing to make such expenditures."

In my opinion, the practices you describe would be unlawful. For example, if a state hospital board of trustees decided to have a Christmas office party for its employees and to pay for the same out of public funds, such would constitute a use of property owned by the State or a governmental subdivision thereof for a private purpose in violation of §740.20, Code of Iowa, 1975, which provides as follows:

"Private use of public property. No public officer, deputy or employee of the state or any governmental subdivision, having charge or custody of any automobile, machinery, equipment, or other property, owned by the state or a governmental subdivision of this state, shall use or operate the same, or permit the same to be used or operated for any private purpose."

Entertainment of employees with public funds could also constitute embezzlement by a public officer in violation of §710.1 of said Code which provides, in pertinent part:

"Embezzlement by public officers. If any state, county, township, school or municipal officer, or officer of any state institution, or other public officer within the state charged with the collection, safekeeping, transfer, or disbursement of public money or property: * * *

"3. Unlawfully converts to his own use in any way whatever, or uses by way of investment in any kind of property, or loans without the authority of law, any portion of the public money entrusted to him for collection, safekeeping, transfer, or disbursement, or

"4. Converts to his own use any money or property that may come into his hands by virtue of his office — he shall be guilty of larceny by embezzlement . . ."

As bearing upon this question, see 26 Am.Jur.2d, 558, 584 and 587, Embezzlement §§7, 34 and 35.

Despite the language of §710.1, actual conversion per se is not a necessary element of embezzlement of public funds by a public officer where it is shown that the officer had the funds but used them for an unlawful purpose. *State v. Williams*, 1970 Iowa, 179 NW 2d 756, 759-760, quoting Perkins on Criminal Law.

Expenditure of public funds for private parties for public employees may violate other statutes as well but, in any event, it can hardly be gainsaid that such a practice is improper in absence of a valid statute or ordinance authorizing the same as an employee benefit.

This opinion should not be construed to apply to conferences in which public employees participate in transactions, activities or educational programs related to their duties and authorized by their superiors at public expense and in which entertainment may be an incidental part of the registration fee or other expense of attending such. Nor does it apply to the legitimate entertainment, luncheon or dinner expense of outside consultants, and which may include the expenses of one or more employees participating therein.

March 14, 1975

COUNTIES AND COUNTY OFFICERS: County and District Fairs. §§174.1(1), (2); 174.9, 174.10, 174.11, 174.12, Code of Iowa, 1975. A county or district fair may not receive state aid unless it satisfies all the requirements of Chapter 174, Code of Iowa, 1975. (Kelly to Fulk, Secretary-Manager, Iowa State Fair Board, 3-14-75) #75-3-6

Mr. Kenneth R. Fulk, Secretary-Manager, Iowa State Fair Board: This opinion is in reference to your request dated January 31, 1975, regarding state aid to the Adams County Agricultural Fair and the Adams County 4-H and Youth Fair. After outlining some of the requirements of Chapter 174 of the Code of Iowa, *County and District Fairs*, you stated:

"The purpose and intent of the Iowa law regarding State Aid to County and District Fairs is to encourage the improvement of agricultural and related products through exhibiting of products by people. If judgment and reason is to prevail, then I would rule that the Adams County 4-H and Youth Fair did carry out the purpose and intent of the law in 1974 and therefore should be entitled to the State Aid, and that

the warrant for such Aid be cashed by the Adams County 4-H and Youth Fair."

It is the opinion of this office that your conclusions regarding the application of Chapter 174 are in error. You should note, that the high court of this State traditionally gives effect to the intention of the Legislature as shown *by what the Legislature said, rather than what it should or mgiht have said,* see for example, *City of Cedar Rapids v. Moses,* 223 N.W.2d 263 (Iowa 1974). The requisites for state aid as outlined in Chapter 174 are clear and not subject to convenient interpretation.

After analyzing both of these agricultural organizations, we found numerous reasons that would prohibit their acceptance of state aid. First, the Adams County 4-H and Youth Fair does not even satisfy the definition of a "Society" as found in Section 174.1(2) of the Code:

" 'Society' shall mean a county or district fair or agricultural society incorporated under the laws of this state for the purpose of holding such fair, and which owns or leases at least ten acres of ground and owns buildings and improvements situated on said ground of a value of at least eight thousand dollars, or any incorporated farm organization authorized to hold an agricultural fair which owns or leases buildings and grounds especially constructed for fair purposes of the value of one hundred and fifty thousand dollars in a county where no other agricultural fair receiving state aid is held."

You advised this Office that the 4-H group does not own or lease ten acres of land and does not own buildings and improvements valued at least eight thousand dollars. We did determine that the Adams County Fair satisfies the "Society" requisite of Section 174.1(2), but your letter stated that in recent years it hasn't met the definition of a "Fair" as found in Section 174.1(1), that section states:

" 'Fair' shall mean a bona fide exhibition of agricultural, dairy, and kindred products, livestock, and farm implements."

However, other information received by this Office regarding this matter, indicates that the 4-H Fair activities *do* satisfy the language of Section 174.1(1) and is a bonafide "Fair." At this point, we are left with a situation where the Adams County Agricultural Fair organization satisfies the requirements of a "Society" under the Code, while the 4-H Fair group doesn't, but the 4-H Fair group meets the mandates of a "Fair" under Section 174.1(1) and the Adams County organization does not. Under this state of affairs, neither one of these organizations are qualified to receive state aid under Chapter 174.

Another problem that confronts these two groups is the fact that under Sections 174.9, 174.11, and 174.12 of the state aid chapter, a county or district fair's request for state aid is contingent upon that organization paying out cash premiums to exhibitors. Your opinion request stated that the Adams County Fair did not issue any premium warrants during the last year; while the 4-H Fair paid out several thousand dollars in premiums. Therefore, only the 4-H Fair group would be entitled to the payment of state aid on the basis of the issuance of premium monies, *if* they satisfied the other requirements of Chapter 174, but they do not.

Lastly, Section 174.10 provides:

"The appropriation which is made biennially for state aid to the foregoing societies shall be available and applicable to incorporated societies of a purely agricultural nature which were entitled to draw eight hundred fifty dollars of more state aid in 1926, or societies located in counties that have no other fair or agricultural society, and which were in existence and drew state aid in 1926, except that in a county where there are two definitely separate county extension offices, two agricultural societies may receive state aid. The provisions of section 174.1 as to ownership of property shall not apply to societies under this section."

The 4-H Fair was not organized until a few years ago, while the Adams County Fair group has been in existence since the late 1800's or early 1900's. Again, we are left with a situation where one of these groups satisfies the requisite language of a section of the Chapter, but the other does not.

Therefore, it is our opinion that neither one of these organizations can legally receive state aid under Chapter 174 standing alone. However, there is nothing in this Chapter that would prohibit these two organizations from forming one entity and thus jointly meeting the mandates listed in Chapter 174. We realize that on December 19, 1974, the Adams County Board of Supervisors took some action in this direction, but in order to comply with the provisions of this Chapter, the two groups are going to have to come to specific terms in a legally binding agreement.

It is always unfortunate when the requirements of a statute seem to interfere with the goals of the legislation, but it is not this Office's duty to review the wisdom of the Legislature, especially when it has expressed itself so explicitly and particularly.

March 14, 1975

COURTS, PUBLIC OFFICERS; Judges, Resignation; Withdrawal of Resignation. §§46.12, 69.8(2), 602.30, 602.32, 602.51. A district associate judge does not resign by notifying the Chief District Judge of his District but must submit his resignation to the state commissioner of elections and the Governor. The accepting authority may permit withdrawal of a resignation prior to its effective date, notwithstanding nomination of successors, as long as no successor has been appointed. (Turner to Doderer, State Senator and Hanson, Chairman, Polk County Judicial Magistrate Nominating Commission, 3-14-75) #75-3-7

Honorable Minnette F. Doderer, State Senator; Mr. Charles A. Hanson, Chairman, Polk County Judicial Magistrate Nominating Commission: You have each requested an opinion as to the validity of the withdrawal of the resignation of the Honorable Howard W. Brooks, District Associate Judge of the Fifth Judicial District of Iowa.

As I have pieced together the facts from various sources, including the Honorable Gibson C. Holliday, Chief Judge of the Fifth Judicial District, Judge Brooks wrote to Judge Holliday on January 13, 1975, stating that he was resigning effective April 1, 1975, because of his health. As will be seen, it is very significant that no formal resignation was submitted to the Governor, the magistrate nominating commission or to anyone else.

Subsequently, on March 11, 1975, Judge Brooks wrote to Judge Holli-

day stating, in Judge Holliday's words, "that he withdrew his previous intention of resigning."

Judge Holliday says that at the time he received Judge Brooks' letter he assumed Judge Brooks would make a formal resignation to the Governor and because of the docket load and his previous conversation with Judge Brooks that he (Judge Holliday) "no doubt jumped the gun" in thinking "there would be a vacancy." So Judge Holliday says he notified the magistrate nominating commission of the expected vacancy and the nominating commission thereupon nominated three women for the office of judicial magistrate.

While Judge Brooks' withdrawal of his resignation followed the nomination of the three women, Judge Holliday says that after January 13 Judge Brooks' health had improved and that Judge Brooks had learned that there was likely to be a substantial increase in salary for the office of district associate judge and which in turn would enhance Judge Brooks' retirement income. Both Judge Brooks and Judge Holliday deny that Judge Brooks' withdrawal of his resignation was motivated by the nomination of the three women for the office of judicial magistrate or that he desired in any manner to control such nomination. Certainly, I have found no evidence that such is the case.

Judge Brooks had served as an elected muncipal court judge for approximately 27 years and, since the Unified Trial Court Act became effective on July 1, 1973, as District Associate Judge. Prior to enactment of the Uniform Trial Court Act (Chapter 282, 65th G.A., 1st Session, 1973) municipal courts were courts of record. §602.13, Code of Iowa, 1971. §69.8(2) of said Code (which remains in effect today) provided that vacancies in the office of judges of courts of record be filled by the Governor. The Unified Trial Court Act converted municipal judges to district associate judges (§602.28; Code) and required them to stand for retention in office within the county of their residence at the judicial election in 1974 and every four years thereafter until they reach age 72 (§602.29) or a vacancy occurs, in which case the vacancy "shall not be filled" (§602.30). Municipal courts were abolished, by the Act, municipal judges converted to district associate judges, with district associate judges to be phased out by natural attrition as they died, resigned, or were not retained. §602.51 of the Unified Trial Court Act says a district court associate judge shall be considered a judicial magistrate for the purpose of that section and provides that "within 30 days after notification is received of a vacancy in an office authorized by this section, and shall, by majority vote, certify to the chief judge of the judicial district the names of the three individuals for each office vacated." Thus, in this sense a vacancy created by the resignation of Judge Brooks would be filled by the appointment of a judicial magistrate named by the district judges of the Fifth Judicial District from the nominees of the Polk County Judicial Magistrate Nominating Commission.

We have found nothing in the former statutes to indicate to whom a municipal court judge would submit his resignation. In absence of statute, a public officer should ordinarily tender his resignation to the tribunal having authority to appoint his successor or to call an election to fill the office. *63 Am.Jur.2d 729,* Public Officers §164. Thus, because §69.8(2),

Code 1971, provided that the Governor appoint persons to fill the vacancy in the office of municipal court judge, it appears that prior to the Unified Trial Court Act a municipal court judge should have submitted his resignation to the Governor.

As Judge Holliday points out, §602.32 of the Unified Trial Court Act provides that district associate judges shall be subject to the same rules and laws that apply to district judges except as otherwise provided in Chapter 602. Nothing in Chapter 602 prescribes the person to whom either a district associate judge or district judge submits his resignation. But §46.12 indicates that a district judge is required to submit his resignation to the state commissioner of elections and to the Governor. Judge Holliday quite properly concluded that it was necessary for Judge Brooks to submit his resignation to both in order to make it effective, and that Judge Brooks did not effect a proper resignation merely by notifying Judge Holliday of his intentions. That answers your first question and I conclude that there is nothing to indicate that Judge Brooks has resigned.

You also ask my opinion as to whether an associate district judge who has properly submitted his resignation can withdraw it, particularly after successors have been nominated. I think the answer to this question must depend in the first instance upon whether the resignation is intended to take effect immediately, or at a time in the future. If a public officer properly submits his resignation to a person entitled to accept it, intending the resignation to take effect immediately, our Supreme Court has held that the resignation cannot be withdrawn. *Board of Directors of Menlo Consolidated School District v. Blakesley*, 1949, 240 Iowa 910, 36 N.W.2d 751; *Gates v. Delaware County*, 1861, 12 Iowa 405 and OAG Turner to Plymat January 16, 1975. Moreover, a resignation implied from the acceptance of an incompatible office may not be withdrawn. 67 C.J.S. 229, Officers §55(f).

There seems to be a split of authority in the American cases as to whether a properly submitted resignation effective at a future date may be withdrawn by a public officer prior to that date, with a bare majority holding that it can. 63 Am.Jur.2d 730, Public Officers §164; 67 C.J.S. 228, Officers §55(f); 82 A.L.R.2d 750, 753, and annotation entitled "Public Officer's withdrawal of resignation made to be effective at future date."

Section 3 of the foregoing annotation provides:

"In a number of instances withdrawal of his resignation by a public officer was held legally effective under circumstances showing variously that the resignation was not accepted, that the acceptance was not effective at once, or that the accepting authority consented to a withdrawal of the resignation, or where the fact of acceptance received no consideration by the Court."

There seems to be ample authority that a person entitled to accept a resignation may permit its withdrawal. In *Throop on Public Officers*, 1892, p. 405, §415, a leading authority says:

"*Where prospective resignation may be withdrawn* — But where the resignation is prospective, it may be withdrawn; at least with the consent

of the appointing power, and, according to some cases, without such consent, unless some new rights have intervened, such as the appointment of a successor. In a case in the supreme court of Indiana, it was said: 'To constitute a complete and operative resignation, there must be an intention to relinquish a portion of the term of the office, accompanied by the act of relinquishment. . . . A prospective resignation may, in point of law, amount but to a notice of intention to resign at a future day, or a proposition to so resign; and for the reason that it is not accompanied by a giving up of the office — possession is still retained, and may not necessarily be surrendered till the expiration of the legal term of the office, because the officer may recall his resignation — may withdraw his proposition to resign. He certainly can do this, at any time before it is accepted; and, after it is accepted, he may make the withdrawal, by the consent of the authority accepting, where no new rights have intervened.' But where a successor has been appointed, a withdrawal, even with the consent of the appointing power, will not displace him. In Missouri, where it has been held that a resignation is not complete, without the acceptance of the governor, it was also held, that the acceptance must be with the knowledge and consent of the person resigning; so that, where the clerk of a county court filed in the office of the court his resignation, to take effect at a future day, and, before the day specified, he forwarded to the court his written withdrawal of the resignation; but it had been previously against his express directions, forwarded to the governor and approved, and another had been appointed in his place; it was held that the office had not become vacant, and that th eresigning officer might, with the sanction of the court, and at the same term, withdraw the resignation, and continue to hold the office, notwithstanding the governor's appointment."

Assuming Judge Brooks' resignation was properly submitted to Judge Holliday, who had a right to accept it, and assuming that Judge Holliday had accepted it, it is my opinion that Judge Holliday had the right to permit Judge Brooks to withdraw it before the effective date and prior t othe appointment of a successor. In fact, Judge Holliday readily supports Judge Brooks' right to withdraw his resignation. *Coco v. Jones*, 1923, 154 La. 124, 97 So. 337.

Some cases go so far as to hold that a public officer has a right to withdraw his resignation even though the resignation has been accepted by the appointing authority and the authority refuses to approve the withdrawal and opposes his continuance in office. *Babbitt v. Shade*, 1938, 60 Ohio App. 100, 19 N.E.2d 778.

In *Clark v. U.S.*, 1947, 72 F.Supp. 594, the Court held a judge who had submitted an unequivocal resignation, effective immediately, could withdraw his resignation prior to the appointment of his successor. Such a ruling is contrary to the holding of our Supreme Court in the Menlo v. Blakesley cited supra. And some cases hold that where a successor has actually been appointed, a public officer cannot withdraw his resignation prior to the effective date. 82 A.L.R. 2d 750, 755.

In any event, in answer to your second question, it is my opinion that a judge who has properly submitted his resignation may be permitted by the accepting authority to withdraw his resignation prior to its effective date, notwithstanding nomination of successors, as long as no successor has actually been appointed.

There have been scurrilous suggestions, without basis in fact, that Judge Brooks is a male chauvinist and withdrew his resignation because

three women were nominated to succeed him. Even if this wretched accusation were justified, I would not consider it relevant or necessarily a discredit to Judge Brooks. No case we have found considers motive as a basis for denying or allowing withdrawal of a resignation. Judge Brooks has an interest, as does any other citizen, in the appointment of competent and qualified magistrates. If he *did* believe any of the nominees were incompetent (at least one of them had been out of law school only a few months) I think withdrawal of his resignation on that account would have been justified. Reliable sources report that there were at least six women lawyers seeking the office and that some very capable male lawyers were told they need not bother to apply because the job was open only to women. If true, Judge Brooks could have properly concluded that the nominating commission was guilty of an invidious reverse discrimination which justified his change of mind.

Fortunately for men, most women are seemingly blessed wit hthe gift of being able to change their minds. Many consider it a woman's nature or prerogative: "Woman is ever varying and changeable." Vergil in Aeneid IV. "Constant you are; but yet a woman." Shakespeare in Henry IV. "A woman's mind is cleaner than a man's — she changes it oftener." Oliver Herford in Epigram. "A man has no less right to change his mind than a woman". Jean Nieboer in the Carousel.

In view of the foregoing, I do not deem it necessary to answer your third question.

March 18, 1975

STATE OFFICERS AND DEPARTMENTS: Secretary of Agriculture; licensing; slaughter houses dealers, brokers and operators. Chapter 172A, Code of Iowa, 1975. A corporation operating one or more plants in Iowa and elsewhere can obtain a single license covering all plants by filing proof of financial responsibility by one of the three methods set forth in the statute. If the corporation elects to provide a financial statement, the net worth shown thereon would have to be not less than five times the amount of the bond or deposit otherwise required by the act based upon such corporation's average daily value of purchases of all of its plants. (Turner to Lounsberry, Secretary of Agriculture, 3-18-75) #75-3-8

The Honorable Robert H. Lounsberry, Secretary of Agriculture: Reference is made to your letter of March 12, 1975, in which you request clarification of our earlier opinion of January 29, 1975, relative to the application of Chapter 172A, Code of Iowa, 1975, entitled "Bonding of Operators of Slaughter Houses". In your letter you state:

"The questions center around your final paragraph which concludes that each plant location is required to be licensed and prove financial responsibility. We have been administering this law using your opinion of the 29th as a guideline. Your conclusion as to the intent of the law seems rather clear and definite in that paragraph.

"However, the number of serious questions that have been raised prompts me to request further clarification from you about that opinion and particularly the final paragraph which reads, 'We have previously concluded that each plant is a person for the purposes of licensing under Chapter 172A and each must separately apply for a license as a dealer or broker. It is the plant which is the applicant and as such each plant must furnish the proof of financial responsibility required by Section 172A.4'."

As you know, your request for the January 29, 1975, opinion arose because of the operations of American Beef Packers, Inc., which was operating a plant at Oakland, Iowa, and its subsidiaries Beefland, Inc. and American Pork, Inc., which were operating plants respectively at Council Bluffs, Iowa, and Harlan, Iowa. Since each of these entities were separate corporations, we concluded that they must each be separately licensed and file separate proof of financial responsibility in accordance with Chapter 172A and stated:

"§172A.1(2) states:

'2. "Person" means an individual, partnership, association or corporation, or any other business unit.'

"§172A.1(3) states:

'3. "Dealer" or "Broker" means any person determined by the department of agriculture to be engaged in the business of slaughtering live animals or receiving or buying live animals for slaughter.'

"Finally, §172A.2 states that 'no person shall act as a dealer or broker without first being licensed.'

"It appears that the plants located in Council Bluffs, Oakland and Harlan are independent 'business units' within the meaning of §172A.1 (2). Each plant maintains separate records and operates independently of the others. Each plant is therefore a 'person' within the meaning of §172A.1(2) and a 'dealer' or 'broker' within the meaning of §172A.1(3). Each plant must therefore be licensed under §172A.2."

It is true that we also concluded the January 29, 1975, opinion by stating:

"... each plant is a person for the purposes of licensing under Chapter 172A and each must separately apply for a license as a dealer or broker. It is the plant which is the applicant and as such each plant must furnish the proof of financial responsibility required by §172A.4."

However, we do not believe that a corporation which does not operate through subsidiaries is other than a single business unit for purposes of licensing and filing proof of financial responsibility under Chapter 172A. Accordingly, a corporation operating one or more plants in Iowa or elsewhere could meet the requirements of §172A.4 by furnishing proof of financial responsibility by one of the three methods set forth in that section, namely, (1) a surety company bond; (2) a deposit of money or negotiable bonds according to the formula provided; or (3) in lieu of either the bond or deposit, the filing of a sworn financial statement showing the applicant's current net worth to be not less than five times the amount of the bond or deposit otherwise required by said section. If the corporation elects to provide a financial statement, the net worth shown thereon would have to be not less than five times the amount of the bond or deposit otherwise required by this section based upon such corporation's average daily value of purchases of all of its plants. To the extent that this opinion may be brought to conflict with any part of our opinion of January 29, 1975, that part of the former is hereby withdrawn.

This office will not attempt to determine the adequacy of a financial statement of an applicant or whether it is current. That is a question

of fact to be determined by the Secretary of Agriculture in the sound exercise of his discretion. The fact that the statute may have shortcomings such as, for example, that the financial condition of a licensee may change within a short period of time after the financial statement has been furnished, are considerations which should be addressed to the General Assembly and not to us. We do note that §172A.7 permits a representative of the Department of Agriculture to examine all records relating to the business of the corporation at all reasonable times necessary to the enforcement of the law.

March 21, 1975

SCHOOLS: Reorganization plans. Chapter 275, Code of Iowa, 1975; Chapter 1172, Laws, 65th G.A., 1974 Session. Plans formulated by county boards of education for school reorganizations should be turned over to the Area Education Agency. New studies may be initiated but are not mandated. (Nolan to Menke, State Representative, 3-21-75) #75-3-9

The Honorable Lester D. Menke, State Representative: This is in response to your request for an opinion as to the status of reorganization plans by county boards of education under Chapter 275, Code of Iowa, 1975. In your letter you state you would like to have an opinion as to the validity of county board reorganization plans after July 1, 1975. Specifically, you have asked:

"Will it be necessary for area education agencies or the State Superintendent of Public Instruction to prepare and make available regional plans or state plans for local districts in the event that they choose to reorganize their districts?"

As indicated by your question, the county board of education ceases to exist after July 1, 1975, and generally, the services which they performed will be taken over by the Area Education Agency Board established pursuant to Chapter 1172, Laws of the 65th General Assembly, 1974 Session (Chapter 273, Code of Iowa, 1975). Prior to the enactment of this legislation, replacing the county school system with the new Area Education Agency, the county boards were required by Chapter 275, Code of Iowa, 1973, to formulate a county plan of school reorganization for the purposes of reorganizing school districts into efficient, economical units, insuring equal education opportunities for all children.

The thrust of your question appears to be whether the county plans, previously formulated to satisfy the requirements of Chapter 275, must necessarily be abandoned and replaced by new studies and surveys encouraging further reorganization.

The county plans were adopted more than ten years ago, and in some instances, may now be obsolete. Although there is authority for the Area Education Agency to initiate and promote studies and surveys under §275.1, Code of Iowa, 1975, the Area Education Agency is not required by the law to effectuate new studies and surveys resulting in new plans. Authority for the State Department of Public Instruction to assist the school boards relative to the adjustment of boundary lines by advisory recommendations is contained in §274.38, Code of Iowa, 1975.

As we see it, fundamental county plans which were formulated some

time ago should be turned over to the Area Education Agency by the county superintendents and should be considered to have continual binding effect until the area education agency, pursuant to §275.1 initiates "detailed studies and surveys of the school districts within the area education agency and adjoining territory for the purpose of promoting reorganization".

March 21, 1975

COUNTIES: County Attorney. §366.2(7), Code of Iowa, 1975. The county attorney has a statutory duty to give advice or written opinions to school district officers but he is not required to attend school meetings. (Nolan to Rodenburg, Pottawattamie County Attorney, 3-21-75) #75-3-10

Mr. Lyle A. Rodenburg, Pottawattamie County Attorney: You have requested an opinion from the Attorney General interpreting §336.2(7), Code of Iowa, 1975, as to whether or not in each respective county, the county attorney has the duty to give his advice or opinions in writing to all school districts within his county and whether or not he may be required to attend school board meetings.

Section 336.2(7) provides that it shall be the duty of the county attorney to:

"Give advice or his opinion in writing, without compensation, to the board of supervisors and other county officers and to school and township officers, when requested so to do by such board of officer, upon all matters in which the state, county, school, or township is interested, or relating to the duty of the board or officer in which the state, county, school, or township may have an interest; but he shall not appear before the board of supervisors upon any hearing in which the state or county is not interested."

This office, in an opinion dated May 4, 1940, 1940 O.A.G. 516, stated:

". . . with reference to school officers the only duty of the county attorney is to give advice or his opinion in writing. . . ."

It should not be necessary for the county attorney to attend the school board meetings to deliver his written opinions on school questions unless he chooses to do so. Such requirement is neither expressed nor implied by the law.

There is an additional problem mentioned in your letter. Where a school district contains territory in more than one county, the county attorney where the superintendent's office is located is the one to be contacted by school officials for legal advice.

March 21, 1975

ELECTIONS: Duplicate registration lists, right to examine and copy — §§48.5 and 68A.2, Code of Iowa, 1975. The right to examine and copy duplicate registration lists is absolute and may not be interfered with on the grounds that the records thereafter may be used illegally. (C. Peterson to L. Peterson, Executive Director, State Commission on the Aging, 3-21-75) #75-3-11

Ms. Leona I. Peterson, Executive Director, State Commission on the Aging: You have requested an opinion of the Attorney General regarding

right of access to voter registration lists for purposes specified in your letter as follows:

"We seek a written opinion regarding right of access to voter registration lists for the purpose of making a mailing list.
"We have recently started distribution of a newsletter entitled PRIME TIME, a sample of which is enclosed. This is sent to Iowans 60 years of age and over in all parts of the state. The material in it is specifically for people in this age group, and the publication, which contains no advertising of any kind, is distributed free to the recipients.

"Our purpose in publishing PRIME TIME is to provide a means of communication that will keep older Iowans aware of what is taking place in aging programs and services and in aging in general. We also hope the publication will help alleviate the isolation of many of the elderly who are unable to get around. * * *

"These lists would be helpful in preparing the mailing list for our newsletter, but at least one of our Area Agency on Aging directors in the state has been refused access to the lists in his county for this purpose."

Access to duplicate voter registration lists is governed by Chapters 45 and 68A, Code of Iowa, 1975, which, in pertinent part, state:

"48.5 Registration records. The county commissioner of registration shall safely maintain at his office or other designated locations the original registration records of all qualified electors in his county . . . *Duplicate registration records shall be open to inspection by the public at reasonable times.*

"Such lists shall not be used for any commercial purpose, advertising, or solicitation, of any kind or nature, other than to request such person's vote at a primary or general election, or any other bona fide political purpose. The commissioner shall keep a list of the name, address, telephone number, and social security number of each person who copies or duplicates such lists. Any person that uses such lists in violation of this section shall, upon conviction, be imprisoned in the county jail, not to exceed one year, or be fined not to exceed one thousand dollars, or by both such fine and imprisonment, for each violation.

"68A.2 Citizen's right to examine. Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential. The right to copy records shall include the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records . . . ." [Emphasis added]

It is the basic rule of statutory construction that where the language of a statute is plain and unambiguous, there is no occasion to resort to statutory construction and the statute must be given effect according to its plain and obvious meaning. 82 CJS *Statutes* §322, *State v. Valeu*, 1965, 257 Iowa 867, 134 N.W.2d 911.

Under the plain and obvious meaning of §48.5 the county commissioner of registration has a duty to make the duplicate registration records open to inspection by the public at all reasonable times.

In an opinion of the Attorney General, Haesemeyer to Faches, Linn County Attorney, dated January 28, 1974, we said that:

March 21, 1975

CITIES AND TOWNS: Municipal Utilities — §368.37 and 397.1, Code of Iowa, 1973; §471.4(6), Code of Iowa, 1975; Ch. 1088, Acts of the 64th G.A. (1972). A city may erect a waterworks plant outside of its corporate limits. (Blumberg to Bobenhouse, Assistant Marshall County Attorney, 3-21-75) #75-3-12

Mr. James E. Bobenhouse, Assistant Marshall County Attorney: We have received your opinion request of February 20, 1975, regarding annexation of land by a city. You specifically ask whether cities have a legal obligation to annex land upon which a waterworks plant is to be constructed, said land being owned by the city, but outside the corporate limits. You have indicated that Marshalltown has adopted Division VII of the Home Rule Code (Chap. 1088, Acts of the 64th G.A.) now Chapter 384, 1975 Code.

Pursuant to §386.37, 1973 Code, cities have the power to condemn land either within or without their corporate limits for such public purposes and as an incident to such other powers and duties conferred upon such cities. Section 397.1, 1973 Code, authorizes cities to erect, operate and maintain waterworks either within or without the corporate limits. Both of these sections are repealed by the Home Rule Code (Ch. 1088, Acts of the 64th G.A.) as of July 1, 1975, or sooner if any conflicting provisions of the Home Rule Code have been adopted. The condemnation powers of §368.37, 1973 Code, as repealed, are found within the general concept of Home Rule, and §471.4(6), 1975 Code. The provisions of §397.1, 1973 Code, as repealed, are contained within the general concept of Home Rule.

Home Rule stands for the proposition that cities may do whatever is necessary that is not inconsistent with any other law or specifically prohibited, and does not involve the levying of taxes. There is no prohibition against a city from erecting a waterworks plant on land not within the territorial limits. If, under the 1973 Code, a city may erect a waterworks plant outside its corporate limits, then Home Rule must surely confer such a power. It matters not whether the 1973 Code or the Home Rule Code under the 1975 Code is applied. If a city may condemn land outside its corporate limits to construct a waterworks plant, then it must be able to construct such a plant upon land already owned by the city, even if the land is outside the corporate limits.

Accordingly, we are of the opinion that a city may erect a waterworks plant outside of its corporate limits.

March 24, 1975

CITIES AND TOWNS: Conflict of Interest — §362.5, Code of Iowa, 1975; §368A.22, Code of Iowa, 1973. Generally, a city councilman may not contract with his city. (Blumberg to Shaff, State Senator, 3-24-75) #75-3-13

Honorable Roger J. Shaff, State Senator: We have received your opinion request of February 24, 1975, regarding a conflict of interest. Under your fact situation a city council passed a motion to place some fill dirt from a street project upon property of one of the councilmen. The minutes of that meeting indicate that the councilman in question

abstained from voting, and that there was no discussion regarding a rental fee to be paid to that councilman for use of his land. Your question is whether a conflict of interest exists if that councilman were to sue the city to recover a rental fee.

Sections 368.22, 1973 Code, and 362.5, 1975 Code, concern conflicts of interest and prohibit contracts between a city official and the city. "Contract" is defined as a claim, account or demand against or agreement with a municipality, either express or implied. These sections prohibit a municipal officer from having any 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 his municipality. The exceptions to this general rule do not appear to be applicable. Thus, the councilman in question could not receive payment from the city for the use of his land by the city. Such an agreement or contract (as defined by these sections) would be void. If the contract, assuming that one exists, is void, it is apparent that an action to enforce it would be fruitless.

We do not hold that it is a conflict of interest for a councilman to sue his city, for such would be inequitable. Surely, where a councilman sustains damage due to the negligence of the city, he could bring an action under Chapter 613A of the Code. We have found here that it is a conflict of interest for a councilman to enter into an agreement with or make a claim or demand against his city. The conflict of interest arises with the contract or agreement, not with the lawsuit.

Accordingly, we are of the opinion that although it may not be a conflict of interest for a city councilman to sue his city, it is a conflict of interest for a councilman to make a claim or demand against or agreement with his city. Your facts fit within the prohibitions of §§368A.22, 1973 Code of Iowa, and 362.5, 1975 Code.

March 24, 1975

LIQUOR, BEER AND CIGARETTES: Sale of Native wines. §§123.41 and 123.56, Code of Iowa, 1975; §§4.1(3) and 4.1(8), I.D.R., 1973, Iowa Beer and Liquor Control Department. A manufacturer of native wines must obtain a manufacturer's license in order to sell wine at wholesale, to the Iowa Beer and Liquor Control Department, and to customers outside Iowa. (Coriden to Gallagher, Director, Iowa Beer and Liquor Control Department, 3-24-75) #75-3-14

Mr. Rolland A. Gallagher, Director, Iowa Beer and Liquor Control Department: You have requested an opinion on the law regarding sale of native wines. You asked:

"Can a native winery sell at wholesale, or to the Iowa Beer and Liquor Control Department, and to customers outside of the State, without a manufacturer's license as referred to in Section 123.41, 1973 Code of Iowa?"

A manufacturer of alcoholic liquors must obtain a manufacturer's license in order to sell either at wholesale, or to the Iowa Beer and Liquor Control Department, or to customers outside Iowa. Section 123.41, 1975 Code of Iowa. However, §123.56, 1975 Code of Iowa, states that:

"Notwithstanding any other provision of this chapter, but subject to rules of the department, manufacturers of native wines . . . may sell,

keep, or offer for sale and deliver the same in such quantities as may be permitted by the director for consumption off the premises.

"A manufacturer of native wines shall not sell such wines otherwise than as permitted by this section . . . ."

Sections 4.1(3) and 4.1(8) of the Rules and Regulations of the Iowa Beer and Liquor Control Department, I.D.R. 1973, allow a manufacturer of native wines to offer his or her wines for sale without a license as long as the sale and delivery are made "only on the premises where the wine was manufactured." An exception to this rule is made, however, if the manufacturer's:

". . . business is such as to require a manufacturer's or wholesaler's license under the provisions of Sections 123.41 and 123.42." I.D.R. 1973, Iowa Beer and Liquor Control Department, §4.1(8).

Therefore, while a manufacturer of native wines is not generally subject to the provisions of Chapter 123, Code of Iowa, he or she must obtain a manufacturer's license pursuant to §123.41, 1975 Code of Iowa, in order to sell wine at wholesale, to the Iowa Beer and Liquor Control Department, and to customers outside Iowa.

March 31, 1975

STATE OFFICERS AND DEPARTMENTS; ALCOHOLISM; Alcoholism facilities. §§125.2(2), 125.3, 125.8, 125.13(1), 125.27, 1975 Code of Iowa. The Division on Alcoholism is not obligated to provide funding to an approved alcoholism treatment facility if the facility and the director of the Division agree that no funding will be provided. An alcoholism facility that merely conducts research into the causes of alcoholism or monitors costs of other facilities or programs, but does not treat individual alcoholics, cannot be approved by the Director or the Commission on Alcoholism so as to be eligible to receive funding from the Division. (Haskins to Voskans, Director, Division on Alcoholism, 3-31-75) #75-3-15

Mr. Jeff Voskans, Director, Division on Alcoholism, State Department of Health: You ask the following questions regarding alcoholism treatment facilities:

"1. Does approval of a treatment facility by the Director of the Division on Alcoholism and the Commission on Alcoholism obligate the Division to provide the facility funding?

2. May an alcoholism facility that merely conducts research into the causes of alcoholism or monitors costs of other facilities or programs, but does not treat individual alcoholics, be approved by the Director and the Commission so as to be eligible to receive funding from the Division?"

Chapter 125, 1975 Code of Iowa, is the new Alcoholism Act. Under this Act, a Division on Alcoholism headed by a Director is created within the Department of Health, and a Commission on Alcoholism is established within the Division. *See* §§125.3, 125.8, 1975 Code of Iowa. Various treatment facilities throughout the state contract with the Division to provide alcoholism treatment. In resolving the first question, it is well to distinguish between treatment facilities that are approved by the Commission alone and those that are also approved by the Director. The former may operate, but only the latter are also eligible to receive funding from the Division.

No treatment facility may operate until it is approved by the Commission. §125.13(1), 1975 Code of Iowa, states:

"1. The commission shall establish standards for treatment programs and facilities. The standards may concern only the health standards to be met and minimum standards of treatment to be afforded patients. *A person shall not operate a public or private alcoholism treatment facility or program until it is approved by the commission*, except as provided in section 125.14." [Emphasis Added]

[The exceptions of §125.14, 1975 Code of Iowa, are not here relevant.] However, in order for a treatment facility to receive funding, it must go one step further and also be approved by the Director. §125.27, 1975 Code of Iowa, states:

"*The director shall enter into written agreements with a facility* as defined in section 125.2 to pay for seventy-five percent of the cost of the care, maintenance and treatment of an alcoholic. Such contracts shall be for a period of no more than one year. The commission shall review and evaluate at least once each year all such agreements and determine whether or not they shall be continued.

The contract may be in such form and contain provisions as agreed upon by the parties. Such contract shall provide that the facility shall admit and treat alcoholics whose legal settlement is in counties other than the contracting county. If one payment for care, maintenance, and treatment is not made by the patient or those legally liable therefore within thirty days after discharge the payment shall be made by the division directly to the facility. Payments shall be made each month and shall be based upon the facility's average daily per patient charge. Provisions of this section shall not pertain to patients treated by the mental health institutes.

If the appropriation to the commission is insufficient to meet the requirements of this section, the commission shall request a transfer of funds and section 8.39 shall apply." [Emphasis Added]

The term "facility" in §125.27 is defined as an operation approved by the Director. §125.2(2), 1975 Code of Iowa, states:

" 'Facility' means a hospital, institution, detoxification center, or installation providing care, maintenance and treatment for alcoholics and *approved by the director* under section 125.13." [Emphasis Added]

Thus, the definition of the term "facility" as used in §125.27 means that a treatment facility must be approved by the Director before it can be eligible to receive funding. In addition, a contract between the Director and a facility under §125.27 may contain such "provisions as agreed upon by the parties." There is no reason why these "provisions" could not pertain to funding. Thus, the parties may agree to no funding at all, as it is their inherent contractual power to do so. Hence, we conclude that the Division is not obligated to provide funding to an approved alcoholism treatment facility if the facility and the Director agree that no funding will be provided.

At this point, it should be noted that the approval of a treatment facility by the Commission is necessary for it to receive funds as well as to operate. In other words, the approval of the Director is not enough for it to receive funding. The Commission's approval is also necessary. It would be absurd to say that once a treatment facility is approved by the Director, it is automatically entitled to receive funding, even

though it is not approved by the Commission and hence cannot even operate!

With regard to the second question, some alcoholism facilities merely conduct research into the causes of alcoholism or monitor the costs of other facilities or programs without treating any individual alcoholics. May such facilities be approved by the Director and Commission so as to be eligible to receive funding from the Division? We believe not. As can be seen from reading it, §125.13(1), *supra,* authorizes the Commission to approve only "*treatment* facilities or programs." Research or cost monitoring is not "treatment", because it does not involve individual alcoholics. (Interestingly, a purely research or cost monitoring facility would not, unlike a treatment facility, be required to have the approval of the Commission in order to operate.) Under §125.27 *supra,* the Director is authorized to enter into an agreement with a "facility". As seen, the term "facility" is defined as an operation providing "care, maintenance, and treatment" for alcoholics. *See* §125.2(2), *supra.* This latter phrase clearly does not encompass research or cost monitoring. Accordingly, an alcoholism facility that merely conducts research into the causes of alcoholism or monitors costs of other facilities or programs, but does not treat individual alcoholics, cannot be approved by the Director or the Commission so as to be eligible to receive funding from the Division.

March 31, 1975

CITIES AND TOWNS: Municipal Band Tax — Chapter 375, Code of Iowa, 1973. Once a valid petition has been filed and a levy approved at an election, a city must levy a tax for a municipal band not to exceed thirteen and one-half cents per thousand dollars assessed value. (Blumberg to Stephens, State Representative, 3-31-75) #75-3-16

Honorable Lyle R. Stephens, State Representative: We have received your opinion request of March 26, 1975, regarding Chapter 375, 1973 Code of Iowa. You ask whether the one-half mill levy for municipal bands under §375.1 is mandatory if it is properly petitioned and passed by a vote of the people.

Section 375.1 authorizes cities of forty thousand population or less to levy a tax for a municipal band when authorized as provided in the remainder of the chapter. Section 375.2 provides that said authority shall be initiated by a petition signed by ten percent of the legal voters of the city and filed with the council or commission. An election is then held pursuant to §375.3. Section 375.4 provides that the levy *shall* be deemed authorized if a majority of the votes cast are in favor. At that point the council or commission *shall* levy a tax sufficient for the band. In 1932 O.A.G. 105, this office held that after a vote approving the levy, a city must levy the tax. We agree with that prior opinion. It should be pointed out that §§75, 76 and 77, Ch. 1231, Acts of the 65th G.A. (1974) amend §§375.1, 375.2 and 375.4, respectively, to provide that the levy shall not exceed thirteen and one-half cents per thousand dollars of assessed value, in place of the one-half mill.

Accordingly, we are of the opinion that once a valid petition has been filed, and the levy has been approved by the voters a city must then levy a tax for the band not to exceed thirteen and one-half cents per thousand dollars of assessed value.

March 31, 1975

COURTS: Costs, magistrates court, nonindictable misdemeanors. §§602.63 and 606.15, Code of Iowa, 1975. With the exception of certain specified traffic violations as provided in §753.15 and 16, for which court costs of $5.00 are provided, and "admitted" overtime parking meter violations for which no court costs are provided, the minimum court costs which may be assessed on a guilty plea entered to a nonindictable misdemeanor is $8.50. (Turner to Erhardt, Wapello County Attorney, 3-31-75) #75-3-17

Mr. Samuel O. Erhardt, Wapello County Attorney: You are the first of several who have requested or suggested an opinion of the attorney general to clarify the amount of court costs which should be taxed in magistrate court in a nonindictable misdemeanor case. It appears that the clerks and, indeed, the magistrates themselves, are in some disagreement and that the costs taxed in such cases are not uniform throughout the state.

A "nonindictable misdemeanor" is a public offense "less than a felony and in which the punishment does not exceed a fine of One Hundred dollars, or imprisonment for thirty days . . ." Such offenses are "tried summarily" before an "officer authorized by law, on information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal . . ." Article I, 11, Bill of Rights, Constitution of Iowa. In addition to statutory public offenses so punished under Acts of the General Assembly, municipal corporations are empowered to make ordinances providing for fines not exceeding $100, or imprisonment not exceeding 30 days. §366.1, Code of Iowa, 1973, and §§364.1.3(2), Code of Iowa, 1975. Counties, also, are sometimes authorized to adopt regulations or ordinances provided that the punishment is similarly limited. See Chapter 358A, Code of Iowa, 1975. Such municipal or county ordinances are generally considered extensions of state statutes and construed as statutes. Thus, a violation constitutes a nonindictable misdemeanor. *Kordick Plumbing & Heating Company v. Sarcone*, 1971 Iowa, 190 N.W.2d 115 and *Wapello County v. Ward*, 1965, 257 Iowa 1231, 136 N.W.2d 249.

Section 602.63, Code of Iowa, 1975, as amended in 1973 (Ch. 282, §47, 65th G.A. 1st) provides in pertinent part as follows:

"All costs in criminal cases shall be assessed and distributed as in chapter 606, except that the cost of filing and docketing of a complaint or information for a nonindictable misdemeanor shall be five dollars which shall be distributed pursuant to section 602.55. The five dollar cost for filing and docketing a complaint or information for a nonindictable misdemeanor shall not apply in cases of overtime parking. . . ."

Applying Chapter 606, as commanded, we find:

"606.15 *Fees.* Except in probate matters, the clerk of the district court shall charge and collect the following fees, all of which shall be paid into the county treasury for the use of the county except as indicated: * * *

"27. In criminal cases, the same fees for same services as in suits between private parties. When judgment is rendered against the defendant, the fees shall be collected from such defendant. * * *"

Reading the two sections, 602.63 and 606.15, together, the costs are

$5.00 for filing and docketing a complaint or information for a nonindictable misdemeanor plus the other fees provided in §606.15, as appropriate, except "in cases of overtime parking." On a typical plea of guilty, where the defendant immediately pays the fine, there would be, as you point out, an additional $1.00 fee for taxing costs (§606.15(10)), another $1.50 for entering a final judgment (§606.15(9)) and still an additional $1.00 for satisfaction of the judgment (§606.15(20)). In other words, the minimum total costs which must be taxed in such a case would be $8.50.

§321.236(1)(a) allows a city or town to impose a fine not exceeding $5.00, for a parking meter violation which is "admitted", and specifies that "No costs or charges shall be assessed." Other parking meter violations (those which are denied) are to be charged and placed before a court the same as other traffic violations. §321.236.

§§753.15 to 753.17 makes special provision for some 14 "scheduled" traffic violations, including illegal parking, and the fines and costs which must be imposed. This eliminates the necessity of a court appearance. With reference to such a scheduled traffic violation, including illegal parking other than an "admitted" parking meter violation, §753.16 provides that the costs are $5.00 in a case where the scheduled violation is admitted and no court appearance is required.

But §753.17, Code of Iowa, 1975, provides that §753.16 "shall not apply to a scheduled violation" in certain circumstances, such as when an accident or injury is involved, or the officer believes the defendant did not have a valid license or that the violation was hazardous or aggravated. In such cases, the defendant "shall appear before the court *and regular procedure shall apply.*" (Emphasis added) In my opinion, the words "regular procedure shall apply" mean that costs must be assessed in accordance with the schedule in §602.15, in which case they would be at least $8.50.

Some confusion may have resulted as a consequence of an opinion, Sullins to Judge Flint, a Judicial Magistrate in Cerro Gordo County, dated October 5, 1973. But that opinion was in answer to a specific request distinguishing the $5.00 costs of filing and docketing a complaint or information from the fee for entering final judgment or decree, and gave no consideration to additional costs which are necessarily taxed in the application of §606.15.

To reiterate, with the exception of certain specified traffic violations as provided in §753.15 and 16, for which court costs of $5.00 are provided, and "admitted" overtime parking meter violations for which no court costs are provided, the minimum court costs which may be assessed on a guilty plea entered to a nonindictable misdemeanor is $8.50.

April 2, 1975

CITIES AND TOWNS: Lease of Space in Parking Facilities — §§390.5, 390.11, 390.12, 422.42(13) and 422.43, Code of Iowa, 1973. In cities under ten thousand population, and in cities of seventy-five thousand or more population where a lease agreement pursuant to §390.5 exists, space in a parking facility may be leased to a car rental agency. In all other cities the prohibitions of §390.11 apply. (Blumberg to Newhard, State Representative, 4-2-75) #75-4-1

Honorable Scott D. Newhard, State Representative: We have received your opinion request of March 13, 1975, regarding Chapter 390, 1973 Code of Iowa. You specifically ask whether §390.11 prevents a city from leasing a store front office in a multistory parking ramp to a rent-a-car agency.

Section 390.11 provides:

"Any sale of automotive supplies or services other than service incidental to the mere parking of cars by the city, a lessee of the city, or by any other person, firm, or corporation on any parking lot or other off-street parking area, whether such service be paid for in full or in part in money or for any other consideration is prohibited and any such sale shall constitute a misdemeanor and be punishable as such.

"This section shall not be construed as prohibiting the lessee of a city of seventy-five thousand or more population from including shop, office space or space for other uses permitted by the zoning ordinance of the city within the design of any multistory parking facility erected by such lessee pursuant to the terms of a lease authorized by section 390.5 and subleasing such space subject to approval by said city, and the same is hereby expressly authorized."

There are two exceptions to the general prohibition of this section. The first is that, pursuant to §390.12, §390.11 does not apply to cities under ten thousand population. The second exception is found in the second paragraph of §390.11.

If a lessee, pursuant to §390.5, has leased land from a city of seventy-five thousand or more population and has constructed a multistory parking facility pursuant to a lease arrangement authorized by that section (that the parking facility become property of the city after the expiration of the lease), that lessee may include office space within the facility for any purpose permitted by the applicable zoning ordinance of the city. Thus, if the city is under ten thousand population or if a lease agreement exists pursuant to §390.5, providing that the city has a population of seventy-five thousand or more, a lease for a rent-a-car agency would appear to be permitted.

The issue remains, however, whether the same would be permitted in cities with populations between ten and seventy-five thousand. The question is whether a rent-a-car business is the sale of automotive supplies or the sale of a service. It cannot be disputed that a rent-a-car agency would not fall within the sale of automotive supplies. "Service" has been defined as an activity carried on to provide people with the use of something, and the act or method of so providing. Webster's New World Dictionary, College Edition 1332 (1959). Rentals are considered to be services or the sale of services for tax purposes. See, §§422.42(13) and 422.43, Code of Iowa. Therefore, it appears that a car rental would be the sale of a service as provided within §390.11.

Accordingly, we are of the opinion that in a city of less than ten thousand population, and in a city of seventy-five thousand or more population where there is a lease agreement pursuant to §390.5, space could be leased for a car rental agency. In all other cities the prohibitions of §390.11 apply.

April 2, 1975

SCHOOLS: Incompatibility. §§273.9 and 277.27, Code of Iowa, 1975. A hearing conservation services supervisor in special education employed by the Area Education Agency is not precluded under the law from holding the office of director on a local school board. (Nolan to Readinger, State Representative, 4-2-75) #75-4-2

The Honorable David M. Readinger, State Representative: You have requested an opinion regarding the legality or the potential conflict of interest of electing an employee of an Area Education Agency to the board of directors of the local school district in which he resides.

We have obtained from your letter the following information:

"The brief facts are that Mr. Don Kurth, residing in Urbandale, Iowa, would like to enter an election, the purpose of which is to fill a vacancy created by the resignation of a local school board director. Mr. Kurth wishes to seek the position but wants to know at the onset does his participation in the campaign and his possible election, as a school board director fall within the law as set forth by the state of Iowa. His concern centers around his daily professional career as an employee of the newly established Area Education Agency and, if elected, his new responsibility as a local school board director.

"Since 1963, Mr. Kurth has been employed by the Polk-Story Joint County School System as a staff member in the superintendent's office. He fully expects his employment to continue into the newly-created Area XI Education Agency. His position with the A.E.A. will be supervisor of Hearing Conservation & Education Services, a position he has held since 1968."

Statutory eligibility requirements for a member of the local school board are set forth in §277.27, Code of Iowa, 1975:

"A school officer or member of the board shall, at the time of election or appointment, be an eligible elector of the corporation or subdistrict. Notwithstanding any contrary provision of the Code, no member of the board of directors of any school district, or his or her spouse, shall receive compensation directly from the school board. No director or spouse effected by this provision on July 1, 1972, whose term of office for which elected has not expired, or whose contract of employment has a fixed date of expiration and has not expired, shall be affected by this provision until the expiration of the term of office to which elected, or the expiration date of the contract for which employed."

Under §273.9, Code of Iowa, 1975, the cost of the special education instruction program and support services provided by the Area Education Agency will be paid by local school districts wiah monies available to the districts from the State Foundation Aid program. The statute mandates that the AEA provide special education services to the school districts. It is not necessary that the district contract with the AEA for such services. We do not find that the election of an employee of the Area Education Agency creates any more potential conflict of interest than the election of, let us say, an employee of a city water department, county welfare office or an employee of a state university.

This office has stated in prior opinions that an incompatibility of office exists when a member of the local school board is elected or appointed to either the county board of education or the governing board of a merged area and has advised that the offices of the county school psychologist and district director within the county are incompatible,

1966 O.A.G. 317. In view of the imminent dissolutions of the county school system in the State of Iowa, we do not withdraw such opinion. However, it is now our view that a county school psychologist is not an elected or appointed officer, but is rather an employee and consequently, no incompatibility of office would exist.

Language from *Bryan v. Cattell*, 1864, 15 Iowa 538, has been quoted again and again by the Iowa courts as a guide in such matters:

"The doctrine of incompatibility of public officers is embedded in the common law and is of great antiquity. It rests on the views that office-holders are inherently subject to regulations and conditions. While a private person may accept as many employments as he can procure, it has always been held that the holding of a public office may render it improper for the holder to accept another public office. The correctness and propriety of this rule are so well established as to be assumed without discussion in practically every case in which the matter of common law incompatibility arises."

In every situation in which the question arises, it must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. *State ex rel LeBuhn v. White*, 1965, 257 Iowa 606, 133 N.W.2d 903. In that case the Iowa Supreme Court provided a guide to the tests to be employed in making such determination: "whether there is an inconsistency in the functions of the two as where one is subordinate to the other and subject to its revisory power; or the duties of the two offices are inherently inconsistent and repugnant; and whether the nature and duties of the two offices are such as to render it improper from considerations of public policy for an incumbent to retain both."

The dissolution of the county school system has transferred to the Area Education Agency most of the duties formerly carried out by the county board and the county superintendent. Beyond a doubt, the office of member of the Area Education Board of Area Education Agency Administrator and the office of the local school district director would be incompatible. However, it is our view that under the tests described above, a hearing conservation services supervisor in special education employed by the Area Education Agency is not precluded under the law from holding the office of director on a local school board.

April 2, 1975

COUNTY OFFICERS: Deputy Sheriffs. Chapter 341A, Code of Iowa, 1975. A deputy sheriff certified to rank of Captain may by giving notice of leave take a position not covered by civil service and return to previous rank within the two year period of certification. (Nolan to Poncy, State Representative, 4-2-75) #75-4-3

The Honorable Charles N. Poncy, State Representative: This letter is written in response to your request for an opinion on the following matter:

". . . whether a Deputy Sheriff, who has been certified, by the County Deputy Sheriff's Civil Service Commission, and appointed to the rank of Captain, and who is appointed to the position of Sheriff to fill a vacancy during mid-term, and who subsequently runs for the office of Sheriff in the next election and is defeated, revert back to his Civil Service position following the election?"

Under the provisions of Chapter 341A, Code of Iowa, 1975, the deputy sheriff's civil service plan is established. This legislation provides for a deputy sheriff to be certified for a two-year period under §341A.8 and under this same section, appointments are to be made with seniority controlling only when other factors are equal. Under §341A.15, a deputy sheriff may request and obtain a leave of abesnce so as not to vacate permanently the position and rank that he may have at the time of taking on some other service not covered by this civil service statute.

It is the opinion of this office that a person who has obtained civil service status with the rank of captain, and who then is appointed to fill a vacancy in the office of the sheriff could return to the position he formerly had without further classification, if this classification and certification had not expired (e.g. the two year period) and if the civil service position he formerly held was still available. The language of the statute is abundantly clear and the pertinent sections are set out as follows:

"All appointments to and promotions to classified civil service positions in the office of county sheriff shall be made solely on merit, efficiency, and fitness, which shall be ascertained by open competitive examinations and impartial investigations, and no person in the classified civil service shall be reinstated in or transferred, suspended, or discharged from any such place, position, or employment contrary to the provisions of this chapter.

"Whenever possible, vacancies shall be filled by promotion. Promotion shall be made from among deputy sheriffs qualified by competitive examination, training and experience to fill the vacancies and whose length of service entitles them to consideration. The commission shall for the purpose of certifying to the sheriff the list of deputy sheriffs eligible for promotion, rate the qualified deputy sheriffs on the basis of their service record, experience in the work, seniority, and military service ratings. Seniority shall be controlling only when other factors are equal. The names of not more than the ten highest on the list of ratings shall be certified. The certified eligible list for promotion shall hold preference for promotion until the beginning of a new examination, but in no case shall such preference continue longer than two years following the date of certification, after which said list shall be canceled and no promotion to such grade shall be made until a new list has been certified eligible for promotion. The sheriff shall appoint one of the ten certified persons. * * *

"Leave of absence, without pay, may be granted by any county sheriff to any person under civil service, however, the sheriff shall give notice of leave to the commission."

Our opinion is premised on an assumption that the requirement of the statute pertaining to notice of leave were met when the individual left his civil service position to fill the office of sheriff.

April 2, 1975

CONTROLLED SUBSTANCES—Acceptance and Disposal by Hospitals: The Iowa Board of Pharmacy Examiners is authorized to accept from hospitals for disposal any controlled substances which the hospital has come to possess, regardless of the circumstances. (Ahrens to Calvin Anderson, Winneshiek County Attorney, 4-2-75) #75-4-4

Mr. Calvin R. Anderson, Winneshiek County Attorney: In your letter

of January 31, 1975, you requested an opinion of the Attorney General on the following questions:

Whether a hospital can take possession of controlled substances found on persons receiving treatment?

How a hospital can dispose of controlled substances received from persons receiving treatment?

Section 204.401, Code of Iowa, 1975, prohibits possession of controlled substances except as authorized by Iowa Code Chapter 204 (1975). Persons possessing controlled substances without authorization have no property rights in them. Hospitals who come to possess controlled substances through treatment, or admission of persons, or as part of a bailment of persons' personal property are under no duty to return the controlled substances to the original possessor.

By policy, the Federal Drug Enforcement Administration has authorized representatives of the Iowa Board of Pharmacy Examiners to accept for disposal controlled substances which have come into possession of the hospital by *whatever method.* The disposal procedure is governed by §204.506 of the Iowa Uniform Controlled Substances Act, Code of Iowa (1973) which provides:

"Controlled substances—disposal. All controlled substances, the lawful possession of which is not established or the title to which cannot be ascertained, or excess or undesired controlled substances, which have come into the custody of the board, the department, or any peace officer, shall be disposed of as follows:

"1. Except as otherwise provided in this section, the court having jurisdiction shall order such controlled substances forfeited and destroyed. A record of the place where the controlled substances were seized, of the kinds and quantities of controlled substances so destroyed, and of the time, place, and manner of destruction, shall be kept, and a return under oath, reporting said destruction, shall be made to the court and to the bureau by the officer who destroys them.

"2. Upon written application by the board, the court by whom the forfeiture of controlled substances has been decreed may order the delivery of any of them, except controlled substances listed in schedule I, to the board for distribution or destruction, as provided by this section.

"3. Upon application by any hospital within this state, not operated for private gain, the board may in its discretion deliver any controlled substances that have come into its custody by authority of this section to the applicant for medicinal use. The board may from time to time deliver excess stocks of controlled substances to the bureau for disposition, or may destroy the excess controlled substances."

Under the aforementioned Act, hospital registrants [See I.D.R. p. 678, §8.2(204) 1973], may notify the Board of Pharmacy Examiners, 300 - 4th Street, Des Moines, Iowa 50319, for instructions relating to the legal disposal of controlled substances. A receipt for the kind and quantity of drugs to be destroyed is provided the hospital registrant pursuant to §204.506(4) which provides:

"4. The board shall keep a full and complete record of all controlled substances received and disposed of, showing the exact kinds, quantities, and forms of controlled substances, the persons from whom received

and to whom delivered, by whose authority received, delivered, and destroyed and the dates of the receipt, disposal, or destruction, which record shall be open to inspection by all federal or state officers charged with the enforcement of federal and state laws relating to any controlled substance."

April 2, 1975

COUNTIES: County Officers. §§317.2, 332.17, 332.21, Code of Iowa, 1975. Person appointed County Weed Commissioner may not also be employed as the solid waste disposal program head. (Nolan to Anderson, Howard County Attorney, 4-2-75) #75-4-5

Mr. Mark B. Anderson, Howard County Attorney: This letter is written in reply to your letter of January 28, 1975, to the Attorney General with respect to the legality of the appointment of the Weed Commissioner. Your letter states:

"I am requesting an Opinion of the Attorney General on the following Section of the 1973 Code of Iowa: 317.2. The fact situation in brief is that during the year 1974 the Howard County Board of Supervisors appointed a gentleman as weed commissioner. This occurred in the early part of the year. In the latter part of the year a need arose for someone to be placed in charge of a Solid Waste Disposal Program for Howard County. The person who had been previously appointed as Weed Commissioner was appointed to act in this capacity also. In December of 1974, while making their appointments to fill these positions, the Board of Supervisors named the same person as Weed Commissioner and Solid Waste Disposal Director. This was done in one transaction for a single set salary with no division of salary between the 2 positions mentioned in the contract agreement.

"In light of the foregoing fact situation I would like an opinion as to the legality of the appointment in light of the fact situation of Section 317.2 specifically that portion which reads as follows: 'It shall be a person not otherwise employed by the County'."

The language of the statute is clear and it is the opinion of this office that the person appointed as county weed commissioner may not also be employed as the solid waste disposal program head for the county. However, the duties of the county weed commissioner may be combined with those of any one of the county officers enumerated in §322.7, Code of Iowa, 1975, and an appropriate salary fixed pursuant to §332.21 of the Code, if the people vote a combined office.

April 2, 1975

COUNTIES: Library Support. §§303B.6, 358B.18, Code of Iowa, 1975. In absence of a county library system there is no authority under present law for a single tax levy to be spread county wide to support all existing libraries in the county. County may tax property outside cities to obtain funds to use to contract with city libraries so that residents of unincorporated areas will have access to such libraries. (Nolan to Hansen, State Representative, 4-2-75) #75-4-6

The Honorable Ingwer L. Hansen, State Representative: You have requested an opinion interpreting Chapter 303B, Code of Iowa, 1975, with respect to the requirement for financing regional library systems. Section 303B.9 provides:

"A regional board shall have the authority to require as a condition for receiving services under section 303B.6 that a governmental subdivision maintain any millage levy for library maintenance purposes that is in effect on July 1, 1973, and that commencing July 1, 1977, a public library receiving services under said section shall be funded by the local governmental subdivision through a levy of at least one-quarter mill or at least the monetary equivalent of one-quarter mill when all or a portion of the funds are obtained from a source other than taxation."

The question which you presented arises from the fact that the board of supervisors of Dickinson County has been requested to levy a one-fourth mill tax to support the library system. There has not previously been a county library system in Dickinson County, although there are four municipal library systems in the county. Your letter does not indicate whether the people residing in the unincorporated area of the county are furnished library services under a contractual arrangement. We assume that the request to the supervisors contemplates the library services be contracted for these people. There are a number of counties which have appropriated funds to provide access to city libraries for county residents who would not otherwise be entitled to a library card. Authority for such contracts between the county and a local public library is contained in §358B.18, Code of Iowa, 1975, and a tax for this purpose may be levied on all taxable property in the county outside the cities. Since we are dealing here with four or more distinct taxing authorities, we do not see a possibility, under present law and in the absence of a county library system, of a single tax levy spread county wide to support all the existing libraries in the county.

April 2, 1975

COUNTIES: Deferred Compensation — §509A.12, Code of Iowa, 1975. Funds for a deferred compensation plan for county officials or employees must come from the contribution or payroll deduction from wage or salary of the individual participating in the plan. (Nolan to Smith, Auditor of State, 4-2-75) #75-4-7

The Honorable Lloyd R. Smith, Auditor of State: You have requested an opinion concerning a deferred compensation plan for county officers and employees. According to your letter, such a plan, to be used solely as a supplemental retirement plan with funds to be available only to a covered official or employee upon retirement or death, is being considered by the Association of County Officials of Iowa.

Your letter asks:

"Your opinion is respectfully requested as to whether or not the Board of Supervisors of an Iowa county have the authority to establish and implement a deferred compensation plan for county officials and employees to be funded:

"1. Solely by county funds or

"2. funded by contributions or assessments of covered county officials and employees and/or County funds

"3. funded only by contributions or assessments of covered officials and employees."

Legislation has recently been enacted and now appears as §509A.12, Code of Iowa, 1975, which provides as follows:

"At the request of an employee the governing body shall by contractual agreement acquire an individual or group life insurance contract, annuity contract, security or any other deferred payment contract for the purpose of funding a deferred compensation program for an employee, from any company the employee may choose that is authorized to do business in this state and from any life underwriter duly licensed by this state or from any securities dealer or salesman registered in this state to contract business in this state. The deferred compensation program shall be administered so that the state comptroller or his designees may remit one sum for the entire program according to a single billing.

"The provisions of this section shall be in addition to any benefit program provided by law for any employees of the state or any of its political subdivisions."

Due to the fact that the compensation of county officers is fixed by statute (Chapter 340, Code of Iowa, 1975) and further, that §509A.12 refers to deferred compensation, it is the opinion of this office that such plan for county officials may be funded only by contributions or assessments of the covered officials. Inasmuch as the deferred compensation authority is intended to be used to lessen the taxable income of the individual, particularly those in the higher income brackets, there is neither an expressed nor implied authority for funding such individual plans from county funds apart from those allocated for the salary or wages of the employees choosing to participate in such a plan.

April 2, 1975

COURTS: Lis Pendens Index. §§598.26, 617.10, 617.11, Code of Iowa, 1975. Clerk of court does not have a duty to index actions for dissolution of marriage in Lis Pendens Book. (Nolan to Rolfe, Union County Attorney, 4-2-75) #75-4-8

Mr. Robert A. Rolfe, Union County Attorney: You have requested the opinion of the Attorney General as to whether or not the clerk of court has a duty to index any dissolutions in *The Lis Pendens Book.* It is the opinion of this office that the clerk of court is precluded from indexing dissolution actions in *The Lis Pendens Book* by the language contained in §598.26 of the 1975 Code of Iowa. This language provides in pertinent part:

"The record and evidence in all cases where a marriage dissolution is sought shall be closed to all but the court and its officers, and access thereto shall be refused until a decree of dissolution has been entered. If the action is dismissed judgment for costs shall be entered in the judgment docket and lien index. The clerk shall maintain a separate docket for dissolution of marriage actions. No officer or other person shall permit a copy of any of the testimony, or pleading, or the substance thereof, to be made available to any person other than a party or attorney to the action. Nothing in this section shall be construed to prohibit publication of the original notice as provided by the rules of civil procedure. Violation of the provisions of this section shall be a public offense, punishable by a fine of not more than one hundred dollars, or imprisonment in the county jail not more than thirty days, or by both such fine and imprisonment."

The purpose of *The Lis Pendens* index, §617.11, Code of Iowa, 1975, is to protect the plaintiff in a legal action against the defendant by giving notice to third persons of the pending action, so that while the action is pending, no interest can be acquired in affected property as against

plaintiff's rights. During the time the parties are married it is not likely that a third party would accept a conveyance of real estate from one spouse which was not also joined in by the other. Iowa Land Title Examination Standards 5.4.

Inasmuch as the abstractors are charged with responsibility of noting only matters of records, the fact that petitioners for the dissolution of marriage are not indexed in *The Lis Pendens Book* should, in no way, effect the integrity of titles to any real estate involved prior to the filing of the decree and any property settlement made a part thereof.

April 3, 1975

STATE OFFICERS AND DEPARTMENTS. Agricultural Extension Councils and Districts — §§24.14, 176A.3, 176A.4, 176A.5, 176A.6, 176A.7, 176A.8(3), 176A.8(7), 176A.8(9), 176A.8(15), 176A.10, 176A.11, 176A.12, 176A.13, 266.5, 1975 Code of Iowa. A county agricultural extension council is bound by an agreement as to the amount of funding to be provided by the council for compensation of personnel entered into between an earlier council and the State Extension Service, unless the agreement would result in the limits of §176A.10 being exceeded. (Haskins to Fenske, Audubon County Extension Director, 4-3-75) #75-4-9

Mr. David C. Fenske, Audubon County Extension Director: You ask our opinion as to whether an agreement made in 1973 between the Audubon County Agricultural Extension Council and the State Extension Service regarding the amount of funding to be provided by the Audubon Council for compensation of personnel is binding on the council in 1975.

A State Extension Service (the "service") has been created to organize and conduct agricultural extension work through Iowa State University. *See* §§176A.3, 266.5, 1975 Code of Iowa. To give a local role in this work, County Agricultural Extension Districts ("districts"), whose boundaries are co-extensive with the counties (except Pottawattamie), have been set up. *See* §176A.4, 1975 Code of Iowa. A county agricultural extension council (a "council") governs the affairs of each district. *See* §§176A.5, 176A.8(3), 1975 Code of Iowa. The councils are state agencies. *See* §176A.8(3), 1975 Code of Iowa. The councils meet on an annual basis, *see* §176A.7, 1975 Code of Iowa, and their members are elected by township to two-year terms, *see* §176A.6, 1975 Code of Iowa. No member may serve more than two consecutive terms. *See* §176A.6, 1975 Code of Iowa. The terms of the members are staggered so that, in any given year, some of the members are up for re-election. *See* §176A.6, 1975 Code of Iowa. Councils are obligated to "co-operate" with the service. *See* §176A.13, Code of Iowa. To this end, councils are empowered and obligated to enter into Memorandums of Understanding with the service, to fix the compensation of personnel in cooperation with the service and in accordance with the Memorandums of Understanding, and to pay salaries of personnel. §§176A.8(7), 176A.8(8), 176A.8(15), 1975 Code of Iowa, state:

"The extension councils of each extension district of the state shall have, exercise, and perform the following powers and duties: * * *

"7. *To enter into a Memorandum of Understanding with the extension service setting forth the co-operative relationship between the extension service and the extension district.*"

"8. To employ all necessary extension professional personnel from qualified nominees furnished to it and not to terminate the employment of any such without first conferring with the director of extension, and to employ such other personnel as it shall determine necessary for the conduct of the business of the extension district, and *to fix the compensation for all such personnel in cooperation with the extension service and in accordance with the Memorandum of Understanding entered into with such extension service.*" * * *

"15. *To expend the 'county agricultural extension education fund' for salaries* and travel, expense *of personnel,* rental, office supplies, equipment, communications, office facilities and services, and in payment of such other items as shall be necessary to carry out the extension district program; provided, however, it shall be unlawful for the county agricultural extension council to lease any office space which is occupied or used by any other farm organization or farm co-operative, and provided further, that it shall be lawful for the County Agricultural Extension Council to lease space in a building owned or occupied by a farm organization or farm co-operative. [Emphasis added]

We believe that these sections together constitute implied authority for the councils to enter into binding agreements with the service as to the amount which the councils will provide for compensation of personnel. Councils are funded by the counties through county agricultural extension funds. *See* §176A.12, 1975 Code of Iowa. The moneys in these funds are obtained through a special levy by the county board of supervisors. *See* §176A.11, 1975 Code of Iowa. However, there are limits on the amount of funds which the councils may receive from the counties. §176A.10, 1975 Code of Iowa, states:

"The extension council of each extension district shall, at a regular or special meeting held in January in each year, estimate the amount of money required to be raised by taxation for financing the county agricultural extension education program authorized in this chapter. The amount so estimated shall not exceed the amount of money which the following rate will produce, based on the assessed value of the taxable property in the extension district: For the 'county agricultural extension education fund' annually not to exceed thirteen and one-half cents per thousand dollars of assessed value, except in districts having a population of less than forty thousand the tax levied shall not exceed twenty and one-fourth cents per thousand dollars of assessed value, provided, however, that no extension council in an extension district shall make an estimate or certify an amount in any one year in excess of forty thousand dollars in districts having a population of fifty thousand or more, in excess of thirty-three thousand dollars in districts having a population under fifty thousand population, which shall be the maximum amount that any such extension district shall be entitled to receive annually from the county. The extension council in every extension district shall in every respect comply with Chapter 24."

Clearly, there are also limits on the amount of funds which the councils may agree with the service to pay toward the compensation of personnel.

In the present case, in 1971, the Audubon County Extension Council (the "Audubon council") entered into a general Memorandum of Understanding with the service. In 1973, pursuant to the Memorandum, the Audubon council and the service specifically agreed on the amount of funding to be provided by the Audubon council for compensation of personnel for the fiscal years beginning in 1974 and 1975. The Audubon council now asks whether the agreement entered into in 1973 binds the council in 1975.

In 1957 O.A.G. 79, 81, we opined that a county Agricultural Extension District (or, in effect, a council) could not enter into a rental agreement in excess of one year which would obligate future money. The reasoning was founded on now §24.14, 1975 Code of Iowa, which states in relevant part:

"[N]o greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated, therefore . . ."

Chapter 24, 1975 Code of Iowa, is applicable to councils. *See* §176A.8(9), 1975 Code of Iowa. The assumption behind the 1957 opinion apparently is that sufficient funds might not be appropriated by the counties in future years to pay the agreed-upon amount for rent. However, this assumption is not valid. It is true, as indicated, that limits exist on the amount of funds which the counties may provide to the councils, and the amount which a prior council might agree to pay for rent, for example, might conceivably exceed these limits at some time. But, subject to these limits, the counties must provide the funds which the councils request. At a meeting held in January of each year, the councils estimate the amount of money required to be raised by the counties for financing the county agricultural extension education programs. *See* §176A.10, supra. The boards of supervisors are then obligated to levy the taxes necessary to finance the county agriculture extension funds (subject to the above limits of course). §176A.11, 1975 Code of Iowa, states:

"*The board of supervisors of each county shall annually*, at the time of levying taxes for county purposes, *levy the taxes necessary to raise the county agricultural extension education fund and certified to it by the extension council* as provided in this chapter, but if the amount certified for such fund is in excess of the amount authorized by this chapter it shall levy only so much thereof as is authorized by this chapter." [Emphasis added]

The tax levied is paid into the county agricultural extension fund, from which the chairman of the council is empowered to draw moneys. §176A.12, 1975 Code of Iowa, states:

"There shall be established, in each county, a 'county agricultural extension education fund' and the county treasurer of each county shall keep the amount of tax levied for such fund, as herein in this chapter authorized, in said fund. Before the fifteenth day of each month in each year the county treasurer of each county shall give notice to the chairman of the extension council of his county of the amount collected for the 'county agricultural extension education fund' to the first day of such month, and the chairman of the extension council shall draw his draft therefor, countersigned by the secretary upon the county treasurer who shall pay such taxes to the treasurer of the extension council only on such draft." [Emphasis added]

Hence, it can be seen that within the limits of §176A.10, the counties are obligated to appropriate the funds needed by the councils and therefore §24.14 is satisfied and presents no bar to the type of agreement which we have here. The assumption behind the 1957 opinion thus falls. We are then left with the question of whether an agreement between a council and the service which extends beyond the term of the council entering it, but which does not result in the limits of §176A.10 being exceeded, is binding. We believe that it is so.

A contract made by a governmental body, under the prevailing view today, binds its successors. *See City of Des Moines v. City of West Des Moines*, 239 Iowa 1, 30 N.W.2d 500, 507 (1948); *Cf.* 63 Am. Jur.2d *Public Officers and Employees*, §307 at 812. This is particularly true where the body is continuing in nature, which the councils basically are by reason of the staggered terms of their members. Moreover, Memorandum of Understanding and related agreements pursuant thereto entered into by a council at one time would be virtually meaningless if they were not binding on later councils. Fiscal chaos could result if Memorandums and agreements were not binding. The service receives and allocates federal grants, *see* §176A.13, 1975 Code of Iowa, and receipt and allocation of these funds requires the foreseeability produced by legally binding committments on behalf of the councils and the counties standing behind them.

Accordingly, we conclude that a County Agricultural Extension Council is bound by an agreement as to the amount of funding to be provided by the council for compensation of personnel entered into between an earlier council and the State Extension Service, unless the agreement would result in the limits of §176A.10 being exceeded.

April 3, 1975

ENVIRONMENTAL PROTECTION: Abandoned river channels and islands in navigable streams — Ch. 111 and Ch. 568, Code of Iowa, 1975. Ch. 111 and Ch. 568 are indirect and irreconcilable conflict as to procedure for sale or other disposition of state-owned land in or along meandered streams. Provisions of Ch. 111, the later enactment, govern the disposition of such lands. Repeal of Ch. 568 will not affect title to privately owned islands in Iowa streams. (C. Peterson to Monroe, State Representative, 4-3-75) #75-4-10

The Honorable W. R. Monroe, State Representative: Reference is made to your request for an opinion of the Attorney General as to:

". . . by eliminating Chapter 568, what is the effect on a privately owned island in the Mississippi or Des Moines River if there is no longer the exemption for platted land: I recognize protection of due process of the Constitution, but would elimination of Chapter 568, without maintaining life for the platted land exemption, cloud the owner's title or jeopardize it?"

Chapter 568, Code of Iowa, 1975, which first appeared in the supplement of 1913, authorizes and requires the sale of certain islands and abandoned river channels in the following terms:

"568.1 Sale authorized. All land between high-water mark and the center of the former channel of any navigable stream, where such channel has been abandoned, so that it is no longer capable of use, and is not likely again to be used for the purposes of navigation, and all land within such abandoned river channels, and all bars or islands in the channels of navigable streams not heretofore surveyed or platted by the United States or the state of Iowa, and all within the jurisdiction of the state of Iowa shall be sold and disposed of in the manner hereinafter provided." * * *

"568.21 Sale or lease authorized. The executive council of the state is hereby authorized and empowered to sell, convey, lease, or demise any of the islands belonging to the state which are within the meandered

banks of rivers of the state, and to execute and deliver a patent or lease thereof. Nothing in this and sections 568.22 to 568.25 shall be construed to apply to islands in the Mississippi or Missouri rivers."

Other sections set out procedures to be followed in the survey, appraisal and sale or lease of such lands. Preference in the sale or lease of such land is provided for bona fide occupants or possessors of such land.

In Chapter 111, which first appeared in the 1924 Code of Iowa, a completely different means of selling or leasing state-owned lands is provided. In pertinent part, Chapter 111 states:

"111.18 Jurisdiction. Jurisdiction over all meandered streams and lakes of this state and of state lands bordering thereon, not now used by some other state body for state purposes, is conferred upon the commission. The exercise of this jurisdiction shall be subject to the approval of the Iowa natural resources council in matters relating to or in any manner affecting flood control. The commission, with the approval of the executive council, may establish parts of such property into state parks, and when so established all of the provisions of this chapter relative to public parks shall apply thereto.

"111.19 Boundaries. The commission shall at once proceed to establish the boundary lines between the state-owned property under its jurisdiction and privately owned property when said commission deems it feasible and necessary, and shall where deemed advisable mark the same so that the boundaries of such state-owned property may be easily ascertainable to the public. * * *

"111.21 County engineer — duties. The commission may call upon the county engineer of any county to advise relative to the true boundary between the state-owned property and private property in the county, and to furnish plats and surveys showing such true boundary lines, and when directed by the commission, shall mark such boundary lines as herein provided. * * *

"111.24 Boundaries — adjustment. Whenever a controversy shall arise as to the true boundary line between state-owned property and private property, the commission may, with the approval of the executive council, adjust said boundary line or take such other action in the premises, all with the approval of the executive council, as in its judgment may seem right. When such disputed boundary line is fixed it shall be surveyed and marked as herein provided.

"111.25 Leases. The commission may recommend that the executive council lease property under the commission's jurisdiction. All leases shall reserve to the public of the state the right to enter upon the property leased for any lawful purpose. The council may, if it approves the recommendation . . . execute the lease in behalf of the state and commission. . . . * * *

"111.31 Sale of islands. No islands in any of the meandered streams and lakes of this state or in any of the waters bordering upon this state shall hereafter be sold, except with the majority vote of the executive council upon the majority recommendation of the commission, and in the event any of such islands are sold as herein provided the proceeds thereof shall become a part of the funds to be expended under the terms and provisions of this chapter.

"111.32 Sale of park lands — conveyance to cities or counties. The executive council may, upon a majority recommendation of the commission, sell or exchange such parts of public lands under the jurisdiction of the commission as in its judgment may be undesirable for conservation purposes, excepting state-owned meandered lands already surveyed and

platted at state expense as a conservation plan and project tentatively adopted and now in the process of rehabilitation and development authorized by a special legislative Act. Such sale or exchange shall be made upon such terms, conditions or considerations as the commission may recommend and that may be approved by the executive council, whereupon the secretary of state shall issue a patent therefor in the manner provided by law in other cases. The proceeds of any such sale or exchange shall become a part of the funds to be expended under the provisions of this chapter.

"Upon request by resolution of any city or county or any legal agency thereof, the executive council may, upon majority recommendation of the state conservation commission, convey without consideration to such city or county or legal agency thereof, such public lands under the jurisdiction of the commission as in its judgment may be desirable for city or county parks. Conveyance shall be in the name of the state, with the great seal of the state attached and shall contain a provision that when such lands cease to be used as public park by said city or county such lands revert to the state, and such park shall, within one year after such land has reverted to the state, be restored, as nearly as possible, to the condition it was in when acquired by such city, county or legal agency thereof at the expense of such city, county or legal agency.

"The state may require that the city, county or legal agency thereof file a notice of intention every three years."

The conflict between Chapter 568 and Chapter 111 and the effect thereof was considered in 1938 OAG 352 wherein it was stated:

"It is immediately apparent that a conflict exists between the provisions of Chapter [568] and the provisions of Chapter [111]. Chapter [568] provides procedures whereby state owned lands within meandered streams and lakes and lands bordering thereon may be required to be sold to persons who may make application to purchase same. On the other hand, Chapter [111] restricts the sale of such land, specifically places the same under the jurisdiction of the state conservation commission, and forbids the sale of state owned islands except with the assent of a majority of the executive council and the state conservation commission. Furthermore, sale of such state owned land, except islands. is restricted to that which is found to be undesirable for conservation purposes. . . .

"The provisions of Chapter [111] were enacted subsequent to the provisions of Chapter [568]. Repeals by implication are not favored by the law and every effort should be made to harmonize apparently conflicting provisions of the statutes. However, to give effect to the provisions of Chapter [568] insofar as the same affect the disposition of state owned lands of the character heretofore described, would be to leave without effect the provisions of Chapter [111].

"Since the provisions of Chapter [111] relative to the management and disposition of such state owned land within the bordering meandering lakes and streams of the state are of more recent enactment than the provisions of Chapter [568], it is our opinion that the provisions of Chapter [111] must control insofar as a conflict exists between the two chapters.

"It is therefore our opinion that the procedure outlined in Chapter [111] should be applied in case sale or other disposition of such property is contemplated, and that the directory provisions of Sections [111.32] and [111.33] should be followed in consummation of such transactions."

In *Park Commissioner v. Taylor*, 1907, 133 Iowa 453, 108 N.W. 927, the Iowa Supreme Court found the Des Moines River to be navigable at Des Moines on the following basis:

". . . defendants could not under the record question the character of the river as navigable, for it is conceded that in the original government survey it was meandered, and its character as a navigable stream was thus established so far as the possible limits of defendants' lots are concerned. The action of the Land Department of the United States government in meandering the stream and conveying the land bordering on such stream with reference to the meander line is conclusive that the stream was navigable in such sense that the title of the riparian owners resting on such survey extended, under the rule in this State, only to high-water mark. Rood v. Wallace, 109 Iowa, 5; Serrin v. Grefe, 67 Iowa, 196; Carr v. Moore, 119 Iowa, 152.

"That the surveyors, in making the original United States survey, were required to determine the navigability of the stream in determining whether it was to be meandered, is apparent from Act May 18, 1796, chapter 29, 'providing for the sale of land of the United States in the territory northwest of the river Ohio and above the mouth of the Kentucky river,' which act was subsequently made the basis for the survey of land in Iowa. It was therein provided (section 2) that the land should be surveyed in townships of six miles square by running north and south and east and west lines, unless where 'the course of navigable rivers may render it impracticable, and in that case this rule must be departed from no further than such particular circumstances require.' U.S. Comp. St. section 2395. And further in the same act (section 9) it is provided that 'all navigable rivers within the territory to be disposed of by virtue of this act shall be deemed to be and remain public highways; and in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and bed thereof shall become common to both.' 1 Stat. 468; U. S. Comp. St. section 2476. In the directions to surveyors issued by the General Land Office it was provided that 'both banks of navigable rivers are to be meandered by taking the courses and distances of their sinuosities.' Lester, Land Laws, page 714. There can be no doubt that the approval of the survey when made constituted a determination by the Land Department that the stream meandered was a navigable stream, and this determination is conclusive so far as the title of riparian owners is concerned. . . ."

The court specifically confirmed this holding in *Shortell v. Des Moines Electric Co.*, 1919, 186 Iowa 469, 172 N.W. 649, and expanded thereon as follows:

"It is true that none of the inland meandered streams of this state are now or ever have been extensively used for commercial purposes. Other means of communication, readily available, are better suited to the needs of the people of Iowa; but, in so far as the title to the beds of meandered streams is concerned, the court has recognized it as in the state. Whether title to the beds of navigable streams is in the state, or belongs to the respective opposite riparian owners to the thread thereof, is a matter of local law, which each state determines for itself. Mr. Justice Pitney, in Donnelly v. United States, 228 U.S. 243 (57 L.Ed. 820), in discussing this question, said:

'The question of the navigability in fact of non-tidal streams is sometimes a doubtful one. It has been held, in effect, that what are navigable waters of the United States within the meaning of the act of Congress, in contradistinction to the navigable waters of the states, depends upon whether the stream, in its ordinary condition, affords a channel for useful commerce. * * * But it results from the principles already referred to that what shall be deemed a navigable water, within the meaning of the local rules of property, is for the determination of the several states.'

"We are not disposed to disturb or overrule the holding of the prior decisions of this court, as indicated by the cited cases upon this question, nor disregard the numerous acts of the legislature referred to, and to now hold that the Des Moines River, at the point in question, is a non-navigable stream. It may be that it will never be used as a waterway for

commercial purposes, and that it should not be classified as a part of the navigable waters of the United States, under the numerous acts of Congress relating to such waters; but, for the purpose of fixing the ownership of the bed thereof and the rights of riparian owners, the question must be considered as settled in this state, and the holding of the court below that the river is non-navigable is disapproved and overruled."

See also *Mather v. State*, 1972, Iowa, 200 N.W.2d 498; *State v. Raymond*, 1963, 354 Iowa 828, 119 N.W.2d 135; *Rand v. Miller*, 1959, 250 Iowa 699, 95 N.W.2d 916; and 1966 OAG 56.

Thus, the Iowa Supreme Court has held that streams and lakes in Iowa are navigable to the extent meandered so far as the title of riparian owners is concerned; that questions of title to the beds of navigable streams are matters of local law which each state determines for itself; and that title to the beds of meandered streams and lakes in Iowa is in the state.

Chapter 568 authorizes and requires the sale of abandoned channels and bars and islands in navigable streams within the jurisdiction of the State of Iowa, except those already surveyed or platted.

Chapter 111 confers general jurisdiction over meandered streams and lakes and state lands bordering thereon upon the state conservation commission and authorizes the sale or lease thereof on considerations and procedures in direct and irreconcilable conflict with those provided in Chapter 568. Under these circumstances, Chapter 111, the later enactment, must be followed in the sale or lease of such lands.

Chapter 568 relates to lands "within the jurisdiction of the State of Iowa" and Chapter 111 relates to "public lands under the jurisdiction of the [state conservation] commission." Since neither chapter purports to affect other than state-owned lands, we are of the opinion that the repeal of Chapter 568 would not affect title to privately-owned islands in any streams in the state.

April 4, 1975

STATE OFFICERS AND DEPARTMENTS. Department of Public Safety — Confidential Records. §§68A.2, 321.11, 321.266, and 321.271, Code of Iowa, 1973. Chapter 294 (S.F. 115), Acts of the 65th General Assembly, First Session. Driver's license records are not "criminal history data". Investigating officer's accident reports are not "criminal history data". Reports of the state criminalistics laboratory in the hands of the Department of Public Safety are not "intelligence data". (Voorhees to Larson, 4-4-75) #75-4-11

Hon. Charles W. Larson, Commissioner of Public Safety: You have requested an opinion as to what extent Chapter 294 (S.F. 115) Acts of the 65th General Assembly, First Session (hereinafter referred to as Chapter 294) applies to drivers' license records and accident reports.

Chapter 294 places restrictions on the communication of "criminal history data" and "intelligence data" by the department. The subject of Chapter 294 has been dealt with extensively in previous opinions. For a discussion of the act's basic provisions and other general comments, see Turner to Sellers, 9-25-73, #73-9-27; Voorhees to Larson, 1-7-74, #74-1-14.

Section 321.11, Code of Iowa, 1973, provides:

"All records of the department, other than those declared by law to be confidential for the use of the department, shall be open to public inspection during office hours."

Section 68A.2, Code of Iowa, 1973, gives every Iowa citizen the right to examine records of a government agency:

". . . unless some other provision of the Code expressly limits such right or requires such records be kept secret or confidential . . . ."

The question is thus whether Chapter 294 expressly makes drivers' license records or portions thereof confidential.

As we observed in previous opinions, the provisions of Chapter 294 are very broad. §1.5 defines conviction data as:

". . . information that a person was convicted of or entered a plea of guilty to a public offense and includes the date and location of commission and place and court of conviction."

§1.3 defines "criminal history data" as including, among other things, "conviction data." §2 places various restrictions on the dissemination by the department of "criminal history data." In our previous opinions (Voorhees to Larson, supra) we stated that §2 applied only to the B.C.I. criminal history file and not to every file cabinet in the department. While this principle would be equally applicable here, we feel that the question should be given further consideration since drivers' license records are maintained in an automated data storage system. It is at least arguable that §2 might apply if the data contained therein was criminal history data.

Chapter 294 makes two exemptions for drivers' license records. Section 8 specifically exempts non-indictable offenses under Chapter 321 and local ordinances from the definition of "criminal history data." However, this exclusion would not totally exempt drivers' license records since the records should contain convictions for some indictable offenses such as OMVUI and manslaughter. On the other hand, §20 exempts from the restrictions of §§2 and 3 a certified driving record obtained pursuant to §321A.3. Thus, on its face, Chapter 294 creates the curious situation that a citizen cannot view a record of conviction for an indictable offense but can obtain a certified copy of it!

We seriously doubt that the legislature intended this result. Indeed, it would appear that the legislature was trying to exempt drivers' license records from the act's restrictions rather than specifically making such records confidential. In view of the strong policy in favor of public records as expressed by §§68A.2 and 321.11, we do not believe that Chapter 294 has, with a sufficient degree of specificity, expressly made drivers' license records secret. It is our opinion that §§68A.2 and 321.11 are controlling and that drivers' license records are not subject to restrictions of Chapter 294.

A similar question is raised with regards to investigating officers' accident reports filed in accordance with §321.266, Code of Iowa, 1973. Section 321.271, Code of Iowa, 1973, requires that such accident reports be made available to any party to an accident, his insurance company

or its agent, and his attorney. However, these reports may contain information that a person was charged with an indictable offense. In a previous opinion, we stated that information regarding current arrest records is open to public inspection (See, Turner to Sellers, supra). We believe that information on charges filed contained in an investigating officer's accident report is in the nature of current arrest data. Further, it would seem to us that Chapter 294 does not expressly limit the disclosure of accident reports. As we noted above, §§68A.2 and 321.11 make records of the Department of Public Safety public unless otherwise expressly provided. Section 321.271 does limit the disclosure of these reports to a party, his insurance company or its agent, and his attorney. However, this is the extent of any express limitations on disclosure of these reports. As was the case of the drivers' license records generally, we do not believe the provisions of Chapter 294 are specific enough to override express statutory provisions to the contrary. For these reasons, it is our opinion that §2 of Chapter 294 does not prohibit the furnishing of an investigating officer's accident report to the persons authorized by Section 321.271.

You have also asked whether reports of the state criminalistics laboratory are "intelligence data" for the purposes of Chapter 294. Your letter points out that the criminalistics lab performs services for various state agencies, including the Auditor and Treasurer of State.

Intelligence data as defined in §1.11 of Chapter 294 is:

". . . information collected where there are reasonable grounds to suspect involvement or participation in criminal activity by any person."

§8 provides that:

"Intelligence data in the files of the department may be disseminated only to a peace officer, criminal justice agency, or state or federal regulatory agency, and only if the department is satisfied that the need to know and the intended use are reasonable."

Viewing these definitions, as well as the entire act, it appears that the term "intelligence data" refers to information about an individual's alleged criminal activities rather than physical evidence. We do not believe that the actual physical evidence nor any laboratory analysis thereof is "intelligence data".

The laboratory analysis in and of itself does not relate to criminal activity. Only when the lab report is combined with other information that would link the physical evidence to an alleged crime could that total quantum of information possibly be considered "intelligence data". The information that would connect physical evidence with an alleged crime would lie with the investigating authority, and not the criminalistics lab. It is therefore our opinion that a report of the criminalistics lab in the hands of the Department of Public Safety is not "intelligence data".

April 14, 1975

CITIES AND TOWNS: Parking Meter Funds — §390.8, Code of Iowa, 1973. A city operating under Chapter 390 of the 1973 Code may use parking meter funds only as provided by §390.8. (Blumberg to Norpel, State Senator, 4-14-75) #75-4-12

Honorable Richard J. Norpel, Sr., State Senator: We have received your opinion request of April 7, 1975, regarding Chapter 390 of the 1973 Code. You ask whether a city may use funds collected from parking meters for non-parking purposes.

Section 390.8 provides for the use of funds collected from parking meters. It states, in part:

"Funds derived from the operation of parking meters shall be used for the following purposes *and none other* . . . ." [Emphasis added.]

The purposes, as listed are the payment of the cost of acquisition and installation of meters; payment for maintenance and repair of meters, collection of meter taxes, and enforcement of traffic laws in meter districts; purchase and installation of other parking or traffic control devices; payment for purchase, lease or other arrangement of parking lots and the like; and, the retirement of revenue bonds issued pursuant to Chapter 390. It is apparent that the funds must be used only for purposes dealing with parking meters, parking lots, enforcement of traffic laws or related matters.

Accordingly, we are of the opinion that a city operating under Chapter 390 of the 1973 Code may expend parking meter funds only for the purposes outlined in §390.8. It should be noted that Chapter 390 will be repealed on July 1, 1975.

April 22, 1975

SCHOOLS: Distribution of assets by county boards of education. §9, Chapter 1172, 65th G.A., Second Session (1974). The Tama County Board of Education does not have the right to distribute the board's assets to local school districts during the interval between October 7, 1974, and June 30, 1975. (Turner to Orr, State Senator, 4-22-75) #75-4-13

The Honorable Joan Orr, State Senator: This opinion is in response to your request dated April 11, 1975, regarding the distribution of assets by county boards of education under Chapter 1172, §9, laws of the 65th G.A. (2nd Session). Your request was prompted by an opinion written by an Assistant Tama County Attorney which answered the following questions:

"(1) Does the Tama County Board of Education have the legal right to distribute the assets of the Board to the 5 local school districts prior to June 30, 1975?

"(2) If the answer to question one is 'yes,' on what basis should the distribution be made?"

The county attorney's opinion was "yes", that the Tama County Board of Education had the right to distribute some of the assets of the board to local school districts prior to the effective date of the Area Education Agencies Act. But it is our opinion that the Tama County Board of Education does not have such right.

§9 of Chapter 1172, Laws of the 65th G.A. (2nd Session), states in part:

"County and joint county boards of education and county and joint county school systems shall continue to function through June 30, 1975.

During the interval between the October 7, 1974, and June 30, 1975, the area education agency board shall meet with the county or joint county boards located in whole or in part within the merged area and arrange for an orderly transfer of records, assets, and liabilities from the respective county or joint county systems *to the area education agency* as of June 30, 1975. . . ." (emphasis added)

We think it is clear that the legislature intended an orderly transfer of all assets of the county boards to the area education agencies and never envisioned a piecemeal distribution of board property to local school districts. If that had been its intent, it would have said so.

The Assistant Tama County Attorney's opinion finds that the county school board had the "vested" power to dispose of school assets until the effective date of the Area Education Agencies Act, June 30, 1975. This is contrary to the express language of §9 of Chapter 1172 underlined above, which states that between October 7, 1974, and June 30, 1975, the area education board and county board will arrange an orderly transfer of assets "to the area education agency." We are not confronted with the question of whether transfer to local districts could have been effected prior to October 7, 1974. But thereafter, such a transfer must be to the area education agency.

April 24, 1975

SCHOOLS: Joint use of fair ground — Ch. 28E.5, §§280A.35, 297.22, & 280A.34. Merged Area XVI, Des Moines County, and the Des Moines County Fair Association are authorized to enter a joint services agreement whereby the area school will transfer 10 acres of land for a fair ground on which buildings to be used by both parties will be erected by the Fair Association. Use of such buildings for intercollegiate activities is not prohibited by law where operation and maintenance is not paid from Ch. 280A funds. (Nolan to Smith, Deputy State Superintendent of Public Instruction, 4-24-75) #75-4-14

Mr. Richard N. Smith, Deputy State Superintendent, Department of Public Instruction: This is written in response to your recent letter stating:

"We request your opinion as to the overall legality of the *College County Fair Service Agency Joint Agreement* being proposed by the Merged Area XVI, Des Moines County, and the Des Moines County Fair Association. A copy of said proposed Agreement as well as a copy of a formal resolution of approval by each governmental agency board, is enclosed.

"This Agreement is being proposed and submitted for consideration under authority believed by the involved governmental agencies to be granted to them under Chapters 28E, 174, 280A and 332 of the Code of Iowa. The consummation of this Agreement will involve a title transfer of ten (10) acres of land presently owned by Merged Area XVI and will decrease the campus size below the 160 acre standard. The facility that may be erected by the College County Fair Service Agency will possibly be used for intercollegiate athletics.

"Your opinion as to the legality of the Agreement at your earliest convenience will be appreciated."

I have reviewed the proposed agreement for the creation of the College County Fair Service Agency pursuant to Chapter 28E of the Code of Iowa. The provisions of this chapter with respect to mutual benefits of the contracting parties and the specific requirements of §28E.5 appear

to be adequately covered. Appropriate resolutions of the governing bodies intending to participate in this joint agreement have also been submitted, pursuant to §28E.4 of the Code, although it appears that at this time no provision has been made for the execution of the joint service agreement document by representatives of the parties involved. In other respects, the proposed agreement is in acceptable legal form.

With respect to the transfer of ten acres of land to the College County Fair Service Agency by Merged Area XVI, a question has been raised as to whether this sale and transfer is contrary to the provision of §280A.35, Code of Iowa, 1975, which states:

"With the approval of the state board, the board of directors of any merged area at any time may sell any land in excess of one hundred sixty acres owned by the merged area, and no election shall be necessary in connection with such sale notwithstanding any other provisions of law. . . ."

Under §280A.16, the merged area is given the status of a body politic as a school corporation and empowered to "exercise all the powers granted by law and such other powers as are incident to public corporations of like character and are not inconsistent with the laws of the state". Code §297.22 authorizes the board of directors of a community school district to "sell, lease, exchange, give or grant and accept any interest in real property to, with or from any county, municipal corporation, school district or township if the real property is within the jurisdiction of both the grantor and grantee". In such situation the usual appraisal requirements and the requirement that the voters of the school district authorized the sale do not apply if the value of the property sold does not exceed the amount prescribed by §297.22. It is the view of this office that the statutes may be construed as being in *pari materia* and that the 160 acre limitation does not foreclose the approval of this agreement.

Another point brought out is that the facility to be erected will possibly be used for intercollegiate athletics. In this connection, attention is called to §280A.34, which prohibits the use of funds obtained pursuant to §§280A.17, 280A.18, 280A.19 and 280A.22 for the construction or maintenance of such buildings. However, the use of funds from other sources for this purpose is not prohibited.

May 2, 1975

BEER, LIQUOR AND CIGARETTES: Gifts to persons involved in the administration and enforcement of liquor laws. §123.44, 1973 Code of Iowa. Persons involved in the administration and enforcement of Iowa's liquor laws may not accept gifts of liquor and food from a distiller. (Coriden to Holden, State Representative, 5-2-75) #75-5-1

The Honorable Edgar H. Holden, State Representative: You have requested an opinion on the following:

"The December 11th issue of the DES MOINES REGISTER carried a story on Seagram Distillers party at the Hyatt House. A copy is enclosed.

"It would appear from the report that Seagram furnished free liquor, food and the place of meeting for some 275 persons and offered free home delivery service from the State stores of any liquor ordered by these guests.

"I would like your opinion on the following:

"1. Is this kind of promotional scheme in violation of section 123.51 Code of Iowa 1973?

"2. Is the gift of liquor at such a party in violation of section 123.44 Code of Iowa 1973?

"3. Would administration or enforcement persons from the Iowa beer and liquor control department be in violation of section 123.18 of the code if they attended such a party and accepted free gifts of liquor and food?"

I believe that it would be inappropriate for this office to attempt to answer your first two questions because we do not know what transpired at the party other than what was reported in the newspaper. An investigation by the county attorney would probably be more appropriate in this situation than an attorney general's opinion.

As for your third question, whether or not there would be a violation of §123.18, 1973 Code of Iowa, there would be a definite violation of §123.44, 1973 Code of Iowa. That section states that:

"No manufacturer, vintner, wholesaler, or importer, organized as a corporation pursuant to the laws of this state or any other state, and who deals in alcoholic liquor or beer subject to this chapter shall offer or give any thing of value to any council member, official or employee of the department . . . ."

Therefore, administration or enforcement persons would clearly be in violation of the law if they attended a party such as the one described and accepted free gifts of food and liquor.

May 5, 1975

TOWNSHIPS: Fire Fighting Companies — §§359.42, 359.43, 359.44, 504.1 and 504.2, Code of Iowa, 1975. A fire fighting corporation under Chapter 504 of the Code has authority to build housing for its fire equipment. Township trustees may levy a tax, after authorization by election, for housing of fire equipment. (Blumberg to Straub, Kossuth County Attorney, 5-5-75) #75-5-2

Joseph J. Straub, Kossuth County Attorney: I have received your opinion request regarding fire companies. You specifically asked:

"The Fenton Community Fire Company, a non-profit corporation, is organized under Chapter 504 of the 1946 Code of Iowa and amendments thereto. The corporation is planning on building a structure to house the fire fighting equipment which will also have a room or area for first aid training. Chapter 504.1 of the 1973 Code of Iowa provides that corporations organized under that chapter shall have as powers, among other things, the power '. . . for the acquisition and ownership of rural fire fighting equipment . . . and doing all things necessary thereto.' My first question is whether or not this power as set out in Chapter 504.1 of the Iowa Code includes the power to build a structure for the purposes set forth above.

"My second question concerns the same corporation. Chapter 359.42 of the 1973 Code of Iowa provides that the township trustees may, among other things, '. . . own, rent, or maintain fire apparatus or equipment and provide housing for the same and furnish services in the extinguishing of fires . . .' My second question is whether or not the authority given in 359.42 includes the authority to have election and levy taxes as provided in 359.43 and 359.44 when some of the funds raised by the tax will be used in fact for the purpose of housing for the fire fighting equipment."

Section 504.1, 1975 Code, provides in part:

"Except as may be otherwise specifically provided in this chapter, any three or more persons of full age, a majority of whom shall be citizens of the state, may incorporate themselves for . . . the acquisition and ownership of rural fire fighting equipment . . . ."

At the end of that sentence is the phrase "and the doing of all things necessary thereto." Section 504.2 provides that such corporations may take by gift, purchase, devise, or bequest real and personal property for purposes appropriate to ts creation.

It appears that the phrase "and the doing of all things necessary thereto" modifies all the corporations listed in section 504.1. Therefore, erecting housing for fire fighting equipment would be within the powers of those corporations listed in the chapter. Even if the above phrase does not modify the other corporations, we believe that housing for the equipment would be necessary and incidental to such a corporation. Finally, we do not see a distinction between purchasing housing, which is authorized in section 504.2, and building housing.

With respect to your second question, section 359.42 authorizes townships to purchase, rent, own or maintain fire apparatus and provide housing for the same. Section 359.43 provides that the township trustees, may levy an annual tax for the purpose of exercising the powers granted in section 359.42, when authorized by an election under section 359.44. It is apparent from the above that taxes and an election authorizing them can be authorized for the housing of the fire equipment.

Accordingly, we are of the opinion that a fire corporation under Chapter 504 has the authority to build housing for its fire equipment. Township trustees may levy a tax, after authorization by an election, for housing of fire equipment. However, this opinion is not to be construed as allowing a township to levy a tax for a fire corporation under Chapter 504 in the absence of a joint agreement.

May 5, 1975

CITIES AND TOWNS: Collection of Sewer Rents — §393.5, Code of Iowa, 1973; §§362.2(22), 384.84, 455B.30(1), (5), (7), Code of Iowa, 1975. A muncipality may collect sewer rentals along with the water bills. (Blumberg to Poncy, State Representative, 5-5-75) #75-5-3

Honorable Charles N. Poncy, State Representative: We have received your opinion request of April 16, 1975, in which you ask about the legality of a Municipal Water Works collecting sewer rent for a city.

Pursuant to §393.5, 1973 Code, sewer rentals must be collected in conjunction with water rentals. That section provides: "Said charges [sewer rentals] *shall* be collected at the same time, place, and in conjunction with the water rentals in any city or town owning and operating the muncipal water supply and distribution system." [Emphasis added]. As of July 1 ,1975, that section will be repealed by §199, Ch. 1088, Acts of the 64th G.A.

Section 384.84, 1975 Code of Iowa, provides that the governing body of a city utility or combined city utility may establish, impose, adjust

and *provide for the collection* of rates to pay the expenses of the operation and maintenance of the utility. Section 362.2(22), 1975 Code, defines city utility to include all or part of a sanitary sewage system, including all lands, easements, fixtures, equipment, accessories and the like. "Sewage" is defined in §455B.30(1), 1975 Code, as water-carried waste products from residences and the like together with ground water, infiltration and surface water. "Sewer system" is defined as pipe lines or conduits, pumping stations, force mains and all other constructions and the like for conducting sewage or other wastes to a point of ultimate disposal. §455B.30(5). "Disposal system" means a system for disposing of sewage and includes sewer systems. §455B.30(7). It is apparent that the collection of sewage through sewers is a sanitary sewage system and therefore a city utility within §384.84. Municipalities operating under the 1975 Code may provide for the manner of collection of utility rates. Since the collection of such rates along with the water bills is not prohibited, Home Rule dictates that a city may so do. Even if the sewer system in question did not, for some reason, qualify as a utility within §362.2(22), 1975 Code, Home Rule would still mandate that the municipality could collect the fees along with the water bills, since there is nothing to prohibit it.

Accordingly, we are of the opinion that a municipality may legally collect sewer rent along with the water bill under either the 1973 or 1975 Code.

May 8, 1975

ALCOHOLISM: Emergency Commitment; §§4.1(36)(a), 125.1, 125.18(1), 125.18(2), 125.18(3), 725.2, 1975 Code of Iowa. An authorized person who seeks to bring a recalcitrant intoxicated person to an alcoholism treatment facility pursuant to the statutory emergency commitment procedure of §125.18, 1975 Code of Iowa, may use force but only such as is reasonably necessary to bring in the intoxicated person. (Haskins to Curnan, Dubuque County Attorney, 5-8-75) #75-5-4

Mr. Robert J. Curnan, Dubuque County Attorney: You request our opinion on the following question:

"Where an application for the emergency commitment of an intoxicated person has been approved by the administrator of an alcoholism treatment facility and a peace officer is dispatched to bring the intoxicated person to the facility what if any powers does the peace officer have in the event the person to be committed refuses to voluntarily accompany him to the facility."

The new Alcoholism Act provides for the emergency commitment of an intoxicated person upon the filing of an application by a statutorily authorized person with the administrator of an alcoholism treatment facility. §125.18(1), 1975 Code of Iowa, states:

"An intoxicated person who has threatened, attempted, or inflicted physical harm on himself or another and is likely to inflict physical harm on himself or another unless committed, or who is incapacitated by alcohol, may be committed to a facility for emergency treatment. A refusal to undergo treatment does not constitute evidence of lack of judgment as to the need for treatment."

§125.18(2), 1975 Code of Iowa, states:

"The certifying physician, spouse, guardian or relative of the person to be committed, or any other responsible person, may make a written application for commitment under this section, directed to the administrator of the facility. The application shall state facts to support the grounds for commitment established in subsection 1."

Once the application is approved by the administrator, a peace officer, or other statutorily authorized person, is required to bring the intoxicated person to the facility. §125.18(3), 1975 Code of Iowa, states:

"Upon approval of the application by the administrator in charge of the facility, the person *shall* be brought to the facility by a peace officer, health officer, alcoholism service unit, the applicant for commitment, the patient's spouse, the patient's guardian or any other interested person. The person shall be retained at the facility to which he was admitted, or transferred to another facility, until discharged under subsection 5." [Emphasis added]

The problem arises when the intoxicated person refuses to go to the facility. May the officer or other authorized person use force if necessary to bring him in? We believe that he may do so. As can be seen, §125.18(3) mandates that upon approval of the application, the intoxicated person *shall* be brought to the facility. The word "shall" imposes a duty. *See* §4.1(36)(a), 1975 Code of Iowa. In some cases, the use of force may be absolutely essential for the authorized person to carry out his duty of bringing the intoxicated person to a facility. The entire purpose of the Alcoholism Act is to provide treatment for alcoholics and intoxicated persons. *See* §125.1, 1975 Code of Iowa. This purpose would be utterly defeated if force could not be used when necessary. It is recognized that the persons who most need alcoholic treatment are often the ones least likely to submit to it voluntarily. This is particularly true of the class of persons who are subject to emergency commitment under §125.18(1), namely, persons who have threatened, attempted, or inflicted physical harm on themselves or others and are likely to inflict physical harm on themselves or others. Significantly, §125.18(3) contains no qualification that the intoxicated person shall be brought to the facility only if he consents to be brought.

Of course, the amount of force which may be used can be no more than that which is reasonably necessary to bring the intoxicated person to the facility and all legitimate methods short of force must be attempted before force can be utilized. A peace officer, when making an arrest for a public offense, can employ no more force than that which a reasonably prudent person would exercise under like circumstances. *See Goold v. Saunders*, 196 Iowa 380, 194 N. W.227, 229 (1923); *State v. Phillips*, 119 652, 94 N.W. 229, 230 (1903); *cf.* §755.2, 1975 Code of Iowa; 1916 O.A.G., p. 129. We believe that this standard applies by logical analogy to emergency commitment of intoxicated persons and governs whether the authorized person bringing the intoxicated person to the facility is a peace officer or not. If the only force used is that which is reasonably necessary to bring the intoxicated person to the facility, there will be no civil liability. *Cf.* 14 C.J.S. *Civil Rights Supp.* §141, at 229.

In summary, an authorized person who seeks to bring a recalcitrant intoxicated person to an alcoholism facility pursuant to the emergency commitment procedures of §125.18(3), 1975 Code of Iowa, may use force but only such as is reasonably necessary to bring in the intoxicated person.

May 13, 1975

LIQUOR, BEER & CIGARETTES: Suspension or revocation of a liquor license or beer permit and incompatibility of duties of county and city attorneys. §§123.39, 123.49 and 123.50, Code of Iowa, 1975. A criminal conviction is not necessary for revocation or suspension of a license or permit. A county attorney may not, as a private attorney, represent a municipality in a license revocation or suspension proceeding. (Shimanek to Eller, Crawford County Attorney, 5-13-75) #75-5-5

Mr. Thomas R. Eller, Crawford County Attorney: You have requested an opinion on two unrelated matters. First, you would like to know whether a criminal conviction under §§123.49 and 123.50, Code of Iowa, is necessary for suspension or revocation of a liquor license or beer permit under §123.39, Code of Iowa. Second, you wonder whether there would be any conflict of interest with your duties as county attorney if you were hired as a private attorney by a municipality to represent the municipality in a license revocation or suspension proceeding.

Section 123.39, Code of Iowa, sets out the grounds for revocation or suspension. That section states that:

"Any liquor control license or beer permit issued under this chapter may, after notice in writing to the license or permit holder and reasonable opportunity for hearing, and subject to section 123.50 where applicable, be suspended for a period not to exceed one year or revoked by the local authority or the director for any of the following causes . . . ."

The relevant portion of §123.50, Code of Iowa, provides that:

"2. The conviction of any liquor control licensee or beer permittee for a violation of any of the provisions of section 123.49 shall, subject to subsection 3 of this section, be grounds for the suspension or revocation of the license or permit by the department or the local authority. However, if any liquor control licensee is convicted of any violation of subsection 2, paragraphs 'a,' 'd' or 'e' of such section, or any beer permittee is convicted of a violation of paragraph 'a,' the liquor control license or beer permit shall be revoked and shall immediately be surrendered by the holder, and the bond of the license or permit holder shall be forfeited to the department."

Section 123.49, Code of Iowa, contains a list of miscellaneous prohibitions.

Clearly, under §123.50, conviction of violation of certain portions of §123.49 will lead to immediate suspension or revocation, but is such a conviction always necessary? We think not. Section 123.39, which lays down the ground for revocation or suspension, speaks only of violation of any of the provisions of the Iowa Beer and Liquor Control Act, not of convictions. Therefore, it is our opinion a liquor license or beer permit can be revoked or suspended pursuant to §123.39 without a prior criminal conviction.

As for your second inquiry, a similar situation was discussed in an Attorney General's opinion issued November 29, 1965. In 1960 OAG 115, the question was whether a county attorney could represent a municipality in a beer bond forfeiture action. The conclusion was that the offices of county attorney and city attorney are incompatible and that a county attorney could not represent a municipality in such a case.

May 15, 1975

DEPARTMENT OF TRANSPORTATION: Comprehensive Transportation Plan. §307.10(1), 1975 Code of Iowa. No passage or positive action concerning the comprehensive transportation plan is required of the General Assembly. (Schroeder to Krause, State Representative, 5-15-75) #75-5-6

The Honorable Robert Krause, State Representative: You have requested an opinion as to whether §307.10(1), Code of Iowa, 1975, requires passage or positive action on the part of the General Assembly concerning the comprehensive transportation *plan* of the Department of Transportation.

Section 307.10(1), Code of Iowa, 1975, reads as follows:

"The Commission shall: Develop and co-ordinate a comprehensive transportation policy for the state not later than January 1, 1975, which shall be submitted to the general assembly for its approval, and develop a comprehensive transportation plan by January 1, 1976, to be submitted to the governor and the general assembly, and to update the transportation policy and plan annually."

Section 307.10(1) does require the General Assembly to approve the initial transportation *policy* of the Department of Transportation. However, §307.10(1) makes no mention of the General Assembly approving the Department of Transportation's transportation *plan*, nor its updated policies and plans to be annually submitted to the General Assembly.

The statutory rule of construction of expressio unius est exclusio alterius is controlling in this matter. The rule means the expression of one thing is the exclusion of another. Where one form of conduct (approval of the General Assembly in this case) is stated in one instance, then any omission to state that conduct in another instance means the exclusion of that conduct in the other instance.

Therefore, no General Assembly approval of the Department of Transportation plan is required. It and any annual up-dates submitted to the General Assembly would be submitted under §307.10(1) for informational purposes only.

The Attorney General Opinion to the Honorable Richard W. Welden, State Representative, dated April 2, 1974, is in accordance with this opinion. The opinion given to Mr. Welden looked at the following proposed section:

"Section 10. *NEW SECTION.* DUTIES. The commission shall: 1. Develop and coordinate a comprehensive transportation policy for the state not later than July 1, 1975, and develop a comprehensive transportation plan by July 1, 1976, to be submitted to the governor and the general assembly, and to update the transportation policy and plan annually."

It can be seen that the above-proposed section had no specific requirement of legislative approval of either the Department of Transportation policy or the Department of Transportation plan. It was, therefore, determnined, in reference to said proposed Section, that

"Approval by the general assembly seems implicit . . . any actual

implementation of *policy* without legislative approval, would run afoul of the constitutional stricture . . . ."
It is for the legislature to establish or approve the Declaration of Policy that the agency is to apply in the varying situations. O.A.G. to Welden, 4-2-74, pp. 6 & 7.

Section 307.10(1) clearly satisfies the requirement that the Legislature approve the policy of the Department of Transportation; and it also properly allows the Department of Transportation to develop plans to implement said policies, with said plans being submitted to the Legislature and Governor, so they may be deemed appropriate in relation thereto.

May 15, 1975

SCHOOLS: Bussing. §285.1(14)(16), Code of Iowa, 1975. Corwith-Wesley Community School District is obliged under §285.1 to provide transportation for a child living in the town of Wesley who attends a private school outside the school district even though the child may live but a few blocks from a public school or a private school which is not his designated attendance center. (Nolan to Stromer, State Representative, 5-15-75) #75-5-7

The Honorable Delwyn Stromer, State Representative: You forwarded to this office a letter from the Corwith-Wesley Community School District with the request that we respond to the following question:

"Does the Corwith-Wesley Community School District have any obligation to the Wesley town students that attend private schools outside of the Corwith-Wesley School District?"

The answer is yes. It is the opinion of this office that the provisions of §285.1(14) and (16), Code of Iowa, 1975, apply to this question. This statute in pertinent part provides as follows:

285.1(14): "Resident pupils attending a non-public school located either within or without the school district of the pupil's residence shall be entitled to transportation on the same basis as provided for resident public school pupils under this section. . . . In the case of nonpublic school pupils the term 'school designated for attendance' means the nonpublic school which is designated for attendance by the parents of the nonpublic school pupil."

285.1(16): "If the nonpublic school designated for attendance of a pupil is located outside the boundary line of the school district of the pupil's residence, the pupil may be transported by the district of residence to a public school or other location within the district of the pupil's residence. A public school district in which a nonpublic school is located may establish school bus collection locations within its district from which nonresident nonpublic school pupils may be transported to and from a nonpublic school located in the district. If a pupil receives such transportation, the district of the pupil's residence shall be relieved of any requirement to provide transportation."

Assuming that the child attending a nonpublic school designated for attendance lives such a distance from the school that transportation is mandated, the Corwith-Wesley Community School District would be obliged to transport such child to the private school designated for attendance unless the child is transported to and from a school bus collection place located within the district where he attends school by the school district where the nonpublic school is located.

The mere fact that a child may live only a few blocks from a public

school does not change the obligation of the district to transport such child to another school which is the designated attendance center for that child. This transportation may be furnished in any one of the following ways: (1) by taking the child on a school bus operated by the public school district to a spot where the child can be picked up by a school bus of the district in which he attends; (2) by contracting with private parties as provided in §285.5; or (3) by reimbursing the parents of the students for the cost of transportation in an amount not exceeding forty dollars per pupil per year.

May 19, 1975

UTILITIES: Deposits and Discontinuance of Service. Chapter 490A, Code of Iowa, 1975. The requiring of a new or additional deposit of an existing customer by a telephone company is proper only upon a reasonable finding that the customer's credit has become impaired and an aggrieved customer may file a written complaint with the Commerce Commission to have that finding reviewed. Telephone service can be discontinued for nonpayment of the deposit only after five days written notice. (Garrett to Middleton, State Representative, 5-19-75) #75-5-8

Hon. M. Peter Middleton, State Representative: You have asked for an opinion in connection with the disconnection of service or requiring deposits or larger deposits of telephone customers where one customer is allowing a former customer who owes money to the Northwestern Bell Telephone Company to use that first customer's telephone.

The rights and obligations of the Northwestern Bell Telephone Company are regulated by the Iowa Commerce Commission pursuant to the provisions of Chapter 490A of the Code of Iowa, 1975, the rules and regulations duly issued by the Commerce Commission pursuant to the provisions of §490A.2 and the tariffs filed by that company pursuant to §490A.4.

The pertinent provisions of the Commerce Commission rules regarding deposits are found in paragraph 22.4(2)(h) on page 204 of the 1973 edition of the Iowa Departmental Rules. The pertinent provision of this Rule reads as follows:

"A new or additional deposit may be required on reasonable written notice of the need for such a requirement in any case . . . where a customer's credit standing is not satisfactory to the utility. The service of any customer who fails to comply with these requirements may be disconnected upon five days written notice."

Similarly, Northwestern Bell's tariff in Iowa Tariff No. 1, Part II, under the heading, "General Regulations," paragraph A.3A, "Deposits" found on the Sixth Revised, page 1A, states in part:

"In addition an existing customer may be required to make a deposit or to increase a deposit presently held in cases where his credit in the judgment of the telephone company becomes impaired."

Therefore, this telephone company may require a new deposit where none had been required before or an additional deposit where the customer's credit standing is not satisfactory. This would leave a considerable amount of discretion with the telephone company, but a finding that a particular customer's credit standing was not satisfactory would have

to have some basis and would have to be reasonable. There does not appear to be any other provision which would cover the situation described in your letter. As far as discontinuance of service is concerned, this could only occur after five days written notice upon a failure by the customer to provide a deposit as reasonably required by the telephone company. Other rules having to do with discontinuance for nonpayment of bills would not be applicable to the situation you describe.

The difficulty with determining whether the telephone company would be reasonable in requiring a deposit where none had been required before, or an additional deposit of a present customer where that customer was allowing a former customer to use his telephone, lies in the fact there could be so many varying factual considerations. The mere fact that a previous customer who owed a bill was using a second customer's telephone would not justify increasing the deposit of the second customer. There would have to be a finding that the credit of the second customer was affected.

For example, if we imagine a situation where Customer A has been a customer of the telephone company for many years and has always paid his bills on time and the previous Customer B who owes the outstanding bill used Customer A's telephone only occasionally so that his monthly bills were not substantially increased, it is hard to see how it could reasonably be said that Customer A's credit is impaired.

On the other hand, if Customer A had a history of delinquent payments and especially where the usage of Customer B with the unpaid bill substantially increased the monthly bills of Customer A, it might well be justifiable to conclude that Customer A's credit was being impaired by Customer B.

Obviously, a number of hypotheticals could be posed in between these somewhat extreme examples.

The answer to your question, therefore, depends entirely on the reasonableness of a finding that the present customer's credit standing is damaged or put in jeopardy. This would be a factual determination which would have to be made in each instance where a question arose over requirement of an additional deposit.

Of course, initially the telephone company would make this determination. If the customer disagreed, he could then file a written complaint with the Iowa Commerce Commission pursuant to the provisions of §490A.3, 1975 Code of Iowa.

It seems clear that the telephone company would not be able to cut off service unless the customer failed to make a reasonably required deposit and unless the customer had five days written notice that his service was about to be disconnected.

May 28, 1975

TAXATION: Real estate taxes payable in extended fiscal year. Ch. 1020, Acts of 64th G.A., 1972 Session, as amended by Ch. 1096, Acts of 65th G.A., 1974 Session; §§8.51 428.4, 444.9, 445.30, Code of Iowa, 1975. The three real estate tax installments payable during the extended fiscal

year constitute taxes levied for calendar 1973, but the taxes so levied do not constitute a tax increase against the property for that year. (Capotosto to Redmond, State Senator, 5-28-75) #75-5-9

The Honorable James M. Redmond, State Senator: You have requested the opinion of the Attorney General relative to the operation of Chapter 1020, Acts of 64th G.A., 1972 Sess. as amended by Chapter 1096, Acts of 65th G.A., 1974 Sess. and its effect on real estate transactions during the extended fiscal year. Specifically, you have propounded three questions which read as follows:

"1. Do the three property tax installments due and owing during the extended 18-month budget year from January 1, 1974, to June 30, 1975, constitute the property tax levied for the 12-month period from January 1, 1973, to December 31, 1973, or for the 18-month period from January 1, 1973, to June 30, 1974?

"2. If the answer to question #1 is that the three installments paid during the extended 18th (sic) month budget year represent the property tax levied for the 12-month period from January 1, 1973, to December 31, 1973, does this constitute a 'tax increase' for the 1973 calendar year?

"3. If it is determined that Chapters 1020 of the Acts of the 64th G.A. and 1096 of the Acts of 65th G.A. result in a 'tax increase' for the 1973 tax year, does this tax increase violate Article III, section 29 or Article VII, section 7 of the Iowa Constitution as explained on pages 2 and 3 of Appendix A?"

You also state that county treasurers are currently treating the property taxes paid during the January 1, 1974, to June 30, 1975, 18-month extended fiscal year as representing taxes due and owing for the 12-month calendar year January 1, 1973, to December 31, 1973. You state that this has created havoc in the realty business and that a clarifying opinion is necessary. In addition to your request you have attached a letter (Appendix A) dated April 1, 1975, to you from Eugene J. Kopecky, Linn County Attorney, and James Hennessey, Linn County Treasurer, which sets out the specific problem in greater detail. The letter further describes the problem as one of determining who is liable for the taxes payable during the extended fiscal year when real estate is transferred.

"Although the actual payments by the taxpayers of the installments of the real estate taxes have not increased as a result of this legislation, (Ch. 1096, Acts 65th G.A. Second Session), when real estate is sold the problem of the actual liability of three installments due for the year 1973 arises and in effect any person who owned property for the calendar year 1973 has effectively had his real estate taxes raised by 50% for that year.

* * * *

"There have been two Attorney General's Opinions dated June 17, 1974, and April 22, 1974, which have dealt tangentially with the issue which we are raising in this letter. The April 22 opinion dealt with the assessment to be used for the entire extended fiscal year, January 1, 1973, to June 30, 1974. The June 17, 1974, opinion was concerned with the excise tax on grain. Language used in these opinions which can be construed as 'dictum' has led to the problem which we are referring to herein.

"To the best of our knowledge the county treasurers of the State of Iowa are following the dictum contained in the Attorney General's Opinions referred to above. The net result of following the Attorney General's Opinion is that for the calendar year 1973 the real estate taxes were raised 50% which results in a detriment to any seller who

owned real estate during the year 1973 in that he has to pay an additional 50% real estate taxes for that year even though he did not have the use of the property for the full eighteen month extended fiscal year."

Chapter 1020, Acts of 64th G.A., 1972 Sess., §3 and Chapter 1096, Acts of 65th G.A., 1974 Sess., §§4-7 have been codified at §8.51, unnumbered paragraphs one (1) through ten (10), Code of Iowa, 1975, and citation to those provisions will hereafter be made to the 1975 Code of Iowa rather than the session laws.

Section 8.51, unnumbered paragraph three (3), Code of Iowa, 1975, provides in pertinent part:

"For the extended fiscal year, budgets shall be prepared in the same manner as prepared for a calendar year, except that they shall include estimated expenditures for the extended year of eighteen months. The amount certified by the various taxing districts to the county auditor shall be for the extended year of eighteen months. The county auditor shall cause the taxes to be levied for the extended eighteen month period in the same manner as previously accomplished under a twelve month period, and based on the property tax valuation of January 1, 1973. Any annual millage limitation, including those for emergency levies, applicable to the taxing districts otherwise provided by law shall for this extended period be increased by fifty percent except that the (sic) fifty percent allowable increase shall not apply if the limitation is waived by the levying board of political subdivision and approved by the state appeal board after the levying board has presented evidence to the state appeal board that either insufficient funding or overfunding of the budget of the political subdivision will result, due to the unequal expense payments of the political subdivision between the first half and the last half of a calendar year."

Real estate for tax purposes is assessed as of its value on January 1 of each year. §428.4, Code of Iowa, 1975; 1954 O.A.G. 58; 1940 O.A.G. 517. The date of assessment was not changed by the conversion to the fiscal year system and still remains January 1 of each year. Prior to the enactment of the extended year law property taxes were levied by the board of supervisors of each county in September following the assessment. §444.9, Code of Iowa, 1973. These taxes were payable in two installments the first of which was due by April 1 of the year following the levy and the second by October 1 of the year following the levy.

With the enactment of Chapter 1020, Acts of 64th G.A., as amended by Chapter 1096, Acts of 65th G.A., the real estate was still assessed as of January 1, 1973. However, taxes levied in September of 1973 were made payable in three installments rather than the customary two. The three installments were made delinquent on April 1, 1974, October 1, 1974, and April 1, 1975. §8.51, unnumbered paragraph ten (10), Code of Iowa, 1975. The purpose for doing this was to effectuate the smooth transition of Iowa counties, cities and other political subdivisions from a calendar year budget system to a fiscal year budget system. In addition to calling for payment of property taxes levied during 1973 in three installments, the legislature also provided in Chapter 1096, §5 (now §8.51, unnumbered paragraph three (3), Code of Iowa, 1975), that the levy be up to 50% higher. Since the taxes would be payable in three installments, rather than two, the amount of each installment would not be raised.

Each of these payments is based upon the assessment and levy made in 1973. For future years property continues to be assessed as of January

1 of each year, but taxes are not levied until the March session of the boards of supervisors of the following year. For example, property was assessed as of January 1, 1974, and taxes based upon that assessment were levied by the boards of supervisors in March of 1975. Taxes based on this assessment and levy are payable in two installments the first of which becomes delinquent as of October 1, 1975, with the second installment delinquent on April 1, 1976. Ch. 1020, §§80, 81, Acts of the 64th G.A., 1972 Sess.

Let us consider your specific questions. First, do the three property tax installments due and owing during the extended fiscal year, January 1, 1974, to June 30, 1975, constitute the property tax levied for the 12-month period from January 1, 1973, to December 31, 1973, or for the 18-month period from January 1, 1973, to June 30, 1974? The taxes payable during the extended fiscal year are based upon the assessed value of the real estate as of January 1, 1973, and the tax levy made in September of 1973. By virtue of unnumbered paragraph three (3) of §8.51, the levy made in September of 1973 is 50% higher than it would be if the county had levied taxes for its expenditures over the next 12 months. This provision enables the local government to set its budget through June 30, 1975. In subsequent years budgets will be set for the period July 1 through June 30 of the following year.

The three property tax installments payable during the extended fiscal year are not based in any way upon the assessed value of property on January 1, 1974. In effect then, the taxes payable in the extended fiscal year are the taxes for the period January 1, 1973, through December 31, 1973.

It is important to recognize the distinction in property tax matters between the year of the tax and the year of collection and expenditure of tax money. In the case of the 1973 tax year, the legislature determined that the taxes levied in 1973 were to be collected and spent over a period of 18 months. That is the reason for increasing the 1973 levy rate by up to 50%.

Thus, to answer your first question, it is the opinon of the Attorney General that the three property tax installments payable during the extended fiscal year represent the property assessed and tax levied for the year 1973.

This brings us to your second question which is whether or not §8.51, unnumbered paragraph three (3) creates a "tax increase" for the 1973 calendar year. If §8.51 is construed narrowly and in a vacuum it can be said to impose a tax increase because it does allow local government to increase the annual millage limitation up to 50%. The higher millage rate merely provides funds for local governments to operate up to a point in time where future budgets can be set for a 12-month fiscal year.

However, when one construes the increased millage limitation as permitted under §8.51, unnumbered paragraph three (3) together with the entire act relating to the transition to a fiscal year budgetary system, it is clear that this is merely one facet in the over-all process of going from a calendar year system to a fiscal year system. One must ask whether the actual tax burden against any property is increased or in-

tensified as a result of the millage increase. When viewed in this light it can be seen that there is no increase in the 1973 taxes. Rather, the higher tax over-all for 1973 is payable over a longer period of time.

In determining the meaning of a statute all provisions thereof and the act of which it is a part must be considered and the intent of the legislature is to be gleaned from viewing the whole statute and not simply by a narrow reading of one portion of the act. *Northern Natural Gas Company v. Forst*, 1973, Iowa, 205 N.W.2d 692; *Goergen v. State Tax Commission*, 1969, Iowa, 165 N.W.2d 782.

While it is the opinion of the Attorney General that §8.51, unnumbered paragraph three (3) does not result in a property tax increase for persons who continuously own and occupy the property throughout 1973, the extended fiscal year and thereafter, difficulty can arise when the real estate in question is transferred and the parties have to decide who is responsible for what tax payments. Some preliminary comments are in order. In Iowa, real estate taxes are directly on and against the property. §445.28, Code of Iowa, 1975; *Laubersheimer v. Huiskamp*, 1967, 260 Iowa 1340, 152 N.W.2d 625. Proceedings to collect real estate taxes constitute an *in rem* claim and such taxes are not a debt for which the owner of the land against which they are assessed can be held personally liable. *In Re Estate of McMahon*, 1946, 237 Iowa 236, 21 N.W. 2d 581, 163 A.L.R. 720; *Lucas v. Purdy*, 1909, 142 Iowa 359, 120 N.W. 1063.

Delinquent real estate taxes are collected by sale of the property at a tax sale carried out in conformity with the terms of Chapter 446, Code of Iowa, 1975. Since the tax runs directly to the land, it ordinarily makes no difference to the taxing authority who pays the real estate taxes on a tract of land. *United States v. Three Parcels of Land in Woodbury County, Iowa*, N.D. Iowa, 1961, 198 F.Supp. 529, 536.

Generally speaking, the determination of liability for real estate taxes in connection with a transfer of the property is left to the parties to the transfer to negotiate and agree upon. It is not the duty of the Attorney General to interpret the provisions of any particular real estate agreement and resolve any question of tax liability agreed upon between private buyers and sellers, and this opinion should not be construed as an attempt to do so.

The lien for real estate taxes levied in 1973 became a lien for tax purposes against the property on the levy date. §445.28; *Cornelius v. Kromminga*, 1917, 179 Iowa 712, 161 N.W. 625; *Gates v. Wirth*, 1917, 181 Iowa 19, 163 N.W. 215; *United States v. Three Parcels of Land in Woodbury County, Iowa*, supra. This lien necessarily extends to all the taxes levied, which taxes include those payable in all three installments during the extended fiscal year. As has been stated, the individual liable for the taxes is generally a matter to be determined by the parties as part of their agreement. They can agree that one will pay all the taxes, or they can divide the responsibility in any fashion they choose. Whatever they settle on is binding as between the two of them.

However, in those instances where individual liability for taxes as between buyer and seller is not provided for in the contract, the law does assign this liability. Section 445.30, Code of Iowa, 1973, provides:

"As against the purchaser, such liens shall attach to real estate on and after December 31 in each year."*

The quoted section has been construed to mean that in the case of transferred property where there is no provision for taxes in the contract or agreement, the party holding legal title on December 31 of the year the lien attaches (year of levy), is liable for the taxes so levied as between the buyer and seller. In *United States v. Three Parcels of Land in Woodbury County, Iowa,* supra, at 533 the court, following *Mohr v. Joslin,* 1913, 162 Iowa 34, 142 N.W. 981 and *Clinton v. Shugart,* 1904, 126 Iowa 179, 101 N.W. 785 wrote:

"Thus, in Iowa, if there is no provision as to the payment of taxes in the contract or deed, the legal owner on December 31, is liable for the taxes as between vendor and purchaser. Section 445.30 specifies when the lien shall be considered as attaching for this purpose."

However, the relationships and consequences arising therefrom under §445.30 create a personal cause of action as between the buyer and seller which exists independently from the taxes impressed on the property itself by the local sovereign. As has been stated earlier, although the 1973 millage rate was increased in the 1973 levy to facilitate conversion to the fiscal year budgetary system, the tax payments attributable to that levy were payable over a longer period of time with the result that no single installment was increased. The property bears no heavier burden than it would otherwise be required to bear. Therefore, it is the opinion of the Attorney General that the three installments payable during the extended fiscal year do not constitute a property tax increase for the 1973 calendar year.

In conclusion, it is the opinion of the Attorney General that the three property tax installments payable during the extended fiscal year constitute the taxes levied for calendar 1973, but that the taxes so levied do not constitute a tax increase against the property for calendar 1973. In view of these conclusions, it becomes unnecessary to meet the constitutional question posed in your opinion request.

May 29, 1975

ENVIRONMENTAL PROTECTION: Mine maps — §§68A.2, 305.12, 305.14, Code of Iowa, 1975. Maps of mines, including abandoned mines, are open to examination at the office of the geological survey in the presence of the state geologist or his designee but may not be copied without the written consent of the operator or owner. (C. Peterson to Van Eck, Assistant State Geologist, 5-29-75) #75-5-10

Mr. Orville J. Van Eck, Assistant State Geologist, Iowa Geological Survey: Reference is made to your request for the opinion of the Attorney General as to whether copies of mine maps may be made without the consent of the owner or operator of the mine.

Relevant statutes, Code of Iowa, 1975, in pertinent part state:

"68A.2 Citizen's right to examine. Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the

* For years *after* 1973 this date is changed to the June 30 after the levy in each year. Ch. 1020, §79, Acts of the 64th G.A., 1972 Sess.

news media may publish such records, *unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential . . . .*" [Emphasis added.]

"305.12 Maps—surveys. The operator of any underground mine shall comply with the following provisions relative to maps: * * *

7. Copies. The original or true copies of the maps shall be kept at the office of the mine, and true copies thereof shall also be furnished the state geologist within thirty days after the completion of the same.

10. Copies furnished. The state geologist shall provide the department of soil conservation a copy of each map and map extension received by him under this section."

"305.14 Maps property of state — custody — copies. The maps so delivered to the state geologist shall be the property of the state and shall remain in the custody of the state geologist. They shall be kept at the office of the geological survey and be open to examination by all persons interested in the same; but such examination shall only be made in the presence of the state geologist or his designee, *and he shall not permit any copies of the same to be made without the written consent of the operator or the owner of the property, except as provided in section 305.12.*" [Emphasis supplied.]

Thus, §68.2 gives citizens the general right to examine and copy all public records unless some other provision of the Code expressly limits such right. The right to copy mine maps is expressly limited by §305.14 to copies made with the written consent of the operator or owner, except that §305.12 requires the state geologist to provide copies of all mine maps to the department of soil conservation.

No special provision is made with respect to maps of abandoned mines which are therefore subject to the provisions of §305.14 prohibiting the making of copies. While the need for such a prohibition is not immediately apparent, policy with respect thereto is within the legislative prerogative and any change in policy must be effected through appropriate action by the General Assembly.

May 29, 1975

COUNTIES: Supervisors. §§69.2, 331.26, Code of Iowa, 1975. Supervisor elected at-large incounty where members of the board of supervisors are required to reside one to each district (§331.26(2), Code of Iowa, 1075) is elected "for" the district in which he resides and a vacancy is created under §69.2 if he moves from that district during his term of office. (Nolan to Lamborn, State Senator, 5-29-75) #75-5-11

The Honorable Clifton C. Lamborn, State Senator: Your letter of April 25, 1975, requests an opinion as to whether or not a vacancy in the office of supervisor exists where one of three supervisors, elected at large but representing a specific district in Jackson County, has moved from the district which he was elected to represent to another location in the county. It is the opinion of this office that the supervisor in question vacated his office by moving from the district in which he was elected to represent. Section 69.2, Code of Iowa, 1975, provides:

"Every civil office shall be vacant upon the happening of either of the following events: * * *

"3. The incumbent ceasing to be a resident of the . . . district, . . . for which he was elected or appointed, or in which the duties of his

office are to be exercised. This subsection shall not apply to appointed city officers."

A similar question was presented to the Attorney General in 1920 at which time a supervisor from Lyon County who was elected for his term by the voters of his particular district, moved from that district to another district within the same county. At this time the Code provided for the election of supervisors either from supervisor districts or by election at large. However, the language of the statute which is now §69.2 has not been materially changed and in interpreting that language, the attorney general stated:

"It is true, of course, that members of the board of supervisors elected by and in respective districts of the county are county officers and perform official duties in any part of the county, but as they must be residents of such districts at the time they are elected, I am constrained to believe that such residence must continue throughout their term of office. * * *

"You will observe that by the provisions of this paragraph that if the incumbent ceases to be a resident of any of the subdivisions enumerated, *'By or for which he was elected,'* the office becomes vacant.

"This language is positive and explicit and must be held to mean what it says; and, therefore, if a member of the board of supervisors removes to another supervisor district of the county during his term of office the office thereby becomes vacant." 1920 O.A.G. 637, 638.

In 1925, the statute which provided that "no member shall be elected who is a resident of the same township with either of the members holding over" was declared in *State v. Boyles*, 1925, 199 Iowa 398, 202 N.W. 92, not to prohibit a supervisor elected from one township from moving to another township before the time he was required to qualify as a member of the board of supervisors. In *Oberman v. Hunt*, 1949, 240 Iowa 1071, 38 N.W.2d 589, the statute pertaining to the resident restrictions for a member of the board of supervisors was held to have reference to the candidates residence at the time of election. In *Mandicino v. Kelly*, 1968, 158 N.W.2d 574, the Iowa Supreme Court declared §39.19, Code of Iowa, 1965, unconstitutional. This statute provided that no person shall be elected as a member of the board of supervisors from the same township with any of the members holding over except in a township embracing a city of 35,000 population from which two members of the board might be elected. The court held that such statute invidiously discriminated against urban residents even though the supervisors were elected at large since it allowed rural dominance of the board by prohibiting more than two supervisors to be elected from a township where the density of population warranted additional representation. In the following year, §331.26 was enacted to authorize the election of supervisors according to one of three county plans selected in accordance with the Code. Plan "one" provides for election at large; Plan "two" provides for election at large from equal population districts; Plan "three" provides for election from equal population districts. Section 331.26(2), referring to Plan "two" clearly states:

"Members of the county board shall be *required to reside* one to each supervisor district but shall be elected by the electors of the county at large. Election ballots shall be prepared to specify the district which each candidate seeks to represent and each elector may cast a vote for

one candidate from each district for which a supervisor is to be chosen in the general election." [emphasis added]

From the foregoing quoted language, it appears abundantly clear that a supervisor election under "Plan two" is elected "for" a specific supervisor district and accordingly, if he moves from that district a vacancy is created.

May 29, 1975

TAXATION: Homestead and Military Service tax credits. §§425.11(2), 427.3, and 427.4, Code of Iowa, 1975. Those occupying an apartment in a retirement home as life tenants with the reversion in a non-profit corporation which has legal title to the property are not entitled to homestead tax credit, but are, if otherwise eligible, entitled to claim military service tax credit. (Griger to Julia B. Gentlemen, State Representative, 5-29-75) #75-5-12

Hon. Julia B. Gentlemen, State Representative: You have requested an opinion of the Attorney General on the question of whether, for real property tax purposes, the residents of a retirement home for the elderly are entitled to claim homestead tax and military service tax credits.

Factually, the situation presented is that title to the property is in the name of a non-profit corporation organized under Chapter 504A, Code of Iowa. Each elderly resident purchases a life estate in an apartment within the building and is responsible for his or her share of the real property taxes, operating and maintenance costs, debt services, and mortgage payments. The reversion interest in each apartment remains with the corporation.

Your opinion request does not concern the property tax reimbursement for the elderly provided for in §425.16, Code of Iowa, 1975.

In order to qualify for the homestead tax credit, the claimant must be an "owner" as that term is defined in §425.11(2), Code of Iowa, 1975. In the case of uninherited divided ownership, an eligible owner is defined in §425.11(2) in relevant part:

". . . the person occupying the homestead under a deed which conveys a divided interest where the divided interest is shared only by persons related or formerly related to each other by blood, marriage or adoption."

In the instant situation, a divided ownership of each apartment exists because each resident has a life estate therein and the corporation has a reversion. Obviously, the eligible relationship required for divided ownership is not present. Hence, each life tenant is not entitled to obtain homestead tax credit. See 1956 O.A.G. 41. Because of such non-entitlement on the basis discussed, it is unnecessary for this opinion to determine whether other factors are present which would prevent the allowance of homestead tax credit for these apartment residents.

Those eligible for military service tax credits are listed in §§427.3 and 427.4, Code of Iowa, 1975. In 1946 O.A.G. 155, the Attorney General opined that the claimant for the military service tax credit must be the beneficial owner of the property upon which the exemption is claimed and that the holder of a life estate is such beneficial owner. Therefore, it is the opinion of this office that these elderly apartment residents, as life tenants, who are otherwise entitled to military service tax credit, are eligible to claim this exemption.

May 29, 1975

SCHOOLS: Professional Teaching Practices Commission: Jurisdiction, §§272A.2, 280A.23(9). Professional Teaching Practices Commission lacks jurisdiction to act upon complaints against the superintendent of an area vocational school or community college because such superintendent is not required to hold "any teacher's certificate". (Nolan to Bennett, Director, Iowa Professional Teaching Practices Commission, 5-29-75) #75-5-13

Mr. Don R. Bennett, Director, Iowa Professional Teaching Practices Commission: This is written in response to your request for an opinion of the Attorney General on the following:

"We have recently received a complaint filed by a teacher at the Indian Hills Community College, Area XV, alleging unethical and unprofessional practices on the part of the Superintendent of that school. In this respect, Section 280A.23(9) of the Code specifically provides that certification from the state board of public instruction is not required as a condition to the position of the superintendent of an area school. In the instant case, however, the superintendent involved is a holder of a certificate from the state board by virtue of prior employment in the teaching profession. The issue presented is whether the Commission has jurisdiction with respect to the superintendent of the Indian Hills Community College in view of the statutory provisions noted above. At its last regular meeting the Commission directed me to request your opinion on this issue."

Under §272A.6, Code of Iowa, 1975, the Commission is empowered to hold hearings on alleged violations of criteria of professional practices in such areas as "(1) Contractual obligations; (2) competent performance of all members of the teaching profession; and (3) ethical practice toward other members of the profession, parents, students, and the community." Section 272A.2 defines the profession of teaching or teaching profession as "persons engaged in teaching or providing related administrative, supervisory, or other services requiring certification from the state board of public instruction". This statutory definition, in the opinion of this office, excludes persons providing administrative services not requiring certification from the State Board of Public Instruction. The superintendent of an area school is not required to hold "any teacher's certificate". (§280A.23(9)) Accordingly, the Professional Teaching Practices Commission lacks jurisdiction to act upon complaints against the superintendent of an area vocational school or community college.

May 29, 1975

HIGHWAYS: Village streets — Sections 306.10, 409.20, 1975 Code of Iowa. Unopened and unaccepted streets in an unincorporated village plat do not require vacation proceedings by the county. Title to such streets remains in the original platter, his heirs or assigns, unless lost under the doctrine of adverse possession. (Schroeder to Raduenz, Assistant Winneshiek County Attorney, 5-29-75) #75-5-14

Ms. Sherry J. Raduenz, Assistant Winneshiek County Attorney: You have posed the question of how the county should vacate or abandon certain platted streets in the unincorporated village of Frankville, platted in 1856. Some of the streets so dedicated have been opened and maintained by the county; however, most of the streets have never been opened, used or maintained. Your question involves only the unopened

streets. Your further question is who owns the fee to the unopened streets.

In my opinion, vacation proceedings are not necessary. The doctrine of abandonment does not apply to the county in this instance because the county never accepted any property interest in the platted streets. The original proprietor of the plat, his heirs or assigns retained the fee title. If the fee has not been deeded to adjoining owners by the original proprietor, his heirs or assigns, it may have been lost to the adjoining lot owners by adverse possession by them of the unaccepted streets in the plat.

The case of *Brewer v. Claypool*, 223 Ia 1235, 275 NW 34, is a vacation proceeding by a landowner involving the ownership of platted streets in an unincorporated village. The Court decided that:

"The acceptance of the dedication was as essential to the establishment of the highway as the dedication by the owner."

The Court found that,

"The plat was never formally accepted nor are there any circumstances from which an acceptance may be implied, so this street was not a public highway." * * *

"No work was ever done on this road by the public authorities, there was no general user of the street by the public, and the public acquired no interest in it."

The result of the case was that title to the portion of the platted street that had been enclosed by an adjoining owner was quieted in the adjoining owner. He proved adverse possession of the disputed land by the enclosure of the land and by a statement of his intent to claim the land.

Absent a deed from the original proprietor or the adverse possession of the unaccepted street by adjoining owners, the title to the Frankville streets remains in the original proprietor. In the case of vacation proceedings, this rule was set forth in Section 647, Code of Iowa, 1851. Beginning with Section 565, Code of Iowa, 1873, (Section 409.20, Code of Iowa, 1975), adjoining proprietors of lots may enclose streets in vacated plats. This later statute has however been narrowly constructed by *Brown v. Taber*, 103 Ia 1, 72 NW 416.

In the case of *Brown*, supra, a purchaser of lots in a plat did not obtain ownership of an adjoining street which had been vacated by the original platter before it was accepted by the City. In the analogous situation of vacation of a plat, the Iowa Court has stated that the recording of a plat in an unincorporated village is a tender of an easement in the roads. When accepted by the public, the right to the easement becomes complete. The fee remains in the original owner and reverts without the easement upon vacation. *Kenwood Park v. Leonard*, 177 Ia 337, 158 NW 653; *Kitzmar v. Greenhalgh*, 164 Ia 166, 145 NW 505.

The present ownership of the unaccepted streets would have to be determined by examining the devolution of the original proprietors' title and the claims and possession of others, if any, who appear to be in actual possession of the property.

May 30, 1975

CONSTITUTIONAL LAW: Regulation of the U.S. Mails. A bill which would prohibit sending by mail a form contract which when signed by the addressee or another becomes a contract for the lending of money is an unconstitutional infringement on the exclusive right of the Congress of the United States to regulate the mails. (Garrett to Gallagher, State Senator, 5-30-75) #75-5-15

Honorable James V. Gallagher, State Senator: You have asked for an opinion on the constitutionality of Senate File 159. Senate File 159 basically prohibits sending "by mail to any private resident, any unsolicited offer, form contract, or other similar writing, which when signed by the addressee or other person becomes a contract, or will become a contract upon acceptance by the sender, where the principal subject of the writing is the lending of money or other extension of credit."

The Congress of the United States is specifically granted the power "to establish post offices and post roads; . . . ." Article 1, §8, *Constitution of the United States.*

The United States Supreme Court almost a century ago explained the power of Congress regulating the postal system. It said:

"The power possessed by congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded." *Ex parte Jackson,* 96 U.S. 727, p. 732 (1877).

The Iowa Supreme Court has stated:

"Only congress regulates the mails in this country." *Severs v. Abrahamson,* 255 Ia 979, 124 N.W.2d 150, p. 152, (1963).

Though the states have no power to directly regulate what may or may not be sent through the U.S. mails, this does not mean that a person can use the U.S. mails to do an act which is illegal in a state apart from the question of whether or not the mails are used. For example, it has been held in Virginia that:

"We do not believe it can be successfully contended that the postal service . . . can be held to operate as a shield to protect persons in the commission of crime in any of the several states." *Travelers Health Assoc. v. Commonwealth,* 188 Va 877, 51 S.E.2d 263, (1949) p. 271.

In other words though a state cannot directly prohibit using the mails in a certain fashion, there is no right on the part of any person to use the mails to commit an act which would be illegal in and of itself, whether the mails were used or not.

To illustrate this principle, the *Iowa Consumer Fraud Act* prohibits any deception or misrepresentation in connection with any advertisement. [Section 713.24(2)(a), 1975 Code of Iowa.]

Therefore, even though the misleading and deceptive advertising was sent solely through the mails, the party sending that kind of advertising to Iowa consumers would be in violation of the *Iowa Consumer Fraud Act.* The violation would be in the use of deceptive advertising and not the specific act of sending that advertising through the mails.

It is clear then that only Congress can directly regulate what may or may not be sent through the U.S. mails. It appears that Senate File 159 is a direct attempt to exclude certain materials from the U.S. mails. As such, it would be in conflict with the power specifically granted to Congress and would be unconstitutional.

June 2, 1975

CITIES AND TOWNS: Financing of Industrial Projects — §419.1(2), Code of Iowa, 1975. Financing the construction of discount department stores falls within Chapter 419. (Blumberg to Harvey, State Representative, 6-2-75) #75-6-1

Honorable LaVern R. Harvey, State Representative: We have received your opinion request of May 16, 1975, regarding Chapter 419, Code of Iowa, 1975. You ask whether that chapter is applicable to the construction of discount department stores.

Chapter 419 provides for municipal support of industrial projects and includes the power to issue bonds to finance such projects. Section 419.1 (2) provides, in pertinent part:

" 'Project' means all or any part of, or any interest in, (a) any land, buildings or improvements, whether or not in existence at the time of issuance of the bonds issued under authority of this chapter, which shall be suitable for the use of any voluntary nonprofit hospital, clinic or health care facility as defined in section 135C.1, subsection 8, or of any private college or university, whether for the establishment or maintenance of such college or university, or of any industry or industries for the manufacturing, processing or assembling of any agricultural or manufactured products, even though such processed products may require further treatment before delivery to the ultimate consumer, or of any commercial enterprise engaged in storing, warehousing, distributing or selling products of agriculture, mining or industry including but not limited to barge facilities and river-front improvements useful and convenient for the handling and storage of goods and products. . . ."

The key phrase is "or of any commercial enterprise engaged in storing, warehousing, distributing or selling products of agriculture, mining or industry . . . ." There are no specific definitions of "commercial enterprise." However, it appears that establishments are considered to be commercial enterprises, at least in part, because of a profit generated from the trade or business. See, e.g., *Jones v. Robertson,* 180 P.2d 929, (Ct. App. Cal. 1947); *California Employment Commission v. Butte County Rice G. Assn.,* 138 P.2d 347 (Ct. App. Cal. 1943); *Jones v. Johnson,* 1949, 80 Ga. App. 340, 55 S.E.2d 904; *Meyer v. Stein,* 1940, 284 Ky. 497, 145 S.W.2d 105; *Chaffee v. Inhabitants of Town of Oxford,* 1941, 308 Mass. 520, 33 N.E.2d 298; *Baumgardner v. City of Boston,* 23 N.E.2d 121 (Mass. 1939); *Phillips v. Board of Appeals of Building Department,* 190 N.E. 601 (Mass. 1934); *Reynolds v. City of Nashua,* 35 A.2d 194 (N.H. 1943); *Westchester County Soc. for Prevention of Cruelty to Animals v. Mengel,* 1943, 266 App. Div. 151, 41 N.Y.S.2d 605. It is obvious that the stores in question will be operated for a profit. Therefore, they fall within the definition of a commercial enterprise. We are not holding, however, that "commercial enterprise" is limited to proift orientated businesses.

You indicated in your request that you are certain that an enterprise

such as a discount store was not within the scope of legislative intent. We are also cognizant of recent newspaper editorials on this subject explaining the inequities of allowing department and discount stores to come under this Chapter. However, the language of the section is clear and unambiguous. *Any* commercial enterprise is included, and it can be one that distributes or sells products of agriculture, mining or industry. The language is broad and contains no limitations. In addition, the actions of the Legislature in adding the language which is the subject of this opinion create a presumption that these types of enterprises were to be included within the chapter. See, section 1, Chap. 1219, Acts of the 65th G.A. (1974).

House File 719 and Senate File 1348 were companion bills with similar language containing these amendments. The originals contained the language quoted above, including the words "distributing or selling". S-2851 was an amendment filed in the Senate to strike the words "distributing or selling". It was later withdrawn. S-2869 was filed to strike "or selling". That amendment was defeated by the Senate. Thus, the pertinent language of the original bill was left intact. Therefore, it is apparent that the Legislature intended to include the selling and distribution of products within the scope of the chapter. If the Legislature had intended to limit this in any way, it could have so done. It should also be noted that the constitutionality of this Chapter has been upheld. *Green v. City of Mount Pleasant*, 1965, 256 Iowa 1184, 131 N.W.2d 5.

Accordingly, we are of the opinion that the scope of §419.1(2) is broad and that financing the construction of discount department stores falls within Chapter 419.

June 3, 1975

MOTOR VEHICLES: Delivery of certificates of title by county treasurers and risk of loss. Sections 321.24 and 321.42, Code of Iowa, 1975. A county treasurer may send a certificate of title by ordinary mail and the owner must purchase a duplicate if it is lost. (Linge to Wyckoff, State Representative, 6-3-75) #75-6-2

The Honorable Russell L. Wyckoff, State Representative: You recently requested an opinion about the application of section 321.24, Code of Iowa, 1975, to the following questions: May a county treasurer send, by ordinary mail, a certificate of title and, if so, who suffers the loss if the certificate is lost in the mail?

Section 321.24 provides, in relevant part:

"Upon receipt of the application for title and payment of the required fees . . . the county treasurer shall . . . issue a . . . certificate of title. . . . The original certificate of title shall be delivered to the owner in the event no lien or encumbrance appears thereon. Otherwise the certificate of title shall be delivered by the county treasurer to the person holding the first lien or encumbrance as shown in the certificate . . . . One copy shall be mailed to the department on the date of issuance."

The word "deliver" is not defined in this section, nor elsewhere in Chapter 321 of the Code. No authority can be found which suggests that the word "deliver" has acquired a peculiar and appropriate meaning

in law. The rules of statutory construction provide that absent such definition or acquisition of unique meaning, statutory words are to be construed according to approved usage of the language. Section 4.1(2), Code of Iowa, 1975; *State vs. Kool*, 1973, 212 N.W.2d 518, 520.

Among the lexicographers, the word "deliver" is most usually stated as meaning to set free, to hand over or convey and, as a more recent usage, to send to an intended destination. Approved usage would appear to mean a transfer or handing over without defining the specific mode of doing so. Section 321.24 does not appear to expand or restrict the approved usage of the word "deliver" as to indicate the mode of transfer required.

In addition to section 321.24, several other sections of Chapter 321 relate to the conveyance by the county treasurer of certificates of title. The pertinent language of the majority of these sections requires that the county treasurer "issue" a certificate of title to the applicant therefore. *See* Code of Iowa, sections 321.42; 321.46; 321.47; 321.48(2). Section 321.50 states that in the instances there involved, the county treasurer shall "mail the certificate of title" (section 321.50(3)) and "deliver the certificate of title" (section 321.50(4)), and again, "the certificate shall be mailed by the treasurer" (section 321.50(6)).

The words "deliver" and "delivery" are also used with reference to certain conveyances of certificates of title by persons other than the county treasurer. *See* Code of Iowa, sections 321.45(2)(c), (3); 321.46; 321.48(1); 321.50(1), (2).

The Code section 321.16 *does* provide for the utilization of personal delivery or restricted certified mail where there is involved any *service of notice* authorized or required by Chapter 321. But there is no provision in this section or in any of those sections noted in the preceding paragraphs which requires the use of certified mail for the delivery of *certificates of title.* This omission gives rise to an inference that if the legislature had wished to require the use of certified mail in the delivery of certificates of title, it would have so provided.

Further, it is a recognized rule of construction that in the interpretation of statutory language susceptible to different meanings, consideration will be given to the administrative construction of the statute. Section 4.6(6), Code of Iowa, 1975. The general statement of the rule is that great deference is given to a long-standing practice or interpretation of an administrative body where that practice is not clearly contrary to the express language of the statute in question. *Iowa Citizens for Environmental Quality, Inc. vs. Volpe*, 1973, 487 F.2d 849, 855 (8th Cir.).

It has been the consistent practice of county treasurers for many years to mail certificates of title by ordinary mail. Their determination that section 321.24 does not prohibit this nor require certified mail must be given weight since there is no contrary statutory language.

Therefore, we conclude that a county treasurer may send a certificate of title by ordinary mail.

Your second question, is an owner who has applied for a certificate of title required to purchase a duplicate if the original is lost in the mail, must also be answered in the affirmative.

Section 321.42 is clear in its wording requiring that "In the event of *any* lost or destroyed certificate of title, application shall be made . . . by the owner . . . accompanied by a fee of five dollars." (emphasis added). The Iowa Supreme Court has held the word "any" to be synonymous with "every" and "all". *State vs. Prybil*, 1973, 211 N.W.2d 308, 312; *State vs. Steenhoek*, 1970, 182 N.W.2d 377, 379. It is, therefore, our opinion that the language of section 321.42 requires the owner of a motor vehicle who has not received the issued title — however it be lost — to purchase a duplicate.

June 4, 1975

COURTS: Judges, Magistrates, Art. III, §1, Pertaining to Distribution of Power; Art. V, §§10, 14 and 15, as amended, Const. of Iowa. §§602.1, .3, .36, .50, .51, .57, .59. 1) A judicial magistrate is a judge. 2) If the legislature can delegate power to increase or diminish the number of judges, §602.59 is nevertheless an unconstitutional delegation without safeguards, standards or guidelines. 3) The power to increase or diminish the number of judges is an exclusively legislative power and cannot be delegated to the district court. 4) Vacancies in the offices of district judge, district associate judge, full-time or part-time judicial magistrates of the district court can be filled only by appointment by the governor from two nominees of judicial nominating commissions. 5) A vacancy exists at once on creation of an office by the legislature. 6) All part-time and full-time magistrates appointed by nominating commissions or district judges are de facto and subject to ouster. 7) All acts of de facto magistrates are valid. 8) Magistrates who have been appointed by order of substitution under §602.59, but who have not yet qualified, may not properly do so. (Turner to Middleswart, State Repr. 6-4-75) #75-6-3

The Honorable James I. Middleswart, State Representative: You have requested an opinion of the Attorney General "as to the constitutionality of Iowa Code of 1975 §602.59 with respect to the delegation of power of the legislature to the judiciary in allowing the judges to overturn the designation of magistrates as set out by §602.50."

§602.50, Code of Iowa, 1975, provides that county judicial magistrate appointing commissions shall appoint the number of magistrates apportioned to each county by the Supreme Court Administrator pursuant to §602.57.

In pertinent part, §602.59 provides:

"1. *Applicability.* In any county having an apportionment of three or more judicial magistrates appointable pursuant to section 602.50, the chief judge of the district subject to the limitations of this section, may designate by order that magistrates appointed pursuant to this section be utilized in lieu of magistrates appointed pursuant to section 602.50. The order of substitution may be made only upon the affirmative vote of a majority of the district judges in that judicial election district that the substitution be made. * * *

"2. *Reduction in appointments.* For any county in which such an order is in effect, the number of magistrates actually appointed pursuant to section 602.50 shall be reduced by three for each magistrate substituted under the provisions of this section."

Thus §602.59 delegates power to the judiciary to order that one full-time (§602.51) magistrate be appointed in lieu of three part-time magistrates apportioned to a county under §602.57 and appointed pursuant to §602.50. You have stated that the judges of judicial district 5(A) have voted to exercise this §602.59 option.

Preliminary to our opinion, we have determined that a judicial magistrate of the district court is not only a judicial officer but in fact a "judge." §602.3, Code 1975; *Elder v. Hallopeter*, 214 Cal. 427, 6 P.2d 245, 246; *Marchbanks v. Marchbanks*, 58 S.C. 92, 36 S.E. 438; *In re Hess*, 20 NJ Misc 12, 23 A.2d 298. A "judge" is a public officer lawfully appointed to decide litigated questions according to law. See also *48 CJS 946, 951, Judges §2.*

I

Assuming for the moment that the power to order the aforesaid substitution can be delegated to the Iowa District Court, it must be made pursuant to the dictates of two recent Iowa Supreme Court cases. In *Iron Workers Local No. 67 v. Hart*, 191 N.W.2d 758 (1971), the Court succinctly stated:

"On the question of power delegation we recently held the important consideration is . . . whether the procedure established for the exercise of power furnishes adequate safeguards for those affected by the administrative action." 191 N.W.2d at 772.

This approach to questions involving a delegation of legislative power was reaffirmed in *Grant v. Fritz*, 201 N.W.2d 188 (Iowa 1972). The delegatons of power in *Iron Workers* and *Grant* were declared valid by the Court because those who were affected by the exercise of the delegated power were protected by adequate safeguards.

Among the "safeguards" identified and found to be "replete" in the statutes in these cases are (1) notice of the proposed action, (2) a hearing on the matter, and (3) an opportunity to appeal from the ruling of the body exercising the delegated power. It should of course be assumed that the safeguards are afforded to someone with standing as they were in *Iron Workers* and *Grant*.

The statute under consideration (§602.59) does not provide for notice (to the commission, serving magistrates or anyone else) of the intended action of the judges. The statute does not provide for a hearing. Nor does it provide for an appeal from the order of substitution. See *Iron Workers*, supra, at p. 772 of 191 N.W.2d for other possible safeguards not enumerated here or listed in the statute. In short, there are no safeguards, standards or guidelines under which the court is to exercise this delegated power. §602.59 is unconstitutional, even assuming the power therein could be delegated to the court.

II

But the power to order the substitution *cannot* be delegated to the judicial department, even with safeguards, standards or guidelines, because it is strictly a legislative power. Article III, §1, pertaining to distribution of powers, provides:

"1. Departments of the government. The powers of the government of Iowa shall be divided into three separate departments—the Legislative, the Executive, and the Judicial; and *no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any function appertaining to either of the others,* except in cases hereinafter expressly directed or permitted." (Emphasis added).

In *State ex rel. Klise v. Town of Riverdale,* 1953, 244 Iowa 423, 57 N.W. 2d 63, the Iowa Supreme Court held a statute delegating to the district court the power to determine "desirability" of annexation to a city was unconstitutional because it delegated legislative power to the court.

In that case, the city of Bettendorf started proceedings to annex adjacent territory and, while the proceedings were pending prior to judicial determination of "desirability" as required by the annexation statute, certain electors of the territory incorporated it as the town of Riverdale. Apparently, a mayor and council of Riverdale were elected and a town clerk appointed. The mayor of Bettendorf commenced a quo warranto action against the incorporated town of Riverdale, its officers and governing body. The trial court held the incorporation of Riverdale null and void, ousted the mayor and council and determined that Bettendorf had the prior right to annex the territory from the date of the adoption of its annexation resolution. Our supreme court reversed the trial court, holding:

"The incorporation of a municipality is purely a *legislative function.* The power to create muncipalities *cannot be delegated to the judicial branch of government.* The power to extend the boundaries of a municipality is an exercise of the power to create a municipality and is within the *exclusive* power of the legislative branch of government." (Emphasis added.) 57 N.W. 2d, 63, 66.

The court went on:

"What is desirable is not a question of fact that can be judicially determined. It is a question of policy or public interest exercisable by the legislature alone. In this plan of annexation the legislature is not giving the court the permissible function of determining whether facts prerequisite to annexation have been established. It is endowing the court with the power to make the conditions precedent to annexation. The court might decide the city's ability to furnish fire protection alone would make annexation desirable. Or the court might decide annexation would not be desirable unless and until every proper municipal service can be extended into the territory annexed. No one knows what the legislature meant by its requirement of desirability. It probably meant the court was to decide what would best promote or be conducive to the public good. *Plainly this is legislation.* The legislature has been entrusted with the power to pass laws for the public good. It cannot delegate to the courts, as a condition to the law's taking effect, the choice of determining whether the law will have a salutary effect. Under this statute the court must say: it is desirable that the city limits be or not be extended. This is no true finding of fact. It gives the municipality power to extend *if the court thinks best.*" 57 N.W.2d 63, 70. (Emphasis added).

See also *Town of Beloit v. City of Beloit,* 1968, 37 Wis. 2d, 637, 155 N.W.2d 633 and 69 ALR 266.

§602.59(5) improperly permits "a majority of the district judges in that judicial district" to determine that "a substitution is no longer *desirable,*" thus indicating that desirability was the chief consideration in the first instance.

Klise notes from 69 ALR at 267:

"It may be stated as a general rule, supported by practically all of the cases in which the proposition is considered, that creation, enlargement, or diminution of political districts or municipalities is a legislative function ***."

Similarly, in *Searle v. Yensen*, 1929, 118 Neb. 835, 226 N.W. 464, it was held that while the legislature might delegate power over public power companies and power districts to municipal corporations, county boards and other public bodies, it could not delegate such powers to the courts. Questions of public policy, convenience and public welfare, as related to the organization, incorporation, boundaries, powers and government of electric light, heat and power districts were held to be, in the first instance, of purely legislative cognizance. The legislature having declared its policy and determined the facts and conditions which must form the basis for the organization, incorporation, powers and government of such, may vest authority in the courts to determine whether or not the law has been complied with, as a condition upon which such organization shall come into being. But the court cannot adjudicate upon the necessity or political propriety of forming a power corporation. Therein the court quoted *In Re North Milwaukee*, 93 Wis. 616, 67 N.W. 1033:

"The question as to whether incorporation is for the best interest of the community in any case is emphatically a question of public policy and state craft, not in any sense a judicial question; and in attempting to submit that question to the decision of the circuit court the legislature has undoubtedly done that which the constitution forbids. If the decision of that question is to be delegated to any officer or body, it must certainly be to the county boards of supervisors. That part of the section, also, which places the whole question of the boundaries of the proposed village under the control of the court is equally objectionable."

A power delegated by the people in the constitution to a major department of government, under special terms which indicate the people expect that department to exercise the power as its prerogative, cannot be delegated or transferred to another department of the same government even by the legislature. For example, the legislature could not transfer the governor's power to pardon a criminal, to veto a bill, or to fill vacancies in office, as delegated in the constitution. Nor can it provide that such powers be shared with another department. See *Fox v. McDonald*, 1893 Ala., 13 So. 416, 417.

In *Buback v. Romney*, 1968, 380 Mich. 209, 156 N.W.2d 549, the Michigan Supreme Court held that when the constitution delegated a particular removal power to the governor, the legislature could not, by statute, authorize the proceedings to be conducted by a probate judge designated by the governor. Such would violate the doctrine of separation of powers. "The framers of the constitution did not expressly provide for the joint exercise of the removal power by two or more branches of government." "If a probate judge is provided by the governor to undertake the function, the judge becomes the governor's substitute."

See also, *Udall v. Severn*, 1938 Ariz., 79 P.2d 347, 352 and *Watrous v. Golden Chamber of Commerce*, 1950 Colo., 218 P.2d 498, 507 and *City of Carrington v. Foster County*, 1969 N.D., 166 N.W. 2d 377, 384.

§602.59 would authorize the court to substitute one magistrate for three, diminishing the number of judges in the district. And, at the same time, the court is in fact *increasing* one *class* of magistrates, the full-time magistrates.

Does our constitutional provision specifically delegate the power to increase or diminish the number of judges in a judicial district to the legislature? Yes. This is a "function appertaining" to the legislative department. Article V, §10 as amended in 1884, when read with Article V, §14, says that such is the prerogative of the general assembly.

Article V, §10, as amended provides in pertinent part:

"At any regular session of the General Assembly the State may be divided into the necessary Judicial Districts for District Court purposes, or the said Districts may be reorganized *and the number of* the Districts and *the Judges of said Courts increased or diminished* . . ."

Article V, §14, provides in pertinent part:

"It shall be the *duty of the general assembly* to provide for the carrying into effect of this article . . ." (Emphasis added).

Thus §602.59 is unconstitutional not merely because it prescribes no safeguards, standards or guidelines, but simply because that exclusively legislative power cannot be delegated to the court.

III

As the state's legal adviser, I consider it my duty to point out that your question has also led us to conclude that §§602.50 and 602.51 are unconstitutional insofar as they authorize appointment of judicial magistrates by judicial nominating commissions or by district judges. Article V, §15 of the Constitution of Iowa, as amended in 1962, provides that vacancies in the district court "shall be filled *by appointment by the governor* from lists of nominees submitted by the appropriate judicial nominating commission." The legislature cannot take away powers which Iowa citizens have given the Governor in our constitution.

There is only one Iowa district court. §602.1, Code of Iowa, 1975, provides in pertinent part:

"There shall be a unified trial court in the state of Iowa, known as 'Iowa District Court'. . . ." (§29, Ch. 282, 65th G.A., 1973).

§602.36 abolished all "mayors' courts, justice of the peace courts, police courts, superior courts and municipal courts and offices connected therewith" as of July 1, 1973. The legislature apparently overlooked the requirement that the governor must appoint all vacancies to the district court when it incorporated the aforementioned courts into the unified district court.

A vacancy in the district court occurs whenever there is a vacancy in any judicial office thereof, whether it be a district court judge, a district associate judge, a full-time (§602.51) magistrate or a part-time (§602.50) magistrate.

A vacancy exists at once upon the effective date of the creation of an office by the legislature. *State v. Birdsall*, 1918, 186 Iowa 129, 167 NW

453. In other words vacancies existed even before there were incumbencies in the magistrate offices created. *Wallace v. Payne*, 1925, 197 Ca. 539, 241 P. 879, 883 and citations therein. Moreover, §§602.50(3) and 602.51 (last paragraph) both provide that a vacancy occurs when there is an "increase in the number of positions authorized." Creation of these magistrates increased the number. Thus, all part-time magistrates created by §602.50 and appointed by nominating commissions, and all full-time magistrates created by §602.51 and appointed by district judges, are de facto judges subject to ouster proceedings because they were not appointed by the Governor as required by Article V, §15.

"A judge de jure is one who is exercising the office of a judge as a matter of right. A judge de facto is one acting with color of right and who is regarded as, and has the reputation of, exercising the judicial function he assumes; he differs, on the one hand, from a mere usurper of an office who undertakes to act without any color of right; and, on the other, from an officer de jure who is in all respects legally appointed and qualified to exercise the office. In order that there may be a de facto judge there must be an office which the law recognizes, and where a court has no legal existence there can be no judge thereof, either de jure or de facto. There cannot be a de facto judge when there is a de jure judge in the actual performance of the duties of the office. Mere possession of the office is not sufficient to make the incumbent a de facto judge; to constitute him a de facto judge he must have color of title or his possession must have been acquiesced in by the public generally." *48 CJS 949, Judges §2.*

"A judge de facto is a judge de jure as to all parties except the state, and, as discussed infra §52, his official acts, before he is ousted from office, are binding on third persons and the public. His right to hold his office can be questioned only in proceedings, regularly instituted for that purpose, in the form provided by law, to which he is a party; it cannot be attacked in a collateral proceeding. His title cannot be determined in an action tried before him or on an appeal. The rules apply although the person acting as judge is incapable of holding the office, and irrespective of the question whether he was properly elected or appointed, or whether he is holding two incompatible offices." *48 CJS 958, Judges §7.*

"A judge de facto, as against all parties but the commonwealth, is a judge de jure, as discussed supra §7, and he is competent to do whatever may be done by a judge de jure. The official acts of a de facto judge, before he is ousted from office, are valid and binding, at least as far as the public and third persons are concerned, and are not open to collateral attack, or subject to question on jurisdictional grounds.

"In passing on the validity, of official acts, however, inquiry into the title to the office of the party acting therein may be pursued far enough to show whether he is a de facto officer, and, if he is not even a de facto judge but is a mere intruder or usurper, his acts are wholly void. The rule that the official acts of de facto judges are valid as against third persons cannot be applied to an attempted exercise of judicial power by an officer de jure who claims the right so to act by virtue of his office, when in fact no such power is vested therein; and the acts of one assuming to act as judge of a court which never had any legal existence are inoperative, because, as discussed supra §2, he is neither a de jure nor a de facto judge." *48 CJS 1016, Judges, §52.*

See also 46 AmJur2d 261, Judges §241 et seq.

The Iowa cases appear to follow the foregoing principles. See *State v. Olson*, 1957, 249 Iowa 536, 86 N.W.2d 214 and *Heyland v. Wayne Inde-*

pendent School District No. 5, 1942, 231 Iowa 1310, 4 N.W.2d 278 and authorities cited in each.

So, while all magistrates *now serving* in the unified district court with "color of right" are de facto, none de jure, they may continue to serve until they are ousted. Theoretically, at least, all such could if re-nominated be re-appointed by the Governor as de jure magistrates except those who may be serving as full-time (§602.51) magistrates under an unconstitutional order of substitution made under §602.59. Neither the nominating commissions nor the district court judges should make *any* appointments of magistrates, by substitution or otherwise. Nominating commissions may submit two nominees to the Governor for each magistrate's office under Article V, §15, but not until the right and title to the offices of the respective magistrates have been determined by quo warranto proceedings or the office otherwise becomes vacant. *State v. Bednar*, 1909, 18 ND 484, 121 NW 614; *46 AmJur2d 265, Judges §246.*

Meanwhile, all acts of de facto magistrates are valid.

Magistrates who have been appointed by order of substitution but who have not yet qualified or taken the place of three part-time magistrates, may not properly qualify or serve.

June 6, 1975

STATE OFFICERS AND DEPARTMENTS: Open Meetings — Chapter 28A, Code of Iowa, 1975. A member of a State Board, such as the Board of Examiners for Nursing Home Administrators, may generally tape record the official meetings. (Blumberg to Kelly, Member, Iowa State Board of Examiners for Nursing Home Administrators, 6-6-75) #75-6-4

Mr. Daniel L. Kelly, Board of Examiners for Nursing Home Administrators: We have received your opinion request of March 19, 1975. You ask whether a member of the Board of Examiners for Nursing Home Administrators may legally tape record official meetings.

Meetings of your Board fall within Chapter 28A of the 1975 Code (Open Meetings Law). Because the meetings are open by law citizens of this State have the right to be present at the meetings. §28.2 of the Code. Minutes of the meetings must be kept, §28.5, and many times the secretaries tape the meetings in order to accurately prepare those minutes. We can find no prohibition or compelling reason against any member of a Board from taping meetings. The only exception to this might concern a closed meeting as authorized by §28A.3. In that case, a reason may exist for not allowing tape recordings of the session. It is assumed that the Board member who is taping a meeting will not abuse any discretion as a Board member or misuse the tapes.

Accordingly, we are of the opinion that a Board member of a state Board may generally tape record public meetings of that Board.

June 12, 1975

CONSTITUTIONAL LAW; GOVERNOR; ITEM VETO. Art. III, §16 as amended and Art. III, §24, Constitution of Iowa. House Files 334 and

455, 66th G.A. 1st Session. The Governor's attempted item veto of conditions and restrictions to appropriations in HF 334 and 455 were not severable but integral parts of the appropriations and hence were beyond his item veto powers and void. "If the Governor desires to veto a legislatively-imposed qualification upon an appropriation, he must veto the accompanying appropriation as well." *Welden v. Ray*, 1975 Iowa, 228 NW2d..... (Turner to Lamborn, State Senator, 6-12-75) #75-6-5

The Honorable Clifton C. Lamborn, State Senator: Reference is made to your letter of May 14, 1975, in which you state:

"On April 22nd Governor Ray exercised his right of item veto with respect to House File 455. On April 28th he took similar action with respect to House File 334. In each case the appropriations as such were not vetoed, but certain restrictions on the use of funds were disapproved. In the one case it had to do with the number of personnel in a department, and in the other the right of transfer of funds from a specific appropriation to any other area.

"In view of the recent decision of the Iowa Supreme Court relative to the item veto, I would like to have your opinion as to whether these two vetoes would represent a proper exercise of the item veto power."

House File 455, 66th G.A., 1st Session (1975) is,

"An Act making appropriations to the Iowa State Fair Board, Agricultural societies, the Geological Survey, and the Iowa Natural Resources Council."

The measure consists of five sections some of which contain a number of subsections. House File 455 was approved April 22, 1975, except for §2, which the Governor disapproved. Such §2 reads as follows:

"Sec. 2. The funds appropriated to the geological survey general office under subparagraph one (1) of paragraph a of subsection three (3) of section one (1) of this Act shall be used to pay salaries for a table of organization of not more than twenty-eight permanent full-time positions. The funds appropriated to the geological survey, Iowa coal research project, for salaries under subparagraph one (1) of paragraph b of subsection three (3) of section one (1) of this Act shall be used to pay salaries for a table of organization of not more than four permanent full-time positions. The funds appropriated to the Iowa natural resources council for salaries under paragraph a of subsection four (4) of section one (1) of this Act shall be used to pay salaries for a table of organization of not more than thirty permanent full-time positions."

In his item veto message with which he transmitted House File 455 to the Secretary of State, Governor Ray explained at some length his reasons for his use of the item veto power to delete §2. Essentially, these boil down to the contention that the section constitutes an unconstitutional incursion by the legislature into an executive function and that limitations on the number of personnel of the Geological Survey would deny the administration staffing flexibility needed for efficient management.

House File 334, 66th G.A., 1st Session (1975) is,

"An Act appropriating funds to the Iowa State Commerce Commission and the Department of Public Defense and providing for the deposit of receipts of such departments in the general fund of the state."

It consists of six sections and a number of subsections. Sections 1 and 2 of House File 334 provide:

"Section 1. There is appropriated from the general fund of the state for the fiscal year beginning July 1, 1975, and ending June 30, 1976, the following sums, or so much thereof as may be necessary, to be used by the following agencies for the purposes designated:

	1975-76 *Fiscal Year*
"1. IOWA STATE COMMERCE COMMISSION	
a. General administration	
(1) For salaries	$243,002
(2) For support, maintenance and miscellaneous purposes	59,417
b. Warehouse division	
(1) For salaries	217,261
(2) For support, maintenance, and miscellaneous purposes	43,790
c. Utilities division	
(1) For salaries	864,599
(2) For support, maintenance, and miscellaneous purposes	219,759
2. DEPARTMENT OF PUBLIC DEFENSE	
a. Military division	
(1) For salaries	782,488
(2) For support, maintenance, and miscellaneous purposes	796,422
b. Civil defense division	
(1) For salaries	57,828
(2) For support, maintenance, and miscellaneous purposes	25,687

"Sec. 2. Notwithstanding the provisions of section eight point thirty-nine (8.39) of the Code, there shall be no transfer of funds appropriated by this Act between categories or line items provided by this Act."

On April 28, 1975, the Governor approved House File 334 except for §2, which he specifically disapproved. Section 8.39, Code of Iowa, 1975, to which reference is made in §2 of House File 334, provides:

"No appropriation nor any part thereof shall be used for any other purpose than that for which it was made except as otherwise provided by law; provided that the governing board or head of any state department, institution, or agency may, with the written consent and approval of the governor and state comptroller first obtained, at any time during the biennial fiscal term, partially or wholly use its unexpended appropriations for purposes within the scope of such department, institution, or agency.

"Provided, further, when the appropriation of any department, institution, or agency is insufficient to properly meet the legitimate expenses of such department, institution, or agency of the state, the state comptroller, with the approval of the governor, is authorized to transfer from any other department, institution, or agency of the state having an appropriation in excess of its necessity, sufficient funds to meet that deficiency.

"Any transfer made under the provisions of this section shall be reported to the legislative fiscal committee* on a monthly basis. The report shall cover each calendar month and shall be due the tenth day of the following month. The report shall contain the following: The amount of each transfer, the date of each transfer; the department to which the transfer was made; the department and fund from which the

transfer was made; a brief explanation of the reason for the transfer; and such other information as may be required by the committee. A summary of all transfers made under the provisions of this section shall be included in the annual report of the legislative fiscal committee."

It is evident therefor that if the Governor's purported item veto of §2 is invalid, the Comptroller and Governor acting under §8.39 of the Code would not be able to transfer funds appropriated for support, maintenance and miscellaneous purposes to salaries or transfer funds appropriated to, for example, the warehouse division to the utilities division or general administration in the case of the Commerce Commission, or between the military division and civil defense division in the case of the Department of Public Defense. Moreover, the Comptroller and Governor would not be able to transfer funds from the Commerce Commission to the Department of Public Defense or vice versa. In his veto message accompanying House File 334, the Governor again asserted that §2 would amount to an unconstitutional involvement by the legislative branch of government in the affairs of the executive and pointed out that without the transfer power given to him by §8.39 of the Code much to be desired flexibility in the administration of the agencies involved would be lost.

Your question, of course, is prompted by the recent decision of the Iowa Supreme Court construing and limiting the item veto power granted to the Governor by Amendment 4 of the 1968 Amendments to the Constitution of the State of Iowa.* This Amendment added the following paragraph to Article III, §16 of the Constitution:

"The Governor may approve appropriation bills in whole or in part, and may disapprove any item of an appropriation bill; and the part approved shall become a law. Any item of an appropriation bill disapproved by the Governor shall be returned, with his objections, to the house in which it originated, or shall be deposited by him in the office of the Secretary of State in the case of an appropriation bill submitted to the Governor for his approval during the last three days of session of the General Assembly, and the procedure in each case shall be the same as provided for other bills. Any such item of an appropriation bill may be enacted into law notwithstanding the Governor's objections, in the same manner as provided for other bills."

Prior to the recent case, an earlier challenge to the Governor's exercise of the item veto power was made in the case of *State, ex rel Turner, Attorney General v. Iowa State Highway Commission, et al.,* (Iowa 1971) 186 N.W.2d 141. This decision of the Iowa Supreme Court involved House File 823, Acts, 63rd G.A., 1st Session (1969), which was an appropriation measure to provide funds from the primary road fund to the State Highway Commission for each year of the biennium beginning July 1, 1969, and ending June 30, 1971, for administration, support, services, planning, development, headquarters operation, field operation, additional equipment, and replacement equipment. Section 5 of such House File 823 provided:

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* *Welden, et al. v. Ray, et al.,* 1975 Iowa, 228 N.W.2d ____.

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* See also *1970 OAG 154,* a still earlier opinion (5-5-69) which the Governor had followed and cited as his reason for *not* vetoing §8 of Ch. 48 (S.F. 655), 63rd G.A., 1st Session.

"The permanent resident engineers' offices presently established by the State Highway Commission *shall not be moved* from their locations; however, the commission may establish not more than two temporary resident engineers' offices within the state as needed." (Emphasis added).

Notwithstanding the fact that we had earlier advised the Governor that §5 was clearly not an item which could constitutionally be vetoed, but rather a proviso, condition or limitation on the highway commission appropriation, on June 20, 1969, the Governor transmitted to the Secretary of State House File 823 approving the same with the exception of item 5 above referred to and in a separate letter, ignoring the advice he had requested from us, stated his reasons for the exercise of the item veto power.*

When it became evident that the Highway Commission was going to move resident engineers' offices in violation of §5, we brought the first item veto suit in Polk County District Court to enjoin the moves. Although the District Court agreed with our contention (supported by virtually unanimous authority from other jurisdictions) that §5 was not subject to the item veto, on appeal the Iowa Supreme Court reversed the lower court, agreeing with the defendants that §5 was not an item within the meaning of the 1968 amendment to Article III, §16 of the Constitution. In reaching this conclusion, the Court said:

"Our determination must be as to whether or not section 5 of H.F. 823 is in truth and in fact an 'item'. We feel it obvious section 5 did not 'qualify an appropriation' or 'direct the method of its use' and is in no sense a condition, qualification or proviso which limits the expenditure of any of the funds appropriated by House File 823."

The Court reached this astonishing result despite the fact that the record before it clearly established that the Highway Commission had requested and included $80,000 in its budget submission for the purpose of moving offices. Then director of highways Joseph R. Coupal had testified:

"In our budget moving expenses are included as a line item in our personnel department budget, not for each individual office or even each individual employee, but as a lump sum for moving expenses. This is for moving of people, I don't really know what it meant by moving an office. I assume what it meant is moving of employees, and we did line item money for that purpose. My recollection is that it is somewhere in the neighborhood of $80,000 for the biennium but I am not sure." (R. pp. 46-47)

And the district court found as a matter of fact:

"The defendant commission asked the General Assembly in the regular session in 1969 for an appropriation of $80,000 to pay the cost of moving certain of said 48 offices to other towns and cities. The General Assembly did not vote on the appropriation, but, on the contrary, enacted (section 5, supra) . . . ." (R. p. 99)

The Court had this to say about the meaning of the term "item":

"The term 'item' as used in the constitutional amendments of the several states is definitive of that portion of an appropriation bill which the Governor is empowered to sever from the bill by his disapproval. The courts have generally agreed that the Governor is limited to vetoing items specifically appropriating money or at least placing conditions,

restrictions or provisos on the use thereof. In Commonwealth v. Dodson, 176 Va. 281, 290, 11 S.E.2d 120, 124, the term 'item' as used in the Virginia State Constitution is said to be 'something that may be taken out of a bill without affecting its other purposes and provisions. It is something which can be lifted bodily from it rather than cut out. No damage can be done to the surrounding legislative tissue or should any scar tissue result therefrom." 186 N.W.2d 141, 151.

In its opinion, the Court also drew a distinction between §§4 and 5 of House File 823:

"We feel a comparison of section 5, which is set out in full above, with the foregoing section 4 is of more than passing interest. Section 4 provides,

'No moneys appropriated by this act shall be used for capital improvements but may be used for overtime pay of employees involved in technical trades.'

"It should be noted section 5 places no prohibition against the use of any moneys appropriated by the act for moving of permanent resident engineers' offices presently established by the defendant commission. Had such language as used in section 4 been employed in section 5 we are impelled to the view that section 5 would have in such case been a proviso or condition upon the expenditure of the funds appropriated, but lacking such phraseology it obviously is not."

In other words, ignoring substance for form, the Court indicated section 5 could not have been item vetoed had it been preceded by a mystic word or phrase such as *"But"* or *"No moneys appropriated shall be used for* moving the permanent resident engineers' offices," instead of simply commanding that the offices "shall not be moved."

Contrary to the accepted view that the item veto power was a strictly negative power which permitted only the veto of a money item in its entirety, and notwithstanding Article III, §24, Constitution of Iowa, *State, ex rel. Turner v. Iowa State Highway Commission* in effect permitted the Governor to appropriate $80,000 to move the offices—an appropriation the legislature had not only refused to make, but the expenditure of which it expressly attempted to forbid!

In the several years that followed the first item veto case, the Governor exercised his then apparently untrammeled item veto power on a number of occasions to the growing vexation and frustration of members of the general assembly as they sought in vain to place limitations on the manner in which moneys they appropriated were to be used.

So it was that in 1973 twenty-three members of the general assembly banded together and at their own expense brought an action to again seek judicial clarification of the meaning of the item veto amendment. This effort resulted in the second item veto case, *Welden, et al. v. Ray, et al.*, Supreme Court of Iowa No. 2-57321, decided May 12, 1975. Though one would have thought that the Supreme Court had so locked itself into a position on the item veto question that it would be impossible to extricate itself or to do anything but uphold the Governor's exercise in the instances under attack, the Court, with an agility which would have done it great credit in another type of court, found a way around its own decision, without overruling it, and struck down ten separate exercises of the item veto involving five separate bills. Ironically, District Court

Judge Gibson C. Holliday, who had followed the unanimous American decisions only to be reversed in *Highway Commission,* was now reversed when he followed *Highway Commission* in *Welden!* Vicissitudes are difficult to discern in the Court's legerdemain.

In reaching its conclusion in *Welden,* the Court fell back on the sophistic dichotomy it had drawn in the first item veto case between §§4 and 5 of House File 823 and indicated that all that is necessary to immunize a prohibition in an appropriations act from the item veto is the incantation of the magical words "no moneys appropriated by this act shall be used . . . ." While we respectfully submit that this is a distinction without a difference and exalts form at the expense of substance, it was sufficient for the court to wend its way past the seemingly insuperable obstacle it had constructed for itself in its own prior decision and enabled it to reach essentially the opposite conclusion in the second case. Relying on virtually all the cases which had been cited to it in plaintiff's brief in the first item veto case, the Court also concluded that an item could not be vetoed unless it was separate and severable from the appropriation to which it related.

Carrying the Court's decision in *Highway Commission* to a logical hypothetical extreme, the Governor could request an appropriation of $5 million to operate his office, and to buy a new yacht. The legislature could appropriate $5 million and include a section saying "No new yacht shall be purchased for the Governor's office." The Governor *could* under *Highway Commission* item veto that prohibition and spend a substantial portion of the $5 million for a new yacht. In such a case, he would not only be appropriating money to buy the yacht but making a purchase expressly forbidden. On the other hand, after *Welden,* if the legislature said "*But* the Governor shall not use any of this money to buy a new yacht", then the Governor could not item veto the prohibition.

With the foregoing background to House File 334 and House File 455, it is clear beyond any cavil of doubt that the Governor's attempted item veto of §2 of House File 455 is invalid, void, and of no force and effect since the language of such §2 is indistinguishable in any material respect from several of the attempted exercises of the item veto which were struck down in the second item veto case, i.e., those involving limitations on the number of employees.

Section 2 of House File 334, which the Governor also attempted to item veto, is of a somewhat different nature but, in our opinion, under the reasoning of the *Welden* case, it too is a condition, proviso or limitation inextricably connected to the appropriation of which it is a part and, therefore, immune from the item veto power. It is probably most nearly analogous to §2 of House File 739, Acts 65th G.A., 1st Session (1973) an appropriation bill for the Department of Social Services involved in the *Welden* case. Such §2 of H.F. 739, with the vetoed language italicized, provided:

"*The budget of total expenditures for each institution under the department of social services during the biennium shall not exceed the state appropriation for each institution set forth in this Act except that the* maintenance recovery shall be available to the institutions."

Section 1 of House File 739 contained separate line item appropriations for each year of fiscal 1973-75 for the State Juvenile Home at Toledo, the Boys Training School at Eldora, the Girls Training School at Mitchellville, the Annie Wittenmyer Home at Davenport and Community Based Pilot Programs. It is clear that if §2 of House File 739 had been allowed to remain in the measure intact, it would have been impossible to transfer or use for one institution funds appropriated for another.

This is essentially what §2 of House File 334 is designated to prohibit. It would in effect prevent the Governor and Comptroller from transferring funds among the various divisions of the Commerce Commission and Department of Public Defense, within divisions of those departments and between the Department of Public Defense and the Commerce Commission. Accordingly, we must conclude that §2 of House File 334 is a condition, proviso or limitation not within the Governor's power to item veto, and that Article III, §24 still really means what it says:

"No money shall be drawn from the treasury, but in consequence of appropriations by law."

While the Governor may quite properly veto an entire item, he cannot strike a condition from an item in the exercise of that power, leaving the item with no strings attached. His is the negative power of veto—not the creative power of amendment. With power to amend away a condition or limitation a Governor could actually appropriate funds to a purpose for which the General Assembly has refused to appropriate. Appropriation is the exclusive power of the legislature, not the prerogative of the Governor. He cannot usurp the General Assembly's legislative power any more than the General Assembly can usurp his executive power.

June 13, 1975

PUBLIC EMPLOYEES; RETIREMENT; LEGISLATURE. Art. III, §25, Const. of Iowa as amended. SF 555, 66th G.A., 1st Session. Proposed sections of SF 555 which extend coverage of the Iowa Public Employee's Retirement System (IPERS) to members of the 67th General Assembly are not prohibited by Art. III, §25, as amended in 1968, because the 66th G.A. does not therein propose to increase the compensation of its own members. (Turner to Lamborn, State Senator, 6-13-75) #75-6-6

The Honorable Clifton C. Lamborn, State Senator: We have your letter of May 28, 1975, wherein you advised that a committee of the Senate was considering a proposal which would extend coverage of the Iowa Public Employee's Retirement Act (hereafter IPERS) to members of the General Assembly. You mentioned that it was proposed to make this coverage retroactive so that certain members of the 67th General Assembly, with prior service, could buy into the program covering the time of their previous service. The proposed legislation would require that the state furnish the funds necessary to match the amount paid by the eligible legislators who buy into the system. The present legislature, the 66th, will appropriate from the general fund of the state to the Employment Security Commission, an amount sufficient to pay the employer contributions for previous service for certain members of the 67th General Assembly who make the required personal contributions under the Act.

With these facts in mind, you have stated:

"In view of the provisions of the constitutional amendment adopted in 1968, which is (28) Amendment 5, it occurs to me that this might very well be unconstitutional in that it would provide additional benefits to the members of the General Assembly, which could not legally be done until the next session of such Assembly."

The constitutional amendment referred to by you, effective in 1968, states as follows:

Article III, Section 25, Constitution of the State of Iowa:

"Each member of the general assembly shall receive such compensation and allowances for expenses as shall be fixed by law, but no general assembly shall have the power to increase compensation and allowances effective prior to the convening of the next general assembly following the session in which any increase is adopted."

Senate File 555 is a lengthy bill covering several subject matters, which includes benefits for public employees and retired public employees, provides for salary adjustments and certain retirement benefits for public employees and certain elected officials and retired public employees, and makes other appropriations. Sections four (4), seven (7), nine (9), eleven (11), and twenty-two (22) make reference to provisions under which members of the legislature will be brought under the coverage of IPERS. Section 22 of Senate File 555 is relevant to your inquiry since it adds a new section to Chapter 97B, Code of Iowa, 1975, and it provides as follows:

"Persons who are members of the general assembly or elected state officials who submit proof to the employment security commission of membership in the general assembly for any period of service between July 4, 1953, and January 9, 1977, of not less than four years may make contributions to the system equal to the accumulated contributions as defined in section ninety-seven B point forty-one 97B.41), subsection thirteen (13), of the Code which would have been made if the member of the general assembly had been a member of the system during the member's service prior to January 10, 1977. The proof of membership in the general assembly and payment of accumulated contributions shall be transmitted to the commission not later than December 31, 1977. There is appropriated from the general fund of the state to the employment security commission, an amount sufficient to pay the employer contributions for previous service for members of the general assembly who make contributions under this section."

Section 38 of House File 555 provides that the above numbered sections which apply to members of the legislature, including §22, shall be effective January 10, 1977, which will be the date the next general assembly convenes. Accordingly, the language of §22, House File 555, does not conflict with the prohibition stated in Article III, §25, Constitution of Iowa.

Former §25 of the Iowa Constitution based the compensation of members of the general assembly on a per diem basis, plus a specific monetary allowance for miles traveled in going to and returning from the place where such session was held. It also provided that after the first session of the general assembly, the legislators would receive such compensation as would be "fixed by law". In addition, old §25 contained the following limitation:

"* * * but no General Assembly shall have power to increase the compensation of its own members. * * *"

It is to be noted that similar language is part of amended §25 cited above. An earlier opinion of this office construed the limitation found in prior §25 (O.A.G. 1913-14, p. 36), by stating in part:

". . . that while the thirty-fourth general assembly could not increase the salary of any member of the thirty-fourth general assembly, an amendment to the law increasing the salary of the members of the general assembly would not, in any way, prohibit members of succeeding general assemblies from accepting the increase, and that a hold-over senator is as much entitled to the increase in salaries as members of the lower house of the thirty-fourth general assembly who have been re-elected and are now members of the thirty-fifth general assembly and that all members of the thirty-fifth general assembly are entitled to the increase."

In the intervening years, the general assembly has seen fit to increase its compensation and said increases are found in Chapter 2, Code of Iowa, 1975. In 1929, during the 43rd General Assembly, the legislature passed an act authorizing allowance of "actual necessary expenses" of legislators. Claims for expenses, such as board, room, taxi cab hire, repair of automobiles, expenses incident to attending funerals, the cost of entertaining constituents, garage rent, mileage, drayage for moving household goods and miscellaneous and estimated items, were submitted by certain members of the 44th General Assembly to the State Auditor for payment. The payment of these claims was challenged in *Gallarno v. Long*, 1932, 214 Iowa 805, 243 N.W. 719, the Iowa Supreme Court held that statute unconstitutional. The Court found that the nature of the expenses claimed were "personal expenses" as contrasted to "legislative expenses" and that they, therefore, amounted to "additional compensation". Although we think this case is no longer controlling because of the 1968 amendment to §25, Article III of the Constitution, we cite same as indication as to what the Iowa Court may consider as additional benefits to the members of the general assembly for future legislative sessions.

Pensions and retirement plans for persons in public service have long been part of the law of Iowa, e.g., retirement plans for teachers (Chapter 294), firemen and policemen (Chapters 410 and 411), judges (Chapter 605A), peace officers (Chapter 97A) and IPERS (Chapter 97B). The right to a public pension is of statutory origin and statutes dealing with pensions have been enacted by practically all states. The granting of pensions in consideration of public services is usually regarded as a public purpose for which public funds may be appropriated or raised by taxation, in absence of any constitutional restriction. 60 Am.Jur.2d 880, §3. The Iowa Court agrees with this general principle. *Talbott v. Independent School District of Des Moines, et al.*, 1941, 230 Iowa 949, 299 N.W. 556, 137 A.L.R. 234. Retirement plans for legislators are part of the law of several states. (California, Wisconsin, Washington, Minnesota, Illinois and thirty-two other states). A leading case on the subject of retirement plans for members of the legislature is *Knight v. Board of Administration of State Employees Retirement System, et al.*, 1948, 32 Cal.2d 400, 196 P.2d 547, 5 A.L.R.2d 410. In the *Knight* case, the legislature, purporting to act under a constitutional provision authorizing the creation of the retirement system "for state employees", created a

retirement fund for its members and it was held to be a permissible exercise of the legislative power and did not contravene other constitutional provisions fixing and limiting the compensation of members of the legislature.

On the authorities cited above, we are of the opinion that the current general assembly may include its members in a retirement plan and that those presently serving will not be excluded from membership in IPERS, that funds may be appropriated for payment to the retirement plan and that legislators are persons rendering a public service, which would permit them to participate in a retirement system.

The *Talbott* case is also authority for the conclusion that the contribution by the state is not a "personal expense", nor is it "additional compensation". The Court stated:

"The conclusion to be deduced from all of these decisions holding that allowances paid to public employees from retirement funds, in part maintained by them, is that such allowances are not pure pensions, gratuities or bounties, but are given in consideration of services which were not fully recompensed when rendered. And also that any contribution by the state, or any subdivision of it, by way of taxation or other public money, to such retirement or disability funds, is not a donation for a private purpose, but is a proper outlay for a public purpose, which purpose is to bring about a better and more efficient service in these various departments by improving their personnel and morale, through the retention of faithful and experienced employees."

Furthermore, the language used in §22, "persons who are members of the general assembly" refers to members of the next general assembly, the 67th. The limitation in the constitutional amendment, §25, does not prohibit an increase in compensation or allowances of members of this present general assembly, so long as it is not effective until after the convening of the next general assembly following the session in which an increase is adopted. It is foreseeable that certain members of the present general assembly, the 66th, may, if they are elected to the 67th General Assembly, elect to receive credit for prior service in the legislature; but it is clear that even if this does increase their compensation, it will do so only after the convening of the next general assembly, the 67th.

Those of the present and previous (and even future) general assemblies, who do not qualify for service in the 67th (and make the required proof by December 31, 1977) will be unable to take advantage of this benefit. However wise or fair, it is reserved only for those of the 67th General Assembly who qualify by December 31, 1977. Even a former legislator appointed after December 31, 1977, to fill a vacancy in the 67th General Assembly will be unable to qualify because under the language of the foregoing quoted section he could not make his proof prior to the deadline.*

The operative fact for entitlement to IPERS benefits if the measure is enacted will be membership in the next (67th) general assembly. It is irrelevant that some of the members of the present general assembly may also be members of such successor body. It is equally irrelevant that the amount of entitlement may vary as among members of the 67th General Assembly and that prior legislative service may be included as a

factor in determining the amount of entitlement of some of such members of the 67th General Assembly.

June 18, 1975

GENERAL ASSEMBLY; STATUTES; TITLES; SUBJECT MATTER. Art. III, §29, Constitution of Iowa. House File 431, 66th G.A., 1st, 1975. HF 431, an act making appropriations to various departments and amending the election and campaign finance laws, is unconstitutional and void in its entirety because the act embraces more than one subject and matters properly connected therewith. The fact that both subjects are expressed in the title prevents a choice between them and a severance of the void part. (Turner to Coleman, State Senator, 6-18-75) #75-6-7

The Honorable Joseph Coleman, State Senator: You have requested an opinion of the attorney general as to whether House File 431, Acts of the 66th General Assembly, 1st Session, 1975, violates Article III, §29, Constitution of Iowa, because it appears to contain more than one subject and matters properly connected therewith. You say that you have been a State Senator since 1957 and have never seen a more obvious violation.

Article III, §29 of our Constitution provides:

"Sec. 29. Every Act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

House File 431, by committee on appropriations, was amended and passed by the House on March 24, 1975. It was then amended and passed by the Senate on June 14, 1975. As of this moment, the House has not concurred in the Senate amendments to the bill as passed by the House. The title to House File 431 is a bill for:

"An Act making an appropriation to the campaign finance disclosure commission, amending laws relating to the administration of the campaign finance laws and providing penalties, and making appropriations to state regulatory agencies for the regulation of banking, beer and liquor control, insurance, real estate, and those subjects regulated by the secretary of state."

The bill itself contains sections numbered 1 to 23, inclusive. In six numbered subsections, §1 provides appropriations to the departments of banking, beer and liquor control, the campaign finance disclosure commission, insurance department, real estate department and the office of secretary of state. §§18 to 23, inclusive, make amendments which appear to be properly connected to these appropriations. *Long v. Board of Supervisors of Benton County*, 1966, 258 Iowa 1278, 142 N.W.2d 378. But §§2 through 17 are substantive amendments to the election laws and laws relating to the administration of campaign financing "and providing penalties." These latter sections are an entirely different subject matter, wholly unrelated to the appropriations, and violate the aforementioned constitutional prohibition against an act embracing more than one subject.

Virtually all cases, Iowa and foreign, hold that this type of constitutional prohibition against more than one subject matter is to be liberally

construed so that one act may embrace all matters reasonably connected with, and not incongruous to, the subject expressed in the title. *Long v. Board of Supervisors*, supra, notes that courts have a duty, if possible, to construe an act in such a way as to uphold it and to avoid a declaration of unconstitutionality. Certainly we are not unaware that declaring an act of the legislature unconstitutional is a "delicate function" and to be avoided if possible. 1968 OAG 132, 139 and *Lee Enterprises v. Iowa State Tax Comm.*, 1968 Iowa, 162 N.W.2d 730.

In *Long* Justice Larson noted:

"Controversy has often arisen as to the proper application of this provision. In Volume 8, No. 1, Drake Law Review, the author of an article on constitutional form of a bill, states there have been about ninety such cases involving this point before our court and, in all but nine, statutes have been held valid. As a result of these opinions, we have some rather definite and specific guides to aid in determining such questions."

We have studied all of the approximately 90 Iowa cases referred to in 8 Drake Law Review 66, as well as those which have arisen since *Long*. We have also attempted to research the thousands arising in other states, most all of which states have nearly identical constitutional prohibitions. As noted in *Long* and the Drake Law Review, only a very few of the thousands of laws questioned on this ground have been held unconstitutional on account of it. Most of the cases consider challenges to the *sufficiency* of the title and whether it adequately expresses the subject matter of the act, rather than whether more than one subject is embraced in both the title and the act. We have found no Iowa case in which more than one subject matter was expressed in the title. See, however, *Williamson v. City of Keokuk*, 1876, 44 Iowa 88, which held the ninth section of the act unconstitutional both because it was neither embraced in the title nor germane to anything contained in the Act.

In other words, while it is not so unusual to find more than one subject matter in an act, or for the court to strike part of the act because it is not embraced in the title or connected with the subject, it is nevertheless extraordinarily unusual to find more than one subject matter expressed in the *title*. When a bill embraces more than one subject matter, but only one subject matter is expressed in the title, the subject matter not expressed in the title is severable and the remainder of the bill stands as constitutional. Art. III, §29. But when two or more separate subject matters are included in the title, the courts cannot choose between them, or determine that one is a mere rider to the other. In such a situation, the entire acts must fall. It's only when one of the subject matters is not expressed in the title that the court can justifiably determine it is the rider and severable from the act:

"But if any subject shall be embraced in an Act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." (From Art. III, §29).

Long holds that to constitute duplicity of subject, the act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other. There is no violation where matters treated in the act fall under some one general idea and are so connected with each

other, either logically or by popular understanding, as to be part of or germane to one general subject. Thus, whole recodifications have been upheld as part of one subject: code revision. *Rains v. First National Bank of Fairfield*, 1926, 201 Iowa 140, 206 N.W. 821; *State ex rel. Pearcy v. Criminal Court of Marion County*, 1971 Indiana, 274 N.E.2d 519.

We encounter no difficulty merely because an appropriation act makes appropriations to several unrelated departments, agencies or commissions of government. Nor do we find any problem in an appropriation act to a single department which contains changes in the substantive law relating to that department. Both type bills had a common denominator. In the first instance, it is the appropriation; in the second, the department.

In *Lee Enterprises, Inc. v. Iowa State Tax Commission*, 1968 Iowa, 162 N.W.2d 730, the court quotes *State v. Talerico*, 1940, 227 Iowa 1315, 1322, 290 N.W. 660, 663:

" 'The decisions involving the sufficiency of titles to legislative enactments lay down certain general rules. It is held this constitutional provision [Section 29 of Article III] should be liberally construed so as to embrace all matters reasonably connected with the title and which are not incongruous thereto or have no connection or relation therewith. It was designed to prevent surprise in legislation, by having matter of one nature embraced in a bill whose title expressed another. However, the title need not be an index or epitome of the act or its details. The subject of the bill need not be specifically and exactly expressed in the title. It is sufficient *if all the provisions relate to the one subject indicated in the title and are parts of it or incidental to it or reasonably connected with it or in some reasonable sense auxiliary to the subject of the statute.* * * *.' (Emphasis added.)"

The purpose of the constitutional prohibition in Article II, §29, according to *Long*, is to prevent so-called "logrolling" legislation, and "was not intended to embarrass legislation or hamper the legislature." In *Long* the court said:

"[5, 6] The primary and universally-recognized purpose of the one-subject rule is to prevent 'log-rolling' in the enactment of laws, the practice of several minorities combining their several proposals as different provisions of a single bill, and thus consolidating their votes so that a majority is obtained for the omnibus bill where perhaps no single proposal of each minority could have obtained majority approval separately. It was designed to prevent riders from being attached to bills that are popular and so certain of adoption that the riders will secure adoption, not on their own merits, but on the merits of the measure to which they are attached.

"[7] Another purpose served by the one-subject rule is to facilitate orderly legislative procedure. By limiting each bill to a single subject, the issues presented by each bill can be better grasped and more intelligently discussed by legislators. Also, limiting each bill to one subject means that extraneous matters may not be introduced into consideration of the bill by proposing amendments not germane to the subject under consideration. See 42 Minnesota Law Review 391."

Applying the case law to House File 431, and considering that Article III, §29 remains meaningful, we are unable to find any way in which §§2 through 17, pertaining to election and campaign finance laws, are related to appropriations to the department of banking, the Iowa beer

and liquor control department, the insurance department, the Iowa real estate commission or the office of secretary of state. Those provisions simply are not "matters properly connected therewith." There is simply no common denominator and to uphold this act we would have to find that the constitution now says every act may contain two or more unrelated subjects.

We have consulted with Code Editor Wayne Faupel, who has served in that office since 1931, and he informs us that while he has seen some acts which may arguably contain two subject matters, he has never found a more apparent violation of this prohibition where both subjects are also expressed in the title.

In *Power v. Huntley*, 1951 Wash., 235 P.2d 173, the title recited that the act provided for various appropriations *and* imposed an excise tax upon corporations and prescribed penalties. The act itself was divided into two parts. The court found it contained two or more subject matters in the act as well as in the title, in violation of a constitutional prohibition which reads: "No bill shall embrace more than one subject, and that shall be expressed in the title." The court said "we cannot see on what basis it can be said that one subject and not the other represents the legislative purpose."

"We have here a situation in which neither the appropriation bill * * * nor the corporation income tax bill * * * standing on its own merits, could pass the legislature in the special session, but when the proponents of these measures combined their interests, both were enacted * * *. This is the clearest possible illustration of the kind of 'logrolling,' the 'you-scratch-my-back-and-I'll-scratch-yours' situation that the constitutional provision was designed to prevent." 235 P.2d at page 178.

We do not herein contend that there was any logrolling in House File 431, but the constitution was designed to prevent that evil and its force may destroy even those good bills, where such trading was not involved, if an unrelated subject is added.

The *Power* case holds that where the title to the act acutally indicates, and the act itself actually embraces, two distinct objects, the whole act must be treated as void because of the "manifest impossibility" of the court's choosing between the two and holding the act valid as to one and void as to the other. See also *Washington Toll Bridge Authority v. State of Washington*, 1956 Wash., 304 P.2d 676 and *Price v. Evergreen Cemetery Company*, 1960 Wash., 357 P.2d 702.

We have found some cases from other jurisdictions which were held to violate the more than one subject prohibition, but in which it could be argued that there was a connection or common denominator between the two subject matters, whether the court recognized it or not. Thus, in *State of Indiana v. Criminal Court of Marion County*, supra, the court held that no rational unity existed between the provisions relating to penal institution employees and provisions relating to length and diminution of sentences. It might have been argued there that both subjects had to do with corrections. And in *Dee-El Garage, Inc. v. Korzen*, 1972, 53 Ill.2d 1, 289 N.E.2d 431, an amendment which would have allowed the state to tax

theretofore exempt university property, when leased out and used for non-exempt purposes, was a use tax and could not be included in a revenue act principally dealing with property tax. The title of the act is not set out in the case, but appears to have been narrowly drafted. The court found the amendment not germane.

In the *Washington Toll Bridge Authority* case, cited supra, powers granted to build toll roads were distinguished and held to be separate subjects merely because one of the powers was "continuing in effect" relating to the power to establish toll road projects in the future, but the other purpose of the act, held not germane, would have provided for the construction of a specific named toll road and was not "continuing in character." Those were cases much closer than the one presented by H.F. 431 here.

Other cases, more like the one we have before us and about which there is little question that there was more than one subject matter, are *Sutter v. People's Gaslight and Coke*, 1918 Ill., 120 N.E. 562; *State v. Hailey*, 1974 Tenn., 735 SW2d 712; *Jackson v. State*, 1924 Ind., 142 N.E. 423.

In my opinion, unless the election and campaign disclosure provisions contained in §§2 through 17, inclusive, are separated out, the entire act, and appropriations totaling $12,810,788.00 must fall. "Every Act shall embrace but one *subject*, and matters properly connected therewith" means exactly that. True, the subject must be expressed in the title. But adding a second subject to the title does not sanction a second subject in the act. If a second subject is added in the title it will ordinarily render the entire act void. The second sentence of §29 applies to save the severable part, *only* where the additional subjects are not expressed in the title. Here two subjects *were* expressed in the title and the whole Act is void.

June 20, 1975

Necessary requirements for selling beer by Army and Air Force Exchange Service at the Camp Dodge post exchange. §§123.130, 123.45, Code of Iowa, 1975. Army and Air Force Exchange Service is not required to obtain an Iowa Class "C" beer permit before purchasing beer from Class "A" wholesalers for resale at the Camp Dodge post exchange. Class "A" wholesalers may legally sell beer to the Camp Dodge post exchange without requiring cash payment pursuant to §123.45, The Code, and without violating §123.130, The Code, since federal law in this instance pre-empts application of chapter 123, The Code, to the parties involved. (Chimanek to Gallagher, Director, Iowa Beer & Liquor Control Department, 6-20-75) #75-6-8

Mr. Rolland A. Gallagher, Director, Iowa Beer & Liquor Control Department: You have requested an opinion concerning the requirements to be imposed by Iowa law on the sale of beer by the Army and Air Force Exchange Service in a post exchange located at Camp Dodge. Specifically, you make the following inquiries:

"1. Section 123.130 of the 1975 Code, states that any person holding a class 'A' permit issued by the department shall be authorized to manufacture and sell, or sell at wholesale, beer for consumption off the premises, such sales within the state to be made only to persons holding

subsisting class 'A', 'B' or 'C' permits, or liquor control licenses issued in accordance with the provisions of this chapter.

"Will the Army Air Force Exchange Service have to obtain a class 'C' Beer Permit so that a class 'A' wholesaler can sell to them?

"2. Section 123.45 of the 1975 Code states that no person engaged in the business of manufacturing, bottling or wholesaling alcoholic beverages or beer, nor any jobber or agent of such person shall directly or indirectly extend any credit for alcoholic beverages or beer or pay for any such license or permit.

"Can this cash requirement be waived and credit extended to the Army Air Force Exchange Service, as they have no way of paying cash at the time of purchase?"

Title to Camp Dodge is held by the State of Iowa, subject to certain rights and interests retained by the United States by virtue of a quit claim deed, dated February 24, 1956, from the United States to the State of Iowa, under the authority of P.L. 50—84th Congress, 69 Stat. 70. By said conveyance, the United States reserved reversionary rights to the property if the State ceased to use the property for military purposes, and also reserved the right to re-enter and use the property in the event of a declared state of war or national emergency. Camp Dodge as currently used provides housing and training facilities for the state militia and the National Guard, the latter including by statute the Iowa units, detachments and organizations of the national guard of the United States and the air national guard of the United States as such forces are defined in the National Defense Act and amendments thereto, and the Iowa national guard and the Iowa air national guard. Section 29A.1(2), The Code.

Given the use of Camp Dodge for both State and federal military purposes, and the specific rights of re-entry and reversionary interests granted the federal government by mutual consent evidenced in the aforementioned deed, one must conclude that by agreement, concurrent jurisdiction over Camp Dodge exists between the State of Iowa and the United States. Although the lands are not withdrawn from the jurisdiction of state law, the federal government is authorized to exercise its superior jurisdiction to the extent of performing without state interference in its legitimate federal military functions. Sections 1.2, 1.4, The Code; Article VI, Constitution of the United States. See generally, *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651, 74 L Ed. 1091, 1094, 50 S.Ct. 455 (1929); Annot. 74 L.Ed. 772.

Involved in the instant questions is a post exchange operated on the Camp Dodge premises by the Army and Air Force Exchange Service, otherwise designated AAFES. Establishment, operation and control of post exchanges is accomplished pursuant to federal rules and regulations, and is deemed a legitimate federal military function. By judicial decree and federal regulation, a post exchange under the auspices of AAFES has been specifically declared to be an arm of the federal government:

"The AAFES is an instrumentality of the United States. As such, it is entitled to the immunities and privileges enjoyed by the Federal Government under the Constitution, Federal statutes, established principles of international law, and international treaties and agreements. The AAFES is immune from direct state taxation and from state regulatory laws, such as licensing and price control statutes, whose application would

result in interference with the performance by the AAFES of its assigned Federal functions." AR 60-10/AFR 147-7 (1-7); *U.S. v. Mississippi Tax Comm'n*, ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___, 43 Law Week 4681 (1975); *Std. Oil Co. v. Johnson*, 316 U.S. 481, 485, 86 L.Ed. 1611, 1616, 62 S.Ct. 1168 (1942); cf. *Paul v. U.S.*, 371 U.S. 245, 9 L.Ed.2d 292, 83 S.Ct. 426 (1963).

The United States Supreme Court recently had occasion to consider the power of a state to impose the taxing provisions of its liquor licensing scheme upon liquor purchases by federal instrumentalities on military bases over which the federal government and the state exercised concurrent jurisdiction. In *U.S. v. Mississippi Tax Comm'n*, supra, at 4685 of 43 Law Week, the majority opinion stated:

"When the case was last here we held that 'the Twenty-first Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercise exclusive jurisdiction (pursuant to Art. I, §8, cl. 17 of the Constitution).' 412 U.S., at 375; Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 538 (1938). Cf. James v. Dravo Contracting Co., 302 U.S. 134, 140 (1937). We reach the same conclusion as to the concurrent jurisdiction bases to which Art. I, §8, cl. 17, does not apply; 'Nothing in the language of the (Twenty-first) amendment nor in its history leads . . . (the) . . . extraordinary conclusion' that the amendment abolished federal immunity with respect to taxes on sales of liquor to the military on bases where the United States and Mississippi exercise concurrent jurisdiction. Department of Revenue v. James Beam Distilling Co., 377 U.S. 341, 345-347 (1964); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964)."

This ruling is dispositive of the inquiries you have posed, Mr. Gallagher.

A Class "C" Beer Permittee by the terms of §123.142, The Code, may legally purchase only from a Class "A" Permittee, with the corollary principle that a Class "A" Permittee must pay a barrel tax, pursuant to §123.136, The Code, on all beer sold in the state wholesale, which tax by economic reality is reflected in the wholesale price the Class "C" Permittee remits. Attempts to pass this tax into the Camp Dodge Post Exchange in this instance is absolutely prohibited. *U.S. v. Mississippi Tax Comm'n*, supra.

Additional regulatory provisions applicable to a Class "C" beer permittee, such as time limitations upon sale and authorized purchasers are encompassed in a broad regulatory scheme promulgated by AAFES regulations. See, e.g., AR 60-20/ AFR 147-14 (3-8, 3-11, 3-12), concerning authorized post exchange patrons. To avoid interference with the AAFES in the exercise of its designated federal functions, both consistent and conflicting state laws must yield to the federal rules and regulations governing the operations of the AAFES post exchange. This would include yielding of the requirement of §123.45, The Code, forbidding extension of credit for beer, in light of the procurement policies of the AAFES under nonappropriated funds.

In sum, federal law pre-empts chapter 123, The Code, concerning regulation of the sale of beer by the AAFES post exchange at Camp Dodge. An Iowa Class "C" Beer Permit is not required of the post exchange before it can purchase from Iowa Class "A" wholesalers, as it must, under AR 60-20/AFR 147-14 (4-40(c)). Iowa Class "A" wholesalers may legally sell to the AAFES post exchange at Camp Dodge pursuant to

applicable federal regulations without violating §123.130, The Code, and without requiring cash on purchase as stated in §123.45, The Code.

June 23, 1975

CITIES AND TOWNS. Financing of Recreational Facility. §419.1(2), Code of Iowa, 1975. Financing the construction of recreational facilities is not within the scope of Chapter 419, "Municipal Support of Industrial Projects". (Beamer to Woods and Harvey, State Representatives, 6-23-75) #75-6-9

Honorable Jack E. Woods and Honorable LaVern R. Harvey, State Representatives: We are in receipt of your opinion request of June 13, 1975, in which you ask whether statutory authority exists for the City of Altoona, Iowa, to issue municipal bonds to finance the construction of a recreational facility.

By way of background information you have attached to your request a letter signed by community leaders of Altoona and some surrounding communities indicating support for the project, that the financing for this facility is not available through normal sources, and that the Altoona City Council has already approved an industrial bond issue subject to a ruling by this office as to the legality of this action.

The answer to the legality question centers on the specific language of Chapter 419, 1975 Code of Iowa. Chapter 419 allows for municipal support of industrial projects and includes the statutory authority to issue bonds to finance such projects. Section 419.1(2) provides, in relevant part as follows:

" 'Project' means all or any part of, or any interest in, (a) any land, buildings or improvements, whether or not in existence at the time of issuance of the bonds issued under authority of this chapter, which shall be suitable for the use of any voluntary nonprofit hospital, clinic or health care facility as defined in section 135C.1, subsection 8, or of any private college or university, whether for the establishment or maintenance of such college or university, or of any industry or industries for the manufacturing, processing or assembling of any agricultural or manufactured products, even though such processed products may require further treatment before delivery to the ultimate consumer, or of any commercial enterprise engaged in storing, warehousing, distributing or selling products of agriculture, mining or industry including but not limited to barge facilities and river-front improvements useful and convenient for the handling and storage of goods and products. . . ."

In O.A.G. Blumberg to Harvey, June 2, 1975, we said the key phrase in determining whether discount stores were in the scope of the legislative intent for bond issuance by municipalities was the following:

"or of any commercial enterprise engaged in storing, warehousing, distributing or selling products of agriculture, mining or industry. . . ."

In that opinion we held that the scope of Section 419.1(2) is broad and allowed for the construction of discount department stores. However, in this instance, a recreation center, no matter how much needed or desired, cannot be considered a "commercial enterprise engaged in storing, warehousing, distributing or selling products of agriculture mining or industry." The language of the section is clear and unambiguous. Where statutory language is clear and plain, there is no room for construction. *Iowa Natl. Indus. Loan Co. v. Iowa State Department of*

Revenue, 224 N.W.2d 437 (Iowa 1974), *McKillip v. Zimmerman,* 191 N.W.2d 706, 709 (Iowa 1971).

Accordingly, we are of the opinion that the bonding of a proposed recreational center to be supported by municipal bonds is not authorized under Chapter 419.

June 24, 1975

ELECTIONS: Campaign Disclosure Act; Election Funds. §56.19, Code of Iowa, 1975. Iowa Election Campaign funds raised through the income tax check-off must be paid to the qualified political parties immediately after certification by the State Commissioner that the party is qualified to have candidates names placed on the official general election ballot. (Haesemeyer to Snethen, Executive Director, Campaign Finance Disclosure Commission, 6-24-75) #75-6-10

Ms. Barbara Snethen, Executive Director, Campaign Finance Disclosure Commission: You have requested an opinion on the following question:

"When is the earliest date on which a political party which has been certified by the state commissioner of elections as qualified to have candidates placed on the general election ballot (as required by Section 56.21 of the *Code,* 1975) may apply for and receive Iowa Election Campaign Funds?"

Section 56.18 establishes the income tax check-off method as the source of the Iowa Election Campaign Fund. Section 56.19 creates the Iowa Election Campaign Fund in the office of the Treasurer of State. Under §56.19, the director of revenue is required to remit funds collected from the income tax check-off to the Treasurer of State who shall deposit such funds in the appropriate account within the Iowa Election Campaign Fund. This section also directs that the funds "shall be subject to payment to the chairman of the specified political party by the state comptroller in any manner provided in this chapter". It is to be noted that no time is specified as to when these acts shall occur.

Section 56.20 provides that the director of revenue, the state comptroller and the Campaign Finance Disclosure Commission shall promulgate rules in the administration of the Iowa Election Campaign Fund. Rules have been adopted by the Commission and Rules 2.2 and 2.3 are relevant to the question raised by you.

Rule 2.2 required that from the last day in May of 1974, the director of revenue shall report to the Commission and each state party chairman the amount of money remitted to the campaign fund for each month, including the total amount of funds received year-to-date.

Rule 2.3 was adopted by the Commission to supplement the provisions contained in §56.21. Section 56.21 states as follows:

"Any candidate for public office, except president or vice president of the United States, may receive campaign funds through the state statutory political committee under this chapter from the Iowa election campaign fund. However, the chairman of the state statutory political committee shall apply to the state comptroller for these funds not later than sixty-five days before a general election.

"The state comptroller shall remit by check drawn upon the Iowa election campaign fund all funds in the party's account to the chairman upon certification by the state commissioner that the party has qualified to have candidate names placed on the official general election ballot."

Rule 2.3, in part, generally provides that each state chairman of a political party may apply for its share of the Iowa Election Campaign Fund and that the "comptroller shall pay over to such political party any funds received by that office after certification by the State Commissioner that the party is qualified to have candidate names placed on the official general election ballot and every 30 days thereafter, . . ."

Both these governing statutes and the rules promulgated thereunder, use the word "shall". Pursuant to the provisions of §4.1(36)a, the word "shall" imposes a duty, and therefore, no discretion is vested in the governing authority on the question of when the funds should be payable to the political parties. It is the opinion of this office that the funds must be paid to the qualified political parties immediately after certification by the State Commissioner that the party is qualified to have candidates names placed on the official general election ballot.

July 1, 1975

ALCOHOLISM; STATE OFFICERS AND DEPARTMENTS; COUNTIES AND COUNTY OFFICERS: Alcoholism treatment facility funding. §§125.27, 125.28, 1975 Code of Iowa; S.F. 572, Acts of the 66th G.A. A "block grant" type of contract for the payment of a fixed total amount of money for a given fiscal year may be entered into between an alcoholism treatment facility and the Director of the State Division on Alcoholism if the facility agrees to accept such a contract. A county, in meeting its statutory obligation for partial reimbursement of the costs of a facility, may not merely pay a facility an amount equal to twenty-five percent of the Division's awarded amount of a "block-grant" type of contract. (Haskins to Voskans, Director, Division on Alcoholism, 7-1-75) #75-7-1

Mr. Jeff Voskans, Director, Division on Alcoholism: You ask two questions of our office with regard to "block grant" type of contracts for alcoholism treatment facilities. The first question is whether it is lawful for the Director of the State Division on Alcoholism to award "block grant" contracts to an alcoholism treatment facility.

Treating this question first, the Director of the Division on Alcoholism is obligated to enter into a contract with qualified facilities to pay part of the costs of treating an alcoholic. §125.27, 1975 Code of Iowa, states:

"The director shall enter into written agreements with a facility as defined in section 125.2 to pay for seventy-five percent of the cost of the care, maintenance and treatment of an alcoholic. Such contracts shall be for a period of no more than one year. The commission shall review and evaluate at least once each year all such agreements and determine whether or not they shall be continued.

"*The contract may be in such form and contain provisions as agreed upon by the parties.* Such contract shall provide that the facility shall admit and treat alcoholics whose legal settlement is in counties other than the contracting county. If one payment for care, maintenance, and treatment is not made by the patient or those legally liable therefor within thirty days after discharge the payment shall be made by the division directly to the facility. *Payments shall be made each month and*

shall be based upon the facility's average daily per patient charge. Provisions of this section shall not pertain to patients treated at the mental health institutes.

"If the appropriation to the commission is insufficient to meet the requirements of this section, the commission shall request a transfer of funds and section 8.39 shall apply." [Emphasis added]

The term "block grant" means a contract for the transfer of a fixed total amount of money in a given fiscal year in a single or periodic payment. This type of contract is opposed to an "open-ended" contract which does not fix a total amount of money but provides for monthly billing by the facility. The last emphasized sentence of the above quoted section appears to create a right on the part of a qualified facility to receive an "open-ended" contract. Such a contract would work as in the following example. Suppose, in a given month, a facility treated three patients for thirty days and one patient for ten days. This would amount to 100 patient-days of treatment. If the facility had an average daily per patient charge of $30, it would send a bill to the Director of the Division on Alcoholism for $3,000 (100 patient-days x $30 per patient-day). The Director would then reimburse the facility for 75% of that $3,000, or $2,250. A "block grant" type of contract would not work in this manner at all. Rather, a single sum of money, such as $100,000, is transferred to the facility by the Division and the sum is to cover the costs of a facility for a given fiscal year.

Any right of a facility arising under §125.27 to receive an "open-ended" contract could, like any other legal right, be waived. A waiver would result from the facility agreeing to accept a "block grant" type of contract. As seen from the above quoted section, the contract between the facility and the Division may be in such form and contain such provisions as agreed upon by the parties. This means that the statutory requirements for the contract, including any right to an "open-ended" contract, can be waived by the facility agreeing to a contract which contains different provisions than those referred to in §125.27. Hence, it is our opinion that a "block grant" type of contract for a fixed total amount of money for a given fiscal year may be entered into between a facility and the Director if the facility agrees to accept such a contract.

The second question you ask is whether a county may meet its statutory obligation for the partial reimbursement of the costs of a facility by paying the facility an amount equal to twenty-five percent of the amount of the "block grant" awarded to the facility by the Division. §125.28, 1975 Code of Iowa, as amended by S.F. 572, Acts of the 66th G.A., sets forth the liability of a county to pay the costs of treating an alcoholic as follows:

"Except as provided in section 125.26, counties shall pay for the *remaining twenty-five percent of the cost of the care, maintenance, and treatment of an alcoholic* from the county mental health and institutions fund as provided in section 444.12. The commission shall establish guidelines for use by the counties in estimating the amount of expense which the county will incur each year. The facility shall certify to the county of the alcoholic's legal settlement once each month twenty-five percent of the unpaid cost of the care, maintenance, and treatment of an alcoholic. Such county shall pay the cost so certified to the facility from its county mental health and insti-

tutions fund. However, the approval of the board of supervisors shall be required before payment is made by a county for costs incurred which exceed a total of five hundred dollars for one year for treatment provided to any one alcoholic or intoxicated person, except that such approval is not required for the cost of treatment provided to an alcoholic or intoxicated person who is committed pursuant to sections 125.18 and 125.19. A facility may, upon approval of the board of supervisors, submit to a county a billing for the aggregate amount of all care, maintenance, and treatment of alcoholics for each month. The board of supervisors may demand an itemization of such billings at any time or may audit the same. [Emphasis added]

As seen, subject to the limitation that a county need not pay more than $500 per year for any one alcoholic, a county must pay twenty-five percent of the cost of treating an alcoholic at a facility. The phrase "remaining twenty-five percent of the cost of the care, maintenance and the treatment of an alcoholic" means that a county will not fulfill its obligation merely by paying a facility an amount equal to twenty-five percent of the Division's awarded amount of a "block grant" type of contract. This is because the Division's awarded contract under §125.27 can, at most, cover only seventy-five percent of a facility's costs. It does not equal one-hundred percent of the facility's costs. Yet, a county must pay twenty-five percent of a total costs of a facility.[1] For it to pay only an amount equal to twenty-five percent of the Division's awarded contract amount would mean that it would only pay, at most, twenty-five percent of seventy-five percent of the costs, or, effectively, only about eighteen percent of the total costs of the facility. Accordingly, a county, in meeting its statutory obligation for reimbursement of the costs of a facility, may not merely pay a facility an amount equal to twenty-five percent of the Division's awarded amount of a "block grant" type of contract.

July 1, 1975

ALCOHOLISM; PUBLIC RECORDS; COUNTIES AND COUNTY OFFICERS: §§68A.1, 68A.2, 68A.7(2), 125.20(1), 125.33, 1975 Code of Iowa. The Books of Account required to be kept by the County Auditor under §125.33, 1975 Code of Iowa, may be viewed by the public. (Haskins to Anderson, Winneshiek County Attorney, 7-1-75) #75-7-2

Mr. Calvin R. Anderson, Winneshiek County Attorney: You ask our opinion as to whether the Books of Account required to be kept by the County Auditor under §125.33, 1975 Code of Iowa, may be viewed by the public. It is our opinion that they may be so viewed.

Under the Iowa Alcoholism and Intoxication, Ch. 125, 1975 Code of Iowa, a County Auditor is required to keep an account of the costs of treatment, and an index of the names, of the alcoholics admitted from the county for treatment at an alcoholism facility. This account of costs and index of names is known as the Books of Account. §125.33, 1975 Code of Iowa, states:

"The auditor of each county shall keep an accurate account of the

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[1] It is assumed here, for the sake of smplicity, that all alcoholics treated by a facility are in the same county. Since this is seldom so in reality, it would be more accurate to say that "the counties" must pay twenty-five percent of the costs of a facility. The words "the counties" refer to all those counties whose alcoholics are being treated by a given facility.

total cost of the care, maintenance, and treatment of any alcoholic and keep an index of the names of the alcoholics admitted from such county."

The problem arises when a member of the public, such as a title abstractor, wishes to examine the Books of Account. May such a person do so?

As a general proposition, subject to some exceptions, all records of a county are open for examination by the public. §68A.1, 1975 Code of Iowa, defines the term "public records" as follows:

"Wherever used in this chapter, *'public records' includes all records and documents of or belonging to* this state or *any county*, city, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee or any of the foregoing. [Emphasis added]

The Books of Account clearly fall within the definition of "public records". However, what is the scope of the right to examine "public records"? §68A.2, 1975 Code of Iowa, sets it forth as follows:

"Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, *unless some other provision of the Code expressly* limits such right or *requires such records to be kept secret or confidential.* The right to copy records shall include the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records. All rights under this section are in addition to the right to obtain certified copies of records under section 622.46." [Emphasis added]

As can be seen, if some statutory provision makes "public records" confidential, then they cannot be examined. §68A.7(2), 1975 Code of Iowa, makes confidential certain medical records. It states:

"The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information: * * *

"2. Hospital records and *medical records* of the condition, diagnosis, care or treatment of a patient or former patient, including outpatient." [Emphasis added]

While the Books of account may refer generally to the condition or treatment of an alcoholic, they simply are not "medical records". They are not made by any medical personnel and contain no detailed information as to diagnosis or cure. Hence, the confidentiality provision of §68A.7(2) does not apply to the Books of Account.

But does the confidentiality provision of 125.20(1), 1975 Code of Iowa, cover them? That section states:

"1. The registration and other *records of facilities* shall remain confidential and are privileged to the patient." [Emphasis added]

The above section serves to make confidential "records of facilities" relating to an alcoholic-patient. We believe that the phrase "records of facilities" refers only to records actually kept by or in the possession of the facilities themselves and not to records kept by the county or others pertaining to the facility. Hence, §125.20(1) does not cover the Books of Account. Since no confidentiality provision covers them, the general principle of 68A.2 mandates that they be made available for public inspection.

In sum, the Books of Account required to be kept by a County Auditor under §125.33, 1975 Code of Iowa, may be viewed by the public.

July 3, 1975

CONSTITUTIONAL LAW: GENERAL ASSEMBLY; Retroactive pay increase for legislative officer and employees. Article III, §31, Constitution of Iowa. Senate Concurrent Resolution 63, 66th G.A., First Session (1975). SCR 63 which attempts to retroactively increase the salaries of officers and employees of the House and Senate was not passed by a two-thirds vote of both houses and is unconstitutional. (Turner to Selden, State Comptroller and Bittle, State Representative, 7-3-75) #75-7-3

Mr. Marvin R. Selden, Jr., State Comptroller; Honorable Edgar H. Bittle, State Representative: Each of you have requested an opinion of the attorney general as to the constitutionality of Senate Concurrent Resolution 63 (SCR 63, Senate Journal 2222, June 19, 1975) passed in the final hours of the 66th General Assembly, 1st Session, which provides a retroactive salary increase for officers and employees of the House and Senate whose salaries were established by the pay grades and steps contained in the salary schedule of House Concurrent Resolution 5, (hereinafter HCR 5) adopted at the beginning of the session.

Each of you point out that Art. III, §31, Constitution of Iowa, provides as follows:

"No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, and no public money or property shall be appropriated for local, or private purposes, *unless such* appropriation, *compensation,* or claim, *be allowed by two-thirds of the members elected to each branch of the General Assembly."*

§2.11, Code of Iowa, 1975, provides that compensation of the officers and employees of the General Assembly shall be fixed by joint action of the House and Senate by resolution at the opening of each session, "or as soon thereafter as conveniently can be done." HCR 5, to provide said compensation, was adopted by both houses, early in the session, pursuant to said §2.11. House Journal, January 22, 1975, page 97, House Journal, January 23, 1975, page 107 and Senate Journal, January 23, 1975, page 171.

HCR 5 provided, in part, that in the event the salary schedule for employees of the state as promulgated by the merit employment commission were "revised upward at any time during the 66th General Assembly such revised schedule for grades 6 through 30 shall simultaneously be adopted for compensation of officers and employees of the 66th General Assembly." Nothing was said therein about said salaries being raised "retroactively." The word was "simultaneously." It appears that HCR 5 was self-executing and that the same raises provided by SCR 63 would go into effect, for grades 6 through 30 (officers and employees of the General Assembly), upon the effective date of SF 555, an act to increase the salary schedules of various public officials and employees including

those promulgated by the merit employment commission. SF 555 will be effective July 1, 1975, if approved by the Governor. §3.7, Code of Iowa, 1975.

But Article III, §31, clearly prohibits "extra compensation" — "after the service shall have been rendered" — "unless such ** compensation ** be allowed by two-thirds of the members elected to each branch of the General Assembly." Cf *1968 OAG 909.*

An officer of the General Assembly is an "officer" under Art. III, §31. And an employee thereof is a "public agent." "An employment, as distinguished from an office, is an agency for a temporary purpose, which ceases when that purpose is accomplished. It lacks the idea of tenure that is associated with an office, and its duties are occasional or intermittent, rather than continuing and permanent." *63 Am.Jur.2d 635,* Public Officers and Employees §12.

While it appears that the resolution was adopted by a two-thirds vote in the Senate (see Senate Journal, June 19, 1975, p. 2225, 66th G.A., 1st Session), it did not receive a two-thirds vote "of the members elected" in the House. Rather it received only 53 favorable votes when 67 were required. House Journal, June 19, 1975, pages 2747 and 2748. Thus, I'm compelled to agree with your conclusions that SCR 63 is unconstitutional, at least to the extent that it provides extra compensation for services rendered prior to its adoption.

Logic suggests that SCR 63 might remain in effect prospectively, and could thus be considered a second raise superimposed upon (and in addition to) the raise provided by HCR 5. It says the officers and employees "shall receive an increase in annual compensation *over that* authorized by" HCR 5, and sets forth a schedule which could be applied to the compensation as "simultaneously" and automatically increased by enactment of SF 555. But no one has proposed this unlikely consequence and legislative officers and service bureau personnel say the purpose of SCR 63 was merely to make the raise retroactive, not to double it. See, however, Rule 344(f)(13), Iowa Rules of Civil Procedure.

July 7, 1975

CITIES AND TOWNS: Majority Vote by Council — §380.4, Code of Iowa, 1975; §366.4, Code of Iowa, 1973. On a council consisting of five members, two of which have resigned, a vote of 2-1 in favor of a resolution or ordinance is not a sufficient majority for passage. (Blumberg to Hansen, State Representative, 7-7-75) #75-7-4

Honorable Ingwer L. Hansen, State Representative: We have received your opinion request of May 22, 1975, regarding the requirements for a majority vote by a city council. From your letter and the letter from the City Attorney of Sheldon, Iowa, it appears that the city council there is made up of five members. Upon a vote for a change in a city zoning ordinance, two of the council members abstained from voting because of an apparent conflict of interest with such a change. The vote was 2-1 in favor of the change, and thus failed to pass since there was not a majority of the five council members. The abstaining councilmen then resigned from the council. Thereafter, a vote was had to reconsider the

matter, and passed by a 3-0 majority. The matter was put to another vote, and again it was 2-1 in favor of the change. The council, some time previous to this, had adopted Chapter 380, 1975 Code of Iowa. Your question is whether the 2-1 vote, after two council members had resigned, passed because there was a majority of the three remaining councilmen.

Section 380.4, 1975 Code, provides in pertinent part: "Passage of an ordinance, amendment or resolution requires an affirmative vote of not less than a majority of the council members." This section replaced §366.4, 1973 Code, which provided: "No resolution or ordinance, except as specifically provided by law, shall be adopted without a concurrence of a majority of the whole number of members elected to the council . . . " Section 4.1(30), 1975 Code, provides that a quorum of a public body is a majority of the number of members fixed by statute. §372.13(1) provides that a majority of all councilmen is a quorum. Thus, in either event, three council members could conduct business.

The general rule is that in the absence of any statutory provision, a majority of a quorum is all that is required for the adoption or passage of any resolution or order of a public body, including a city council. *Thurston v. Huston*, 1904, 123 Iowa 157, 98 N.W. 637; *Cowles v. Independent School Dist.*, 1927, 204 Iowa 689, 216 N.W. 83; 1970 O.A.G. 42. The issue is whether the phrase "majority of the council members" establishes a requirement other than the common law. There can be no doubt that §366.4, 1973 Code, required a majority vote of all the positions rather than a majority of the quorum.

There are several Iowa cases on the question of the number of votes required for a majority. *Griffin v. Messenger*, 1901, 114 Iowa 99, 86 N.W. 219; *The State v. Vail*, 1880, 53 Iowa 550, 5 N.W. 709; and, *Horner v. Rowley*, 1879, 51 Iowa 620, 2 N.W. 436, all dealt with the question of what constituted a three-fourths majority vote to suspend with the second and third readings of an ordinance. The Court held each time that the term "three-fourths of the council" meant three-fourths of the number to which the council was entitled. In *City of Nevada v. Slemmons*, 1953 244 Iowa 1068, 59 N.W.2d 793, the issue concerned the requirements of a majority vote to fill a vacancy. There, the city was entitled, by statute, to six councilmen. One resigned, and the remaining councilmen met to fill the vacancy. On the first ballot the defendant received four of the five votes. However, he was not declared the winner. A second vote was taken at a later meeting and the vote was 3-2 in his favor. The defendant was then placed on the council. The issue was whether a majority of the entire council or a majority of the remaining council (five) was required. The Court cited to past opinions of this office (1909 O.A.G. 104; 1914 O.A.G. 28; 1920 O.A.G. 780; 1936 O.A.G. 155) which stood for the proposition that the words "a majority of the votes of the whole number of members" meant the number of members to which the council was entitled, and distinguished those opinions from the facts of the instant case.

The Court distinguished §1(8), Chap. 147, Acts of the 54th G.A., which provided that the vacancies shall be filled upon a majority vote of the whole number of members from §1(2), of that same chapter which provided that a quorum was a majority of the whole number of members

to which a city was entitled. It was held that the Legislature intended, where a vacancy occurred, that the majority was of the remaining members, since to hold otherwise could effectively cause a failure of a city's functions. However, the Court, in dicta, indicated that a different result would be reached if a vacancy question did not exist (244 Iowa at 1074):

"We are aware that the New Jersey Court reached the opposite decision on the phrase 'all the members', holding that this meant originally elected members. The decision, however, refers to a quorum vote on a proposed ordinance *and does not differ from what our own conclusion would be on a question addressed to a legislative action by the council as distinguished from the election of a member to fill a vacancy.*" [Emphasis added]

Similar reasoning exists in decisions of the New Jersey Courts. *Ross v. Miller*, 1935, 115 N.J. L. 61, 178 A. 771, concerned the number required to fill a vacancy on a city council. Unlike the above Iowa statute there was no specific requirement for a vote in the section dealing with the filling of vacancies. Another section provided that "the affirmative vote of a majority of all the members shall be necessary to take any action or pass any measure." It was held (178 A. at 772-773):

"Did the Legislature here intend to modify the common-law rule? We find such an intention adequately expressed. The language employed is persuasive of a design and purpose to make the approval of a majority of the full membership prescribed by law, rather than of the qualified, sitting members for the time being, a sine qua non of action by the governing body in all cases except one not here involved. It is fairly to be presumed that, in the use of the phrase 'a majority of all the members' of the councilmanic body, both in relation to the number constituting a quorum and in prescribing the requisites of valid action, the legislative concept was the full membership commanded by the act, and not a reduced body, however occuring. . . . Unquestionably, it was not the intention to declare the common-law rule; the phraseology is not appropriate to that end. We are required to assume that if the Legislature had in mind the common-law rule, i.e., a majority of a quorum, it would have chosen appropriate and unambiguous language to express that intent. And there is nothing to indicate that, in respect of the clause at issue, anything less than a full membership was contemplated."

See also, *Dombal v. City of Garfield*, 1943, 129 N.J. L. 555, 30 A.2d 579.

In *Prezlak v. Padrone*, 1961, 67 N.J. Super. 95, 169 A.2d 852, the issue again was the filling of a vacancy on a city council. That court, however, held that a majority of a quorum was all that was necessary to fill a vacancy in the city in question, relying upon the common-law rule set forth above. This decision was not a departure from the previously cited cases because the facts were somewhat different, as indicated by the Court. Here, the city charter provided for the filling of vacancies, but did not indicate the required vote. The plaintiffs relied upon another provision of the charter which provided that "no corporate action shall be taken, except by the affirmative votes of at least a majority of the whole number . . . of the members of the city council . . . ." The Court held that the filling of a vacancy was not a corporate action. It was held that corporate action meant action of legislative character, implying that a different result would have been reached if such an action was involved.

There can be no question that the action of the Sheldon City Council was legislative in character. Accordingly, based upon the above cases and statutes, we are of the opinion that the above measure did not receive a sufficient majority of votes.

July 7, 1975

COUNTIES AND COUNTY OFFICERS: Joint County and City Property — §§345.1, 346.26 and 346.27, Code of Iowa, 1975. The provisions of §345.1 providing that an election is not necessary where payment is made from funds on hand and the cost does not exceed one hundred thousand dollars is applicable to joint county and city projects under §§346.26 and 346.27. (Blumberg to Hutchins, State Representative, 7-7-75) #75-7-5

Honorable C. W. Hutchins, State Representative: We have received your opinion request of February 12, 1975, regarding Chapters 345 and 346, 1975 Code. You ask whether §346.26 allows counties to join with municipalities in construction projects without being subject to the $100,000 limitation provided in §345.1.

Section 346.26 provides that counties may contract with municipalities for the joint purchase, acquisition, ownership and control of property for the use and occupancy jointly by the city and county. It also provides that the county may pay its portion of the cost by issuing bonds. However, no bonds shall be issued unless an election is held and sixty percent of the votes are cast in favor of the proposition. It is apparent that if bonds are to be issued, notice must be given and an election held regardless of the amount. Your question deals with the situation where a county does not issue bonds, but pays its share out of funds on hand, federal matching funds or federal revenue sharing funds.

Section 346.26(5) provides that this division (beginning with §346.26) is a complete and independent law for providing joint county and city buildings. The remainder of the division deals with the incorporation and adoption of an "Authority" to proceed with the project; the contents of the articles of incorporation; how the Authority is governed; the powers of the Authority; the issuance of revenue bonds; and the collection of taxes. Nowhere in that division is there any mention of the payment by the county from funds not derived from the issuance of bonds. It appears that the provision of §346.26(5) refers solely to the joint agreements, powers pursuant to those agreements (which consist of approving a site for the project; acquiring property; demolishing, improving or repairing buildings; constructing or repairing streets, sidewalks, sewers and the like; providing parking; operating and maintaining the building; employing personnel; leasing of office space; procurement of insurance; acceptance of gifts and donations; and the borrowing of money and issuance of revenue bonds), revenue bonds, and taxes. Thus, any other provision of law regarding the above enumerated things would not be controlling. It is difficult, however, to hold that something not mentioned within that division cannot be controlled by some other law.

Section 345.1 provides in part that if the payment for a project will come from funds on hand or federal funds, and the cost of the project will not exceed one hundred thousand dollars an election need not be held. This provision is generally applicable and controlling. We find no exception to or mention of this provision or its contents within §§346.26 or 346.27.

Accordingly, we are of the opinion that provisions of §345.1 providing that an election is not necessary where payment is made from funds on

hand and the cost of the project does not exceed one hundred thousand dollars are applicable to §§346.26 and 346.27.

July 7, 1975

BEER & LIQUOR CONTROL DEPARTMENT — Delivery of liquor supplies by department employees — Sections 123.3(25), 123.45. Liquor Department employees are precluded by §123.45, The Code, from participating in a liquor delivery service, directly or indirectly either with or without compensation therefor. (Shimanek to Gallagher, Director, Iowa Beer and Liquor Control, 7-7-75) #75-7-6

Mr. Rolland A. Gallagher, Director, Iowa Beer & Liquor Control Department: You have requested an opinion on §123.45, 1975 Code of Iowa. You stated:

"On November 6, 1972, an opinion was given to Rolland A. Gallagher, Director of the Iowa Beer and Liquor Control Department, by Robert D. Jacobson, Assistant Attorney General, as follows:

" 'Therefore, it is the opinion of this office that individuals could start a delivery service for compensation by taking orders from licensees and picking up their order at State Liquor Stores and delivering them to the licensee.'

"We request your opinion whether Liquor Department employees referred to under Section 123.45, 1973 Code of Iowa, could qualify under the above opinion and be eligible to deliver liquor from a state store to a licensee for compensation, or for just free service."

For purposes of clarification, the aforementioned opinion was based on a construction of §123.59, The Code, defining bootlegging and §123.28, The Code, permitting transportation of liquor under certain conditions.

Proceeding to the substance of your inquiry, §123.45, 1975 Code of Iowa, states in pertinent part:

"No . . . department employee shall, directly or indirectly, individually, or as a member of a partnership or shareholder in a corporation, have any interest in dealing in . . . alcoholic liquor or beer nor receive any kind of profit nor have an interest in the purchase or sale of alcoholic liquor or beer by persons so authorized under this chapter . . . ."

(Note that this section remains unchanged from the 1973 Code). A review of the Iowa Beer and Liquor Control Act shows that the prohibited "sale" of alcoholic liquor or beer under the chapter includes:

". . . soliciting for sales, taking orders for sales, . . . , delivery or other trafficking for a valuable consideration promised or obtained and procuring or allowing procurement for any other person."

See §123.3(25), The Code.

While transportation by common carrier or other persons is specifically allowed by statute [§123.28, The Code], thereby creating an exception to the delivery and procurement prohibitions of §123.3(25), as indicated in the aforementioned opinion of November 6, 1972, the specific language of §123.45 regarding department employees takes them out of any such exception.

Thus it is the conclusion of this office that department employees are

absolutely prohibited from participating directly or indirectly in any kind of a delievery service which contemplates delivery of or procurement of liquor from a state store to or for a licensee for compensation.

Further, to determine whether the terms "any interest" as used in §123.45, 1975 Code of Iowa, would also preclude delivery by department employees as a gratuitous service, the legislative intent should be gleaned from the entire statute. Dealing in liquor, manufacture, purchase and sale of liquor are all included in the statutory prohibitions of §123.45, 1975 Code of Iowa, whatever they may be. Use of the phrase "receive any kind of profit" encompasses the pecuniary aspects of any interest at issue. Given the extensive prohibitions going beyond mere sale, and coverage of pecuniary interests, context necessitates that the phrase "any interest" be construed in its broadest sense to mean a right or claim to something, concern or curiosity about something, or a personal influence over something. See "interest" as defined in *Webster's New World Dictionary.* Such a conclusion would then preclude a delivery service by department employees even without pay or profit.

In sum, it is the opinion of this office that department employees are precluded from participating in a liquor delivery service, directly or indirectly, with or without compensation.

July 7, 1975

CRIMINAL LAW: Human Artificial Insemination. §§144.13, 595.18, 633.3 (5), 633.219, 633.221, 633.222, and 633.223, Code of Iowa, 1975; §1, Chapter 1266, Acts, 63rd G.A., (1970); §598.22, Code of Iowa, 1966. Human artificial insemination by a donor (A.I.D.) is legal in Iowa. A.I.D. is not adultery. (Blumberg to Readinger, State Representative, 7-7-75) #75-7-7

The Honorable David M. Readinger, State Representative: We have received your opinion request of May 22, 1975, regarding human artificial insemination. You ask whether human artificial insemination is legal in Iowa, and if so, the following questions:

"Is a doctor using the insemination procedure legally liable if there was a mixup in race?

"Is a doctor using the insemination procedure legally liable if the baby is born deformed?

"Could someone bring a charge of adultery against a woman and/or doctor who has undergone this procedure?

"Is the baby born out of this procedure legitimate or illegitimate?

"How could a child born out of this procedure be treated in a case of marriage dissolution?

"In case of death of one or both parents what would be the inheritance rights of the child?"

Artificial insemination is a process by which sperm is deposited in the female by other than sexual intercourse. The sperm can be from a donor (A.I.D.), the husband (A.I.H.) or a combination of the donor and husband. This opinion will concern only A.I.D.

In answer to your first question, we can find nothing in the Code

which speaks of A.I.D. or declares it to be a criminal act. Accordingly, it must be considered that A.I.D. is legal in Iowa. This leads, then, to your remaining questions.

You next ask whether a doctor, using A.I.D., can be legally liable if there is a mixup in the race. This is a question that cannot be easily answered because each case is determined on its own set of facts. A doctor, of course, can be liable for his negligent acts or omissions. Therefore, it is conceivable that a doctor can be liable, under the right circumstances, if there is a mixup in the race. However, we are not, at this time, able to list those circumstances which could generate liability. Your third question is similar in that it deals with liability if there is a deformity in the child. Again, each case must be determined by its own set of facts. See, Note, 19 Drake L.Rev. 409.

There is no case law in Iowa regarding A.I.D. and adultery. Nor is there any law in Iowa on any of your questions. Other courts have dealt with this question. See *Annot.*, 25 A.L.R.3rd 1103 (1969). In *Orford v. Orford*, 1921, 49 Ont.L. 15, 58 D.L.R. 251, a Canadian case, a husband charged his wife with adultery. The wife alleged she had undergone A.I.D. without her husband's consent. The Court held that A.I.D. constituted adultery as a matter of law, basing its decision on Mosaic and ecclesiastical law. It held (490 Ont.L. at 22, 58 D.L.R. at 258):

"[T]he essence of the offense of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or facilities of the guilty person; and any submission of those powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of 'adultery.'

"Sexual intercourse . . . involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that would, therefore, be adulterous."

In other words, the Court defined "adultery" as introducing a foreign strain in the blood line, and equated A.I.D. to sexual intercourse. Other courts have similarly held. In *Doornbos v. Doornbos*, Unreported, Super. Ct. Cook County, No. 54 S. 14981, 23 U.S.L.W., 2308, app. dismd. 12 Ill.App.2d 473, 139 N.E.2d 844 (Ill. 1954), it was held that A.I.D., with or without the husband's consent, constituted adultery on the part of the wife. Contra, see *Hoch v. Hoch*, Unreported, Cir. Ct. Cook County (Ill. 1945), as cited in 25 A.L.R.3rd at 1108. See also, *Gursky v. Gursky*, 1963, 39 Misc.2d 1083, 242 N.Y.S.2d 406, in which the Court appears to agree with the holding in *Doornbos;* and *Russell v. Russell*, 1924, A.C. 687, House of Lords (Great Britain).

Other courts have held that A.I.D. is not adulterous. See, *Hoch v. Hoch, supra; People v. Sorenson*, 1968, 68 Cal.2d 280, 66 Cal.Rptr. 7, 437 P.2d 495; and *MacLennan v. MacLennan*, (1958) Sess. Cas. 105, (Scot.), 1958 Scots. L.I.R. 12. In *MacLennan*, a Scottish case, it was held that A.I.D. did not constitute adultery even without the husband's consent. The Court stated ((1958) Sess. Cas. at 108, 114, 1958 Scots. L.T.R. at 14, 17):

"[T]his problem . . . must be decided by an objective standard of legal principles as these have been developed and must be confined to the

narrow issue of whether this form of insemination constitutes adultery in the eyes of the law. . . .

"The idea that a woman is committing adultery when alone in the privacy of her bedroom she injects into her ovum by means of a syringe the seed of a man she does not know and has never seen is one which I am afraid I cannot accept."

People v. Sorenson, was an action brought against the defendant-husband for willful failure to provide support to his child, who had been conceived by A.I.D. with the husband's consent. The Court held (437 P.2d at 501):

"In the absence of legislation prohibiting artificial insemination, the offspring of defendant's valid marriage to the child's mother was lawfully begotten and was not the product of an illicit or adulterous relationship. Audltery is defined as 'the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife.' (Civ. Code, §93). It has been suggested that the doctor and the wife commit adultery by the process of artificial insemination. (See 43 ABAJ 1089, 1091-1092, 1156.) Since the doctor may be a woman, or the husband himself may administer the insemination by a syringe, this is patently absurd; to consider it an act of adultery with the donor, who at the time of insemination may be a thousand miles away or may even be dead, is equally absurd."

In Iowa adultery is defined as sexual intercourse between two persons not husband and wife, either one or both of whom are married. *State v. Anderson,* 1908, 140 Iowa 445, 118 N.W. 772. See also, *Aitchison v. Aitchison,* 1896, 99 Iowa 93, 68 N.W. 573. The meaning of sexual intercourse is clear and of common knowledge. It is the sexual connection involving penetration of the female organ by the male organ. *State v. McCall,* 1954, 245 Iowa 991, 63 N.W.2d 874. Since Iowa's definition of adultery is similar to that in California, it is apparent that the holding in *Sorenson* would be applicable here. In addition, the decisions in *Sorenson* and *MacLennan* are better reasoned than those holding that A.I.D. is adultery. Accordingly, we are of the opinion that A.I.D. does not constitute adultery in Iowa.

Your next question regarding legitimacy of an A.I.D. child is more difficult. Since most of the cases on this subject deal with divorces or dissolutions and child support, we will combine this question with the one on the result of a dissolution of marriage. There are a variety of decisions and results on the question of legitimacy, some of which are conflicting within the same jurisdiction. See, *Annot.* 25 A.L.R.3rd 1103, 1109. In *Oklsen v. Oklsen,* Unreported, Super. Ct. Cook County (Ill. 1954) (discussed in 34 Notre Dame Lawyer 521, 8 Fla. L.Rev. 309, and 32 Wash. L.Rev. 281), the Court adhered to the presumption of legitimacy and ruled that it had not been rebutted because of conflicting evidence on A.I.D. However, the same court in *Doornbos* held that an A.I.D. child with or without the consent of the husband, is a child not born in wedlock and is therefore illegitimate. *Gursky v. Gursky,* supra, similarly so held, even with the husband's consent. That court, however, held that the husband was liable for support of the child since his consent to the procedure implied a promise on his part to furnish support for the child which was sufficient to constitute an implied contract. See also, *Anonymous v. Anonymous,* 1964, 41 Misc.2d 886, 246 N.Y.S.2d 835, for an adherence to the *Gursky* ruling on support. *Strnad v. Strnad,* 1943, 190

Misc. 786, 78 N.Y.S.2d 390, counters *Gursky*. There, the question was on visitation rights by the husband whose wife had borne a child through A.I.D. with his consent. The court held that such a child was legitimate, analogizing to the case of a child born out of wedlock who by law is made legitimate upon the marriage of the interested parties. Because the husband had consented, he had potentially adopted or semi-adopted the child. Therefore, the husband was entitled to visitation rights.

In re Adoption of Anonymous, 1973, 345 N.Y.S.2d 430, concerned the adoption of an A.I.D. child. There, the child was born of consensual A.I.D. during the marriage. The husband was listed as the father on the birth certificate. The couple was divorced, and the divorce decree declared the child to be the daughter and child of the couple. The wife was granted support, and the husband visitation rights. Later, the wife remarried and her new husband petitioned for adoption of the child. The former husband would not consent, and the wife alleged that his consent was not necessary since he was not the "parent" of the child. After a lengthy review of the cases on A.I.D., the Court held:

"At the outset, it is observed that *Gursky* is not persuasive. It is the only published decision which flatly holds that AID children are illegitimate. It has been criticized. (Note: 1968 U. of Ill. L.Forum 203, 208). The 'historical concept' and the statutory definition of 'a child born out of wedlock' upon which it relies were developed and enacted long before the advent of the practice of artificial insemination. The birth of AID children was not then contemplated. An AID child is not 'begotten' by a father who is not the husband; the donor is anonymous; the wife does not have sexual intercourse or commit adultery with him; if there is any 'begetting' it is by the doctor who in this specialty is often a woman. The suggestion that the husband might not regard the child as his own has been dispelled by our gratifying experience with adoptive parents. Since there is consent by the husband, there is no marital infidelity. The child is not born 'out of wedlock' but in and during wedlock. And finally legislative inaction is an unsound basis for any inferences favorable or unfavorable. Bills are not reported or voted on favorably for a variety of reasons not the least of which is that legislative consideration is unnecessary because the courts can reach an acceptable solution. * * *

"Basically the problem of the status of AID children viz-a-viz the 'father' is one of policy. Policy is best made by our appellate courts. This decision is purposed to present the problem for such determination.

"New York has a strong policy in favor of legitimacy. This is evidenced by the recent enactment of section 24 of the Domestic Relations Law. vision Commission; Leg. Doc. (1969) No. 65C). Under that statute a child (Added L. 1969, c. 325, eff. April 30, 1969; see also Report of Law Reborn of a void (Domestic Relations Law §6) or voidable (Domestic Relations Law §7) marriage, even if the marriage is deliberately and knowingly bigamous, incestuous or adulterous, is legitimate and entitled to all the rights (inheritance, support, etc.) of a child born during a perfectly valid marriage. In the fact of the liberal policy expressed by such a statute, it would seem absurd to hold illegitimate a child born during a valid marriage, of parents desiring but unable to conceive a child, and both consenting and agreeing to the impregnation of the mother by a carefully and medically selected anonymous donor.

"It must be recognized that there exist moral and religious objections to artificial insemination. (See Comment 19 Syr.L.Rev. 1009, 1011-1013.) But these are stronger against bigamous, incestuous and adulterous relationships. That such objections have not prevented as a matter of state policy the legitimization of the children of such marriages, establishes that our liberal policy is for the protection of the child, not the parents.

It serves no purpose whatsoever to stigmatize the AID child; or to compel the parents formally to adopt in order to confer upon the AID child the status and rights of a naturally conceived child.

"It is determined that a child born of consensual AID during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage. The father of such child is therefore the 'parent' (Domestic Relations Law §111) whose consent is required to the adoption of such child by another."

The *Sorenson* case was described by the above court as the "leading case in the Nation", and rightly so since *Sorenson* contains a lengthy and in-depth discussion of the problems concerning A.I.D. The first issue faced was whether the term "father" as used in the applicable code section, included the defendant-husband. The Court held that an A.I.D. child does not have a natural father since the anonymous donor is no more responsible for the use made of his sperm than is a blood donor. In addition, such a donor could not rebut the presumption of legitimacy since he would not be a proper party. Also, he may be dead at the time. Therefore, the court looked for a lawful father. It was held (437 P.2d at 499):

"In light of these principles of statutory construction, a reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport. One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible. As noted by the trial court, it is safe to assume that without defendant's active participation and consent the child would not have been procreated."

Thus, the court held the husband to be the lawful father and therefore liable for support. It placed the emphasis on the welfare of the child rather than the parents.

Regarding the issue of legitimacy, the court held (437 P.2d at 501):

"The public policy of this state favors legitimation (Estate of Lund, 26 Cal.2d 472, 481, 490, 159 P.2d 643, 162 A.L.R. 606), and no valid public purpose is served by stigmatizing an artifically conceived child as illegitimate. An illegitimate child is 'one not recognized by law as lawful offspring; * * * born of parents not married to each other; conceived in fornication or adultery' (Webster's New Internat. Dict. (3rd ed. 1961) p. 1126); illegitimacy is defined as 'the state or condition of one whose parents were not married at the time of this birth' (Black's Law Dictionary (4th ed. 1951) p. 882); 'the status of a child born of parents not legally married at the time of birth' (1 Bouv. Law Dict. (8th ed. 1914) (Rawle's Third Revision, p. 1491). * * *

"Nor are we persuaded that the concept of legitimacy demands that the child be the actual offspring of the husband of the mother and if semen of some other male is utilized the resulting child is illegitimate.

"In California, legitimacy is a legal status that may exist despite the fact that the husband is not the natural father of the child. (See Evid. Code, §621.) The Legislature has provided for legitimation of a child born before wedlock by the subsequent marriage of its parents (Civ. Code, §215), for legitimation by acknowledgment by the father (Civ. Code, §230), and for inheritance rights of illegitimates (Prob. Code,

§255), and since the subject of legitimation as well as that of succession of property is properly one for legislative action (Estate of Lund, supra, 26 Cal.2d 472, 483-484(7), 159 P.2d 643), we are not required in this case to do more than decide that, within the meaning of section 270 of the Penal Code, defendant is the lawful father of the child conceived through (A.I.D.) and born during his marriage to the child's mother."

See also, *People, ex rel Abajian v. Dennett*, 1958, 15 Misc.2d 260, 184 N.Y.S.2d 178.

The question of legitimacy in Iowa is not easily answerable. 19 Drake L.Rev. 409, 423. Section 144.13, 1975 Code, provides that if the mother of a child is married at the time of conception or birth the name of the husband shall be entered on the certificate as the father of the child unless paternity has been determined otherwise by a court. Section 595.18, 1975 Code of Iowa, provides that illegitimate children become legitimate by the subsequent marriage of their parents. Section 598.22, 1966 Code, provided, with respect to an annulment, that where there is impotency of the husband, any issue of the wife would be illegitimate. However, that section was repealed by §1, Chapter 1266, Acts of the 63rd G.A. (1970). Similar language is not found anywhere else in the Code. Other sections of the Code refer to an illegitimate child as being born out of wedlock. See, e.g. §675.1, 1975 Code.

Iowa firmly adheres to the presumption that a child born in wedlock is lgeitimate. Our court has stated that "every reasonable presumption will be admitted in favor of legitimacy and the burden of proof is upon the person alleging the contrary. "Every child born in wedlock is presumed to be legitimate — a rule founded upon decency, morality and public policy, sacredness, and peace and harmony of the family relationship." *Bowers v. Bailey*, 1946, 237 Iowa 295, 297-8, 21 N.W.2d 773, 775; *State v. Heath*, 1937, 224 Iowa 483, 276 N.W. 35; *Craven v. Selway*, 1933, 216 Iowa 505, 246 N.W. 821; *Niles v. Sprague*, 1862, 13 Iowa 198. Upon dissolution of the marriage, the presumption of legitimacy may be overcome by "clear, strong and satisfactory evidence of sterility, impotence or non access. *Kuhns v. Olson*, 1966, 258 Iowa 1274, 141 N.W.2d 925; *Spears v. Veasley*, 1948, 239 Iowa 1185, 34 N.W2.d 185. Repudiation of legitimacy based upon non access is complicated because sexual intercourse is presumed to occur between a married couple living together because of marital access. *Craven v. Selway*, supra. Thus, testimony by either spouse regarding non access as proof of illegitimacy of a child born in wedlock is in admissable. *Craven v. Selway*, supra. Blood grouping is another way of showing illegitimacy, and the Iowa courts can take judicial notice of such results. *Dale v. Buckingham*, 1949, 241 Iowa 40, 40 N.W.2d 45. However, with A.I.D. most physicians match the donor's blood type with that of the husband. In that event the blood test will be inconclusive. Commentary, Artificial Insemination: Problems, Policies, and Proposals, 26 Ala. L.Rev. 120 (Fall 1973).

Upon a dissolution, if a child is legitimate, the husband can be, and usually is, responsible for support. Also, the husband who accepts and supports the wife's illegitimate child stands *in loco parentis* and may be forced to fulfill future obligations to the child. *Wallace v. Wallace*, 1908, 137 Iowa 37, 114 N.W. 529; *State v. Shoemaker*, 1883, 62 Iowa 343, 17 N.W. 589. This result is not different from those cases cited above where

the A.I.D. child is determined to be illegitimate. From all the cases regarding divorce, dissolution, support or visitation rights, it is obvious that it matters not whether the A.I.D. child is legitimate or not. The courts are going to hold the husband liable for support (at least where the husband consents in some manner). Regarding legitimacy, those decisions which hold the A.I.D. child to be legitimate appear to be the most logical and rational. As stated by those courts, most cases and statutes dealing with illegitimacy were enacted prior to the advent of A.I.D. In addition, public policy should favor the child and not stigmatize it for conditions beyond its control. With Iowa's strong presumption of legitimacy of a child born during a marriage, we are of the opinion that the presumption applies to A.I.D. children.

We can find no cases regarding the inheritance rights of A.I.D. children. However, it can be assumed that if those children are determined to be legitimate, they should be able to inherit from the husband. There is a general discussion of inheritance rights in 19 Drake L.Rev. 409, 428. The answer may be easy if the husband leaves a will. Problems may arise, however, if the husband dies intestate. Section 633.219 of the Code speaks of a decedent's children. Section 633.3(5) defines "child" to exclude an illegitimate child except as to §§633.221 and 633.222. Section 633.221 provides that an illegitimate child, unles adopted, shall inherit from the natural mother, and she from the child. Section 633.222 provides that such a child, unless adopted, shall inherit from his natural father, when paternity is proven or when the child has been recognized generally, notoriously or in writing. The natural father could then inherit from the child. If the husband adopts the A.I.D. child, that child could inherit from him. See §§633.3(5), 633.219 and 633.223.

If the A.I.D. child is held to be illegitimate, and the donor is kept anonymous, as is usually the case, then such a child's rights of inheritance could be effectively shut off, save for its natural mother. Such a situation would be inequitable. Where the husband has consented to A.I.D., it is normally for the purpose of bringing someone into the family unit. 19 Drake L.Rev. at 430. The situation is not any different from an adoption, where inheritance rights exist. Because we presume an A.I.D. child to be legitimate, we must also presume that such a child can and should inherit from the husband. Accordingly, in most circumstances the right to inherit from the husband should exist.

July 7, 1975

COUNTY OFFICERS: COUNTY RECORDERS. Statutory prohibition against collection of release fees under §554.9405(3), Code of Iowa 1975, is a valid means of accomplishing a public policy. (Nolan to Hansen, State Representative, 7-7-75) #75-7-8

The Honorable Ingwer Hansen, State Representative: You submitted to this office a letter sent to you by the Clay County Recorder, commenting on the payment of filing fees for chattel mortgages and requested an opinion on the legality of the amendment to the Uniform Commercial Code which provides for prepayment of the U.C.C. release fee form and after January 1, 1975.

The statute in question is §554.9405(3), Code of Iowa, 1975, which provides as flolows:

"3. There shall be no fee for filing a termination statement."

Two challenges to the validity of this law are presented here: ". . . it is (1) retroactive to July 4, 1966 and (2) it is discriminatory, secured parties would be getting terminations free that others have been paying for".

With respect to the first challenge, the statute amends a former provision of law which required that payment of a uniform fee for filing and indexing a termination statement. The amendment (Chapter 1249, Laws of the 65th G.A., 1974 Session, §59) became effective July 1, 1974. There is nothing in the amendatory act to relate back or require a refiling of termination statements filed prior to the effective date of the amendment to §554.9404 or in fact to those filed between July 1, 1974 and January 1, 1975.

A statute is presumed to be prospective in its operation unless expressly made retroactive. §4.5, Code of Iowa, 1975. The prohibition against collecting termination fees applies to all filings after the legislation became law — no reference is made to prior filings to make the application retroactive. Accordingly, it is the opinion of this office that the first challenge is without merit.

The uniform fee which is to be paid after January 1, 1975, for filing and indexing financial statements may have the effect of operating also as a prepaid release fee. However, as long as the law applies to all filings after the date specified in the act, it cannot be said to be discriminatory. The legislature is empowered to establish reasonable classifications to accomplish a public policy and in so doing may cause some classes to be treated differently than others. A challenger must assume the burden of negating every reasonable basis upon which such statute may be sustained. *Heath Corp. v. CBR Development Co., Inc.*, 210 N.W.2d 632, Iowa, 1973.

July 7, 1975

CITIES AND TOWNS: Appointment to Boards — Sec. 38A, Art. III (Amend. 25, 1968) Iowa Const.; §199, Chap. 1088, Acts of the 64th G.A. (1972); §§364.1, 364.2, 372.13(4), and Chapter 392, Code of Iowa, 1975. A city may set forth its own procedure for appointment to Boards or other Administrative Agencies, within the limitations imposed by the Constitution or statute. (Blumberg to Gluba, State Senator, 7-7-75) #75-7-9

Honorable William E. Gluba, State Senator: We have received your opinion request of June 9, 1975, regarding an appointment for the Davenport Park Board. You wish to know if the city council can prescribe the method of appointment, such as an election. Davenport is a special charter city.

Chapters 370 and 371, 1973, provided for Park Commissioners and Park Boards. Those chapters were repealed by §199, Ch. 1088, Acts of the 64th G.A. (1972), effective July 1, 1972. There is no section in the 1975 Code which speaks to an appointment to Park Boards. Thus, under

the concept of Home Rule, as stated in Section 38A, Art. III (Amendment 25, 1968) Iowa Constitution and §§364.1 and 364.2, 1975 Code, and Chapter 392, 1975 Code (which provides for administrative agencies), it appears that a city may establish a Park Board, set forth its functions, and prescribe the methods of its operations and appointment of members as it sees fit. See also, §372.13(4), 1975 Code, which provides that the council may appoint city officers and prescribe their powers, duties, compensation and terms. The fact that Davenport is a Special Charter City does not alter this result.

Accordingly, we are of the opinion that a city may establish the procedures for appointments to boards or other administrative agencies, within the limitations that may be imposed by the Constitution or a statute.

July 7, 1975

REGENTS: COAL PURCHASE. Language of §73.7, Code of Iowa, requires a "good and sufficient" performance bond to support bids for coal contracts. Establishment of an escrow account from the proceeds of coal as delivered in lieu of the performance bond does not satisfy the statutory requirement. (Nolan to Richey, Exec. Secty., Board of Regents, 7-7-75) #75-7-10

Mr. R. Wayne Richey, Executive Secretary, State Board of Regents: You have requested an opinion on the following:

"Iowa State University, Ames, Iowa, received coal bids for 1975-76 on April 22, 1975. Only one Iowa coal company bid; that was University Avenue Coal Company, Des Moines, Iowa, who was bidding coal mined by the ICO Corporation, Mahaska County, Iowa.

"We would like to accept the bid and were assured verbally that the performance bond required by the specifications would be provided. This bond is required under Section 73.7 of the Code which states 'the successful bidder shall furnish a good and sufficient bond with qualified sureties for the faithful performance of the contract'.

"The ICO Corporation has now run into difficulty in securing the required performance bond and proposes, as an alternative, the establishment of a penalty escrow account held by Iowa State University, whereby $2 of the price per ton delivered by ICO would be withheld until such account reached $50,000. When the contracted amount of 36,000 tons of coal had been delivered on or before the end of June, 1976, the escrow account would be released to ICO.

"We would request a formal Attorney General's opinion as to whether such an escrow account satisfactorily meets the Code requirements under Sect. 73.7. * * * "

It is the opinion of this office that the language of §73.7, which requires the furnishing of a good and sufficient bond, does not contemplate or authorize the plan for the building of an escrow fund from the payment for coal, as it is delivered. Accordingly, if the low bidder is unable to furnish the bond required by the statute, the bid cannot be accepted.

July 8, 1975

GENERAL ASSEMBLY; STATUTES; TITLES; SUBJECT MATTER. Art. III, §29, Constitution of Iowa. Senate File 566, 66th G.A., 1st, 1975.

§§11.27 and 422.43, Code 1975. SF 566, an act making appropriations to various state officers and departments, and at the same time making substantive amendments to the biennial reporting requirements of the auditor, and to the service tax on flying services, which latter amendment was also expressed in the title, is unconstitutional and void in its entirety because it embraces more than one subject matter and matters properly connected therewith. The fact that two subjects are expressed in the title prevents a choice between them and a severance of the void part, although another subject, not expressed in the title, could be severed. (Turner to Governor Robert D. Ray, 7-8-75) #75-7-11

The Honorable Robert D .Ray, Governor of Iowa:

Re: Senate File 566, Acts of the 66th General Assembly, First Session, 1975.

Code Editor Wayne Faupel has pointed out to me that Senate File 566, Acts of the 66th General Assembly, First Session, 1975, contains more than one subject matter in the title, as well as in the body of the bill, and accordingly appears to be in violation of Article III, §29, Constitution of Iowa, which provides:

"Sec. 29. Every Act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The title to Senate File 566 is an Act:

"Appropriating Funds to the Auditor of State, Treasurer of State, State Comptroller, and Department of Revenue Relating to the Administrative Duties of the Department of Revenue, and Making Certain Provisions of the Act Retroactive."

This bill, which I understand you have not yet approved, makes appropriations totaling $11,228,501, to the auditor of state, treasurer of state, state comptroller and department of revenue. These appropriations are one subject matter.

§2 amends §11.27, Code of Iowa, 1975, by striking subsection 2, and thereby deleting from the auditor of state's biennial report the requirement of including a "narrative report and statistical statements of all county financial operations similar to that now tabulated and reported in his biennial report." This is a second subject matter and severable from the act because not expressed in the title.

§3 makes a substantive amendment to §422.43 of said code, pertaining to the service tax on flying services, which is a third subject matter and one which is included in the title by addition of the words "relating to the administrative duties of the department of revenue."

In my opinion, unless §§2 and 3 are separated out, the entire act and all appropriations must fall for all the reasons stated in my opinion (Turner to Senator Coleman) of June 18, 1975, relating to House File 431.

July 14, 1975

ELECTIONS: Political party state central committees. §43.111, Code of Iowa, 1975. §§1 and 5 of Article IV of the constitution of the Republican

party of Iowa conflict with §43.111 of the Code. The national committeeman and committeewoman may not be voting members of the central committee. The state chairman and co-chairman unless elected from the membership of the state central committee are not entitled to vote whether to break a tie or otherwise. (Haesemeyer to Bittle, State Representative, 7-14-75) #75-7-12

The Honorable Edgar H. Bittle, State Representative: Reference is made to your letter of July 7, 1975, in which you requested an opinion of the Attorney General and state:

"Section 43.111 of the Iowa Code states, *inter alia*:

"There shall be selected at or prior to each political party's state convention a state party central committee consisting of an equal number of members from each congressional district, which number shall be determined by the party constitution or bylaws, who shall be elected or nominated by the district convention or caucus.

"The Constitution of the Republican Party of Iowa states:

" Article IV

1. The State Central Committee shall consist of the National Committeeman and the National Committeewoman and two (2) members from each Congressional District who shall be elected by the District Convention or Caucus.

"I would appreciate your opinion, as soon as possible, as to whether or not the above Constitution conflicts with §43.111 in allowing the national committeeman and committeewoman to be voting members of the State Central Committee and whether or not their votes on such committee would be harmful in party affairs.

"In addition, the Party Constitution states:

" Article IV

5. The State Chairman and Co-chairman . . . shall have no vote in official business transactions of the Committee except the state chairman or co-chairman while presiding at a meeting of the Committee may vote to make or break a tie vote.

"Is such provision allowing the chairman or co-chairman to vote involving public policy such as election of a state chairman?"

In response to your first question, it is our opinion that the provisions of subsection 1 of Article IV of the Constitution of the Republican Party of Iowa does conflict with §43.111, Code of Iowa, 1975, that under these circumstances such §43.111 prevails over the party Constitution and that the national committeeman and committeewoman may not be voting members of the State Central Committee.

The question you present is similar to that which we had before us in an earlier opinion of the Attorney General, Haesemeyer to Patchett, State Representative, March 8, 1974. In that opinion, we concluded that an individual county could not change the composition of its central committee by providing for the election of additional precinct committee people with full voting rights from precincts based on the vote for that party's candidate for governor in that precinct in the most recent general election because of the provisions of §43.99, Code of Iowa, 1973, which provided in relevant part:

"Two members of the county central committee for each political party shall, at the precinct caucuses, be elected from each precinct."

In this March 8, 1974, opinion we said that:

"In our opinion the statutory language is clear, plain and unambiguous and is suscepible of only one interpretation. Two members of the party county central committee, no more and no less, are to be elected at the precinct caucuses."

Similarly under the plain language of §43.111, there must be an equal number of members on the Republican State Central Committee from each congressional district and no other voting members are permitted.

Apart from the statutory requirements of only two members from each congressional district there are also "one man one vote" aspects to the matter. It is clear from the Code that political party state central committees may sometimes be called upon to perform public electoral functions. For example, under §§43.77, §43.78, 43.80, 43.81 and 43.82, such state central committees have authority to fill vacancies in nominations in certain circumstances. In similar situations, courts have held that the one man one vote principle applies. See *Seergy, et al. v. Kings County Republican County Committee, et al.,* (C.C.A. 2d, 1972) 459 F.2d 308; *Maxey, et al. v. Washington State Democratic Committee, et al.,* (U.S. D.C., W.D. Wash., 1970) 319 F.Supp. 673; Cf. *Dahl, et al. v. Republican State Committee, et al.,* (U.S. D.C., W.D. Wash., 1970) 319 F.Supp. 682.

Finally, the second part of your first question asks whether or not the votes of the national committeeman and national committeewoman on the state central committee would be harmful in party affairs. We do not think that this is a proper question for an opinion of the Attorney General. Presumably, the votes of the national committeeman and committeewoman would be no more harmful nor helpful than those of the members of the central committee from the congressional districts.

Turning to your second question, it is our opinion that the state chairman and co-chairman unless elected from the membership of the state central committee are not entitled to vote whether to break a tie or otherwise. In *State, ex rel. McCurdy v. DeMaioribus,* 1963, 90 Ohio App. Rep.2d 280, 224 N.E.2d 353, the question was presented whether the chairman of a county central committee had to be a member of the committee. The Court concluded that he did not but went on to say:

"It is clear that the respondent does not have a vote as an elected member of the county central committee, . . ."

See also, *State, ex rel. MacArthur v. McClean, et al.,* 1916, 35 N.D. 203, 159 N.W. 847.

July 16, 1975

TAXATION: Property Tax; Time for collection. §§445.36, 443.4, Code of Iowa, 1975. Property tax became delinquent 92 days following certification of the tax list. County treasurers can begin to collect taxes immediately after tax list is certified. (Capotosto to Kelso, 7-16-75) #75-7-13

Mr. William E. Kelso, Supervisor of County Audits, Office of Auditor of State: This is to acknowledge receipt of your letter of June 23, 1975, in which you requested an opinion of the Attorney General as follows:

"A previous Attorney General's opinion was written that stated the taxpayer must be given ninety days after certification of taxes, in which he may pay his tax without penalty, based on Section 445.36 of the Code of Iowa.

"That opinion was written when taxes were certified December 31, and penalty attached April 1, of each year.

"Now the law has been changed so that the taxpayers (sic) duty is to come in and pay and penalty attaches October 1, and certification is still ninety days from penalty date but taxpayers (sic) duty to come in has been shortened to sixty days. Under this change, how long a time must be given from certification to penalty date?

"The second part of this same question is, since the certification date of June 30 of each year, as provided for in Section 443.4, can the treasurer collect taxes from date of certification of June 30 ,or must he wait until the first Monday in August as provided in Section 445.36?"

Your question evolves from a 1974 amendment to §445.36, Code of Iowa, 1973. The former section provided:

"No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the treasurer, at some time between the first Monday in January and the first day of March following, and pay his taxes in full, or one-half thereof before the first day of March succeeding the levy, and the remaining half before the first day of September following."

The law existing at that time also provided that the first installment of property taxes became delinquent on April 1, and the second installment was delinquent on October 1 of each year, after which dates penalty was imposed. §§445.37; 445.39, Code of Iowa, 1973. Thus, the duty to pay taxes began the first Monday in January and taxes were delinquent the following April 1, a period of 90 or 91 days.

In 1972 the Iowa General Assembly enacted legislation placing the state's cities, counties and other political subdivisions on a fiscal budget year running from July 1 to June 30 of each year. Ch. 1020, Acts of 64th G.A., 1972 Sess. Accordingly, property tax collections were also converted. Section 445.36, Code of Iowa, 1975, provides:

"No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the treasurer, at some time between the *first Monday in August* and September 1 following, and pay his taxes in full, or one-half thereof before September 1 succeeding the levy, and the remaining half before March 1 following." (emphasis supplied)

The first installment of property taxes is now delinquent on October 1 of each year, 92 days after certification of the tax list, with the second installment delinquent on the following April 1. §§445.37, 445.39, Code of Iowa, 1975.

The property tax list is certified to the county treasurer on or before June 30 of each year. §443.4, Code of Iowa, 1975. Under previously existing law the tax list was certified to the treasurer by December 31

of each year. §443.4, Code of Iowa, 1973. In either case, a period of three months elapses from the time the taxes are certified until they become delinquent and subject to the penalty provisions of §445.39.

The only change made by the legislature in §445.36 was that respecting the taxpayer's duty to present himself or herself at the treasurer's office and pay the taxes. Under the old statute this duty ran from the first Monday in January until March 1, a period of about 60 days. Under the present statute the duty extends from the first Monday in August to September 1, a period of only about 30 days.

It is clear that the change in §445.36 does not shorten or lengthen the time in which property taxes become delinquent. Delinquency occurs 3 months from the time the tax list is certified to the county treasurer. 1968 O.A.G. 416. Therefore, it is the opinion of the Attorney General that a taxpayer has 92 days from the time of certification of the tax list before unpaid taxes are delinquent.

Your second question is whether the treasurer can begin to collect taxes immediately upon certification of the tax list or whether he must wait until the first Monday in August. The change in §445.36 relates only to the duty of the taxpayer to present himself at the treasurer's office to pay his taxes. As he or she has no duty to do so until the first Monday in August, the treasurer cannot compel his appearance before that time. At the same time, §445.36 does not prohibit the treasurer from preparing and distributing tax statements before August 1 if he or she is prepared to do so. Certification of the tax list is authority for the treasurer to proceed with the collection process under §443.4.

In any event, enforcement of property taxes by the treasurer through tax sale cannot be undertaken until the taxes are delinquent on or after October 1. Therefore, it is the opinion of the Attorney General that §445.36 does not prevent the treasurer from starting the collection process prior to the first Monday in August as long as the tax list has been duly certified from the auditor. §443.4. Moreover, since the treasurer has the authority to collect taxes immediately after certification, the taxpayer has a similar right to pay them immediately after certification. That is to say, if a taxpayer presents himself at the treasurer's office prior to the first Monday in August and tenders his taxes, the treasurer has no right to refuse acceptance.

July 16, 1975

VETERINARY MEDICINE: Undergraduate Veterinarians — §§169.3, 169.7, 1975 Code of Iowa; Ch. 1150, Acts of the 65th G.A. An undergraduate veterinarian may be certified to perform all those types of veterinary duties which a licensed veterinarian may perform. (Haskins to Hennessey, State Senator, 7-16-75) #75-7-14

Honorable Maurice Hennessey, State Senator: You ask our opinion as to what duties an undergraduate veterinarian may legally perform. An undergraduate veterinarian is a person who is still a student in a veterinary college and who has not yet been licensed to practice veterinary medicine.

§169.7, 1975 Code of Iowa, allows certified undergraduate veterinarians to perform veterinary duties under the direction of an instructor of veterinary medicine or under the direct supervision of a licensed veterinarian. That section states:

"The secretary of agriculture shall issue to any person, who attends an accredited veterinary medicine college or school and who has been certified as being competent by an instructor of such college or school to perform veterinary duties under the direction of an instructor of veterinary medicine or under the direct supervision of a licensed veterinarian, a certificate authorizing him to perform such functions."

§169.3, 1975 Code of Iowa, permits certified undergraduate veterinarians to perform veterinary duties without running afoul of the prohibition on the unlicensed practice of veterinary medicine. That section states:

"No person shall engage in the practice of veterinary medicine unless he shall have obtained from the department of agriculture a license for that purpose.

"This section shall not prohibit a person who has been issued a certificate from the secretary of agriculture which authorizes him to perform the duties of a veterinarian under the direction of an instructor of veterinary medicine or under the direct supervision of a licensed veterinarian from performing such duties."

The above sections were only recently enacted or amended to permit certified undergraduate veterinarians to perform veterinary duties. *See* Ch. 1150, Acts of the 65th G.A.

It is our view of these sections that if in fact an undergraduate veterinarian is certified by an instructor of veterinary medicine as being competent to perform a particular type of veterinary duty under the direction of an instructor of veterinary medicine or under the direct supervision of a licensed veterinarian, then he may perform that type of duty—regardless of its nature.[1] Thus, for example, if an undergraduate veterinarian is certified by an instructor of veterinary medicine as being competent to perform the spaying and neutering of animals or to give rabies vaccinations under the direction of an instructor of veterinary medicine or under the direct supervision of a licensed veterinarian, then he may do those things. No qualification or limitation exists in §169.7 or elsewhere on the type of veterinary duties which an undergraduate veterinarian may be certified to perform. Necessarily, at least some of these duties will be those which heretofore could only have been performed by licensed veterinarians; otherwise, there would be no need for an exception to have been created in §169.3 for certified undergraduate veterinarians. As seen, §169.3 prohibits the unlicensed practice of veterinary medicine. Hence, we conclude that an undergraduate veterinarian may be certified to perform all those types of veterinary duties which a

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[1] It is assumed here that the undergraduate veterinarian attends an accredited veterinary college or school and that the Secretary of Agriculture, upon receiving the certification of competency by the instructor of veterinary medicine, issues a certificate authorizing the undergraduate veterinarian to perform veterinary duties.

licensed veterinarian may perform.[2] Of course, the undergraduate veterinarian must perform the duties under the direction of an instructor of veterinary medicine or under the direct supervision of a licensed veterinarian.

It should be noted that exact meanings of the terms "direction" and "direct supervision", as used in the present context, cannot be given. The meanings of these terms can be determined only on a case-by-case basis. More specifically, whether an instructor of veterinary medicine or licensed veterinarian must be in attendance when an undergraduate veterinarian performs veterinary duties in order for there to be "direction" or "direct supervision" will probably depend on the nature of the veterinary duties and the skill of the undergraduate veterinarian involved.

July 17, 1975

STATE OFFICERS AND DEPARTMENTS: Iowa Commission for the Blind; Power to hire and fire employees. §§601B.6(9), 19A.3(9), Code of Iowa, 1975. The director of the Commission for the Blind is vested with the discretionary power to hire Commission employees, and such power necessarily includes the power to discharge. (Haesemeyer to Jernigan, Director, Iowa Commission for the Blind, 7-17-75) #75-7-15

Mr. Kenneth Jernigan, Director, Iowa Commission for the Blind: You have requested an opinion of the Attorney General and state:

"As you know, the Iowa Commission for the Blind provides a broad range of services to the blind of the State. Commission staff members are key in the operation of the program. The most important factor in choosing a Commission employee (whether secretary or teacher, rehabilitation counselor or maintenance man) is personality and the effect which that personality will have upon the blind trainee. No formal qualifications — that is, listing of college degrees and years of experience — can indicate the effectiveness of an employee working in this field, especially with the newly blinded. The determination as to suitability of employees must necessarily be a judgmental matter.

"In a particular instance an individual may not possess given formal qualifications but may be the best qualified person to do the job. On the other hand, an individual may have all of the degrees and experience which would seem necessary; he may faithfully work each day and commit no provable violation of rules; yet, (and it is not unusual) his personality and temperament may have exactly the wrong effect upon the blind persons with whom the Commission is working. In rehabilitating a newly blinded person, helping him overcome depression, convincing him that he can still carry on as a normal human being, personality and temperament mean everything. This is true of every person on the staff, from Director to janitor. The balance between success and failure is so delicate that when a newly blinded person comes to the Commission for

[2] This is not to say, however, that, in a specific situation, an instructor of veterinary medicine or a licensed veterinarian may not prohibit a particular undergraduate veterinarian working under him from performing in whole or in part a veterinary duty which he has been certified as competent to perform. The directing or supervisory instructor or licensed veterinarian may choose to restrict or limit the performance of veterinary duties by the undergraduate veterinarian to the extent he feels proper in a particular case. The discussion above merely attempts to ascertain the permissible outer perimeters of the activities of a certified undergraduate veterinarian in general and assumes that the instructor or licensed veterinarian permits the undergraduate veterinarian to work to the limit of those perimeters.

training, he is asked not to go home for the first month, and his family are asked not to come to see him. By some word or action they may unknowingly destroy what is being built up. He needs to be in the right environment twenty-four hours a day. Every person working in the Commission Building (whether that person is apparently working directly with the trainees or not) is important in the process.

"Recognizing these facts, the General Assembly exempted the Commission for the Blind from the provisions of the merit employment statute and the Collective Bargaining Act. It has been our understanding that staff members of the Commission do not have a vested interest in their employment. The Commission does not enter into a contractural relationship with the employees. Section 601B.6(9) of the Code of Iowa states in part:

The director of the commission for the blind shall have the power to employ the necessary personnel to maintain and operate the center or centers, at salaries fixed by the director with the approval of the commission.

"Are we correct in assuming that the Director of the Commission for the Blind may hire or fire staff members at his discretion when, in the judgment of the Director, such hiring or firing is in the best interest of the program?"

As you correctly point out, the broad powers of the Director of the Commission for the Blind in regard to the hiring and controlling of Commission employees are spelled out in §601B.6(9), Code of Iowa, 1975. It is equally clear that under §19A.3(9), Code of Iowa, 1975, employees of the Commission for the Blind are exempt from the merit system established by Chapter 19A. From the language of such sections 601B.6(9) and 19A.3(9), it is clear beyond doubt that the Director for the Commission for the Blind is vested with the power to independently hire and control Commission personnel. Furthermore, it is a well recognized principle that where the power to hire exists, the power to discharge is also implied. This rule is exemplified in *Hjerleid v. State*, 1940, 229 Iowa 818, 295 N.W. 139. There, where the State Board of Social Welfare was vested with the power to hire and control employees, the Iowa Supreme Court stated *inter alia* that the determination as to the qualifications or diligence of the employees was plainly granted to the state board by the Code and inherent in such power is the power to discharge.

In conclusion, we are of the opinion that the Director of the Commission for the Blind is vested with discretionary power to hire and control Commission employees, independently of the merit system, and that such power to hire necessarily includes the power to fire.

July 17, 1975

COUNTIES AND COUNTY OFFICERS — PRISONERS. §§356.1, 356.5, 356.15 and 759.24, Code of Iowa, 1975. The county in which an individual is held awaiting extradition is liable for any medical expenses incurred while the individual is detained in the county jail. (Boecker to Rodenburg, Pottawattamie County Attorney, 7-17-75) #75-7-16

Lyle A. Rodenburg, Pottawattamie County Attorney: This is in answer to your request for an opinion with respect to who must bear the medical costs incurred by Pottawattamie County while holding an individual awaiting extradition to Missouri.

Any discussion dealing with the cost of maintaining an individual in the county jail must begin with Chapter 356, Code of Iowa, 1975. Section 356.1 authorizes the use of the county jail as a prison for the confinement of an individual awaiting extradition. Section 356.1(3) states:

"The jails in the several counties in the state shall be in charge of the respective sheriffs and used as prisons: * * *

3. For the confinement of persons under sentence, upon conviction for any offense, and all other persons committed for any cause authorized by law."

Further, §356.5(2) clearly states that the keeper of the jail is responsible for the medical needs of an incarcerated individual. Section 356.5(2) provides in part that:

"The keeper of the jail shall: * * *

2. Furnish each prisoner with necessary bedding, clothing, towels, fuel and *medical aid.*" (Emphasis supplied)

A recent opinion of the Iowa Attorney General provides a relevant analogy to the question before us in this request. In that opinion, the Worth County Attorney asked us to decide if the Board of Parole and thus the state could be held liable for medical expenses of a parolee held in the Worth County jail. We answered in 1968 A.G.O. 545 negatively citing the provisions of §§356.5(2) and 356.15, 1966 Code of Iowa, supplemented by the fact that the Board of Parole was not authorized by Chapter 247 to contract for those expenses.

These sections of the 1975 Code of Iowa, read today in pertinent part the same as they did in the 1966 Code of Iowa. Section 356.15 Code of Iowa, 1975, specifically states the liabilities of the counties and from whom they may recover these expenditures — the United States and cities using the county facilities for violations of city ordinances. There is no provision in §356.15 permitting recovery from a receiving state in an extradition. Section 356.15 reads:

"All charges and expenses for the safekeeping and maintenance of prisoners shall be allowed by the board of supervisors, except those committed or detained by the authority of the courts of the United States, in which case the United States must pay such expenses to the county, and those committed for violation of a city ordinance, in which case the city shall pay expenses to the county."

We must now turn to Chapter 759, Code of Iowa, 1975, to determine if within that Chapter there is an exception which would relieve the County of medical financial responsibility of an individual held for authorities of another state. We find none. Section 759.24, Code of Iowa, 1975, limits the expenses that can be charged when the State of Iowa is the receiving state to fees paid to the officers of the state on whose governor the requisition is made and all necessary traveling expenses in returning the prisoner. No other expenses are authorized. Section 759.24 reads:

"When the punishment of the crime shall be the confinement of the criminal in the penitentiary, the expenses shall be paid out of the state treasury, on the certificate of the governor and warrant of the comptroller; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the state

on whose governor the requisition is made, and all necessary and actual traveling expenses incurred in returning the prisoner."

We note here that the State of Missouri has a provision similar to that of Iowa, Section 548.241 Vernon's Annotated Missouri Statutes. The expenditures authorized by both the Iowa and Missouri statutes clearly relate only to the costs incurred in the actual extradition and not items such as medical expenses incurred by the holding state or county.

It is therefore our opinion that County is liable for the medical expenses incurred while holding an individual who is awaiting extradition. We would state here, however, that nothing on this opinion precludes Pottawattamie County from submitting a claim to the State of Missouri or from possible civil action against the individual himself.

July 18, 1975

CONSTITUTIONAL LAW; GENERAL ASSEMBLY; ARREST; PRIVILEGE; Art. III, §11, Const. of Iowa. Art. III, §11, affords Senators and Representatives of the General Assembly privilege against civil arrests only, and the words thereof "except treason, felony, and breach of the peace" encompass all crimes in and against the State of Iowa. No Senator or Representative is privileged from arrest for a crime, even a misdemeanor such as speeding. (Turner to Norpel, State Senator, 7-18-75) #75-7-17

Honorable Richard J. Norpel, Sr., State Senator: You have requested an opinion of the attorney general concerning the privilege against arrest afforded you and "all members of the General Assembly" by Art. III, §11, Constitution of Iowa, which provides:

"Senators and Representatives, in all cases, except treason, felony, or breach of the peace, shall be privileged from arrest during the session of the General Assembly, and in going to and returning from the same."

Sometime during the interval between June 20 and 27, you say you were "stopped" by a Trooper of the Iowa Highway Patrol and charged with the crime of speeding, a simple misdemeanor.

You submit that the 66th General Assembly adjourned its first session on June 27, 1975, rather than June 20, as indicated by the Senate Journal, and that even then the adjournment was not final (or sine die). You contend for that reason and because of interim committee meetings between the formal sessions that "the session of the General Assembly" referred to in Article III, §11, operates continuously through the interim and the second annual session to sine die adjournment. (There is merit to your suggestion since the framers of our constitution contemplated only one regular session, biennially, of a General Assembly. See *1970 OAG 66.* And of course it *seems* to many of us that our legislators are in constant session.)

In event, you request an answer to the following three questions:

"1. Whether the deprivation of my liberty for the purpose of issuance of a citation for speeding constituted an arrest within the meaning of Article III, Section 11, of the Constitution of Iowa.

"2. Whether the Senate was still in session within the meaning of Article III, Section 11, of the Constitution of Iowa in view of the actual

date of adjournment being June 27, 1975, despite what the Senate Journal will show.

"3. Whether the General Assembly is in fact in session within the meaning of Article III, Section 11, of the Constitution on a continuous basis in view of the yearly sessions (now an adjournment between sessions), and the required interim committee work."

We deem it unnecessary (and perhaps improper) to answer your three questions, as posed, for reasons hereinafter explained and because, although we have found no Iowa cases on point, it is universally held that the words "except treason, felony, or breach of the peace" as used in various state constitutions giving privilege against arrest to legislators, and in the United States Constitution to Congressmen, encompass *all* criminal offenses, even misdemeanors!

"The constitutional privilege of Senators and Assemblymen from arrest in all cases 'except treason, felony, and breach of the peace', while going to, attending, or returning from sessions of the legislature, confers a privilege from arrest only in civil cases, since the quoted words of exception are broad enough to include all crimes within the exception to the privilege." *81 CJS 946, States §35.*

And in 1 ALR 1156 we find the following annotation applicable to a member of a legislative body:

"It is provided by the Constitution of the United States, and by the constitutions of practically all of the states, that members of Congress, or of the state legislature, shall be exempt from arrest while in attendance at a session of their body, or while going to or coming from the place of meeting, except in cases of treason, felony, or breach of the peace. These exceptions are uniformly held to include all criminal offenses, so that the exemption applies only to arrest in civil cases. Thus, in Williamson v. United States (1907) 207 U.S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163), wherein it was held that a member of Congress was not immune from arrest and punishment for conspiracy to commit subornation of perjury, the court, after an exhaustive review of the American and English authorities, said: 'The terms treason, felony, and breach of the peace, as used in the constitutional provision relied upon, except from the operation of the privilege all criminal offenses.'

"Similarly, in United States v. Wise (1842) 1 Hayw. & H. 82, Fed. Cas. No. 16,746a, it appeared that a member of Congress was arrested on a warrant charging that he was about to commit a breach of the peace, and from the evidence it appeared that he was about to fight a duel with another member of the house. It was insisted that, as a member of Congress, the defendant was immune from arrest. The court decided against the plea of privilege, and the defendant was placed under bond to keep the peace.

"And see Burton v. United States (1905) 196 U.S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243, wherein it appeared that a member of the United States Senate was arrested and tried for a criminal offense, although the question of his immunity as a mmber of Congress was not directly passed on.

"In Com. ex rel. Bullard v. Keeper of Jail (1877) 4 W. N. C. (Pa.) 540, a member of the general assembly was arrested on a charge of embezzlement, and it was insisted that, by virtue of the constitutional provision exempting members of the general assembly from arrest, except in cases of 'treason, felony, violation of his oath of office, and breach or surety of the peace,' he was immune, and entitled to be discharged. Holding that the immunity could be claimed only in civil cases, the court

said: 'The constitutional privilege claimed by the relator is borrowed from the privileges claimed by and accorded to members of the British Parliament. These privileges were recognized and enjoyed in Pennsylvania before any written constitution had been adopted. They were a part of our common law. The privileges, from very small beginnings, had, by accumulation, assumed alarming proportions. Parliament, being the judge of its own privileges, could not be confined within any certain limits, and for this reason the framers of the Federal Constitution inserted the clause defining what the privileges of members of Congress should be, and beyond which they should not go. The object was not to *create* the privileges therein expressed, for they were already established by our common law, but rather to render them certain, and fix limits within which they should be confined. The several states followed the national Constitution, and inserted similar clauses in all their constitutions. As the object was to *limit* the privilege from arrest to that then enjoyed by members of the British Parliament, and as the same language is employed as had been adopted in England to express the offenses for which members of Parliament could be arrested, to wit: "Treason, felony, and *breaches of the peace*," it follows that all offenses in England, comprehended in the words *breach of the peace*, are excepted from the privilege from arrest. Blackstone says there is no precedent for any such privilege, but only in civil suits. . . . It may be safely concluded that the privilege from arrest in America is, in no case, greater than the same privilege in England. We cannot, by a liberal construction of the language of our Constitution, enlarge the privileges of our legislators beyond those formerly enjoyed by members of the Parliament in England. See Story, Const. §865. The reason of the law is its life, and while there is great reason for privileging public servants from civil detentions and arrests, there is none for shielding them from apprehension for crimes against the peace and dignity of the state'." (Emphasis included in the annotation.)

More recently, the U.S. Supreme Court has upheld these principles in *Gravel v. U.S., Mass.* 1972, 408 US 606, 92 S.Ct. 2614, 33 L.ed 2d 583, rehearing denied 409 US 902, 93 S.Ct. 98, 34 L.ed2d 165.

The only authority we have been able to find to the contrary is that in *State ex rel. Isenring v. Polacheck*, 1898, 101 Wis. 427, 77 N.W. 708 where the legislator was held to have waived his privilege from arrest for bribery, which was not in that state a felony. The court said, by way of dicta, that had the legislator properly pleaded his privilege in due time he would have been entitled to his privilege from arrest.

The United States Constitution contains language virtually identical to that in Article III, §11, Constitution of Iowa. Article I, §6, United States Constitution. We feel compelled to follow the overwhelming weight of authority, including the view of the United States Supreme Court, rather than the obiter dictum of the Wisconsin court in 1898, which really was not faced with the question because the legislator there waived his immunity.

As stated by Mr. Justice White in *Gravel v. U.S.* supra:

"It is, therefore, sufficiently plain that the constitutional freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members. (Citation) Indeed, implicit in the narrow scope of the privilege of freedom from arrest is, as Jefferson noted, the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons. Jefferson, Manual of Parliamentary Practice, S Doc No 92-1, p 437 (1971)."

The court there noted that when the Constitution was adopted, arrests in civil suits were still common in America and that the privilege extended only to such arrests.

In *5 Am.Jur.2d 786,* Arrest §104 we find, in addition to the foregoing law:

"The privilege extended to a member going to and from a legislative session is limited to a reasonable time for going and coming. Moreover, it will be observed that the privilege conferred is not an exemption from arrest while a member of Congress or even during the sessions of that body, but only during attendance at the sessions and going to, and returning from, the same."

So, even during a session, a legislator is not necessarily free even from civil arrest if he is not in actual attendance at the session or going to or from it. During adjournment in the evening, or on weekends, it appears that a legislator might not be privileged from arrest. And, of course, after adjournment sine die a legislator is no longer privileged from arrest unless perhaps the statute of limitations has run.

In any case, a breach of the traffic laws or municipal ordinances would amount to a breach of the peace and fall within the exception to the privilege. *Ex Parte Emmett,* 1932, 120 Cal. App. 349, 7 P.2d 1096. See also *Swope v. Commonwealth,* 1964 Ky., 385 SW2d 57.

This seems dispositive of your specific problem and to render your three questions moot. We do not ordinarily answer hypothetical, academic or moot questions. Moreover, your speeding case is apparently still pending before a magistrate and there is no reason why your attorney cannot present your defenses, if any, without our assistance. See, however, *1970 OAG 66* which may be helpful in answering your questions concerning sessions of the General Assembly if you still consider them relevant despite the foregoing.

Thus, neither you nor any other legislator is privileged from arrest under Art. III, §11, even during the session of the General Assembly, for any criminal offense committed in and against the State of Iowa, whether it be a felony or a mere misdemeanor such as speeding. Your only privilege is from arrest in civil cases.

July 17, 1975

STATE OFFICERS AND DEPARTMENTS: Transportation Commission and City Councilmen and County Supervisor; Dual Offices; Incompatibility. Chapters 307 and 307A, Code of Iowa, 1975. The offices of city councilman and county supervisor are incompatible with the office of transportation commissioner. A city councilman or supervisor by taking the office of transportation commission **ipso facto** vacates his first office. If such an individual refused to relinquish his office, the proper proceedng to oust him would be an action in **quo warranto.** (Haesemeyer to Senators Redmond and Lamborn, 7-17-75) #75-7-18

The Honorable James M. Redmond, State Senator, and The Honorable Clifton C. Lamborn, State Senator: By your letter of June 19, 1975, you have requested an opinion of the Attorney General and state:

"Chapter 1180 of the ACTS of the 65th GENERAL ASSEMBLY (1972, 2d Regular Session), 'Department of Transportation,' created a

new state agency for the purpose of coordinating the transportation policies of the state of Iowa. This new law reorganized the Executive Department by transferring and combining the duties and functions of certain existing state agencies into a single agency, the State Department of Transportation. The bulk of the provisions of Chapter 1180 is found in the 1975 Code as Chapter 307, 'Department of Transportation,' and Chapter 307A, 'Transportation Commission.'

"Section Three of Chapter 1180 of the ACTS OF THE 65th GENERAL ASSEMBLY, (1974 2d Regular Session), establishes the procedure to be followed for selecting members of the Transportation Commission. Basically, members are appointed by the Governor for four-year terms, subject to the approval of the State Senate. The initial appointments to the Commission, however, were made from the several existing state agencies reorganized by Chapter 1180. The Transportation Commission ceases to be affiliated with these other agencies as of July 1, 1975, the period from July 1, 1974, to June 30, 1975, constituting a transition period.

"On Monday, January 13, 1975, the Governor submitted his nominees to the Transportation Commission to the Senate via the Lieutenant Governor. In reviewing the resumes of these individuals, it was noted that several were either elected or appointed public officers of state political subdivisions. Specifically, two nominees are city councilmen; one, a member of a municipal airport commission; and one, a member of a county board of supervisors. These individuals have continued to serve in both capacities during the transition period. At least two have indicated an intention to serve as a member of the Transportation Commission while continuing to serve as a public officer of a state political subdivision after July 1, 1975, the end of the transition period.

"Our initial reaction to this plural office holding was negative. It is our feeling that serving in both capacities where each would be dealing on different levels with the same subject matter constituted a conflict of interest or duty. Any doubt we had in this area was bolstered by your opinion of January 16, 1975, holding that members of the General Assembly could not constitutionally serve as members of boards and commissions of state agencies, even when membership was specifically provided by statute. While not specifically applicable to the question of whether Transportation Commissioners may serve as public officers of state political subdivisions, the opinion did apply the legal doctrine of incompatibility of offices. The introduction of this concept crystalized our concern: Are public officers of political subdivisions having duties relating to the transportation problems of the respective local governments incompatible as a matter of law with concurrent membership on the State Transportation Commission?

"Recognizing the need for further information, a legal memorandum was obtained from the Legislative Service Bureau. It was felt that clarification of the issue was needed in order to properly evaluate the legal ramifications of Senate approval of those nominees to the Transportation Commission who insisted on retaining both offices. A copy of that memorandum is attached hereto as Appendix A.

"Consistent with the Bureau's charter, the memorandum does not draw any conclusions or make any recommendations. However, the authorities cited clearly indicate that Iowa follows the Common Law rule of incompatibility when the statutes creating the offices are silent concerning plural office holding.

"Secondly, it is clear from the Bureau's analysis that none of the appointees were *ineligible* to serve on the Transportation Commission, since the relevant statutes are silent on this issue. The fact that appointees holding other public offices were eligible to serve on the Transportation Commission is important. All of these persons were confirmed by the Senate. We think we can state unequivocally that partisanship, personalities, nor the appointees' qualifications were at issue. Those Senators not voting for confirmation were only concerned with the

wisdom of having members of the Transportation Commission simultaneously serving as public officers of state political subdivisions also responsible in the latter capacity for the delivery of transportation services to the citizens of their respective jurisdictions.

"Thirdly, the memorandum states, in general terms, the test for incompatibility. Citing *State Ex. Rel. Crawford vs. Anderson*, 155 Iowa 271, 136 NW (1912), the memorandum indicates that the test of incompatibility is whether there is an inconsistency in the functions of the two such as where one is subordinate to the other and subject in some degree to its revisory power; where the duties of the two offices are inherently inconsistent and repugnant; or where the nature and duties of the two offices render it impossible, from consideration of public policy, for an incumbent to retain both.

"A preliminary application of these tests indicates that there may be an incompatibility problem. The policy-making decisions of the Department of Transportation were delegated to the Transportation Commission. §307.10 of the Iowa Code (1975), 'Duties of Commission,' and §307A.2 of the Iowa Code (1975), 'Duties,' enumerates commission duties. Clearly these two sections delegate the overall development and supervision of the State's transportation policies and programs to the Transportation Commission. It is also clear that city councilmen, members of a county board of supervisors, members of an airport commission, and members of the board of directors of a school district are also responsible for various aspects of the State's transportation program within their respective jurisdictions.

"It appears that in many instances, the aforementioned public offices would be subordinate to or subject to the revisory powers of the Transportation Commission. It also seems that as a matter of public policy, given the nature of the offices involved, it is impossible for a Transportation Commissioner to retain a public office of a state subdivision that involves the duty to provide for local transportation services.

"Finally, the Bureau's memorandum points out that a person that accepts a second public office incompatible with one the person already holds *ipso facto* is considered to have resigned from the first. If the local offices discussed *supra* are incompatible with membership on the Transportation Commission, there appears to be a problem of challenging the individual's title to the office so that the vacancy can be recognized and filled in accordance with procedural due process.

"This is a complicated problem involving many complicated issues. For this reason, it was felt it was necessary to detail the complete history of the development of the problem as well as clearly state what is believed to be the fundamental issue to be resolved. Therefore, given the above discussion, and in accordance with subsection 4 of §13.2 of the Iowa Code (1975), 'Duties,' we respectfully submit the following questions of law to you and request that you render an official written opinion on each:

"1. Is membership on the State Transportation Commission incompatible as a matter of law with concurrent holding of the following public offices:

"(a) member of a county board of supervisors;

(b) mayor or member of a city council of either an incorporated or charter city of this State;

(c) a city manager of either an incorporated or charter city of this State;

(d) member of an airport commission established pursuant to Chapter 330 of the Iowa Code (1975), 'Airports';

(e) an airport manager of an airport established in accordance with Chapter 330 of the Iowa Code;

(f) a member of the board of directors of a school corporation of this State; or

(g) a school superintendent of any of the school corporations of this State.

"2. If any of the above local public offices are found to be incompatible with concurrent membership on the Transportation Commission, what is the effect on the person's right to continue to serve as a local public official subsequent to accepting appointment to the Transportation Commission; and

"3. If any of the local public offices are found to be incompatible, and the effect of subsequent acceptance of an appointment to the Transportation Commission constitutes *ipso facto* resignation from the local public office, when action is necessary to prevent the person from continued plural office holding; and whose duty and/or standing is it to bring such action?

"We do not need to advise you of the importance of your opinion on these issues. Due to the energy crisis, transportation is an issue of vital concern to all of us. The Transportation Commission is fully activated as of July 1, 1975. It is hoped that you can resolve this issue as soon thereafter as possible, in order to allow the members of the Commission to take up their duties with as little trouble as possible. Legislative duties have prevented our tendering this request earlier in the year."

We have determined from conversations with personnel of the Department of Transportation that the only members of the Transportation Commission still purporting to hold dual offices are one who is a county supervisor and two who are city councilmen. Accordingly, we shall confine our answer to these positions. It is not our practice or policy to answer hypothetical, academic or moot questions.

Chapter 307, Code of Iowa, 1975, establishes the Department of Transportation and §307.10 sets forth the duties of the Transportation Commission established by §307.3 in broad terms. Among other things, such §307.10 provides that:

"The commission shall:

"1. Develop and coordinate a comprehensive transportation policy for the state not later than January 1, 1975, which shall be submitted to the general assembly for its approval and develop a comprehensive transportation plan by January 1, 1976, to be submitted to the Governor and the general assembly, and to update the transportation policy and plan annually.

"2. Promote the coordinated and efficient use of all available modes of transportation for the benefit of the state and its citizens including, but not limited to, the designation and development of multimodal public transfer facilities if carriers or other private businesses fail to develop such facilities.

"3. Identify the needs for city, county and regional transportation facilities and services in the state and develop programs appropriate to meet these needs.

"4. Identify methods of improving transportation safety in the state and develop programs appropriate to meet these needs. * * *

"6. Approve the budget of the department as prepared by the director, prior to submission of the budget to the governor and the general assembly. * * *

"8. Consider the energy and environmental issues in transportation development.

"9. Enter into such contracts and agreements as provided in this chapter."

Chapter 307A spells out in some greater detail the duties of the Transportation Commission with respect to highway construction and maintenance. It is to be observed that under §307A.3, the Commission is given the authority to apportion among the counties of the state any road construction machinery and equipment which may be received from the federal government. We agree with your observation that persons holding the public offices in question are also responsible for various aspects of the state's transportation program within their respective jurisdictions. It is equally clear to us that under Chapters 307 and 307A the Transportation Commission has the duty of evaluating competing needs of various local subdivisions and transportation agencies. Under these circumstances and for the reasons you state, it is our opinion that the offices of county supervisor and city councilman are incompatible under the tests laid down in *State v. White* (1965) 257 Iowa 606, 133 N.W.2d 903 and *State, ex rel Crawford v. Anderson,* (1915) 155 Iowa 271, 136 N.W. 128, which tests of incompatibility are set forth in a February 11, 1975, memorandum prepared by the Legislative Service Bureau for Senator George Kinley, a copy of which is annexed hereto and made a part hereof.

this memorandum is attached to the back cover of this book

Turning to your second question, under the ruling in *State v. White, supra,* a person accepting appointment to the Transportation Commission has no right to continue to serve as a county supervisor or city councilman and *ipso facto* vacates his office as such a local public official and his title thereto is terminated without any other act or proceeding.

In answer to your third question, as we have already stated, acceptance of appointment to the Transportation Commission automatically vacates the local office and presumably the appropriate officials would take the necessary action to fill the vacancy thus created. In the event an individual obstinately refused to relinquish his office the proper proceeding would be one in quo warranto brought in the district court. R.C.P. 299 provides in relevant part:

"A civil action in the nature of quo warranto, triable by equitable proceedings, may be brought in the name of the state against any defendant who is

"(a) unlawfully holding or exercising any public office or franchise in Iowa, or an office in any Iowa corporation; or

"(b) a public officer who has done or suffered to be done, an act which works a forfeiture of his office; . . ."

R.C.P. 300 specifies who may bring such an action and provides:

"(a) The county attorney of the county where the action lies may bring it in his discretion, and must do so when directed by the Governor, General Assembly or the Supreme or District Court, unless he may be a defendant, in which event the Attorney General may, and shall when so directed, bring the action.

"(b) If on demand of any citizen of the state, the county attorney fails to bring the action, the attorney general may do so, or such citizen may apply to the court where the action lies for leave to bring it. On

leave so granted, and after filing bond for costs in an amount fixed by the court, with sureties approved by the clerk, the citizen may bring the action and prosecute it to completion."

July 17, 1975

LICENSING: Insurance Agent. §522.1, Code of Iowa, 1975. A licensed blind insurance salesman does not have to have a licensed sighted insurance salesman as his driver, in order to be employed as an insurance agent. (Haesemeyer to Omvig, Ass't. Director in Charge of Training & Development, Iowa Commission for the Blind, 7-17-75) #75-7-19

Mr. James Omvig, Assistant Director in Charge of Training and Development, Iowa Commission for the Blind: By your letter of June 13, 1975, you have requested an opinion of the Attorney General on the question of whether or not §522.1, Code of Iowa, 1975, requires that a licensed, blind insurance salesman have a licensed, sighted insurance salesman as his driver.

Such §522.1 provides in relevant part:

"No person shall directly or indirectly, act within the state as agent, or otherwise, inreceiving or procuring applications for insurance, or doing or transacting any kind of insurance business for any company or association . . . until he has procured from the commsisioner of insurance a license authorizing him to act for such company or association as agent."

It is clear from the foregoing that the only requirement for an individual to engage in the insurance business is that he be licensed by the Commissioner of Insurance. The statute contains no requirement that a blind insurance salesman have a licensed sighted insurance salesman as a driver and such requirement cannot be implied.

Accordingly, it is our opinion that a licensed blind insurance salesman does not have to have a licensed sighted insurance salesman as his driver. Expressio unius est exclusio alterius.

July 30, 1975

CITIES AND TOWNS: Solid Waste Fees — Sec. 38A, art. III (Amendment 25, 1968) Iowa Const.; §§364.1, 364.2, 384.24(2)(f), 384.80(6), 384.81, 384.84, and 384.93, Code of Iowa, 1975; Section 27, S.F. 526, Acts of the 66th G.A. (1975). Cities may collect fees for garbage collection in advance of the performance of the service. Cities may collect fees for solid waste even though the service is not being used. Liens may be placed on property for non-payment of solid waste or water bills. (Blumberg to Matheny, Howard County Magistrate and Mayer, State Citizen's Aid, 7-30-75) #75-7-20

Honorable Gerald L. Matheny, Magistrate, Howard County, and Mr. Thomas R. Mayer, Citizen's Aid — Ombudsman: We have received your opinion requests regarding the collection of garbage and garbage fees. You specifically asked:

1. Can a municipality legally charge a fee for solid waste pick-up to residents who actually do not use the service?

2. Can a City collect for garbage collection in advance of the service being performed?

3. Can a City collect an unpaid garbage bill or unpaid water bill by

assessing the amount against real property as a special assessment and collecting it with real estate tax?

This opinion was not issued earlier because of a bill in the Legislature regarding the third question.

In answer to your first question, that issue has been dealt with in an earlier opinion of this office. See, Opinion, May 24, 1973, to Stromer, #73-5-21, a copy of which is enclosed.

Section 384.24(2)(f), 1975 Code, includes solid waste collection systems within the definition of "city enterprise." Section 384.81, 1975 Code, provides that a city which proposes to own, operate or maintain a city enterprise must do so in accordance with the City Code. The governing body of a city enterprise may establish, impose, adjust, and provide for the collection of rates to pay for the expenses of such an enterprise. The rates must be established by ordinance of the city council or by resolution of the trustees. Section 384.84, 1975 Code. "Rates" is defined in §384.80 (6), 1975 Code, as "rates, fees, tolls, rentals and charges for the use of or service provided by a . . . city enterprise. . . ." Section 384.93, 1975 Code, provides that the enumeration of specified powers and functions is not a limitation of the powers of cities. There is no prohibition in the 1975 Code that cities may not collect, in advance, for garbage collection fees. Amendment 25 (1968) to the Iowa Constitution (§38A, Art. III) provides that cities are granted home rule power and authority, not inconsistent with the laws of the General Assembly. Sections 364.1 and 364.2, 1975 Code, provide that a city may, except as expressly limited by the Constitution, and if not inconsistent with the laws of the General Assembly, exercise any power and perform any function deemed appropriate to protect and preserve the rights, privileges and property of its residents, and to preserve and improve the health, safety and welfare of its residents; and, that the enumeration of a specific power does not limit or restrict the general grant of home rule. Pursuant to the above, a city has the power to set rates and the manner of collection. Said manner may include collection in advance for garbage fees since there is no apparent prohibition.

Under the 1973 Code, §368.2 provided in part that cities "shall not have power to levy any tax, assessment, excise, fee, charge or other exaction except as expressly authorized by statute." Thus, even though Home Rule was effective, cities could not impose a lien for collection of solid waste without statutory authorization. Such authorization was found in §§28F.5 and 394.5, 1973 Code. Thus, cities operating under those chapters could establish liens.

Senate file 526 provides in section 27 that §384.84(1), 1975 Code, be amended by adding the following new paragraph:

"All rates or charges for the services of sewer systems, sewage treatment, solid waste collection, solid waste disposal, or any of these, if not paid as provided by ordinance of council, or resolution of trustees, shall constitute a lien upon the premises served by any of these services and may be certified to the county auditor and collected in the same manner as taxes."

Thus, effective July 1, 1975, fees for solid waste collection shall constitute a lien.

With respect to liens for unpaid water bills, the result is similar although the basis is different. The discussion above relative to §§384.80 (6), 384.81, 384.84 and 384.93 of the 1975 Code is applicable to city utilities which include water. Keeping in mind that rates may be set for city utilities and enterprises, and for the collection of such rates, it is apparent that Home Rule mandates that cities could provide in their ordinances, or the trustees by resolution, how the rates are to be collected in the event they are not paid when due. This may include an assessment to be collected in the same manner as taxes. The only prohibition that could possibly apply would be the provision in the constitutional amendment granting Home Rule which provides that cities shall not have the power to levy taxes unless expressly authorized. The question then is whether an assessment, or special assessment as you state, is a tax. The Supreme Court of Iowa has held that there is a well-known and recognized distinction between taxes and assessments. *Bennett v. Greenwalt*, 1939, 226 Iowa 1113, 1133, 286 N.W. 722; *In re Trust of Shurtz*, 1951, 242 Iowa 448, 454, 46 N.W.2d 559. See also, *The City of Fairfield v. Ratcliff*, 1866, 20 Iowa 396, where it was held that special assessments are not taxes. Therefore, because there is no provision in the 1975 Code prohibiting a city from assessing such costs, if unpaid, against the real property, it appears that the same may be done with respect to unpaid water bills. It should be noted here that the lien for solid waste is mandatory, whereas such a lien for water would have to be set by the governing body.

Accordingly, we are of the opinion that cities may, under the circumstances outlined in the prior opinion, charge fees for garbage collection even though the service is not used; that said fees may be charged and collected prior to the service; and that unpaid solid waste or water fees may constitute a lien upon the property.

July 30, 1975

COUNTIES AND COUNTY OFFICERS: SHERIFF: COMPENSATION: HF 802, 66th G.A. 1st, 1975. §340.7(13), Code of Iowa, 1975. The $1500 salary raise schedule authorized in §12 HF 802, as applied to sheriff's compensation, is in addition to the sheriff's salary as such existed on June 30, 1975, including the $750 allowance for a residence where no residence is furnished by the county. The board of supervisors is not justified in ignoring the $750.00 housing allowance before adding the $1500.00 increase thereby effectively granting the sheriff only a $750.00 increase. (Turner to John N. Nystrom, State Senator, 7-30-75) #75-7-21

Honorable John N. Nystrom, State Senator: You have requested an opinion of the attorney general as to the effect of House File 802, 66th G.A., 1st, 1975, on the compensation of a sheriff in a county where the sheriff is not furnished a residence by the county.

Your question arises because, in such cases where the sheriff was not furnished a residence, §340.7(13) Code of Iowa, 1975, allowed him "an additional sum of $750.00 per annum" in addition to his compensation fixed thereunder. There can be no doubt that this allowance was "salary" for all purposes except computing the salary of deputies.

§10, House File 802, struck §340.7 and provided that the annual salary

of the sheriff be determined as provided in §6 thereof, effective December, 1975, and each year thereafter.

Meanwhile, §12 of said act, effective July 1, 1975, provides that the supervisors may by resolution, increase the annual salary or per diem of the members of the board of supervisors, county treasurer, county auditor, county recorder, county attorney, sheriff and clerk of the district court "as such salary or per diem exists June 30, 1975." If such allowances are made, §12 mandates that they be in accordance with a schedule which provides in paragraph 3 thereof:

"For the county auditor, county treasurer, county recorder, clerk of district court, sheriff, and county attorney, a sum not to exceed $1,500.00."

Thus, if the supervisors do in fact allow the aforesaid officers, including the sheriff, a raise effective July 1, 1975, all of the officers must be treated equally and the "increase shall be consistent" with the schedule. When a sheriff received $750 allowance in lieu of his house, it was part of his salary under §340.7, as it existed on June 30, 1975. The $1500 must be in addition to his compensation as of that time.

It would be inconsistent to allow the sheriff a $1500 raise while, at the same time, taking away $750 which he formerly received on June 30, 1975. The board has no authority to reduce his former salary. That would result in his being paid a raise of only $750 as compared to the other officers' $1500.00. It would also give an additional advantage to sheriffs who are furnished a residence. The language of HF 802 in no way suggests that the General Assembly intended such an inequitable result. Indeed, §6 says that in December, 1975, and after, if the "board of supervisors wishes to reduce the amount of the recommended compensation schedule [of the compensation commission], the annual salary or compensation of each elected county officer *shall be reduced an equal percentage.*" In my opinion this manifests a legislative intent to treat county officers relatively equally.

July 31, 1975

SCHOOLS: Higher Education Tuition Grants. §261.9(5)(c), Code of Iowa, 1975. Business schools supplying the required number of letters from accredited colleges assuming acceptance of credits for work taken by students at such business schools will qualify for participation in the student tuition grant program. (Nolan to Wolff, Executive Director, Higher Education Facilities Commission, 7-31-75) #75-7-22

Mrs. Willis Ann Wolff, Executive Director, Higher Education Facilities Commission: You have requested an opinion of this office as to whether the American Institute of Business and Spencer School of Business, which have applied to the Higher Education Facilities Commission for eligibility under the Iowa Tuition Grant Program, meet the requirements of the statute for participation in this program.

Under §261.9(5)(c), a tuition grant may be made to an eligible student attending an institution which is an accredited private institution.

" 'Accredited private institution' means an institution of higher learning located in Iowa which is operated privately and is not controlled or administered by any state agency or any subdivision of the state and * * *

"c. Which has received letters from at least three Iowa institutions accredited by the North Central Association of Colleges and Secondary Schools accrediting agency based on their requirements as of April 1, 1969, stating that its credits are and have been accepted as if earned in an institution so accredited."

Both of the institutions requesting eligibility under this tuition grant program have substantially complied with the provisions of statutes by submitting the letters required by §261.9(5)(c). While the letters do not in all instances state that the credits from the applying institutions have actually been accepted, there is clear indication that the credits of a transferring student will be accepted at full value for all applicable courses in fulfillment of the requirements for a baccalaureate degree granted by the receiving college.

Accordingly, it is the view of this office that the requirements of the statutes have been met and that the Higher Education Facilities Commission may give further consideration to the request of the two institutions that students otherwise eligible to receive tuition grants will not be disqualified because of their attendance at these two particular schools.

July 31, 1975

SCHOOLS: School House Fund. §278.1(7), Code of Iowa, 1975. A balance remaining in fund voted for the purchase of grounds and construction of school houses may be expended to improve athletic field located on such grounds. (Nolan to Shepard, Butler County Attorney, 7-31-75) #75-7-23

Mr. Gene W. Shepard, Butler County Attorney: You have requested an opinion of the attorney general on the following:

"On September 10, 1962, the electors of the Allison-Bristow Community School District approved by affirmative vote the following proposition: 'Shall the Allison-Bristow School District levy a school house tax 1 mill for a period of 10 years beginning with the year 1963 to be used for the use of purchase of grounds, construction, remodeling and repairing of school houses'. Pursuant to the authority granted, the Board levied and collected the revenue, but did not expend it all. As a result, there remains in this fund the approximate amount of $30,000.00. The Board now wishes to use these funds for the purpose of constructing and equipping an athletic field on land owned by the District adjacent to the school buildings in Allison. Your opinion is respectfully requested as to whether or not the Board may do so without another authorizing vote of the electors."

It is our view that the language of the proposition submitted to the voters is sufficiently general in terms to permit the use of the balance of the schoolhouse fund for the improvement of land added to the schoolhouse grounds for an athletic field. In the opinion the Attorney General issued on May 24, 1971, 72 O.A.G. 130, it was stated that the use of the schoolhouse fund, voted pursuant to §278.1(7), was valid to build a stadium or a playground where such purposes had been specifically voted upon by the electors. This opinion expresses a view that the term "schoolhouse" is a broad term encompassing various buildings, places, and facilities other than the school building proper, to be used by the school district for educational purposes. The opinion further points out that the Iowa Supreme Court in *Livingston v. Davis*, 243 Iowa, 21, 27, 50 N.W.2d 592, 596 (1951), cited with approval *Alexander v. Phillips*, 31 Arizona 503, 254 Pacific 1056, where the Arizona court held that

stadiums for athletic games are "included within the term 'schoolhouse'." There is no question but that under §257.25(3) and (4) of the Iowa Code, physical education is required to be taught in grades one through eight. And all high school students who are physically able are required to participate in physical education activities. Recently, the legislature has provided that the minimum semester unit requirement will be satisfied by a pupil participating in an organized and supervised high school athletic program which requires at least as much time of participation per week as the minimum physical education required time. Thus, even without express provision for the improvement of athletic fields in the Code, it may be reasonably concluded that the improvement of an athletic field may necessarily be implied in order to provide adequate facilities for the minimum physical education requirement of the statute.

Accordingly, it is our view that there is no statutory bar to the use of the $30,000 remaining in the schoolhouse fund for the improvement of an athletic field owned by the school district.

July 31, 1975

COUNTIES AND COUNTY OFFICERS: County/Municipal Civil Defense Council, Salary of Assistant to Director; Authority to Set. §29C.7, Code of Iowa, 1975. Assuming that there are sufficient funds in the joint county/municipal civil defense fund and assuming also that the proposed salary of the assistant to the director is within the salary schedule included in the budget adopted by the joint administration, it is our opinion that the fixing of the compensation of the assistant is the responsibility of the joint administration and the county board of supervisors has no authority to deny the raise. (Haesemeyer to Nystrom, State Senator, 7-31-75) #75-7-24

Honorable John N. Nystrom, State Senator: Reference is made to your recent request for an opinion of the Attorney General in which you ask if the members of the Boone County/Municipal Civil Defense Council grant an increase of salary to a local civil defense assistant in conformity with merit system guidelines, can the board of supervisors deny the raise.

Section 29C.7, Code of Iowa, 1975, provides in part:

"County boards of supervisors, city councils and school boards are hereby authorized to cooperate with the civil defense division, department of public defense to carry out the provisions of this chapter, and shall form a joint county-municipal civil defense and emergency planning administration, hereinafter referred to as the joint administration. Such joint administration shall be composed of a member of the county board of supervisors and the mayor or his representative of the city governments within the county and the sheriff of such county . . . ."

I assume that the Boone County/Municipal Civil Defense Council is a "joint administration" as defined above. Such §29C.7 goes on to authorize the establishment of a joint county-municipal civil defense fund in the office of the county treasurer which fund is administered by the joint administration. Section 29C.7 also provides as follows:

"Not later than November 15 of each year the joint county-muncipal civil defense director and the joint administration shall prepare a proposed budget of all expenses for the ensuing fiscal year, July 1 to June 30. The proposed budget shall include estimated expenses that might be incurred in the event of a natural disaster, including, but not limited to,

hurricanes, tornadoes, windstorms, or floods, and the necessary training, warning, protection facilities, and equipment necessary to minimize the loss of ilfe in the event of acts of aggression.

"The budget shall contain an itemized list of the proposed salaries of civil defense and emergency planning personnel and other personnel, their number and their compensation, the estimated amount needed for personnel benefits, travel and transportation, transportation of things, rent, communications and utilities, printing and reproduction, supplies and material, equipment, and other services needed.

"Each year the chairman of the joint administration shall, by written notice, call a meeting of the joint administration to consider such proposed budget and shall fix and adopt a budget for the ensuing federal fiscal year not later than January 15. * * *"

At such meeting, the joint administration shall authorize:

"* * *

"2. The salaries and compensation of civil defense and emergency planning employees. Those employees coming under the merit system will include salary schedules for various classes in which the salary of a class is adjusted to the responsibility and difficulty of the work. * * *

"The director may, with the approval of the joint admniistration, employ such technical, clerical and administrative personnel as may be required and necessary to carry out the purposes of this section.

"The joint administration shall fix the compensation of such persons so employed to be paid out of the civil defense and emergency planning fund created by this chapter. * * * "

In your letter requesting this opinion you state that the assistant to the director is under the merit system. Assuming that there are sufficient funds in the joint county-municipal civil defense fund and assuming also that the proposed salary of the assistant to the director is within the salary schedule included in the budget adopted by the joint administration, it is our opinion that the fixing of the compensation of the assistant is the responsibility of the joint administration and the board of supervisors has no authority to deny the raise.

August 7, 1975

CRIMINAL LAW: LIQUOR & BEER: GAMBLING: LICENSES REQUIRED. Chapters 99B and 726, Code of Iowa, 1975, as amended by SF 496, 66th G.A., 1st, (1975). (1) A Class A, B, C or D liquor control licensee, or a Class B beer permittee licensed under §8 of SF 496 to allow social gambling on the licensed premises may also be licensed as a qualified organization under §9 of said Act, and may conduct games of skill, games of chance and raffles, including bingo, on the licensed premises, so long as social games between individuals are not taking place at the same time. (2) The department of revenue should deny issuance of a §8 social gambling license to an organization or club licensed to sell liquor or beer and whose members are charged dues. Under §§8 and 14, no cover charge, participation charge, entrance fee or other charge may be exacted for admission to the premises where gambling occurs, whether or not upon the premises of a liquor licensee or beer permittee. (3) Both §8 social gambling licensees and §9 qualified organization licensees can own any lawful gambling game, cards or paraphernalia therefor, so long as a §8 licensee does not actually conduct or operate the game, or profit from it other than as a player. (Turner to Bair, Dept. of Revenue Director, 8-7-75) #75-8-1

Mr. Gerald D. Bair, Director, Department of Revenue: You have re-

quested an opinion of the attorney general with reference to several provisions of Senate File 496, Acts of the 66th General Assembly, 1st Session, entitled "An Act Relating to Gambling, and Providing Penalties," the new gambling law which will take effect on August 15, 1975. Specifically, you ask:

"1. Other than as provided in Section 10 of Senate File 496, can the holder of a liquor control license or beer permit be licensed by the Department of Revenue to conduct or participate in gambling activities including games of skill, games of chance and raffles on the holder's licensed or permitted premises where such gambling activities are outside the scope of Section 8 but allowed by Section 9?

"2. May private clubs which are holders of a liquor control license or beer permit and charge their members dues obtain a social gambling license for the club's premises pursuant to Section 8 of Senate File 496?

"3. May the holder of a liquor control license or beer permit own or provide as a participant on his premises any of the games included in Section 14, Subsection 2 of Senate File 496?"

I.

Your first question arises because §8 amends §99.B6, Code of 1975, to provide in pertinent part:

"99.B6. GAMES WHERE BEER OR LIQUOR IS SOLD

1. Gambling is unlawful on premises for which a class 'A', class 'B', class 'C' or class 'D' liquor control license, or class 'B' beer permit has been issued pursuant to chapter one hundred twenty-three (123) of the Code unless all of the following are complied with:

"a. The holder of the liquor control license or beer permit has submitted an application for a license and an application fee of twenty-five dollars, and has been issued a license, and prominently displays the license on the premises.

"b. The holder of the liquor control license or beer permit or any agent or emlpoyee of the license or permit holder does not participate in, sponsor, conduct or promote, or act as cashier or banker for any gambling activities, except as a participant while playing on the same basis as every other participant.

"c. *Gambling other than social games is not engaged in on the premises covered by the license or permit.*" (Emphasis added.)

* * *

"g. No cover charge, participation charge or other charge is imposed upon a person admitted to the premises, whether or not the person participates in gambling, and no rebate, discount, credit, or other method is used to discriminate between the charge for goods or services to participants in gambling and the charge for goods or services to non-participants. * * *

"k. No person under the age of eighteen years may participate in the gambling except pursuant to sections five (5), six (6), seven (7), and nine (9) of this Act. . . ." * * *"

The importance of your question is at once apparent. Many veterans' organizations, fraternal societies, country clubs and churches, possess a beer or liquor license, or both, as enumerated in §8. And many of these organizations are presently (prior to August 15, 1975) licensed under

§99B.7, Code of Iowa, 1975, as qualified organizations and "conduct" games of skill, games of chance, and raffles, including bingo, on their licensed premises.

Superficially, from the italicized language of §8(1)(c), it seems that no gambling, other than social games as defined in §§3 and 14(2) of the bill, could be engaged in on the premises covered by one of the enumerated liquor control licensees or beer permittees. In other words, it would appear that bingo, which although it may be legally defined as a social game and theoretically played as such within the law, cannot be "conducted" in the manner it is ordinarily played — with the house operating the game and collecting participation fees from the players. §8(1)(c) clearly says that only social games may be played on the premises of a beer or liquor licensee.

For purposes of analyzing this complex law, we shall sometimes hereafter refer to such a liquor or beer licensee or permittee, who has a gambling license issued under §8, as a §8 licensee. Is a §8 licensee limited by §8 to permitting only social games? Or can §9 pertaining to games conducted by qualified organizations, be considered an exception to §8?

Of course, all statutory sections of the law pertaining to gambling must be considered in pari materia and construed together. *Northern Natural Gas Co. v. Forst*, 1973 Iowa, 205 N.W.2d 692.

We should note, at the outset, that §15 of SF 496 includes a new section which provides in pertinent part:

"APPLICABILITY OF CHAPTER. It is the intent and purpose of this chapter to authorize gambling in this state only to the extent specifically permitted by a section of this chapter. . . ."

Thus, if gambling is not specifically permitted in Chapter 99B as amended by SF 496, the conclusion is compelled that it has not been allowed.

§9 of SF 496 amends §99B.7 to provide in relevant part as follows:

"99B.7. GAMES CONDUCTED BY QUALIFIED ORGANIZATIONS.

1. Except as otherwise provided in section ten (10) of this Act, games of skill, games of chance and raffles lawfully may be conducted at a location specified in subsection two (2) of this section, but only if all of the following are complied with:

"a. The person conducting the game or raffle has been issued a license pursuant to subsection three (3) of this section and prominently displays that license in the playing area of the games.

"b. No person receives or has any fixed or contingent right to receive, directly or indirectly, any profit, remuneration, or compensation from or related to a game of skill, game of chance, or raffle, except any amount which the person may win as a participant on the same basis as the other participants. *A person conducting a game or raffle shall not be a participant in the game or raffle.* * * *

"[L.] During the entire time that games permitted by this section are being engaged in, no other gambling is engaged in at the same location.

"2. Games of skill, games of chance, and raffles may be conducted on premises owned or leased by the licensee, but shall not be conducted on rented premises unless the premises are rented from a person licensed under this section, and unless the net rent received is dedicated to one or more of the uses permitted under subsection three (3) of this section for dedication of net receipts. This subsection shall not apply where the rented premises are those upon which a qualified organization usually carries out a lawful business other than operating games of skill, games of chance or raffles. However, a qualified organization may rent premises other than from a licensed qualified organization to be used for the conduct of games of skill, games of chance and raffles, and the person from whom the premises are rented may impose and collect rent for such use of those premises, but only if all of the following are complied with: * * *

"c. The person from whom the premises are rented shall not be a liquor control licensee or beer permittee with respect to those premises or with respect to adjacent premises. * * *" (Emphasis added)

§10 as mentioned in §99B.7 as amended by §9 of SF 496 provides for licenses for annual game night conducted once a year during a period of 12 consecutive hours, the so-called "Las Vegas Night," and is not really pertinent to this opinion.

Construing §§8 and 9 together, our first task is to determine whether §8 applies to a qualified organization as defined in §§99B.1(10), Code 1975 and 99B.7 as amended by §9, SF 496. In other words, is §9 an exception to §8? As you put it, can a person have both a §8 and a §9 gambling license?

It will be noted that §99B.7 as amended now says "Except as otherwise provided in §10." It does *not* say "Except as otherwise provided in §§*8* and 10." And while §9 does not specifically say "*Notwithstanding §8 and* except as otherwise provided in §10" we think that is what it probably means. There are good reasons for our conclusion.

First, we have heretofore quoted §8(1)(k): "No person under the age of eighteen (18) years may participate in the gambling except pursuant to sections five (5), six (6), seven (7), and *nine (9)* of this Act." Since the words of this limitation are part of §8, dealing with games where liquor or beer is sold, that sentence implies that a person under the age of eighteen may participate in §9 (qualified organization) gambling even on the premises of a liquor or beer (§8) licensee.

§9(2), quoted above, is an exceedingly complex description of the locations where qualified organizations may conduct games of skill, games of chance and raffles (including bingo). To start with, it flatly permits such games to be conducted on premises *owned* by a qualified organization, without mentioning §8 or the limitations therein. It also allows a qualified organization to conduct such gambling on *leased* or rented premises (we deem leased and rented to be synonymous in the act), but subject to conditions:

Games are not to be conducted by qualified organizations on rented premises "unless the premises are rented from a person licensed" under §9 (another qualified organization) and then only if the "net rent received" by the lessor qualified organization is dedicated to one or more of the uses permitted in §9(3). But this qualification is further qualified,

so that the net rent need not be dedicated as aforesaid where the lessor qualified organization "usually carries out a lawful business other than operating games of skill, games of chance or raffles." Presumably, any tavern, club or church which holds a valid liquor license or beer permit is a "lawful business," could be a qualified organization by obtaining a §9 license, and would not then have to so dedicate its net rent. But there is still a further qualification or condition! A qualified organization "may rent premises from someone *other than* a 'licensed' qualified organization (we deem the word licensed to be superfluous because a qualified organization is a licensed person under §99B.1(10)), but only if three conditions are complied with, including the condition that "c. The person from whom the premises are rented shall *not* be a liquor control licensee or beer permittee with respect to those premises or with respect to adjacent premises."

Painstaking analysis of §9(2) indicates that a qualified organization *may* rent from a liquor control licensee or beer permittee if the liquor control licensee or beer permittee *is* a qualified organization under §9!! It is only when the liquor control licensee or beer permittee is someone "other than" a qualified organization that a lessee qualified organization cannot lease from a liquor licensee or beer permittee for the purpose of conducting gambling.

To summarize our construction, games of skill, games of chance and raffles (including bingo), except social gambling, may be conducted:

a. On premises *owned* by a qualified organization, whether or not the qualified organization is a beer permittee or liquor licensee, and

b. On premises *leased or rented* from another qualified organization where:

(1) The net rent received is properly dedicated, *or*

(2) The qualified organization "usually carries out a lawful business other than operating games of skill, games of chance or raffles," and

c. On premises rented or leased from a person *other than* a qualified organization if the person is not a liquor control licensee or beer permittee "with respect to those premises or with respect to *adjacent* premises," and subject to two other conditions not relevant here. (We have not determined whether adjacent premises would include premises separated by a hallway, another room, or an adjoining building or lot.)

Beer or liquor licensees who are not also qualified organizations under §9, may not "conduct" gambling, but may permit and play in social games if a §8 license is obtained.

A further qualification upon conducting gambling by qualified organizations *anywhere* is found in §9(1)(L): "During the entire time that games permitted by this section are being engaged in, no *other gambling* is engaged in at the same location." Qualified organizations ordinarily do not "conduct" what §14 denominates "Games Between Individuals" such as card and parlor games, §14(2)(a). Nevertheless, when bingo starts, those games are to stop. Such special games are doubtless the "other gambling" referred to in §9(1)(L). (There are of course other limitations imposed upon qualified organizations in Chapter 99B as amended by SF 496, but they are not relevant to the question you pose.)

We conclude that no gambling may be "conducted" by a liquor licensee or beer permittee, unless he is also a qualified organization. A liquor or beer licensee may permit social gambling on his premises, and may participate therein as any other player, provided he has a §8 license. But in order to "conduct" games allowed by §9, including bingo, a §8 licensee must in addition obtain a license under §9.

Thus §8(1)(b) and (c) are consistent with §9(1)(L). Qualified organizations may not "conduct" games when social gambling is being engaged in at the same location. We do not here decide whether "location" may mean more than one room or floor of the same licensed premises, another question left open by the language of the bill.) But the holder of a liquor control license or beer permit who is licensed both under §§8 and 9 may not simultaneously "permit" social gambling under §8 and "conduct" gambling under §9 at the same location. A liquor or beer licensee licensed to permit social gambling under §8 may participate in such gambling as any other player. But a qualified organization which conducts gambling under §9 may not participate as a player therein.

Construing §§8 and 9 together, we conclude, in answer to your first question, that the department of revenue may lawfully license the holder of a liquor control license or beer permit to allow and participate in social gambling under §8 and also license such to "conduct" gambling under §9, at the same location, if the respective kinds of gambling permitted are not engaged in at the same time.

II.

Your second question is whether private clubs which have a liquor control license or beer permit and charge dues to their members may obtain a social gambling license under §8.

This question may even be more significant than your first because it is a matter of common knowledge that many veteran and fraternal associations, private dining clubs, golf and country clubs, and numerous other organizations which charge membership dues, have liquor licenses and beer permits. Some churches charge specific dues or tithes as a requirement of membership and some of these, too, have beer permits. Many of them now allow social gambling as it is presently defined under §726.12, Code of Iowa, 1975. No license for such social gambling is presently (prior to SF 496) required if the game is pursuant to a bona fide social relationship. Thus, in the dining area, bar or locker room of almost every such club, members engage in social gambling through games like pitch, gin rummy, bridge and even poker, all of which they play for money. The only current limitation (before SF 496) is that no participant wins or loses more than a total of $500 in all such games or activities during any period of 24 consecutive hours. On and after August 15, 1975, the limit is $50 at time during any period of 24 consecutive hours or over that entire period. SF 496, §§8(1)(h) and 14(1)(g).

But §8(1)(g) provides as a condition of lawful gambling on the premises of a liquor licensee or beer permittee:

"g. No cover charge, participation charge or other charge is imposed upon a person admitted to the premises, whether or not the person parti-

cipates in gambling, and no rebate, discount, credit, or other method is used to discriminate between the charge for goods or services to participants in gambling and the charge for goods or services to nonparticipants."

A similar prohibition may also be found in §14(1)(h) as a condition to lawful social gambling between individuals:

"h. No participant pays an entrance fee, cover charge, or other charge for the privilege of participating in gambling, or for the privilege of gaining access to the location in which gambling occurs."

In our opinion, dues are clearly included in the language "No cover charge, participation charge or other charge" or in the words "entrance fee, cover charge, or other charge." This is especially true when they are coupled with the imposition upon a person "admitted to the premises, whether or not the person participates in gambling" or "for the privilege of gaining access to the location in which gambling occurs." *Thompson v. Wyandanch Club*, 127 N.Y.S. 195, 200, 70 Misc. 299. *Greenwald v. Chiarella*, 57 N.Y.S.2d 765, 769, 185 Misc. 762, *Johnston v. U. S., D.C.Mass.*, 227 F.Supp. 934, 935.

By contrast, an amendment to Senate File 496, offered by Senator Philip B. Hill, prohibited certain profits, including "any cover charge or admission for" social games of the kind in question, but at the same time specifically provided an exception for dues and similar charges:

"A fair and reasonable charge may nevertheless be assessed the players for the use of any billiards or pool tables, bowling alleys, golf courses, tennis courts, shuffle boards, ping-pong tables, lawful pinball machines, or other devices or services not essentially of a gambling nature, if the charge is the same whether such are used by the players for gambling purposes or not."

See §10 of Amendment S-3700 to SF 496, filed May 5, 1975, Senate Journal, pages 1227 to 1244 at page 1237. Senator Hill's amendment clearly would have excluded dues from cover, participation or other like charges. The Hill amendement failed by a vote of 22 to 24. Senate Journal 1253.

While the language of these statutory prohibitions against cover charges, entrance fees, participation charges and other charges seems to clearly include membership dues, and accordingly is not open to construction, if there *is* any doubt about the intent, the failure to adopt Senator Hill's amendment may be considered in resolving the ambiguity. *Builders Land Co. v. Martens*, 1963, 255 Iowa 231, 122 N.W.2d 189. See also *1968 OAG 864* and my caveat thereto at page 870. "In construing statutes the courts search for the legislative intent as shown by what the legislature *said*, rather than what it *should or might have said*." Rule 344(f)(13), Iowa Rules of Civil Procedure. (Emphasis added).

And it must be remembered again that §15 contains a new section, "Applicability of Chapter":

"It is the intent and purpose of this chapter to authorize gambling in this state *only to the extent specifically permitted by a section of* this chapter. . . . " (Emphasis added.)

§8 gambling is not "specifically permitted" — it is prohibited — where

dues are paid for admission. So are §14 social gambling games between individuals prohibited by §14(h) where a participant is required to pay "an entrance fee, cover charge, or other charge for the privilege of participating in gambling, or for the privilege of gaining access to the location in which gambling occurs," even though not on the premises of a liquor licensee or beer permittee! I understand this might make unlawful some duplicate bridge and chess tournaments, as well as other card and parlor games, where participants pay an entry or admission fee for a chance to win a prize.

Moreover, in *State v. Mabrey*, 1953, 244 Iowa 415, 56 N.W.2d 888, a scheme in which patrons of a club paid $2.00 on entering the club and were given a ticket entitling them to a smorgasbord meal, and then they were permitted to play bingo for cash prizes, was held to be unlawful gambling and the operator of such a club was deemed guilty of violation of a statute against keeping of a gambling house. Later it was held, in a second case, that even though some were allowed to enter the premises free, while others paid for their privilege, it was nevertheless unlawful gambling to conduct bingo under the scheme. *State v. Mabrey*, 1953, 245 Iowa 428, 60 N.W.2d 889.

So, in answer to your second question, if you know that a club has a liquor control license or beer permit and charges its members dues, you would be justified in denying the club a license under §8. Such a club owes its members a duty of prohibiting social gambling on its premises.

III

Your third question is whether the holder of a liquor control license or beer permit may own or provide as a participant on his premises any of the games included in §14(2) of SF 496.

Of course, as we have already set forth in Division I of this opinion, a §9 qualified organization which can conduct gambling, including bingo, can own any lawful gambling game and the paraphernalia therefor. And as we have opined, a §8 licensee may qualify for a §9 license.

§3 of SF 496 provides a new subsection to 99B.1, which says:

"A person 'conducts' a specified activity if that person *owns*, promotes, sponsors, or operates a game or activity. A natural person does not 'conduct' a game or activity if the person is merely a participant in a game or activity which complies with section fourteen (14) of this Act."

But under §8, which allows only social gambling on the premises of a liquor licensee or beer permittee, the licensee may not "conduct" the gambling. §8(1)(b) says he may "not participate in, sponsor, conduct or promote, or act as cashier or banker for any gambling activities, except as a participant while playing on the same basis as every other participant."

As long as the §8 licensee does not actually conduct or operate the game, or take any rake-off or profit from it, or participate other than as a player, it is my opinion that he may furnish playing cards or other lawful gambling paraphernalia the same as any other player or participant could lawfully do. The suggestion that a person "owns" a game or activity, and therefore unlawfully conducts the same, which might arise

from a very strict construction of §3, is not supported elsewhere in the law and I think is aimed against "ownership" of a game in the sense that one also promotes, sponsors and operates it for a profit. After all, anyone else could bring such lawful gambling paraphernalia onto the premises for social purposes, whether he plays in the game or not. Any other construction would likely lead to an unenforceable absurdity. Accordingly, your third question is answered in the affirmative.

August 13, 1975

ELECTIONS: Vacancies in Office; Election to Fill. §69.12, Code of Iowa, 1975. A vacancy in the municipal office could not be filled at the regular school election held on the second Tuesday in September pursuant to §277.1, because the municipality under §69.12 would not comprise the "same political subdivision" as the school district. (Haesemeyer to Synhorst, Secretary of State, 8-13-75) #75-8-2

The Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your letter of July 11, 1975, in which you request an opinion of the Attorney General as to whether or not vacancies in municipal offices should be filled at the regular school election in September.

Section 69.12, Code of Iowa, 1975, provides in relevant part:

"When a vacancy occurs in any elective office of a political subdivision of this state, and a method for electing a person to the vacant office for the remainder of the unexpired term is not otherwise provided by law, the vacancy shall be filled pursuant to this section. As used in this section, 'pending election' means any election at which there will be on the ballot either the office in which the vacancy exists, or any other office to be filled or any public question to be decided by the voters of *the same political subdivision.* * * *." (emphasis added)

In our opinion, the words "same political subdivision" at the end of the quoted portion of §69.12, relate back to the earlier uses of the same term in the beginning of the section, i.e., "when a vacancy occurs in any elective office of a political subdivision . . . ." Thus, a vacancy in the municipal office could not be filled at the regular school election held on the second Tuesday in September pursuant to §277.1, because the municipality would not comprise the "same political subdivision" as the school district.

August 15, 1975

SCHOOLS: School buses — §321.373(5)(6). Privately-owned school bus painted national school bus chrome may be used without repainting during temporary periods when not under contractual arrangement with school district. (Nolan to Monroe, State Representative, 8-15-75) #75-8-3

The Honorable W. R. (Bill) Monroe, State Representative: Some time ago you submitted the following question to this office for an opinion:

"Given a situation of ownership by a private party of a bus used during the school year to transport children to or from school, said bus meeting all rules and Laws as to equipment, color, etc., and a proper agreement with a school district for such operation. Can said owner, in spite of subsection 6 of section 321.373 operate that vehicle on any public highway for purposes such as private transportation of adults, not school enrollees, during a period when said bus is not under contract or arrangement with a School district while said bus is still painted the color known as national school bus chrome?"

The section of the Code to which you refer is, in our view, not controlling in this situation since there appears to be no dispute but that the vehicle is a "school bus". Section 321.373(6), Code of Iowa, 1975, provides:

"No vehicle except school buses shall be operated on any public highway if the vehicle is painted the color known as national school bus chrome. . . ."

Under §321.373(5), the following appears, which we believe is more pertinent to your inquiry:

"Vehicles owned by private parties and used as school buses shall have reversed or covered the words 'school bus' wherever they appear on the vehicle when the vehicle is not in use as a school bus. It shall be unlawful to operate flashing stop warning signals on such privately-owned vehicles except as provided in section 321.372."

From this language, we believe it is clear that a privately-owned "school bus" may be used on the public highway while still painted the color known as national school bus chrome and when such bus is not currently transporting children to and from school. We note that even under subsection 6 of §321.373, a person purchasing a vehicle formerly used as a school bus shall have ten days after such purchase to re-paint the vehicle.

It is our view that where a vehicle is operated from year to year for the transportation of children to and from school as a school bus, such vehicle does not fall under the classification of a "vehicle formerly used as a school bus". Accordingly, it is our opinion that such vehicle need not be re-painted to a color other than national school bus chrome during the seasons when school is not in session.

August 18, 1975

LIBRARIES: Regional Library Trustees — Chapter 303B, Code of Iowa, 1975. Regional library trustees are not state officers and ordinarily the Attorney General would not represent them in the case of liability in the absence of some overriding state interest. (Nolan to Porter, State Librarian, 8-18-75) #75-8-4

Mr. Barry L. Porter, State Librarian: This letter is written in response to your inquiry dated January 28, 1975, requesting an opinion on the following question:

"Will the State Attorney General's office represent the Regional Library System in the case of liability? Will this representation cover them as an organization or will it cover the Regional Trustees as individual members?"

The Regional Library System, established under Chapter 303B, Code of Iowa, 1975, creates seven political subdivisions in which trustees are elected by the eligible electors of the seven representative districts. Regional trustees are, therefore, not state officers and ordinarily in the absence of an overriding question of state interest, the Attorney General's Office would not represent these regional trustees in legal matters.

You indicate that the regional trustees are concerned about possible liability in the case of law suits against either the region or the trustees. Under §517A.1, Code of Iowa, 1973, any political subdivision of the

state not otherwise authorized is "impowered to purchase and pay the premiums on liability, personal injury and property damage insurance covering all offices, proprietor functions and employees of such public bodies". We trust this information will delay some of the confusion and provide a helpful start to these new regional organizations.

August 18, 1975

ALCOHOLISM: STATE OFFICERS AND DEPARTMENTS; COURTS: Payment of costs of treating court-referred alcoholics. §§125.2(2), 125.2(6), 125.27, 125.28, 125.30, 321.283(3), 1975 Code of Iowa. The State Division on Alcoholism need not pay the costs of treating a person referred by the District Court to a treatment center pursuant to §321.283(3) after conviction of OMVI, where the center is not approved by the Director of the Division. (Haskins to Voskans, Director, Division on Alcoholism, 8-18-75) #75-8-5

Jeff Voskans, Director, Division on Alcoholism: You ask our opinion as to whether the Iowa Division on Alcoholism must pay the costs of treating a person referred by the District Court to an alcoholism treatment center pursuant to §321.283(3), 1975 Code of Iowa, after conviction of the offense of operating a motor vehicle while under the influence of an alcoholic beverage (OMVI), where the center does not have a contract with the Director of the Division.

§321.283(3) authorizes the court to refer a person convicted of OMVI to an alcoholic treatment facility as defined in §§125.1 to 125.36, 1975 Code of Iowa. §321.283(3) also provides that such a person is to be considered a "state patient" and that the costs of treatment are to be paid in the manner of an alcoholic who has no legal residence in the state. That section states:

"After any conviction for operating a motor vehicle while under the influence of an alcoholic beverage under section 321.281, the court may refer the defendant for treatment at a facility as defined in sections 125.1 to 125.26. The court may prescribe the length of time for treatment or it may be left to the discretion of the facility to which the defendant was referred. A person referred under this section shall be considered a state patient, and charges and costs for treatment shall be paid for in the manner provided for payment for treatment of alcoholics who have no legal residence in this state."

§§125.1 to 125.26 constitute Ch. 125, 1975 Code of Iowa, the Iowa Alcoholism and Intoxication Treatment Act. Under that Act, if an alcoholic has no legal settlement in the state, the entire cost of his treatment is paid by the state. §125.30, 1975 Code of Iowa, states:

"In the event any county to which certification of the cost of care, maintenance, and treatment of an alcoholic is made, disputes that such alcoholic has his legal settlement in that county, it shall immediately notify the facility that such dispute exists. The director shall immediately investigate the facts and determine in which county the patient has legal settlement. The director shall certify his determination to the county wherein it is found the patient has legal settlement and to the facility. The county of legal settlement shall reimburse the facility as provided in this chapter. *If the director finds that the legal settlement of an alcoholic at the time of admission was in another state or country or was unknown, then the division shall pay for that portion of his care, maintenance, and treatment that his county of legal settlement would have been liable to pay.* For purposes of this section, a 'facility' does not

include a mental health institute under the control of the department of social services." [Emphasis added]

Since the Division pays seventy-five percent (75%) of the cost of treating an alcoholic at a facility, *see* §125.27, 1975 Code of Iowa, and the county of his legal settlement normally pays twenty-five percent (25%), *see* §125.28, 1975 Code of Iowa, when no legal settlement in the state exists and the county therefore pays nothing, the Divisin will have to pay one hundred percent (100%) of the costs of treatment. Hence, if the District Court, acting pursuant to §321.283(3), refers a person to an alcoholic treatment "facility", the Division must pay the full costs of treating that person at the facility. But what is crucial here is the meaning of the word "facility". As used in §321.283(3), its meaning is defined by Ch. 125. §125.2(2), 1975 Code of Iowa, defines "facility" as follows:

"'Facility' means a hospital, institution, detoxification center, or installation providing care, maintenance and treatment for alcoholics and *approved by the director* under section 125.13." [Emphasis added]

The word "director" refers to the Director of the Division on Alcoholism. *See* §125.2(6), 1975 Code of Iowa. As can be seen, a hospital, institution, detoxification center, or installation (a "treatment center") must be approved by the Director before it can become a "facility" within the meaning of Ch. 125. Therefore, in order for the Division to be obligated under §321.283(3) to pay the costs of treatment at a treatment center, the treatment center must be approved by the Director so as to become a "facility".

In sum, it is our oponion that the Division on Alcoholism need not pay the costs of treating a person referred by the District Court to a treatment center pursuant to §321.283(3) after conviction of OMVI, where the center is not approved by the Director of the Division.

August 19, 1975

SCHOOLS: Professional Teaching Practices Commission — §272A.4. The cost of obtaining a substitute teacher to replace a commission member attending meetings is not a "necessary expenses" contemplated by §272A.4, Code of Iowa, 1975. (Nolan to Bennett, Director, Iowa Professional Teaching Practices Commission, 8-19-75) #75-8-6

Mr. Don R. Bennett, Director, Iowa Professional Teaching Practices Commission: This is written in response to your request for an opinion on two questions submitted by your letter of June 23, 1975, as follows:

"1. Does section 272A-4 of the 1975 Code of Iowa allow a Commission member to recover monies paid for a substitute teacher, which teacher was secured to permit the member to attend a meeting, hearing or other official function or business of the Commission in accordance with Chapter 272A of the Iowa Code?

"2. If the answer to question number 1 is in the negative, in view of the mandatory duties imposed by chapter 272A of the 1975 Code of Iowa may a school district require a Commission member to pay the expense of a substitute teacher as a condition to releasing that member to attend to such statutory duties?"

It is the opinion of this office that the "necessary expense" of §272A.4 does not include the cost of obtaining a substitute teacher which some

commission members must bear as a consequence of attending commission meetings conducted during the week. Such cost is not an expense of the sort anticipated by the statute. The language "while engaged in their official duties" connotes a reference to expenses incurred by the individuals qua commissioners and not in their individual capacities. Thusly, stenographic assistance at committee meetings would qualify as an "expense while engaged in their official duties" whereas lost profits, baby-sitting expenses, speeding tickets enroute and the like would not qualify merely because they were occasioned contemporaneously with performing one's duties as a commission member. These latter expenses would not qualify because incurred by the commission members in their individual capacities, as are the substitute teacher expenses here in question.

It seems the most logical point at which to draw the line of distinction is between expenses incurred by an individual qua commission member as opposed to his capacity as an individual.

Furthermore, insofar as this interpretation regards the cost of substitute teachers as an actual and/or necessary expense, it is supported by the Oregon experience to which you have referred us in preparing this opinion. The Oregon Teachers Standards and Practices Commission are protected by statutory insulation from being required to pay the cost of a substitute teacher while conducting commission business, this statutory insulation consists of a statute which Iowa does not have. This statute is §342.420(2) Oregon Revised Statutes, which provides:

"A school district required to employ a substitute for a teacher or administrator performing duties as a member of the Teaching Standards and Practices Commission shall be entitled to reimbursement for the district's actual expenses in employing the substitute. Reimbursement for the expense of employing such substitutes shall be made by the Commission from the Teacher Standards and Practices Commission Account."

Evidently, §342.390(2) Oregon Revised Statutes, which provides that a member shall receive "his actual and necessary travel and other expenses incurred in the performance of his official duties", was inadequate to cover the expense of a member's substitute teacher.

Nebraska has apparently likewise determined that "actual expenses" do not include the cost of a substitute teacher incurred by members of their Professional [Teachers] Practices Commission in the course of conducting commission business. Prior to 1973, their relevant Professional Practices Commission statute read (in relevant part): "Members of the Commission shall be reimbursed for their actual expenses incurred". §79-1281, Revised Statutes of Nebraska, 1943, Reissue of 1971. The 1973 amendment to that statute provides (in relevant part):

"Each school district which employs a member of the commission and which is required to employ a person to replace such member during his attendance at meetings of the commission or any committee or subcommittee thereof, shall be reimbursed from the Teacher's Certification Fund for the expense it incurs from employing a replacement."

It would seem that the Nebraska experience has been that the cost of a substitute was not included within the scope of commission members'

actual expenses and that additional legislation was needed to provide such benefit.

Accordingly, it is our opinion that the cost of obtaining a substitute is not an expense covered by §272A.4, Code of Iowa, 1975.

Your second question cannot be answered without more specific information derived from the provisions of contract between the teacher and the school board involved.

August 20, 1975

CRIMINAL LAW: GAMBLING: FUSSBALL TOURNAMENT: §99B.11, Code of Iowa, 1975, as amended by §13, Senate File 496, Acts, 66th G.A., First Session (1975). A private organization may conduct a fussball tournament for profit at the state fair and award prizes without obtaining a gambling license provided such tournament is not held at an "amusement concession" as defined. (Turner to Fulk, Secretary-Manager, Iowa State Fair, 8-20-75) #75-8-7

Mr. Kenneth R. Fulk, Secretary-Manager, Iowa State Fair: You have requested an opinion of the attorney general as to whether a gambling license is required for a fussball tournament at the state fair and in which participants will pay an entry fee of $10.00 each for a chance to win prizes of up to $500. You state that the fussball tournament will be conducted for profit by a private organization which is seeking a gambling license for this purpose.

"Fussball," deriving from the German word "fuss" or "foot" and pronounced and often spelled "foosball" or 'foozball," is a miniature soccer game played on a table by 2 to 4 players (singles or doubles) who manipulate parallel rods extending through sideboards and across the table at regular intervals, with small soccer figures or bats on each rod and so designed to bat or maneuver a ball to a goal at either end of the table. It is unquestionably a game requiring skill, steady nerves and a competitive spirit. It is quite popular with young people and fussball parlors have sprung up all over the country. There is even a magazine dedicated to the sport entitled "Foos News" and designated the official magazine of the World Table Soccer Association (W.T.S.A.).

You question whether a fussball tournament is among the enumerated bona fide contests in §99B.11, Code of Iowa, 1975, as amended by §13, Senate File 496, Acts of the 66th G.A., 1st Session (1975). You recognize that if it is, indeed, a bona fide contest or tournament, no gambling license is required even though the sponsors conducting the tournament profit therefrom. But if it is not such, it may not be lawful whether licensed or not, because, although it may lawfully be played for money by individuals, the promoters may not "conduct" such games and profit therefrom except as players. §14(1)(e), SF 496.

Division III of the Act, entitled "Games For Which a License is Not Required" covers bona fide contests in §13 thereof and says:

"2. A contest is not lawful unless it is one of the following contests:

a. Athletic or sporting contests, leagues or tournaments, rodeos, horse shows, golf, bowling, trap or skeet shoots, fly casting, tractor pulling, rifle, pistol, musket, muzzle-loader, archery and horseshoe contests,

leagues or tournaments.

b. Horse races, harness racing, ski, airplane, snowmobile, raft, boat, bicycle and motor vehicle races.

c. Contests or exhibitions of cooking, horticulture, livestock, poultry, fish or other animals, artwork, hobbywork or craftwork, except those prohibited by section seven hundred twenty-six point seven (726.7) of the Code."

Ordinarily, in construing statutes, when there is an enumeration or list of specific items, anything not included in the list is considered as excluded. Expressio unius est exclusio alterius. Express mention in a statute of one thing implies the exclusion of others. *In re Wilson's Estate*, 1972 Iowa, 202 N.W.2d 41, *Dotson v. City of Ames*, 1960 Iowa, 101 N.W.2d 711, 251 Iowa 467.

Thus, in listing rodeos, horse shows, golf, bowling, trap or skeet shoots, fly casting, tractor pulling, rifle, pistol, musket, muzzleloader, archery and horseshoe contests, leagues or tournaments, it might superficially appear that such things as ping-pong tournaments, frisbee tournaments, billiard tournaments, fussball tournaments, darts or other games which require muscular coordination, strength, speed, physical stamina, endurance, agility, a keen eye or a steady hand, might be excluded. The legislature neglected to say why the specific athletic or sporting contests, leagues or tournaments were listed; whether they were to be the only such allowed or whether they were considered "included but not limited to."

A "sport," according to *Webster's 3rd New International Dictionary* is "1 a: something that is a source of pleasant diversion: a pleasing or amusing pastime or activity: RECREATION (spent the afternoon in sport and play) d: a particular play, game, or mode of amusement: as (1): a diversion of the field (as fowling, hunting, fishing, racing, or athletic games); also: any of various games (as bowling, rackets, basketball) or comparable diversions usu. played under cover (2): a game or contest esp. when involving individual skill or physical prowess on which money is staked."

A harness race, involving both persons and horses was held a "sporting contest" within the meaning of a statute prohibiting bribery in a sporting contest as a contest between individual contestants. *U.S. v. Pinto*, C.A. N.Y., 503 F2d 718, 724 (1974).

In my opinion, the words "Athletic or sporting contests, leagues or tournaments," are inclusive of all of the other words in §13(2)(a) and (b). In other words, it appears to me that everything after the words "Athletic or sporting contests, leagues or tournaments" in subparagraphs (a) and (b) is exemplary only, if not superfluous or redundant. "Athletic or sporting contests, leagues or tournaments," is inclusive of all the specifically enumerated contests, leagues or tournaments and the expressio unius doctrine would operate to render the broader terms "athletic or sporting" meaningless. All are one or the other, either athletic or sporting. So are "horse races, harness racing, ski, airplane, snowmobile, *raft*, boat, bicycle and motor vehicle races," as listed in sub-paragraph (b). Surely the legislature did not intend to include "raft races" as lawful but

to exclude hydroplane and canoe races, sailing regattas, sack races, soap box derby races, skating races, and other athletic events of a similar nature in which an entry fee might be paid for a chance to win a prize. Noscitur a sociis. 73 Am. Jur.2d 406, Statutes §213. The word "races," if not included within "contests," would have sufficed for all races listed in sub-paragraph (b) and all other conceivable races unless the legislature intended some mysterious, inscrutable or absurd limitation on kinds of races.

In sum, it is my opinion that a fussball tournament may be conducted at the state fair as a bona fide contest under §99B.11 of the Code as amended by §13, SF 496 if it is not held at an "amusement concession," a defined term in the Act. §99B.1, as amended by §3, SF 496. §13(1)(a), which amends §99B.11, requires that "the contest is not held at an amusement concession."

August 21, 1975

COUNTIES: County Officers. §§341A.7, 748.3, Chapter 80B, Code of Iowa, 1975. Chief deputy sheriff is not included in coverage of law providing civil service for deputy sheriffs but as a peace officer is entitled to obtain training at law enforcement academy. (Nolan to Poncy, State Representative, 8-21-75) #75-8-8

The Honorable Charles N. Poncy, State Representative: By letter of June 9, 1975, you have submitted the following question for the opinion of the attorney general:

"The deputy Sheriff's at the present time are covered by Civil Service. Several years ago, to provide for professional law enforcement officers, the General Assembly adopted Civil Service for the deputies of the Sheriff's department.

"The question is whether the Chief Deputy is also covered under this umbrella?"

The answer to this question is found in §341A.7, Code of Iowa, 1975, in the following language:

"The classified civil service positions covered by this chapter shall include persons actually serving as deputy sheriffs who are salaried pursuant to section 340.8, *but do not include a chief deputy sheriff, two second deputy sheriffs in counties with a population of more than one hundred thousand, and four second deputy sheriffs in counties with a population of more than two hundred thousand.* A deputy sheriff serving with permanent rank under this chapter may be designated chief deputy sheriff or second deputy sheriff and retain such rank during the period of his service as chief deputy sheriff and shall, upon termination of his duties as chief deputy sheriff, revert to his permanent rank."

Although the chief deputy sheriff is not covered under the civil service provisions of Chapter 341A of the Code, such deputy is included in the designation of "peace officers" under §748.3 of the Code and also as a "law enforcement officer" under the provisions of Chapter 80B, which provides for specialized training to upgrade law enforcement in this state to a professional status. Accordingly, a chief deputy sheriff is eligible to obtain training at the law enforcement academy, although it is not required under the provisions of the county civil service law.

August 29, 1975

CITIES AND TOWNS: Conflict of Interest — §362.5, Code of Iowa, 1975. A contract entered into in violation of §362.5 of the Code is void. (Blumberg to Mayer, Ombudsman, 8-29-75) #75-8-9

Mr. Thomas R. Mayer, Ombudsman, Office of the Citizens' Aide: We have received your opinion request regarding a conflict of interest. You wish to know whether it is a conflict of interest for an officer of a local telephone company who owns approximately twenty percent of the company to be on the city council of a city doing business with the company. You indicated that this is the only telephone company doing business in the city.

The facts presented to us do not suggest a situation where the council member would not be entitled to continue in his elected position. We can find nothing to indicate an incompatibility of positions. See, *State ex rel. Le Buhn v. White*, 1965, 257 Iowa 606, 133 N.W.2d 903; and, *State ex rel. Crawford v. Anderson*, 1912, 155 Iowa 271, 136 N.W. 128. However, these facts may constitute a conflict of interest pursuant to §362.5 of the Code.

That section provides that a city officer shall not have either a direct or indirect interest in any contract or job of work or material or the profits thereof or services to be furnished or performed for the city. A contract entered into in violation of the section is void. There are listed ten exceptions to this general rule. Of particular importance are those dealing with contracts made upon competitive and open bidding in cities of less than three thousand population; contracts where the city officer has an interest solely by reason of employment and/or a stock interest of less than five percent, if made by competitive bidding, if the employees remuneration will not be directly affected by the contract, and if the employee's duties do not directly involve the procurement or preparation of the contract; and, a contract with a corporation where a city officer has an interest by stockholding, direct or indirect, of less than five percent.

From your fact situation it is apparent that the last above-stated exception is not applicable. However, we cannot conclusively state whether the first two are applicable since we do not know whether there was competitive bidding, nor whether the officers remuneration was affected or if he assisted in the procurement or preparation of the contract. The fact that he owns twenty percent of the company may place him outside the exceptions, although the exceptions speak only of stockholdings, and there may be no stock of the company.

The purpose of this section and its predecessors is to protect the public from public officers who would profit personally from their place of advantage in government. *Leffingwell v. City of Lake City*, 1965, 257 Iowa 1022, 135 N.W.2d 536. Thus, public officers cannot recover for such services. *State ex rel. Cochran v. Zeigler*, 1925, 199 Iowa 392, 202 N.W. 94. Therefore, if the contract in question does not fall within one of the exceptions to §362.5, it is void.

September 2, 1975

CITIES AND TOWNS: Financing of Industrial Projects. §§4.1, 4.5 and 419.1(2), Code of Iowa, 1975; §1, Senate File 526, Acts, 66th G.A., 1st (1975). Section one of S.F. 526, which struck the word "selling" from §419.1(2) of the Code, applies retrospectively. Municipalities that have not completed the issuance of bonds for retail stores will lack statutory authority to do so from and after the effective date of the amendment. (Blumberg to Perkins, Koogler, State Representatives, and Van Gilst, State Senator, 9-2-75) #75-9-1

Honorable Carroll Perkins and Honorable Fred L. Koogler, State Representatives; Honorable Bass Van Gilst, State Senator: We have received your opinion request of June 19, 1975, regarding Chapter 419 of the Code. You ask whether the amendment of §1, Senate File 526, 66th General Assembly, to Chapter 419 is applicable to proceedings of city councils started prior to the effective date of the amendment, but not completed as of that time.

Chapter 419 provides for municipal support of industrial projects, including the power to issue bonds. Section 419.1(2), 1975 Code, provided in pertinent part:

" 'Project' means all or any part of, or any interest in, (a) any land, buildings or improvements, whether or not in existence at the time of issuance of the bonds issued under authority of this chapter, which shall be suitable for the use of any voluntary nonprofit hospital, clinic or health care facility as defined in section 135C.1, subsection 8, or of any private college or university, whether for the establishment or maintenance of such college or university, or of any industry or industries for the manufacturing, processing or assembling of any agricultural or manufactured products, even though such processed products may require further treatment before delivery to the ultimate consumer, or of any commercial enterprise engaged in storing, warehousing, distributing or *selling* products of agriculture, mining or industry including but not limited to barge facilities and river-front improvements useful and convenient for the handling and storage of goods and products. . . ." [Emphasis added]

Based upon that section, and more specifically the underscored word "selling", this office issued an opinion of June 2, 1975, #75-6-1, that retail department or discount stores fell within the purview of that Chapter.

After the issuance of that opinion the Legislature adopted §1, S.F. 526 which struck the word "selling" from §419.1(2). Thus, the provisions of Chapter 419 will no longer be available to retail discount stores. However, your question goes further than this. It is whether the applicable section of S.F. 526 applies retrospectively to those municipalities which may have begun proceedings prior to the effective date of the amendment.

Section 4.5 of the Code provides that statutes are presumed to be prospective in their operation unless expressly made retrospective, and is a codification of the common law. See, *Monticello v. Adams*, 200 N.W.2d 522 (Iowa 1972); *Needham Packing Co. v. Iowa Employment Security Comm'n.*, 1963, 255 Iowa 437, 123 N.W.2d; *Manilla Community School Dist. v. Halverson*, 1960, 251 Iowa 496, 101 N.W. 705; *Grant v. Norris*, 1957, 249 Iowa 236, 85 N.W.2d 261; and *Young v. O'Keefe*, 1957, 248

Iowa 751, 82 N.W.2d 111. However, it should be noted that this is only a presumption that may be rebutted. Such a rebuttal may come from ascertaining the intent of the Legislature. *Young v. O'Keefe*, supra; *In re Town of Avon Lake*, 1958, 249 Iowa 1112, 88 N.W.2d 784; and, *Appleby v. Farmers State Bank of Iowa*, 1953, 244 Iowa 288,56 N.W.2d 917. Courts interpreting such statutes will look at the language, consider the evil to be remedied, and consider whether there was a previous statute governing or limiting the mischief which the new act is intending to remedy. *In re Town of Avon Lake*, supra.

In *Town of Avon Lake* an attempt was made to incorporate Avon Lake. A petition for incorporation was filed in the District Court on March 16, 1957. Thereafter an election on the proposal was held, with the resulting vote in favor of incorporation. However, the Court set aside the election because of an irregularity. A second election was held on July 1, 1957, with the same result as the previous election. The Court, on August 29, 1957, voided the election on another irregularity and dismissed the petition. On July 4, 1957, an amendment to the then existing Chapter on incorporation became effective. That amendment provided:

"All territory within three (3) miles of the corporate limits, as the same now exist or may hereafter be established, of any city having a population of fifteen thousand (15,000) or more is hereby declared to be an urbanized area. No territory within said urbanized area shall hereafter be incorporated as a city or town, and the district court shall have no jurisdiction to take any action upon a petition to incorporate a municipality within said area."

The Court applied the above rules of statutory construction and found that the obvious legislative intent was to prevent cities from being limited in their expansion. In addition, prior to the amendment there was no existing law which in any way prevented or remedied this evil. Thus, the Court held that the statute operated retrospectively and affirmed the dismissal of the petition. See also, *Appleby*, supra.

Other Iowa cases have held certain statutes to be prospective only. In *Grant v. Norris*, supra, the statute was held to prospective only because of a saving clause within it. In *Manilla Community School District v. Halverson*, supra, and *Monticello v. Adams*, supra, the amendments altered the voter qualification or eligibility for certain elections. Those amendments were held to be prospective only. *Town of Avon Lake*, was specifically distinguished from those fact situations. The Court interpreted the amendment, in *Manilla*, to be one of clarification rather than an outright repeal. And, in *Monticello*, the amendment did not attempt to restrict or deny any actions.

Section one of Senate File 526, however, does operate more as a repeal than a clarification. The Legislature was attempting to prohibit municipalities from providing assistance to purely retail stores. Retrospectivity is not expressed by specific statutory language. However, that is not necessary. As stated in *Monticello*, citing to 82 C.J.S. *Statutes* §415 at 990-992, statutes are presumed to be prospective only unless the contrary clearly appears or is very clearly, plainly, and unequivocably expressed, *or necessarily implied*. And, as expressed in *Town of Avon Lake*, no good reason appears why the Legislature should have intended to abate only part of the mischief apprehended rather than all of it. Even if we

were to apply the provisions of §4.1 of the Code regarding the repeal of a statute, that rule of construction only applies if not inconsistent with the intent of the Legislature. See, *Town of Avon Lake.*

Accordingly, we are of the opinion that §1 of S.F. 526 operates retrospectively. Therefore, as of the effective date of the amendment those municipalities which have not completed the process of issuing bonds for assistance to retail stores will no longer have statutory authority to complete the process.

September 2, 1975

CITIES AND TOWNS: City Utility Boards — Sec. 38A, Art. III (Amend. 25, 1968) Iowa Const., §§39.3, 364.1, 388.2, 388.3 and 388.7, Code of Iowa, 1975. A city council may, by resolution or ordinance, increase the membership of a city utility board from three to five. (Blumberg to O'Halloran, State Representative, 9-2-75) #75-9-2

Honorable Mary O'Halloran, State Representative: We have received your opinion request of August 27, 1975. You ask whether a city council may increase the membership of a municipal utility board by a resolution or ordinance, or may do so only by an election. The board in question is a holdover from before the effective date of the new city code, and consists of three members. The council wishes to increase this number to five members.

Section 388.2, 1975 Code, provides that a proposal of a city to establish, acquire, lease or dispose of a city utility in order to undertake or discontinue the operation of a utility, or the proposal to establish or dissolve a combined utility system, or the proposal to establish or discontinue a utility board is subject to an election. The proposal for the establishment of a board must specify either three or five members. Section 388.3 provides that upon approval by the voters the mayor shall appoint the board members. Finally, §388.7 states that a utility board existing at the time of the new city code shall continue to function with all powers granted by the chapter until discontinued, pursuant to the chapter.

Chapter 39 of the Code controls on the questions of elections. Section 39.3(3) defines "general election" to mean the election for national or state officers, members of Congress and the legislature, county and township officers, and for the choice of other officers *or the decision of questions as provided by law.* "Special election" is defined in §39.3(7) as any other election held for any purpose *authorized or required by law.* The type of election mandated in §388.2 can be either part of a general election or special election, dependent upon when the election is held. Pursuant to Chapter 39 elections can only be held as authorized by that section, succeeding sections of the Code or any constitutional provision.

The type of election you refer to has no authority anywhere. Chapter 388 does not speak to elections solely to increase board membership. Nor can we find such an indication or authorization anywhere else. Accordingly, such a election is not permitted.

That leaves us with the issue of how such a measure can be accomplished. Section 388.2 specifically provides for board memberships of five. Thus, there is no prohibition against your board comprising five members. The concept of Home Rule is that cities are allowed to do whatever is necessary or proper for the health, safety, welfare and conven-

ience of its residents as long as the same is not specifically prohibited or in conflict with another law. See §364.1 and Amendment 25 of 1968 to Article III of the Iowa Constitution. There is no prohibition preventing a city from increasing the membership of a utility board. Employing the concept of Home Rule leads us to the conclusion that a city council may provide for the increased membership of a utility board, and may so do by resolution or ordinance. We are not, however, expressing any opinion whether a city utility board may have over five members.

Accordingly, we are of the opinion that a city council may, by resolution or ordinance, increase the membership of a utility board from three to five.

September 3, 1975

STATE OFFICERS AND DEPARTMENTS; APPOINTMENTS; VACANCIES; Natural Resources Council — §§2.32, 69.1, 69.2, 455A.4, 455A.5, 1975 Code of Iowa. 1) Incumbent members of Council whose reappointment to regular six-year terms was either rejected or considered and deferred by the Senate continue to serve as holdover members upon requalifying by filing oath of office and bond. 2) Person whose appointment to a regular six-year term was rejected by the Senate may not serve and is ineligible for appointment to an interim term. 3) Person whose appointment to fill the remainder of an unexpired term was submitted while General Assembly was in session and Senate took no action thereon may not serve thereunder but is eligible for appointment to an interim term. (C. Peterson to McMurry, Director, Iowa Natural Resources Council, 9-3-75) #75-9-3

Mr. Othie R. McMurry, Director, Iowa Natural Resources Council: Reference is made to your request for an opinion of the Attorney General as to the status of persons appointed or reappointed to membership on the Iowa Natural Resources Council.

You furnished information concerning the appointments as follows:

1. Hugh A. Templeton was reappointed for a regular six-year term beginning July 1, 1975, and filed his oath of office and bond. No final action or confirmation was taken by the Senate in the 66th General Assembly, 1st Session, 1975, prior to its adjournment, although the Senate had opportunity to do so.

2. Mabel E. Miller was reappointed for a regular six-year term beginning July 1, 1975, and filed her oath of office and bond. Her appointment was disapproved by the Senate.

3. Richard R. Ayres was appointed for a regular six-year term beginning July 1, 1975, to replace J. Justin Rogers whose term expired June 30, 1975. The Ayres appointment was disapproved by the Senate. Mr. Rogers did not file an oath of office or bond with respect to membership on the Council after June 30, 1975.

4. John T. Pelton was appointed to fill a vacancy created by the resignation of Lee Feil, which term ends June 30, 1977. At Mr. Pelton's request, his appointment was withdrawn and Mrs. Joyce Repp was appointed. She filed her oath of office and bond. The Senate did not consider the Repp appointment, although there was opportunity prior to adjournment.

Specific to the Resources Council are the following provisions of the Code of Iowa, 1975:

"455A.4 *Appointment.* The council shall consist of ten members, nine of whom shall be electors of the state of Iowa and shall be selected from the state at large solely with regard to their qualifications and fitness to discharge the duties of office without regard to their political affiliation. The tenth member shall be the executive director of the department of environmental quality or his designee, who shall be a nonvoting member. The appointive members of the council shall be appointed by the governor with the approval of two-thirds of the members of the senate and shall be appointed for overlapping terms of six years. The terms of three members of the council shall expire on July 1 of each odd-numbered year. Within sixty days following the organization of each biennial regular session of the general assembly, appointments shall be made of successors to members of the council whose terms of office shall expire on the first of July next thereafter and of members to fill the unexpired portion of vacant terms.

"455A.5 *Vacancies.* Vacancies occurring while the general assembly is in session shall be filled for the unexpired portion of the term as full-term appointments are filled. Vacancies occurring while the general assembly is not in session shall be filled by the governor but such appointments shall terminate at the end of thirty days after the convening of the next general assembly."

Also, Sections 2.32, 69.1, and 69.2 state, in pertinent part:

"2.32 *Confirmation of appointments — rejected nominees not eligible.* When the nomination of a public officer is required to be confirmed by the senate, the nomination shall not be considered by the senate until it shall have been referred to a committee of five senators who shall, if possible, represent different political parties. The committee shall be appointed by the president of the senate, without motion, and shall report to the senate. The consideration of the nomination by the senate shall not be made on the same legislative day on which the nomination is so referred, unless it be the last day of the session. When a nomination has been so considered by the senate and approval has been refused, the nominee shall not be eligible for an interim appointment to any position requiring confirmation by the senate, prior to the convening of the next regular session of the general assembly.

"69.1 *Holding over.* Except when otherwise provided, every officer elected or appointed for a fixed term shall hold office until his successor is elected and qualified, unless he resigns, or is removed or suspended, as provided by law.

"69.2 *What constitutes vacancy.* Every civil office shall be vacant upon the happening of either of the following events:

1. A failure to elect at the proper election, or to appoint within the time fixed by law, unless the incumbent holds over.

2. A failure of the incumbent or holdover officer to qualify within the time prescribed by law . . ."

We are, therefore, of the opinion that Mrs. Miller and Mr. Templeton, having duly requalified, continue as holdover members of the Council under the provisions of §69.1.

In *Downing v. Cree*, 1922, 195 Iowa 57, 190 N.W. 36, the Iowa Supreme Court held no vacancy occurs from failure to elect a successor at the time designated by law when, by law, an incumbent does in fact hold over.

In the great majority of jurisdictions, it has been held that during the period in which a public officer holds over after the expiration of his

fixed term, under constitutional or statutory authority to do so until election or appointment and qualification of a successor, there is no vacancy in that office which may be filled by interim appointment. (See Anno: 164 ALR 1248).

In an opinion issued June 19, 1963, this office concluded that no vacancy existed on the Board of Control or the Highway Commission upon the expiration of fixed terms providing the incumbents requalified as holdover officers.

Under the authorities cited above, we are of the opinion that a vacancy exists on the Council with respect to the term of J. Justin Rogers inasmuch as he has not requalified as a holdover and the appointment of his successor was rejected by the Senate.

The appointment of Joyce Repp was made to fill a vacancy created by the resignation of Lee Feil. Her appointment was made late in the 1975 session and no action thereon of any kind was taken by the Senate. Since her appointment to the unexpired term was submitted while the General Assembly was in session and the Senate did not give confirmation, Mrs. Repp has not fully qualified to serve. See opinion of the Attorney General, Nolan to Ray, Governor of Iowa, August 11, 1969. However, since the Repp appointment was never considered by the Senate, the proscriptions of §2.32 do not apply, and she is eligible for appointment to an interim term.

September 3, 1975

CONSTITUTIONAL LAW; GOVERNOR; ITEM VETO. Art. III, §16, as amended by the 27th Amendment to the Const. of Iowa, 1968. §7, House File 898, 66th G.A., 1st Session, 1975. The Governor's disapproval of §7 of HF 898, was a proper exercise of his item veto power, §7 being a severable item, including an appropriation, all of which was disapproved. (Turner to Tieden, State Senator, 9-3-75) #75-9-4

Honorable Dale L. Tieden, State Senator: You have requested an opinion of the Attorney General as to whether Governor Ray properly exercised the item veto power in excising §7 of House File 898, Acts of the 66th General Assembly, 1st Session, 1975, an appropriations act to various state agencies for capital improvements and various other purposes. The purpose of §7 was to provide the state conservation commission with funds and power to make "annual payments to school districts in such amounts sufficient to pay school taxes on [state] lands acquired" for purposes of the Conservation Commission under statutory power of acquisition. §7 further provided a method for appropriation of the funds necessary to make these "tax-equivalent" payments.

In its entirety, §7 provided:

"The state conservation commission shall make annual payments to school districts in such amounts sufficient to pay school taxes on lands acquired under the provisions of the Acts of the Sixty-fifth General Assembly, chapter seventy-four (74), 1973 Session, and under the authority of any other Act of the general assembly which authorizes the acquisition of land which would otherwise be subject to the levy of school taxes. There is appropriated annually from the general fund of the state from funds not otherwise appropriated to the state conservation commission an amount sufficient to make the payments provided for in

this section. The state comptroller shall administer the funds appropriated by this Act and shall administer the program established by this section. The state conservation commission shall cooperate with the state comptroller in order to provide information necessary to carry out the provisions of this section."

On July 18, 1975, Governor Robert D. Ray approved HF 898 "except the item designated as §7" which he disapproved for reasons set forth in a veto message which he attached to the bill and filed with the Secretary of State on that date.

In my opinion, Governor Ray's disapproval of §7 was a proper exercise of the item veto power granted him by the 27th Amendment to the Constitution of Iowa in 1968 and which provides as follows:

"Item veto by Governor. The Governor may approve appropriation bills in whole or in part, and may disapprove any item of an appropriation bill; and the part approved shall become a law. Any item of an appropriation bill disapproved by the Governor shall be returned, with his objections, to the house in which it originated,or shall be deposited by him in the office of the Secretary of State in the case of an appropriation bill submitted to the Governor for his approval during the last three days of a session of the General Assembly, and the procedure in each case shall be the same as provided for other bills. Any such item of an appropriation bill may be enacted into law notwithstanding the Governor's objections, in the same manner as provided for other bills."

§7 was one of many parts or items of an appropriation bill submitted to the Governor for his approval during the last three days of the session and something which could be "lifted bodily from it rather than cut out" without doing damage "to the surrounding legislative tissue" or leaving any "scar tissue [resulting] therefrom." *State ex rel Turner v. Iowa State Highway Commission,* 1971 Iowa, 186 N.W.2d 141, 151.

Governor Ray's disapproval was not merely disapproval of a condition, limitation, restriction or proviso on an appropriation, but rather a disapproval of that specific item of appropriation in its entirety, limitations and all. In this respect, the item veto was clearly distinguishable from those such vetoes held improper in the recent decision of our Iowa Supreme Court in *Welden v. Ray,* decided May 12, 1975, 229 N.W.2d 706, and those in a recent opinion of the attorney general, Turner to Senator Lamborn, June 12, 1975. See also 1970 OAG 154.

Incidentally, on July 8, 1975, I advised Governor Ray by letter that HF 898 was one of 12 bills of the 66th General Assembly which appeared to contain more than one subject matter in violation of Art. III, §29, Constitution of Iowa. Therein, I requested that he give consideration to using his "item veto power on those provisions which can be excised without damage to surrounding tissue." §7 probably included such unconstitutional additional subject matter and might properly have been vetoed for that reason alone. But Governor Ray faced the issue squarely on its merits and based his item veto upon sound legislative policy considerations which are well and clearly expressed in his letter of disapproval. Whether one agrees with the wisdom of his views, they seem persuasive, command respect and are certainly well within his constitutional prerogative in any event. The widsom of a veto is not open to judicial consideration.

September 4, 1975

COUNTY OFFICERS: Responsibility for property found on the body of a deceased person — §§339.7 and 339.11, Code of Iowa, 1975. Property pertinent to the autopsy made by a county medical examiner should be identified and inventoried in his report then in discretion of the medical examiner having "charge of the body" it may be turned over to the sheriff for appropriate disposition. (Nolan to Greenfield, Guthrie County Attorney, 9-4-75) #75-9-5

Mr. C. F. Greenfield, Guthrie County Attorney: You requested an opinion on the matter of the responsibility of a county medical examiner concerning valuables and cash possessions taken from the body of a decedenet. Further, according to your letter, the Guthrie County Sheriff's Office is of the opinion that it is the sheriff's job to obtain property or money found on a deceased person and turn such items over to the family. You have asked that Code §§339.7 and 339.11, Code of Iowa, 1975, be reviewed in order that the medical examiner and the sheriff's office may be advised as to who takes care of the valuables and cash possessions of the decedent whose body the county medical examiner is called to examine.

It appears that a number of other states specifically vest the duty of disposal of property found on a deceased person in a named officer. Volume 18 of Corpus Juris Secundum, Section 25 on coroners, at page 302, states:

"If money or other property is found on the body, it is the obvious duty of the coroner to make an inventory thereof and to take it into his possession, after which he must then turn it over to the public officer appointed by law to be the custodian thereof. If the true owner of the property appears and makes due demand and proof of ownership it is the duty of the coroner, as provided by statute, to deliver it to him."

Under Chapter 339 of the Iowa Code, the county medical examiner is given the primary responsibility for conducting investigations of deaths effected with public interest. Under §339.4 it is the duty of the county medical examiner to "take charge of the body". It is not an unreasonable exercise of duties imposed upon the county medical examiner by Chapter 339 for him to entrust property taken from the body of the deceased to the sheriff for disposition in accordance with the statutory provisions.

Accordingly, it is the view of this office that determination of the question depends upon whether or not the property found on or near the body of the deceased is essential to the autopsy made by the medical examiner. Assuming that such property is pertinent to the examination, then it should be identified and inventoried in the medical examiner's report prior to any further disposition. This being done, the property may, in the discretion of the medical examiner, be turned over to the sheriff to be held until claimed by persons entitled to it, or to be held as evidence of the commission of a crime, or turned over to the clerk of court, pursuant to §339.11.

September 4, 1975

CONSTITUTIONAL LAW: Collective bargaining for Public Employees. Section 20.22(9), Code of Iowa, 1975. Legislature may delegate legis-

lative authority to provide for binding arbitration of impasse or deadlocked items in collective bargaining between public employers and employees provided sufficient safeguards are present in statute. (Beamer to Vander Hart, Assistant Buchanan County Attorney, 9-4-75) #75-9-6

Mr. Allan W. Vander Hart, Assistant Buchanan County Attorney: Reference is made to your request for an opinion in which you ask the following question regarding the constitutionality of Iowa's Public Employment Relations Act:

"This request specifically concerns Section 22 of the Act, providing for binding arbitration of impasse or deadlocked items in collective bargaining between public employers and employees. The question appears to be whether legislation permitting an arbitrator or arbitration board to settle impasse items between a public employer, such as a school board, and employees, such as teachers, is an undue delegation of legislative power."

The Iowa Public Employment Relations Act, Chapter 20, 1975 Code of Iowa, was established by Chapter 1095, Acts of the 65th G.A., Second Session. The judicial impetus for such adoption came in the decision of *State Board of Regents v. United Packing House Food and Allied Workers*, 175 N.W.2d 110 (Iowa 1970). It was in this ruling that the Iowa Supreme Court noted that if the legislature desired to give public employees the advantages of collective bargaining, it should be done by specific legislation to that effect. In this regard the Court said at pages 113-114 of the decision:

"The power to fix the terms and conditions of public employment is a legislative function, which with proper guidelines from the legislature, can be delegated to its administrative agencies."

Generally, the constitutional prohibition against delegating legislative powers to administrative boards is given a liberal interpretation in favor of constitutionality of legislation. When the legislature has declared a policy which is definite in the subject it covers and definite in the character of the regulation to be imposed, it may delegate to a non-legislative board the power to make rules and regulations for effectuating such policy. *Miller v. Schuster*, 1940, 227 Iowa 1005, 289 N.W. 702; *State v. Van Trump*, 1937, 224 Iowa 504, 275 N.W. 569.

In *Miller*, the court held that there was a valid delegation of power where the standards set by the legislature were sufficiently defined and definite. In *Elk Run Telephone Co. v. General Telephone Co.*, 1968 Iowa, 160 N.W.2d 311, it was held that power could be delegated to an administrative body to fill in the details of a statute if there were sufficient standards and guidelines. Therefore, it is the general rule in delegating powers that the legislature must set out a policy and guidelines within which the policy will be effectuated, and the agency or body must not be vested with uncontrolled discretion. See, *Burlington Trans. Co. v. Iowa State Commerce Commission*, 1947, 230 Iowa 570, 298 N.W. 631; *Lewis Consol. School District v. Johnston*, 1964, 256 Iowa 236, 127 N.W.2d 118; *State v. Rivera*, 1967, 260 Iowa 320, 149 N.W.2d 127; *Goreham v. Des Moines Met. Solid Waste*, 1970, 179 N.W.2d 449; *Board of Regents v. Lindquist*, 1971 Iowa, 188 N.W.2d 320.

In *Goreham v. Des Moines Met. Solid Waste Agency*, supra, the court stated the following at pages 454-455:

"If such power is derived from the State Legislature, is adequately guidelined and does not violate the separation of powers provision of the State Constitution set forth should be sustained."

Further, the court stated at page 455:

"Generally, when the legislature has adequately stated the object and purpose of the legislation and laid down reasonably-clear guidelines in its applications, it may then delegate to a properly-created entity the authority to exercise such legislative power as is necessary to carry into effect that general legislative purpose."

In *Danner v. Hass*, 1965, 257 Iowa 654, 134 N.W.2d 534, one of the issues was whether there was an illegal delegation of legislative power to an administrative body to decide what would constitute a serious violation for purpose of motor vehicle license revocation. The question was whether the words "serious violation" were a sufficient guide or standard. The court held that those words were a sufficient guideline, and the statute was not unconstitutional on those grounds.

In *Brotherhood of Loc. Fire & Eng. v. Chicago B. & Q. R. Co.*, 225 F.Supp. 11 Aff. 331 F.2d 1020, 118 U.S. App. D.C. 100, Cert. den. 84 S.Ct. 1181, 377 U.S. 918, 12 L.Ed.2d 187 and 84 St. 1182, 377 U.S. 918 12 L.Ed.2d 197 (1964), the court held the following standards were fully adequate to save a statute from a successful challenge on the grounds of indefiniteness. "Adequate and safe transportation service to the public"; "interests of the carrier and employees affected"; "due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation".

Section 20.22(9), 1975 Code of Iowa, provides that the arbitrators shall consider the following factors in their deliberations:

a. Past collective bargaining contracts between the parties including the bargaining that led up to such contracts.

b. Comparison of wages, hours and conditions of employment of the involved public employees with those of other public employees doing comparable work, giving consideration to factors peculiar to the area and the classifications involved.

c. The interests and welfare of the public, the ability of the public employer to finance economic adjustments and the effect of such adjustments on the normal standard of services.

c. The power of the public employer to levy taxes and appropriate funds for the conduct of its operations.

These factors are sufficient guidelines in view of the standards and guidelines discussed in the above cases which have been held to be adequate.

Federal Acts providing for compulsory arbitration have repeatedly withstood constitutional challenges. *Louisville and Nashville Railroad Co. v. Bass*, 328 F.Supp. 732 (W.D. Ky. 1971); *Brotherhood of Loc. Fire & Eng. v. Chicago B. & W.R. Co.*, supra; *Natl. Labor Rel. Board v. Botany Worsted Mills*, 133 F.2d 876 (3rd Cir. 1943); *Brown v. Roofers & Waterproofers Union*, 86 F. Supp. 50 (N.D. 1949).

In *Brotherhood of Locomotive Fireman and Enginemen v. Chicago B. & O. R. Co.*, supra, the Court upheld the power of Congress to provide for compulsory arbitration of a dispute over the use of locomotive firemen and over the make up of train crews. The court noted, at page 22, the basis for its decision:

"Counsel for the plaintiffs attempt to distinguish the two statutes in that the 1916 Act involved in the Wilson case was a legislative decision as to hours and wages, whereas in the Act here involved, the Congress delegated to a board the power to make the determination. It requires no argument, however, to demonstrate that Congress has the authority to delegate its legislative power in this respect to administrative agencies. It has done so in respect to various fields, such as carriers, to the Interstate Commerce Commission; electric power, to the Federal Power Commission; radio and television to the Federal Communications Commission, and the like.

"The suggestion was made during the oral arguments that compulsory arbitration was a far reaching innovation. This contention is hardly accurate. The Railway Labor Act, by the creation of the National Railroad Adjustment Board and the powers conferred on it, in fact, provided for compulsory arbitration of minor disputes between carriers and labor organizations as far back as 1926, 45 U.S. Code, §153. Countless proceedings have been conducted under it over the years."

In *Louisville and Nashville Railroad Co. v. Bass*, supra, and *City of Biddeford v. Biddeford Teachers Association*, 304 A.2d 387 (Me. 1973), the issue presented was whether the statute permitted delegation of legislative authority to arbitrators who were not public officials. The court held that the legislature had such power but found the statute unconstitutional on the ground that the legislature failed to set forth adequate guidelines to the parties (arbitrators) to whom the authority was delegated. Thus, one can infer that had the legislature set guidelines on the arbitrators, the statute would have met the constitutional requirements. In *State v. City of Laramie*, 437 P.2d 295 (Wyo. 1968), the Wyoming Supreme Court upheld a binding arbitration law and dismissed the argument that compulsory and binding arbitration was an unconstitutional delegation of legislative authority.

In the Michigan case of *Dearborn Fire F.U. Loc. No. 412 v. City of Dearborn*, 201 N.W.2d 650 (Mich. App. 1972), the court rejected a constitutional attack by the City on a statute providing for compulsory arbitration of disputes concerning firemen and policemen. See also *Hjelle v. Sornsin Construction Company*, 173 N.W.2d 431 (N.D. 1969), when the court upheld a statute providing for compulsory arbitration of controversies arising out of contracts with the highway commission.

In the recent case of *City of Amsterdam v. Helsby*, B.N.A., G.E.R.R. Cur. Summary No. 616, E-1 (N.Y. App. June 5, 1975), the City challenged the constitutionality of a statute which provides that disputes arising out of the collective bargaining process between a public employer and its firemen and policemen are to be submitted to an arbitration panel for compulsory and binding arbitration. One of the grounds alleged was that the legislature had unconstitutionally delegated its legislative authority to the arbitration panel. In upholding the statute the court said:

"However, there is no constitutional prohibition against the legislative delegation of power, with [reasonable] safeguards and standards, to an agency or commission established to administer an enactment. (*Martin v. State Liquor Authority*, 43 Misc 2d 682, 685 [Cooke, J.], affd. upon the opinion rendered at Special Term, 15 N.Y.2d 707; see *Chiropractic Assn. of New York, Inc. v. Hilleboe*, 12 N.Y. 2d 109, 120-121, and *Matter of City of Utica v. Water Pollution Control Board*, 5 N.Y. 2d 164.) Here, the Legislature has delegated to PERB, and through PERB to *ad hoc* arbitration panels, its constitutional authority to regulate the hours of work, compensation, and so on, for policemen and firemen in the limited situation where an impasse occurs. It has also established specific standards which must be followed by such a panel. (Civil Service Law, §209, subd. [4], par. [c], subpar. [v].) We conclude that the delegation here is both proper and reasonable."

In *City of Amsterdam v. Helsby*, Justice Fushberg wrote a lengthy concurring opinion much of which dealt with the delegation of power question. He states in Division III of his opinion entitled "Delegation of Power" the following:

"It is settled law that a delegation of power by the legislature to a subordinate body is constitutional, provided it is accompanied by sufficiently specific standards for its use and provided that the delegation is of power to carry out law, not power to make law. (*Martin v. State Liquor Authority*, 43 Misc.2d 682, affd 15 N.Y.2d 707; *8200 Realty Corp. v. Lindsay*, 27 N.Y. 2d 124; *People v. Local 365 Cemetery Workers*, 33 N.Y.2d 582; *Chiropractic Assn. of N.Y. v. Hilleboe*, 12 N.Y. 2d 109; *Matter of City of Utica v. Water Pollution Control Board*, 5 N.Y.2d 164.)

"As I indicated at the outset, laws very similar to the one before us have been challenged and up held in a number of states. (See *City of Warwick v. Warwick Regular Firemen's Assocation*, 106 R.I. 109, 256 A.2d 206; *Dearborn Fire Fighters Union, Local No. 412 v. City of Dearborn*, 201 N.W.2d 450 (Mich.); *State ex rel. Firefighters Local No. 946 v. City of Laramie*, 437 P. 2d 295 (Wyo.); *City of Biddeford v. Biddeford Teachers Association*, 304 A.2d 387 (Me.); *Harney v. Russo*, 435 Pa. 183, 255 A.2d 560.)"

Justice Fushberg's opinion deals with the crux of the issue on delegation of legislative authority:

"Clearly the test must be not how one denominates the delegates, but what guarantees there are against excessive or lawless exercise of their grant of power. Therefore, the focus should not be on forced classifications, but instead, on what in fact is the scope of the delegation in a particular case and on the standards by which such a delegation is to be guarded.

"A primary evil to be avoided is the *unnecessary* delegation of power, however characterized, and even when otherwise amply safeguarded. But that does not mean that a broad delegation is not constitutional. Where the issues to be determined by a delegated body are complex and variable, so as to call for the expenditure of an indeterminate amount of time and openended efforts in their resolution, and require sophistication in order to deal fairly with the parties, as in the resolution of labor disputes, a grant whose breadth is suitable to the dimension and character of the function to be performed is appropriate.

"Delegation is, after all, a matter of degree, and the amount of power which it is permissible to delegate to any agency varies with the problem involved." (Wright, Beyond Discretionary Justice, 81 Yale L.J. 575, 587.) And, as we stated in *8200 Realty Corp. supra*, 'fair latitude should be allowed by the Court to the legislative body to generate new and imaginative mechanisms addressed to municipal problems.' (Id. at 132.) It follows that the more serious, complex, and sensitive the problem, the greater and more varied the latitude.

"However, that an extensive grant is warranted does not lesson the need for safeguards. Instead, it quickens our search for them. For the desideratum should be safeguards proportionate to the grant; the larger the grant, the greater the safeguards required."

In his analysis Justice Fushberg also noted that the New York statute, like Iowa's, does not expressly provide for judicial review of the arbitrator's decision. However, the Court concluded that even in the instance where a statutory requirement provides that the arbitrator's decision be final, judicial review may be available to establish (1) substantiality of the evidence or (2) procedural fairness. See *Mount St. Mary's Hospital v. Catherwood,* 26 N.Y.2d 493; *Guardian Life Insurance Co. v. Bohlinger,* 308 N.Y. 174.

In our opinion, Section 20.22(9) contains similar standards, guidelines or safeguards found in the New York statute upheld in *City of Amsterdam v. Helsby,* supra. The Iowa cases appear to follow the same principles in delegation of legislative authority. Therefore, the provision for binding arbitration found in Section 20.22, of impasse or deadlocked items in a collective bargaining agreement between public employers and employees is constitutional.

September 5, 1975

SCHOOLS: Tuition. §§281.2, 282.8, Chapter 273, Code of Iowa, 1975. A school district may comply with the statutory mandate to furnish adequate facilities for handicapped students by tuitioning multiple handicapped students to a school in another state when such school is closer than any appropriate school in the district. (Nolan to Walter, State Representative, 9-5-75) #75-9-7

The Honorable Craig D. Walker, State Representative: You have submitted to this office for an opinion, a letter from Mr. Jack Hyler, Uni-Serv Director, Red Oak, Iowa, which states:

"On Saturday, February 1, 1975, I spoke to you concerning the problem of providing adequate facilities for those few multiply handicapped children in Council Bluffs who will be counted with a 4.4 weighting under provisions of S.F. 1163 for the school year 1975-1976.

"The specific question is this: Is there any law that would prevent the Council Bluffs Community School District from sending those children to the Omaha J. P. Lord School and paying tuition to the Omaha School District from funds generated by implementation of S.F. 1163?

"This opinion request is from the Council Bluffs Education Association."

Under the provisions of Chapter 281, Code of Iowa, 1975, each school district is required to provide special education for children requiring special education. However, if the program or service can be more economically and equably obtained from the Area Education Agency, another school district, another group of school districts, a qualified private agency or in cooperation with one or more other districts, the school district may fulfill the requirements mandated by this statute in this manner. Section 281.2, Code of Iowa, 1975.

Under §282.8 of the Code of Iowa, 1975, a school district may tuition its students to attend school out of state if the school is nearer than any appropriate school in the district of residence or in the State of Iowa.

Accordingly, it is our view that Senate File 1163, which was enacted as Chapter 1172, 65th General Assembly, 1974 Session, and is now codified as Chapter 273, Code of Iowa, 1975, does not prohibit the school district sending multiple handicapped children from Council Bluffs to an appropriate school in Omaha.

September 5, 1975

ELECTIONS: County Officers. §69.12, Code of Iowa, 1975, §122, H.F. 700, Acts, 1975 Session. A proposed county-wide bond election is not a "pending election" within the meaning of §69.12 at which a county supervisor vacancy can be filled because no provision is made for the selection of nominees by a political party within the time frame prescribed by the statute. (Nolan to Jenkins, Monroe County Attorney, 9-5-75) #75-9-8

Mr. James D. Jenkins, Monroe County Attorney: This is written in reply to your request for an opinion on the following:

"On August 18, 1975, a member of the Monroe County Board of Supervisors, a three member board, resigned his position. The Board of Supervisors has committed itself to a bond issue election on the proposition of a new County Home. The date for such election has not yet been selected although it will be a 'public question to be decided by the voters of the same political subdivision', Sec. 69.12. The Supervisor term involved expires January 3, 1977.

"H.F. 700, Acts of the 66th General Assembly, 1975 Session, appears to be contradictory. Sec. 5 amends Sec. 39.18 of the Code, and Sec. 122 amends Sec. 69.12 of the Code. I would, therefore, like your opinion as to whether or not Sec. 69.12 as amended by Sec. 122 H.F. 700 66th General Assembly is applicable to the above stated factual situation or not.

"Additionally, if Sec. 69.12 as amended is applicable, what nomination procedures are to be used and what are the filing deadlines. Additionally, should the commission composed of the Clerk, Auditor and Recorder, appoint to fill a vacancy for an interim term between now and the time the bond issue election is held.

"Further, how much speed is required of the Clerk, Recorder, and Auditor to fill the vacancy, keeping in mind 69.12(1)(a), stating that a vacancy occurring *50 or more* days prior to the next pending election . . . shall be filled at that election.

"Your assistance resolving the foregoing will be greatly appreciated."

It is the view of this office that the county-wide bond election for the proposed new county home is not a "pending election" within the meaning of §69.12, Code of Iowa, 1975, at which a supervisor can be elected. Since there are no provisions to allow political parties to nominate a candidate through regular primary or convention procedures, §69.12 was clearly meant to apply only to vacancies for nonpartisan offices.

The most recent amendment to §69.12 by the 66th General Assembly (§122, H.F. 700, Acts, 1975 Session) enlarged the time period in §69.12 (1)(a) from "forty" to "fifty or more days" to accommodate the deadline used for filing nomination papers for city and municipal offices. If it had been the intent of the legislature to allow this section to be used to fill partisan offices, the provision relating to the number of days

preceding the time of a special election would have allowed for the necessary period of time to accommodate the deadlines used for determining the nominees of a political party for such offices.

Accordingly, although the special election contemplated in Monroe County will be held to determine a "public question to be decided by the voters of the same political subdivision", the next "pending election" for filling the unexpired term of a member of the board of supervisors is the general election which will be held on the first Tuesday in November, 1976. This being the case, the Clerk, Recorder and Auditor should proceed immediately to make an appointment to fill the vacancy. Then the provisions of §69.12(2) take hold so that the successor to the appointee filling the vacancy will immediately take office upon qualifying therefore, because the remaining portion of the unexpired term will then be less than 70 days, as specified by the Code.

September 5, 1975

STATE OFFICERS AND DEPARTMENTS: Board of Nursing—§§17A.3, 147.3 and 147.4, Code of Iowa, 1975. A board under Chapter 147 must, of necessity, be able to decide which felonies are directly related to the practice of a profession and may so provide by rule. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 9-5-75) #75-9-9

Lynne M. Illes, R.N., Executive Director, Iowa Board of Nursing: We have received your opinion request of August 7, 1975, regarding §147.3 of the Code. You ask whether the Board of Nursing has the authority to define those felonies that are related to the practice of nursing, and, if so, if that should be done by adoption of rules and regulations.

Section 147.3, 1975 Code, provides in pertinent part:

"An applicant for a license to practice a profession under this title shall not be ineligible because of age, citizenship, sex, race, religion, marital status or national origin, although the application form may require citizenship information. Any board may consider the past felony record of an applicaint only if the felony conviction relates directly to the practice of . . . nursing . . . for which the applicant requests to be licensed."

Section 147.4 provides that a license may be refused upon any of the grounds for revocation of a license, which includes the conviction of a felony. Reading these sections together leads us to the conclusion that a board may refuse to grant a license based upon a felony conviction, but only if that felony relates directly to the practice of the profession.

Section 17A.3 provides that each agency shall adopt rules describing the organization, the general course and method of its operations, and its practice setting forth the nature and requirements of all formal and informal procedures, in addition to other statutory requirements. Since the board must pass upon each applicant, it must, at some time, make a decision concerning a prior felony. There is no specific statutory requirement for a rule delineating the same. Nor can we find any legal reason why a board cannot state by rule which felonies or which fact situations relative to felonies the board considers to be directly related to the practice of a profession. However, we must state that it may not be wise to so provide by rule, since that may, in effect, limit the felonies or fact situations upon which a refusal can be based. A board would

be better able to make an independent decision on each fact situation at the time it is presented, rather than being limited to a few.

Accordingly, we are of the opinion that a board must, of necessity, be able to decide which felonies are directly related to the practice of a profession, and that it may so provide by rule, although it is not mandatory.

September 5, 1975

STATE OFFICERS AND DEPARTMENTS: Board of Nursing—§§147.21 and 152.7, Code of Iowa, 1975. The Board of Nursing may disclose information referred to in §147.21 to boards of other jurisdictions for purposes of endorsement. The board may disclose final scores of examinations to schools of nursing without the applicant's approval, and other types of information with the applicant's approval. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 9-5-75) #75-9-10

Lynne M. Illes, R.N., Executive Director, Iowa Board of Nursing: We have received your opinion request of August 7, 1975, regarding §147.21 of the Code. You ask whether forms for release of information to be signed by the applicants, can be considered a legal document and therefore relieve the Board from any liability for a violation of the above section. The underlying issue here is what authority or discretion the Board has in releasing certain information.

Section 147.21, 1975 Code, provides in pertinent part:

"A member of the board shall not disclose information relating to the following:

"1. Criminal history or prior misconduct of the applicant.

"2. Information relating to the contents of the examination.

"3. Information relating to the examination results *other than final score* except for information about the results of an examination which is given to the person who took the examination. [Emphasis added]

"A member of the board who willfully communicates or seeks to communicate such information, and any person who willfully requests, obtains, or seeks to obtain such information, is guilty of a public offense which is punishable by a fine not exceeding one hundred dollars or by imprisonment in the county jail for not more than thirty days."

You indicated that prior to July 1, 1975, when this section became effective, the board completed endorsement forms from other jurisdictions on Iowa licensees wishing to be licensed in another state. All jurisdictions, including Iowa utilize such a form requesting examination scores. See, for example, §157.2, which concerns endorsement, and provides that the board may issue a license to practice nursing to an applicant who has been licensed under the laws of another state if the applicant meets the qualifications in this state.

Not only does that section mean that the board can look to the statutory requirements in the other states, but also the examinations and the scores given or needed for passing said examinations. It is obvious that if another state's examination is not as comprehensive as Iowa's, or if the passing score is lower than is required here, the board may not grant endorsement since our qualifications may not have been met.

The same would apply with boards in other states. In order for the boards to make such determinations and therefore allow nurses to become licensed in more than one state, there must be a free flow of information. By the passage of §152.7, we do not believe that the Legislature intended to limit such a flow under these types of circumstances. In addition, §147.21 provides that final scores may be disclosed. It should also be indicated that most, if not all, states use the same examination. Therefore, the knowledge of scores is even more necessary. Since your board has authority to issue such information to other states it is not necessary to decide whether the release form for such information relieves the board from any liability.

Your second situation concerns the relase of scores to nursing schools. You indicated that such schools utilize these scores to determine the strengths or weaknesses of their curriculums. Again, §147.21 provides that final scores may be given. Thus, such scores may be given to the schools. However, the board may not give out other information to the schools such as scores on particular questions. Therefore, we need not decide the legality of the release form with regard to final scores.

That question is relevant, however, to the release of other information to the schools. The first issue here is to determine what the purpose of §147.21 is. That section is quite explicit in providing that a board member *shall not* disclose certain information. Such a disclosure does not affect or in any way harm the board, the schools or any board in another jurisdiction. The only effect that section may have on the board is the effect it has on the quality of nursing in this state if the examination contents were disclosed prior to the examination. However, disclosure of criminal history, prior misconduct or examination results will have no such effect. There may be such an effect on the applicant if such information is disclosed. The obvious intent of subsection one and three is to protect the applicant. In that regard, the applicants should be able to decide whether they wish others to know this information. They surely can tell others about their own criminal history and examination results (see discussion below relative to the criminal penalty). If they are able to do that the board should not be held in violation of the section by complying with the applicants' wishes.

This brings us to the discussion of the penalty for such a violation. The section provides that a board member who *willfully* communicates, and any person who *willfully* requests, obtains or seeks to obtain, such information is guilty of a misdemeanor. The word "willfully" is underscored because that is the crux of the violation. There is no set definition of "willfully." Thus, the context and the character of the act denounced is important in determining the meaning of "willful" or, as here, "willfully." *State v. Savre*, 1905, 129 Iowa 122, 105 N.W. 387. Generally, "willful" or "willfully" means intentional, deliberately or knowingly as distinguished from accidentally, inadvertently or carelessly. *State v. Wallace*, 1966, 259 Iowa 765, 145 N.W.2d 615; *State v. Shipley*, 1966 259 Iowa 952, 146 N.W.2d 266; *Huston v. Huston*, 1963, 255 Iowa 543, 122 N.W.2d 892. However, as pointed out in *State v. Willing*, 1905, 129 Iowa 72, 73, 105 N.W. 355, "[e]very voluntary act of a human being is intentional . . . ." Thus, many times more is needed for a willful act

when a criminal statute is involved. Generally, a voluntary act becomes willful in law only when it involves some degree of conscious wrong or evil purpose, or at least an inexcusable carelessness or recklessness on the part of the actor. *State v. Willing*, supra, and *State v. Savre*, supra, citing to *Parker v. Parker*, 1897, 102 Iowa 500, 71 N.W. 421. In *Parker* the court stated (102 Iowa at 505-506) that it is "uniformly held that the term 'wilful,' in [penal] statutes, not only means intentionally or deliberately done, but with bad or evil purpose, as in violation of law, or wantonly and in disregard of the rights of others, or knowingly and of stubborn purpose, or contrary to a known duty, or without authority, and careless whether he have the right or not." See also, *Huston v. Huston*, supra, which cites with approval to *Parker*. Contra., *State v. Dunn*, 199 NW..2d 104 (Iowa 1972), where "willfully," as used in a penal statute with the term "maliciously," was defined to mean purposely, deliberately, intentionally.

Applying those definitions to §147.21, we feel that something more than intentional, knowing or purposely is intended. There should be no prohibition to giving the information of subsections one and three to the applicant, who can then disclose the same to anyone. Therefore, the fact that the applicant requests the board to disclose the information should not be prohibited. We do not believe that the voluntary act of disclosing such information is "willful" as that term is used in the statute. Thus the fact that the board discloses scores and similar information to schools upon the written request of the applicant should not place any member of the board in violation of §147.21. Nor do we believe that the releases are a manner of evading or getting around the proscriptions of the statute since the applicants themselves can disseminate the information. This discussion is not intended to apply any interpretations to §147.21 with reference to subsection two.

Accordingly, we are of the opinion that the board may disclose information referred to in §147.21 to boards of other jurisdictions for purposes of endorsement. The board may give final scores to schools of nursing without a release, and may give other information referred to in this opinion upon written request or approval by the applicant without violating §147.21.

September 10, 1975

CRIMINAL LAW; COURTS; JUDGMENTS; DEFERRED SENTENCES; WITHDRAWAL OF PLEAS; EXPUNGING RECORDS. §§789A.1, 789A.6, 749.2, 777.15, 204.409, Code of Iowa, 1975. 1) Upon discharge from probation after deferred sentence, §789A.6 requires and permits expunging of only that part of the court's criminal record "with reference to the deferred judgment." No authority exists for expunging the docketing or indexing of the case, the defendant's name, the charge filed or even the plea or verdict of guilty. The court may refuse to permit withdrawal of a guilty plea during or upon conclusion of probation, but if such withdrawal is permitted it should be shown of record and not expunged since withdrawal has no "reference to" and is not part of or necessary to the deferred judgment. 2) Only the court's prelinimary order deferring judgment following establishment of guilt and the final order discharging the defendant are to be expunged. Upon discharge from probation these entries are to be sufficiently blotted out or obliterated with ink so that it cannot be later

ascertained from district or magistrate court records that judgment was ordered deferred. If these entries have been preserved by photostat or microfilm, such must be destroyed. 3) Specific reference to the "court's criminal record" does not authorize expunging of records of police, sheriff, county attorney, BCI or other law enforcement agencies or officers. 4) A plea or verdict of guilty is a "conviction" within the meaning of §749.2 and fingerprint records should not be destroyed on the basis of a deferred sentence, whether or not defendant is permitted to withdraw his plea. 5) §204.409 is a special deferred sentencing statute for crimes involving controlled substances, discharge and dismissal under which may occur only once with respect to any person. No expunging of any court record is authorized by §204.409. Ch. 789A is a general statute which does not effect or alter the deferred sentencing procedure provided in §204.409 for those special crimes. §789A.6 may not be used in lieu of §204.409 or to expunge records made thereunder. 6) A defendant discharged upon fulfillment of the terms and conditions of his probation after deferred sentence under either §789A.1 or §204.409 suffers no loss of his rights as a citizen (as he does under a suspended sentence following a felony conviction) and no restoration thereof need be recommended to the Governor. 7) A county attorney may not lawfully as part of a plea bargain, agree or promise to expunge records not statutorily authorized to be expunged. But if he does, the state will probably be held to the agreement. (Turner to Wornson, Cerro Gordo County Attorney, 9-10-75) #75-9-11

Mr. Clayton L. Wornson, Cerro Gordo County Attorney: You have requested an opinion of the attorney general as to what criminal records are to be expunged, and how, under the provisions of Chapter 789A, Code of Iowa, 1975, when a criminal defendant has conformed to the terms of probation and fulfilled its purposes under a deferred judgment of conviction and is ordered discharged by the court pursuant to §789A.6, without being sentenced.

You state:

"As a practical matter, when the charge is filed, the record thereof ordinarily exists in the Magistrate's Court in Magistrate dockets and Magistrate indexes. When it is waived to the District Court, it appears not only in the District Court file folder, but it appears in the bound (non-looseleaf) volume in connection with which the pages contain on one side part of the record of one defendant and on the other side part of the record of another defendant, only one of whom may be the subject of deferrment. Such volumes, of course, also contain indexes in various forms. In addition, every order has been photostated under circumstances where one defendant may appear on one side of a photostat and another defendant on the other side."

"Finally, the question arises as to what to do with the final District Court order which releases the defendant's probation and orders the record expunged. Do we also expunge the final order? And do we attempt to expunge police records, sheriff's records and county attorney's records?"

Accordingly, this opinion deals solely with which of such a criminal defendant's public records, judicial and non-judicial, pertaining to a given crime, are to be expunged as a consequence of discharge under deferred judgment, how it is to be done, and problems of withdrawal of plea and rights of citizenship incidental thereto.

I

§789A.6 provides in pertinent part:

"Upon discharge from probation, if judgment has been deferred under

section 789A.1, *the court's criminal record with reference to the deferred judgment shall be expunged.* The record maintained by the supreme court administrator required by section 789A.1 shall not be expunged. The court's record shall never be expunged in any other circumstances except as provided in section 602.15." (Emphasis added)

Webster's Third New International Dictionary defines the transitive verb "expunge" "la: to strike out, obliterate, or mark for deletion (as a word, line, or sentence) b: to obliterate (a material record or trace) by any means (expunge the sound of a voice from a tape recording) (expunge a man's fingerprints) c: DROP, EXCLUDE, DISCARD, OMIT . . . d: to cause . . . to be effaced . . . 2a: to cause the physical destruction of: ANNIHILATE . . . b: to treat or cause to be regarded as nonexistent: consign to oblivion: to destroy in any manner: ERADICATE . . ."

In 35 C.J.S. 343, the word "expunge" is described as a term expressive of cancellation or deletion, implying not a legal act, but a physical annihilation. "Expunge" is further defined as meaning to blot out, to rub out, obliterate, strike out, or cancel. It has been held synonymous with "cancel."

But §789A.6 requires only that that portion of the court's criminal record "with reference to the deferred judgment" shall be expunged. It does not say "if judgment has been deferred under section 789A.1, the court's *entire* criminal record (or even simply the court's criminal record) shall be expunged." What is to be expunged is plainly limited by the qualifying phrase "with reference to the deferred judgment." "If the language of a statute when given its plain and rational meaning is precise and free from ambiguity, no more is necessary than to apply to the words used their ordinary sense in connection with the subject considered. Effect must be given, if possible, to every word, clause and sentence of a statute. It should be construed so that effect is given to all its provisions and no part will be inoperative or superfluous, void or insignificant." *Maguire v. Fulton,* 1970 Iowa, 179 N.W.2d 508.

"The right to defer imposition of a sentence in a criminal case is not inherent but is regulated by statute and can only be exercised in accordance with the terms of the statute." *State v. Wright,* 1972 Iowa, 202 N.W.2d 72. This is true also of expunging a record, particularly in view of the last sentence of §789A.6 which says "The court's record shall never be expunged in any other circumstances except as provided in section 602.15." Expunging a criminal court record is a relatviely new, exceptional and extraordinary procedure. It is certainly contrary to a general policy against destroying court records. Statutory authorization thereof must accordingly be strictly construed. See *Wood Bros. Thresher Co. v. Eicher,* 1942, 231 Iowa 550, 1 N.W.2d 655; *Ham v. The Hamburg,* 1856, 2 Iowa 460, 2 Clarke 460.

Nothing in Ch. 789A relating to deferred sentencing suggests that any of the preliminary matters, including the docketing and indexing of the case, the defendant's name, the charge filed, or even the plea of guilty or verdict of guilty, are to be expunged. The only remaining portions of the criminal record which can lawfully be expunged are the court's

preliminary order deferring judgment *following* establishment and record of guilt, (establishment of guilt, is a prerequisite to a deferred judgment under 789A.1) and the final order which releases the defendant from probation and orders the record expunged. These are required to be deleted so that a defendant who has successfully completed his probationary period is left with no court order of conviction beyond the establishment of his guilt. In the case of a deferred sentence, the result of a proper expungement would simply be no showing of a final disposition. No "cover-up" of the crime was intended.

§777.15 provides:

"At any time before judgment, the court may permit the plea of guilty to be withdrawn and other plea or pleas substituted."

The substance of that section has been in the Code of Iowa in nearly identical form since 1851 and is identical to §5337, Code 1897. In *State v. Watts*, 1975 Iowa, 225 N.W.2d 143, our high court said, in reference to §777.15:

"The word 'may' as used in the statute must be given its usual meaning. It clearly implies that discretion is lodged in the court and does not give a defendant an absolute right to withdraw his plea. State v. Taylor, Iowa, 211 N.W.2d 264, 266; State v. Machovec, 236 Iowa 377, 382, 17 N.W.2d 843, 846.

"In State v. Weckman, Iowa, 180 N.W.2d 434, 436, we say:

'The rule is now clear that if a defendant, with full knowledge of the charge against him and of his rights and the consequences of a plea of guilty, enters such a plea understandably and without fear or persuasion, the court may without abusing its discretion refuse to permit its withdrawal. State v. Sisco, supra, Iowa, 169 N.W.2d 542, 545; State v. Hellickson, Iowa, 162 N.W.2d 390, 395; State v. Krana, Iowa, 159 N.W.2d 413, 416; State v. Bastedo, 253 Iowa 103, 111, 112, 111 N.W.2d 255, 260'."

In *State v. Taylor*, 1973 Iowa, 211 N.W.2d 264, the court said at page 266:

"*Withdrawal of Guilty Plea.* Our statute provides that trial courts 'may' permit an accused to withdraw a plea of guilty. Code 1973, §777.15. Trial courts have discretion in the matter. State v. Weckman, 180 N.W.2d 434 (Iowa); State v. Machovec, 236 Iowa 377, 17 N.W.2d 843. In this case the trial court accepted defendant's plea only after fully and fairly examining the validity of the plea. *Defendant obtained a deferred sentence and enjoyed the benefits of the deferral for a considerable time. A defendant is naturally tempted to seek to withdraw his plea after such a period has passed and the trail has grown cold on the original charge.* We find no abuse of discretion by the trial court in refusing to permit defendant to withdraw the plea under the facts of the case, and we cannot sustain the first assigned error." (Emphasis added)

See also *State v. Tillman*, 1975 Iowa, 228 N.W.2d 38.

Thus it is clear that withdrawal of a plea of guilty is *not* a necessary part of the deferred sentencing procedure set forth in Chapter 789A. It is no longer a matter of absolute right and hasn't been since 1945 when the *Machovec* case, *supra*, overruled prior decisions. It is well within the discretion of a trial court to refuse permission to withdraw such a plea. Indeed, unless a defendant could show he did not have full knowledge of the charge against him and of his rights and the consequences of his plea of guilty, (*State v. Watts*, supra) or that the

court did not make proper inquiry as to the voluntariness of the plea or follow other requirements of *State v. Sisco*, 1969, 169 N.W.2d 542 (*State v. Tillman, supra*) there appears to be no reason, aside from a "cover-up", why a defendant should be permitted to withdraw his plea during or at the conclusion of his probation. A deferred sentence is granted to a guilty defendant, as a matter of judicial grace (according to Webster "grace" is "unmerited divine assistance given man for his regeneration or sanctification") within the sound exercise of the court's discretion and usually as a consequence of a frank admission of guilt.

But if a judge does, for some extraordinary reason, permit withdrawal of the plea during or at the conclusion of probation, the withdrawal should be shown of record and not expunged. Again, expungement of "the court's criminal record *with reference to the deferred judgment*" specifies that only that part of the record is to be expunged. Withdrawal of a plea of guilty is not necessary to, nor a part of, the deferred judgment and has no "reference" thereto under the statute.

§789A.6 does not mean that pages of the criminal court record must be torn out and destroyed. But it does mean that the final entries following arraignment and plea or verdict of guilty are to be sufficiently blotted out or obliterated with opaque ink so that it cannot later, after discharge from probation, be ascertained from the district or magistrate court records that judgment was ordered deferred. When sentence is deferred there is no record of conviction and no conviction exists in a technical legal sense. *State v. Hanna*, 1970 Iowa, 179 N.W.2d 503; *Maguire v. Fulton* and *State v. Wright, supra*. But the order of deferral is, in the first instance, public information, properly rendered in a proceeding in open court, open to the public and the news media, and may be freely reported and published at the time it is pronounced or at any time thereafter. The simple purpose of expunging the record upon discharge from probation, is to leave the defendant with no record of conviction following a successful probation—to excuse him—not to acquit him.[1]

A judge, by imposition of a deferred sentence, does not and cannot erase a defendant's plea of guilty or squelch the verdict of twelve good persons and true. He cannot order the guilty innocent. Obviously there is a difference between forgiving or excusing a person for his crime and acquitting or finding him not guilty. The distinction is perhaps somewhat analagous to, and more clear than, the difference between a conditional pardon or a restoration to the rights of citizenship and an absolute pardon. (And of course the court has no power of pardon.[2]

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[1] If such records have been photostated for preservation by the court, the photostats too must be obliterated or destroyed even if it means re-photostating another case on the other side. Similarly, if preserved on microfilm, the microfilm must be destroyed.

[2] Under Article IV, §16, Constitution of Iowa, no one but the Governor has the power to grant reprieves, commutations and pardons after conviction for offenses against the state (except treason and cases of impeachment). *State ex rel. Preston v. Hamilton*, 1928, 206 Iowa 414, 220 N.W. 313. Compare §232.72 which appears to allow the Court to "set aside the plea of guilty or conviction" of a minor over age 14 after the child has successfully completed a period of probation of not less than one year, Art. IV, §16 notwithstanding! The Governor's power to restore rights of citizenship to a convict is found in §248.12.

Had the General Assembly intended full and complete confidentiality, rather than limited expungement, it should have said so as it has in

Of course §789A.1 provides, *inter alia*, for the keeping of a record of adoption, juvenile and other proceedings. Rule 344 (f)(13), I.R.C.P.[3] See for example §§600.9 and 232.27.

the deferred sentence by the Supreme Court administrator and those records *are* confidential:

"Any deferment of judgment * * * shall be promptly reported to the supreme court administrator who shall maintain a *permanent record* thereof including the name of the defendant, the district court docket number, the nature of the offense, and the date of the deferment. Before granting deferment in any case, the court shall request of the supreme court administrator a search of the deferred judgment docket and shall consider any prior record of a deferment of judgment * * *. The permanent record * * * shall constitute a *confidential record exempted from public access* * * * and shall be available only to justices of the supreme court, district judges, district associate judges, and judicial magistrates * * *. (Emphasis added.)

The obvious purpose of keeping a permanent record of the deferred sentence is to guard against the possibility that a criminal might enjoy such grace again and again when apprehended for additional crimes. But a person who makes one "mistake" in an otherwise good and clean life is left without the blot of technical legal conviction if he obeys the terms of his probation. In such a case he needs no restoration of rights of citizenship or pardon. He is entitled to vote, hold public office, and to enjoy the same privileges as any other citizen. He suffers nothing except ignominy and the pangs of his own conscience for his lone transgression.[4] The purpose of the statute is fully served without expunging more of the court record than its words require.

Justice McCormick in a special (and powerful) concurring opinion in *State v. Wright*, supra 202 N.W.2d 72, 79-84, in which he was joined by two other Justices, argued with great force that courts have inherent, or common law, power to defer sentences. Among the many authorities he cited was Lord Chief Justice Hale who said reprieves before judgment were given for various reasons, including, "when favorable or extenuating circumstances appear, and when youths are convicted of their first offense." Justice McCormick lists the statutes of 47 states other than Iowa which expressly authorize the practice and shows that the basis of deferment in the Michigan statute is "* * * where it appears to the satisfaction of the court that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant shall suffer the penalty imposed by law * * *."

Whatever the merits of deferred sentencing, we consider nothing herein contrary to the authorized practice or destructive of the goals thereof

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[3] "In construing statutes the courts search for the legislative intent as shown by what the legislature said, rather than what it should or might have said."

[4] See Division III, p. 13.

so eloquently espoused by Justice McCormick, with whom our legislature seems to have immediately agreed.

II

Specific reference to the "*court's* criminal record" does not, in my opinion, mean that records of the police, sheriff, county attorney, state bureau of criminal investigation, or other law enforcement agencies or officers, may be expunged pursuant to §789A.6. *Expressio unius est exclusio alterius.* This issue is now pending before the Iowa Supreme Court in a case brought by the City of Des Moines against a judge who ordered destruction of police records.[5] Ordinarily, we don't render opinions on issues pending before courts. But court orders to destroy police and other law enforcement agency records are becoming a matter of common practice and I believe our district judges have no statutory authority or jurisdiction to render them. Pending decision by our highest court approving such a practice, *no* law enforcement record should be destroyed on the basis of §789A.6. 46 ALR3rd 900, 909, and 21 AmJur2d 393, Crim. Law §369.

See, however, §749.2 which provides, with regard to fingerprints:

"It shall be the duty of the sheriff of every county, and the chief of police of each city regardless of the form of government thereof and having a population of ten thousand or over, to take the fingerprints of all persons held either for investigation, for the commission of a felony, as a fugitive from justice, or for bootlegging, the maintenance of an intoxicating liquor nuisance, manufacturing intoxicating liquor, operating a motor vehicle while under the influence of an alcoholic beverage or for illegal transportation of intoxicating liquor, and to take the fingerprints of all unidentified dead bodies in their respective jurisdictions, and to forward such fingerprint records on such forms and in such manner as may be prescribed by the commissioner of public safety, within forty-eight hours after the same are taken, to the bureau of criminal investigation. *If the fingerprints of any person are taken under the provisions hereof whose fingerpirnts are not already on file, and said person is not convicted of any offense, then said fingerprint records shall be destroyed by any officer having them.* In addition to the fingerprints as herein provided any such officer may also take the palm prints of any such person." (Emphasis added.)

As has been noted in Division I, above, in the case of a deferred sentence under §789A.1, there is no record of conviction and no conviction exists in a technical legal sense notwithstanding defendant's plea of guilty or a verdict of guilty. But when the legislature used the words "and said person is not *convicted* of any offense" in §749.2, I believe it intended to use "convicted" in its general and popular sense of establishment of guilt prior to and independent of judgment. In *State v. Hanna,* 1970 Iowa, 179 N.W.2d 503, our highest Iowa court decided that a guilty verdict returned by a jury against the defendant, for keeping alcoholic beverages on which a special tax had not been paid to the state, constituted a "conviction" within the meaning of a statute which provided that "conviction of a violation of this section shall cause the license held to automatically be revoked," although no judgment or sentence was ever

[5] City of Des Moines v. Brooks, No. 2-57972, Supreme Court of Iowa.

entered upon the verdict. The Court distinguished between a "conviction" in its technical sense and its ordinary sense:

"The word 'conviction' is of equivocal meaning, and its use in a statute presents a question of legislative intent.

"In the restricted or technical legal sense in which it is sometimes used, the word 'conviction' includes the status of being guilty of, *and sentenced for*, a criminal offense, whether that status is established after confession of guilt, by a guilty plea or after determination by a jury verdict upon an assertion of innocence. Stated otherwise technically the word means the final consummation of the prosecution against the accused including the judgment or sentence rendered pursuant to an ascertainment of his guilt.

"In its general and popular sense *and frequently in its ordinary legal sense*, the word 'conviction' is used in the sense of establishment of guilt prior to and independently of judgment and sentence by a verdict of guilty or a plea of guilty. State v. Superior Court, 141 A.2d 468, 471-472, (Del. 1958); Dubar v. Dizdar, 240 Minn. 26, 60 N.W.2d 77, 79-80; Commonwealth v. Greer, 215 P. Super. 66, 257 A.2d 66, 72-73, (Iowa 1968); 24 C.J.S. Criminal Law §1556 (2); 9A Words and Phrases, pages 270-282.

"The word 'conviction' is used in its ordinary legal sense in section 123.100 [Code of Iowa, 1971, the section in question] to signify merely an ascertainment of guilt in the trial court and not as requiring entry of a judgment thereon as a basis for license revocation and bond forfeiture required by this section." (Emphasis added.)

Even the courts, themselves, frequently think of and use the word "conviction" in its "general and popular sense" and its frequently used ordinary legal sense, as establishment of guilt by plea or verdict. Thus, in his concurring opinion in *State v. Horton*, 1975 Iowa, 231 N.W.2d 36, 40, Justice McCormick said:

"The most important responsibility of a trial judge in a criminal case is his duty to prouounce sentence *after* a defendant's *conviction*." (Emphasis added.)

Yet, as *State v. Hanna* noted, in the restricted or technical legal sense "in which it is *sometimes* used, the word 'conviction' includes the status of being guilty of, *and* sentenced for a criminal offense . . ." (Emphasis added). See also §789.2.

I submit that most laymen, as well as most legislators, lawyers and jurists, ordinarily think of a defendant as "convicted" either when he confesses his guilt by plea in open court, or a jury finds it in a true verdict—before judgment of conviction and sentence. Justice McCormick's language concerning "conviction" was obviously directed at the jury's verdict in that case rather than the judgment or sentence, indeed, even in the majority opinion of the court, at page 37 of 231 N.W.2d we find:

"Upon jury trial defendant was *convicted* of possession of a controlled substance . . ."

Indications are that the court was speaking of a time prior to judgment or sentence when it said "defendant was convicted."

So, too, I believe the legislature intended destruction of fingerprints under §749.2 only when:

1) the fingerprints are not already on file and

2) the person has been found "not guilty," or the case has been dismissed without establishment of guilt by plea or verdict.[6]

Fingerprint records should not be destroyed under §749.2 on the basis of a deferred sentence, whether or not the defendant is permitted to withdraw his plea during or upon conclusion of probation.

If it were otherwise, the fingerprints of a man guilty by his own words and plea, or by jury verdict, but not technically "convicted" because judgment was not entered, would be destroyed merely on the basis of a deferred judgment and an expunged record. When defendant's fingerprints are not already on file and the defendant has been acquitted, §749.2 is self-executing and requires no court order of destruction. The fingerprints are destroyed in obedience to §749.2. A guilty defendant, whose fingerprints are destroyed, and who is later charged under a slightly different name, might receive another deferred sentence simply because the prosecutor, the court and the Supreme Court's administrator are unaware of the first. Federal and state bureau of investigation records and fingerprints have nearly always been available to police, sheriffs, county attorneys, courts and other duly constituted law enforcement agencies. Fingerprints are a far better and more accurate means of identification than a mere name. The Supreme Court administrator is required to keep no fingerprint records and could easily miss reporting a deferred sentence to a judge because the name (or perhaps the residence) was not identical, or had been changed. The courts are not required to make inquiry of the Bureau of Criminal Investigation, police or other law enforcement agencies, but only of the Supreme Court administrator, before granting a deferred sentence.

I think the legislators intended that law enforcement officials and prosecutors, as well as the courts, ought to be able to find out whether a defendant has previously pleaded guilty or been found guilty by a jury, whether the plea was withdrawn or not, and to point that fact out to the court before another judgment is deferred.

Any other construction could render the deferred sentencing and expunging process discriminatory. An experienced county attorney who has served for many years might well remember and show the court that a defendant had previously received a deferred sentence, whereas a new county attorney might have no such knowledge. Difficulties in proving an identity would frequently arise. In such situations one defendant under otherwise identical circumstances might well be treated differently than another.

Only when everyone having to do with the administration of justice knows the truth, can justice be fairly administered.

§789A.1(1)(g) and (h) provide that a deferred sentence shall not be granted if:

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[6] See also *Eddy v. Moore*, 1971, 5 Wash.App. 334, 487 P.2d 211, 46 ALR3rd 889. And it should be noted that §749.2 does not authorize destruction of any records other than fingerprints and palm prints under any circumstances.

"g. Prior to the commission of the offense the defendant had been granted a deferred judgment or similar relief, two or more times anywhere in the United States.

"h. Prior to the commission of the offense the defendant had been granted a deferred judgment or similar relief in a felony prosecution anywhere in the United States within the preceding five years, measured from the date of granting of deferment of judgment to the date of commission of the offense."

Clearly, the legislature forbade repeated deferred sentences and provided a means whereby the court could find out about a previous deferred sentence even when the records had been expunged. And by specifying the "court's criminal record" they left a way for law enforcement officials and prosecutors, as well, to ascertain the record by fingerprint and other non-court records.

The provisions of Chapter 789A with reference to deferred sentences and expunging the record should be compared with the provisions of §204.409, an unrelated deferred sentence statute enacted in 1971 (Ch. 148, §409, 64th G.A., 1st). §204.409 is applicable to defendants who plead guilty to, or are found guilty of, possession of a controlled substance, or who receive a special accommodation sentence pursuant to §204.410, for delivering a controlled substance to another. §204.409 provides that the court "may defer further proceedings and place [defendant] on probation upon terms and conditions as it requires." It then provides:

"Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this section *shall be without court adjudication of guilt and is not a conviction* for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under §204.410. *Discharge and dismissal under this section may occur only once with respect to any person.*" (Emphasis added.)

It will be noted that §204.409 makes no provision whatsoever for expunging any portion of the record. Rather, it operates by its own terms to authorize the court to show that the defendant was not convicted in a technical legal sense. In this respect it effectuates precisely the same result as Chapter 789A achieves for a defendant. But it does so without authorizing the expunging of *any* portion of the record and thereby insures against discharge and dismissal occurring more than once with respect to a defendant.

We emphasize by repeating that §204.409 is unrelated to Chapter 789A and that a person who receives a deferred sentence under it is not entitled to have any portion of his record expunged. A defendant who pleads guilty to or is found guilty of possession of a controlled substance, or who receives an accommodation sentence, if he receives a deferred sentence at all, *must* receive such pursuant to §204.409 and not under Chapter 789A. §204.409 is a special statute and is applicable to special crimes. Subsequent enactment of the general statute, Chapter 789A, two years later (Ch. 295, 65th G.A., 1st, 1973), in no way effects or alters the deferred sentencing procedure provided in §204.409 for these crimes or permits its use in lieu thereof. So a deferred sentence under §204.409

cannot be expunged pursuant to §789A.6. The latter section applies by its own terms only to a judgment which "has been deferred under section 789A.1."[7]

III

While the scope of this opinion has been confined to expunging the record under deferred sentence, we take full cognizance of the fact that §789A.6 is applicable in part to a sentence *suspended after* judgment of conviction where the defendant is placed on probation by the court. We quoted at the outset, on page 2, only the last portion of §789A.6 which pertains to discharge from probation "if judgment has been *deferred* under section 789A.1." This is the portion of §789A.6 which deals with deferred sentences.

But the first few sentences of §789A.6 are pertinent to *suspended* sentences *after* conviction, as well as to deferred sentences, and part thereof is not applicable to deferred sentences at all. The first sentences of §789A.6 say:

"*Discharge from probation.* At any time that the court determines that the purposes of probation have been fulfilled, the court may order the discharge of any person from probation. At the expiration of the period of probation, in cases where the court fixes the term of probation, the court shall order the discharge of such person from probation, *and the court shall forward to the governor a recommendation for or against restoration of citizenship rights to such person.* A person who has been discharged from probation shall no longer be held to answer for his offense."

In my opinion, as I noted earlier in Division I, at pages 6 to 7 of this opinion, no restoration of rights of citizenship or pardon are necessary where discharge from a deferred sentence in a felony case has been ordered pursuant to §789A.6. In such case, there is no technical legal conviction and no legal disabilities or disqualifications attach. Therefore,

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[7] If Chapter 789A deferred sentencing procedures were improperly applied to a defendant quilty of a crime for which he should be sentenced under §204.409, and the defendant's records were expunged upon discharge from probation as required by §789A.6, the defendant might well obtain another deferred sentence, this time properly under §204.409, for another crime of the same nature. §204.409 does not require the court to request of the supreme court administrator a search of the deferred judgment docket and to consider a prior record of deferment of judgment under Ch. 789A. Thus the court might well grant a deferred sentence under §204.409 without knowledge of the 789A deferment for a similar crime earlier.

But even if the court knew or learned of the 789A deferment, it might be persuaded either:

a. §204.409 had operated to acquit the defendant and render him not guilty the first time, notwithstanding his deferment under 789A. Without record of guilt, and record of deferment having been expunged, the defendant may still be discharged under §204.409 for another like offense. For if the defendant was, indeed, not guilty the first time, there is no reason why he should not receive a deferred sentence for another crime of the same kind committed thereafter.

or more likely simply

b. that the 789A deferment was not a discharge and dismissal "under *this section*" (204.409) and thus §204.409 does not prohibt the second deferment.

it is our opinion that the underscored words of §789A.6 have no application to a deferred judgment. But a person who receives a *suspended* sentence, stands convicted, does lose his rights of citizenship, and at the expiration of his probation the court must recommend to the governor whether or not citizenship rights should be restored.

Under §204.409, there is similarly no need for restoration of citizenship because, upon discharge from probation following fulfillment of the terms and conditions and dismissal of the proceedings, the discharge and dismissal is "without court adjudication of guilt and is not a conviction for purposes of [§204.409] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime . . ." In other words, a defendant receiving a deferred sentence in a felony case, from which he is discharged and dismissed upon fulfillment of the terms and conditions of his probation pursuant to §204.409, does not lose his rights of citizenship under that procedure either.

IV

For reasons aforesaid, it is our opinion that a county attorney may not, as part of a plea bargain or otherwise, lawfully agree or promise to expunge records not statutorily authorized to be expunged, or that he will recommend to the court that they be expunged. He cannot agree to an illegal act. *State v. Gaffney*, 1946, 237 Iowa 1399, 25 N.W.2d 352, 356. Where criminal procedures are defined by statute, county attorneys and courts have no power or authority to agree to vary them.

But if a county attorney does enter an unlawful bargain and therein makes a promise to the defendant, upon which the defendant relies and incriminates himself, the state will probably be held to the terms of the agreement. Doubtless the state *should* ordinarily be estopped from reneging or breaking promises upon which others rely to their ultimate detriment. In fact, in *State v. Kuchenreuther*, 1974 Iowa, 218 N.W.2d 621, where a county attorney made a promise of immunity from prosecution which he was not authorized to make, and then backed out of the promise and prosecuted the promissee who had cooperated and incriminated himself, our Supreme Court said it was "nothing less than an intolerable violation of our time-honored fair play norm, and accepted professional standards."

Thus, in a case where a county attorney in order to obtain a plea of guilty unlawfully makes a promise to expunge all records, an offer a criminal cannot refuse, the people of Iowa may well be without a direct remedy. That state of affairs should weigh heavily upon the conscience of any responsible prosecutor. And habitual and willful promises of this kind could result in removal from office at the polls or otherwise.

September 12, 1975

COUNTIES: Drainage Assessments. §§455.57, 455.64, Code of Iowa, 1975. Drainage assessment levies bear interest from date of levy. (Nolan to Priebe, State Senator, 9-12-75) #75-9-12

The Honorable Berl E. Priebe, State Senator: This letter is written in response to your request for an opinion interpreting §455.57, Code of Iowa, 1975, on drainage assessments. Your letter states that the Winne-

bago County Treasurer questions the legality of charging interest on assessments from the date of the levy.

Although unstated, your letter appears to imply a question of whether or not the interest rate is calculated from the day of the levy when the assessment is paid in installments, as provided by §455.64 of the Code. The pertinent parts of the Code sections involved are as follows:

"455.57 Levy—interest. When the board has finally determined the matter of assessments of benefits and apportionment, it shall levy such assessments as fixed by it upon the lands within such district, . . . All assessments shall be levied at that time as a tax and shall bear interest at not to exceed seven percent per annum from that date, payable annually, except as hereinafter provided as to cash payments thereof within a specified time."

"455.64 Installment payments—waiver. If the owner of any land against which a levy exceeding one hundred dollars has been made and certified shall, within thirty days from the date of such levy, agree in writing endorsed upon any improvement certificate referred to in section 455.77, or in a separate agreement, that in consideration of having a right to pay his assessment in installments, he will not make any objection as to the legality of his assessment for benefit, or the levy of the taxes against his property, then such owner shall have the following options:

"1. To pay one-third of the amount of such assessment at the time of filing such agreement; one-third within twenty days after the engineer in charge shall certify to the auditor that the improvement is one-half completed; and the remaining one-third within twenty days after the improvement has been completed and accepted by the board. All such installments shall be without interest if paid at said times, otherwise said assessments shall bear interest from the date of the levy at the rate of not to exceed seven percent per annum, payable annually, and be collected as other taxes on real estate, with like penalty for delinquency.

"2. To pay such assessments in not less than ten nor more than twenty equal installments, the number to be fixed by the board and interest at the rate fixed by the board, not exceeding seven percent per annum. One such installment shall be payable at the September semiannual taxpaying date in each year; provided, however, that the county treasurer shall, at the September semiannual taxpaying date, require only the payment of a sufficient portion of the assessments to meet the interest and the amount maturing on bonds or certificates prior to the regular time for the payment of the second installment of taxes and the balance shall be collected with such second installment and without penalty."

In a previous opinion issued by this office on October 23, 1967, 1968 O.A.G. 362, we said that under §455.64 the legislature clearly provided for three distinct methods for paying the drainage tax.

"A statute authorizing special assessments upon private property for the cost of public improvements is generally drastic in nature and burdensome in operation, and the Courts will be slow to imply burdens or penalties which are not clearly necessary. *Fitchpatrick v. Fowler*, 157 Iowa 215, 138 N.W. 392 (1912). Therefore, if the taxpayer does not pay the drainage tax within 20 days after the levy, but does sign a waiver pursuant to Section 455.64(2), there is no penalty when the installment payments of the tax became delinquent, in addition to the interest rate not to exceed five percent per annum as fixed by the board of supervisors."

The language of the Attorney General's opinion set forth above dealt with the Code section prior to the amendment changing the interest rate from five to seven percent and the further amendment to §445.39, increasing the interest rate on installments of taxes by the following language:

"If the first installment of taxes shall not be paid by October 1, said installment shall become due and draw interest, *as a penalty*, of one percent per month until paid, from October 1 following the levy; and if the last half shall not be paid by April 1 following such levy, then a like interest shall be charged from the date such last half became delinquent." [emphasized]

Accordingly, it is our view that the distinction must be made between interest at seven percent per annum from the date of the levy of the assessment due and payable and interest as a penalty applied where installment payments allowed by §455.62 and §455.64(1) become delinquent. In the first instance, the interest accrues from the date of the levy. In the second instance, the penalty interest, it is chargeable for the period of delinquency of the installment payment at the rate of one percent per month from the date of the delinquency.

September 12, 1975

COUNTY OFFICERS: SHERIFF: BOARD OF SUPERVISORS: AUDITOR: PEACE OFFICERS PUBLIC RECORDS: Secret investigations and confidential informants — reimbursement of expense claims. §§4.6(5), 68A.1, 68A.2, 331.19(1), 331.19(4), 331.19(5), 331.20, 331.21, 332.2, 332.3(5), 332.3(8), 333.2, 333.6, 337.1, 748.3 and 748.4, Code of Iowa, 1975. A sheriff may be reimbursed from county funds for expenses incurred in the payment of confidential informants without disclosing the names of those informants to the County Board of Supervisors. The County Board of Supervisors may not refuse the claim for merely failing to disclose the name of the informants. Law enforcement officers are presumed to act in good faith when undertaking actions under their general powers but may not abuse such discretion as is vested in them. (Coleman to Fenton, Polk County Attorney, 9-12-75) #75-9-13

Mr. Ray A. Fenton, Polk County Attorney: This letter is in reply to a request by your office for an Attorney General's Opinion on the following matter:

"May the sheriff of Polk County expend money to make undercover buys and to obtain information from confidential informants used in law enforcement without disclosing the names of said confidential informants?

"It appears this question has been answered by your opinions in 1936 and 1947, but we request another opinion in light of more recent developments in this activity."

This inquiry presents three distinct issues:

1. Can the Sheriff expend the money for undercover buys and to obtain information from confidential informers?

2. Can the Sheriff be reimbursed for these expenditures by the Board of Supervisors?

3. Can the Board of Supervisors refuse to allow a reimbursement claim for money expended to pay informants which refusal is based on a failure to name a confidential informant?

Before specifically addressing these issues, brief mention should be made to the "recent developments" to which you refer. We assume that these "recent developments" are those Iowa Supreme Court cases which have provided the guidelines to lower courts, prosecutors, and defense attorneys, with respect to the disclosure of confidential informants' identities.

Recent Iowa Supreme Court cases point out that, in criminal trials, disclosure of an informant's identity at trial should be made only after determining that the interests of the defendant in obtaining the name outweigh the interests of the State in non-disclosure. See: *State v. Lamar*, 1973 Iowa, 210 N.W.2d 600; *State v. Battle*, 1972 Iowa, 199 N.W.2d 70. See also: *Roviaro v. United States*, 1957, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639. The interests of the defendant in obtaining the name are foundationed upon his right to a fair trial and to prepare a defense, but that . . . "their identity need not be disclosed until defendant[s] show[s] that disclosure is relevant, necessary and helpful to the defense." *United States v. McCarthy*, 1968, 292 F. Supp. 937. This sentiment is echoed also in *State v. Denato*, 1970 Iowa, 173 N.W.2d 576. The interest of the State in not disclosing the name is based upon a "public interest in maintaining flow of information essential to law enforcement," and to protect the safety and well-being of those individuals who supplied and are supplying the information. *State v. Lamar*, 1973 Iowa, 210 N.W.2d at 602. The general rule remains, however, that the prosecution, subject to certain exceptions, is privileged to withhold the names of individuals who furnish law enforcement officers with information relating to violations of the law. *State v. Battle, supra.* It is interesting to note, however ,that even if a court orders disclosure, that the State, because of the sensitive nature of informants, still need not divulge the name of the informant, but at such point is confronted with the option of either disclosing or dismissing. *State v. Denato, supra.* Not infrequently, it would follow that because of the ongoing character of the information being supplied, it would be more beneficial to dismiss the prosecution and keep a firm grasp on the covert criminal activity than to try the case and lose the source entirely. Moreover, the State may choose to dismiss the prosecution to save the life of or prevent reprisals against the informant. Such concept is certainly not the least bit speculative when one examines the Federal Witness Relocation Program, where complete identities are changed to protect witnesses after their testimony is given. Unfortunately, states do not generally have the resources to undertake such programs themselves.

1. In regard to the ability of the Polk County Sheriff to expend funds to make undercover buys and to pay confidential informants, I would refer you to Chapter 337, Code of Iowa, 1975, which pertains to the Office of Sheriff. Section 337.1, Code of Iowa, 1975, provides:

"*The sheriff, by himself or deputy, may call any person to his aid to* keep the peace or *prevent crime*, or to arrest any person liable thereto, or to execute process of law; and when necessary, the sheriff may summon the power of the county. The sheriffs may use the services of the state department of public safety in the apprehension of criminals and detection of crime." (emphasis added).

Section 748.3, Code of Iowa, 1975, provides in pertinent part:

"The following are 'peace officers':

"1. Sheriffs and their deputies."

Additionally, Section 748.4, Code of Iowa, 1975, states with regard to the duties of the sheriff as a peace officer:

"It shall be the duty of a peace officer and his deputy, if any, throughout the county, township, or municipality *of which he is such officer,* or to which he is assigned or employed under any mutual assistance arrangement or intergovernmental agreement, *to preserve the peace, to ferret out crime, to apprehend and arrest all criminals, and insofar as it is within his power, to secure evidence of all crimes committed, and present the same to the county attorney, grand jury or magistrate, and to file informations against all persons whom he knows, or has reason to believe, to have violated the laws of the state, and to perform all other duties, civil or criminal, pertaining to his office or enjoined upon him by law. Nothing herein shall be deemed to curtail the powers and duties otherwise granted to or imposed upon peace officers.* (emphasis added).

These sections of the Code outline the general duties of a Sheriff, and as stated in 1936 OAG 522, 524:

". . . Public officers have not only the powers expressly conferred upon them by law, but they also possess by necessary implication such powers as are requisite to enable them to discharge the official duties devolved upon them . . . ."

Such concept is more recently affirmed by the Iowa Supreme Court, in the cases of *in re Frentress' Estate,* 1958, 249 Iowa 783, 786, 89 N.W.2d 367, 368, and *Woodbury County v. Anderson,* 1969 Iowa, 164 N.W.2d 129, 134, wherein it was held county officials "have only such powers as are expressly conferred by statute, *or necessarily implied from the powers so conferred.*" Thus, it is our opinion that it is implied from Sections 337.1, 748.3, and 748.4, Code of Iowa, 1975, that a sheriff can expend money to make undercover buys and to pay confidential informants since such actions are undertaken in furtherance of the sheriff's general law enforcement duties.

2. Can the sheriff be reimbursed for these expenditures by the Board of Supervisors?

In regard to the ability of a Sheriff to obtain reimbursement from the Board of Supervisors, Section 332.3(5), Code of Iowa, 1975, provides that the Board of Supervisors has the following power:

"5. To examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle, and allow all claims against the county, unless otherwise provided by law."

The reimbursement procedure that the sheriff employs consists of filing a claim with the Board of Supervisors for monies which *the sheriff has expended* in payment to confidential informants. Section 331.20, Code of Iowa, 1975, states:

"Claims filed shall be numbered consecutively in order of filing, and shall be entered on the claim register alphabetically, so as to show the date of filing, the number of the claim and *its general nature, the name of the claimant* and the action of the board thereon, stating, if allowed, the fund upon which allowance is made. A record of the allowance of claims at each session of the board shall be entered on the

minute book by reference to the numbers of the claims as entered on the claim register." (emphasis added).

Section 331.21, Code of Iowa, 1975, provides with regard to unliquidated claims, as such claim by the sheriff would be:

"*All unliquidated claims against counties and all claims for fees or compensation*, except salaries fixed by statute, *shall, before being audited or paid, be so itemized as to clearly show the basis of any such claim* and whether for property sold or furnished the county, or *for services rendered* it, or upon some other account, and *shall be signed by the claimant*, filed with the county auditor for presentation to the board of supervisors; and no action shall be brought against any county upon any such claim until the same has been so filed and payment thereof refused or neglected." (emphasis added).

It will be noted from the italicized portions quoted above that reimbursement procedures and requirements are stated in terms of the "claimant." Once these procedures are followed, it is our opinion that the Board of Supervisors does have the power to allow claims for reimbursement made by the Polk County Sheriff under the circumstances of this case; no contrary provisions of the law negate this power.

3. Must informants' names be disclosed before the Board of Supervisors allows reimbursement claims?

A question of a very similar nature was posited to this office in 1952 OAG 84. It should be noted that the 1952 opinion involved reimbursement to a county attorney for secret investigations conducted by him, and did not relate to the duties of the Office of Sheriff. The opinion held that the Polk County Board of Supervisors could allow the claim and was "not required to demand the name of the undercover investigator." 1952 OAG 84, 87.

In the previous question, it was noted that the "claim" procedure necessary for reimbursement involved or contained language relative to a "claimant." It appears very clear that the "claimant" must be identified, but does this also encompass an identification requirement as to the person or persons to whom a "claimant" has made a payment? Limited solely to the question presented in this opinion request, we think it does not require that the ultimate "receiver" of the funds need be identified.

Our opinion is based upon a number of factors which require a balancing of the various interests involved while simultaneously giving the appropriate statutes their full force and effect. As previously discussed in the first question of this opinion, Section 332.3(5), Code of Iowa, 1975, gives the Board of Supervisors the power to ". . . examine and settle all accounts of the receipts and expenditures of the county . . . ." Moreover, Section 332.3(8) provides that the Board has the power:

"To require any county officer to make a report to it, under oath, on any subject connected with the duties of his office and to give such bonds as shall be necessary for the faithful performance of his duties."

It is apparent, therefore, that the County Board of Supervisors may make inquiry into the nature of the claim, expected results, and results in fact received. We do not believe, however, that legitimation of or investigation into a sheriff's claim would necessarily be enhanced by

requiring the disclosure of the name of every informant in the county. Such would not only serve to place, at a minimum, a severe strain on the entire criminal investigation procedures of a sheriff's office, with regard to informant use, but raises serious questions as to why the Supervisors really need this information — the particular names — in order to determine whether the claim is legitimate.

In 1972 OAG 605, 608, it was stated:

"A sheriff being a public officer is presumed to act in good faith and within the scope of his authority. Accordingly, his appointment of deputies who are not then assigned to duty by him is presumed to be done for the purpose of providing a reserve of persons qualified as deputy sheriffs whom he can employ as and when he deems their employment necessary or advisable *to perform any part of the duties of his office.*" (emphasis added).

We reaffirm such statement in this opinion and would further apply it to the use of secret informants, who bring reports to law enforcement agencies, of criminal activity in the county, which would otherwise be unobtainable to peace officers.

In the words of 1952 OAG 84, 87:

"Having the legal power and authority to so undertake an investigation of the character described, it would follow that the county is liable for the cost of such investigation, provided the Board finds such costs reasonable, and the investigation undertaken within the sound discretion of the [sheriff]. The power thus vested in the [sheriff] may not be abused. It is to be observed that his actions in incurring expenses of investigators, (informants) may, under pertinent situations, be subject to investigation by the grand jury, who can elicit the name of a secret investigator (informant) or, the board of supervisors, within their powers, and in their discretion, could deny payment of the claim. In the latter event the [sheriff] would be compelled to secure payment by plenary action against the county."

As can be seen, the actions of a sheriff are not without review, and if suspicions have grown to such proportions that a board of supervisors desires the names of the informants to determine if they have in fact been paid (which appears to us to be the only legitimate reason for disclosure of their names) such disclosure and determination is best left to and vested in the county grand jury.

Lastly, the question arises as to the payment on warrant by the County Auditor to the sheriff. Section 333.2, Code of Iowa, 1975, sets forth the following:

"Except as otherwise provided, the auditor shall not sign or issue any county warrant unless the board of supervisors by recorded vote or resolution shall have authorized the same, and every such warrant shall be numbered and the date, amount, and the number of the same, *and the name of the person to whom issued*, shall be entered in a book to be kept in his office for that purpose." (emphasis added).

The mechanics of record keeping as provided for in this section are similar to the mechanics that a board of supervisors must also employ under Chapter 331, Code of Iowa, 1975. Section 331.19(1), Code of Iowa, 1975, states:

"1. *Minute book.* A book known as the 'minute book,' *in which shall be recorded all orders and decisions made by it* except those relating to highways and drainage districts, and in which book, or in a separate book kept for that purpose, there shall be an alphabetical index of proceedings of said board as shown by the minutes." (emphasis added).

Section 331.19(5) states:

"5. *Claim register.* A book to be known as a 'claim register,' *in which shall be entered a minute of all claims filed for allowance of money from the county treasury.*"

And, Section 331.19(4) provides:

"4. *Warrant book.* A book to be known as the 'warrant book,' in which shall be entered, in the order of its issuance, the number, date, amount, *name of drawee of each warrant drawn on the treasury,* and the number of warrants, as directed in relation to the minute book." (emphasis added).

Two items should be noted from the preceding sections set out: (1) each of the "books" kept by both the county auditor and county board of supervisors are "public records" within the definition of Section 68A.1, Code of Iowa, 1975, and are open to public scrutiny under Section 68A.2, Code of Iowa, 1975, and (2) that under Sections 333.2 and 331.19(4), Code of Iowa, 1975, the only requirement as to *names* that should appear in the various books are those individuals to whom the warrants are addressed. Sections 331.20 and 331.21, Code of Iowa, 1975, respectively dealing with "Claims generally" and "Unliquidated claims," are the sections of the law which make Sections 333.2, 331.19(1), 331.19(5), and 331.19(4), Code of Iowa, 1975, operable. You will observe that Sections 331.20 and 331.21 speak in terms of "*claimants*" only.

The upshot of such analysis is that the required recordation of "names" goes only to the individual making the *claim* — in this case, the Polk County Sheriff. Some may argue, however, that Section 333.6, Code of Iowa, 1975, requires that ultimately the names of the undercover informants must be disclosed, as that section provides, with regard to the county auditor:

"*Form of warrants. Each warrant issued by the auditor shall be made payable to the person performing the service or furnishing the supplies for which said warrant makes payment, and shall state the purpose for which said warrant was issued.*" (emphasis added).

We believe that it does not so do. Certainly, it canot be assumed that the legislature would intend to enact a futile and ineffectual law or one which would lead to absurd consequences or defeat avowed policy of the state. See: *Graham v. Worthington,* 1966 Iowa, 146 N.W.2d 626; *Monroe Community School District v. Marion County Board of Education,* 1960, 251 Iowa 992, 103 N.W.2d 746. Certainly if under the language of Section 333.6, Code of Iowa, 1975, the name of the informant appeared on the warrant and a "public record" was maintained in the county auditor's office which contains information as to whom and "the purpose for which said warrant was issued," the ability of the sheriff to investigate and ferret out crime in the county through the use of informants would be neutralized. We do not believe that duties and powers were given with one hand by the legislature and then taken back or frustrated

by a statute enacted for the very purpose of reimbursing individuals for services rendered to the county.

We believe that in harmonizing any ambiguity in the statute to avoid absurd consequences, as directed by Section 4.6(5), Code of Iowa, 1975, *the sheriff in the instant situation is seeking a reimbursement of funds expended by him* in furtherance of his law enforcement duties. *This expenditure is the service and/or supplies furnished* under Section 333.6, Code of Iowa, 1975. Such conclusion is the only one which leaves intact both the duties of a county sheriff and a county auditor.

To reiterate, it is our opinion that the mere nondisclosure of a confidential informant's name cannot be a basis for deciding that an expense is unreasonable. However, some indicia of reliability for the claim should be present and the Polk County Board of Supervisors in the exercise of their discretion may determine the criteria employed for establishing reliability. Moreover, the Board of Supervisors may always question the amount of expenses incurred in specific cases and if the reasonableness of such claim cannot be shown, may deny the claim on that basis. This opinion holds that mere failure to disclose a confidential informant's name is not a ground for denial of a claim for reimbursement.

September 12, 1975

CONSTITUTIONAL LAW: GENERAL ASSEMBLY: LEGISLATORS: COMMISSION ON AGING: SEPARATION OF POWERS. Art. III, §1, Constitution of Iowa. §§249B.2, .4 and .6, Code of Iowa, 1975. Subsections 1 and 2 of §249B.2 requiring legislative service on the commission on aging, a commission in the executive department of government, are unconstitutional as requiring a person in the legislative branch to exercise functions appertaining to the executive branch. An unconstitutional provision does not create an office and legislators purporting to serve in a non-existent office may not be compensated, and must refund any per diem they have received, therefor. (Turner to Peterson, Exec. Dir. Commission on Aging, 9-12-75) #75-9-14

Mrs. Leona I. Peterson, Executive Director, Commission on Aging: In your letter of September 3 ,1975, you request an opinion of the attorney general as follows:

"We have studied your opinion of January 16, 1975, to Senator Plymat, testimony by you and Mr. Krause on August 15 to the Interim Committee on Public Boards and Commissions, and Article III, §§1, 21, and 22 of the Constitution. We find that said opinion, testimony, and provisions of the Constitution all indicate that the lucrative nature of legislative membership on the Commission on the Aging is unconstitutional.

"We are charged with authorizing the Secretary of the Senate and the Chief Clerk of the House to pay per diem to legislators for their attendance at Commission meetings. We need to know whether or not we are violating the constitution by executing what appears to be an unconstitutional law.

"We request your opinion as to whether or not we should continue to authorize payment of the per diem pursuant to §249B.6, insofar as it applies to legislative members of the Commission, and apprporiations subsequent thereto."

In my opinion, membership on the Commission of the Aging is a public office in the *executive* department of government. Members thereof exer-

cise the sovereign power of the state when they perform their duties under §249B.4(7), Code of Iowa, 1975, which among other things provides:

"It shall be the duty of the commission to: * * *

"7. Seek resources to provide direct service programs and services to the aging at the state, regional, county or local levels and provide services through *contract arrangements with public or private nonprofit agencies.*" (Emphasis added.)

As we have noted in our opinion (OAG to Senator Plymat, January 16, 1975), the thread of definition of a public officer runs through many Iowa cases from *State v. Spaulding*, 1897, 102 Iowa 639, 72 NW 288, to *Vander Linden v. Crews*, 1973 Iowa, 205 N.W.2d 686. Suffice it to say that now under the aforesaid statutory authority, members of the Commission on Aging occupy positions created by statute and exercise the sovereign power of the state when they negotiate and approve contractual arrangements, and they bind the state thereto.

Indications are that membership on this commission is also a "lucrative office" or a "civil office of profit." See OAG to Plymat 1-16-75, pages 4 to 11. Members receive a "per diem rate equal to that allowed members of the legislature." §249B.6.

On the basis of that opinion, I conclude that subsections 1 and 2 of §249B.2, requiring legislative service on the commission on aging, are unconstitutional under Art. III, §1, of the Distribution of Powers, Constitution of Iowa, which provides:

"The powers of the government of Iowa shall be divided into three separate departments—the Legislative, the Executive, and the Judicial: and *no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others*, except in cases hereinafter expressly directed or permitted." (Emphasis added.)

That section prohibits a legislator from exercising *any* function appertaining "to the executive department, regardless of compensation therefor or even whether he holds an office."

Thus legislators are constitutionally prohibited from becoming members of the commission and subsections 1 and 2 of §249B.2 are unconstitutional. An unconstitutional provision cannot create an office. OAG to Plymat, 1-16-75. Thus there was no office for any legislator to take and legislators cannot be compensated for services on the Commission on Aging. *Security Sav. Bank of Valley Junction v. Connell*, 1924, 198 Iowa 564, 200 N.W. 8.

But as I pointed out on page 25 of the Plymat opinion, if I am wrong and legislators have properly taken seats on the commission since qualifying as legislators, they have ipso facto vacated their seats in the general assembly for taking a constitutionally incompatible office. *State ex rel. LeBuhn v. White*, 1965, 257 Iowa 606, 133 NW2d 903. In that case they may properly be compensated as members of the commission but not as legislators.

In any event you should not "continue to authorize payment of per diem pursuant to §249B.6, insofar as it applies to legislative members

of the commission." And you should inform us as to what has been paid so we can seek reimbursement of any payment of such per diem in accordance with authorities cited on pages 27-28 of the Plymat opinion.

September 12, 1975

STATE OFFICERS AND EMPLOYEES; COMPENSATION; PER DIEM. §§79.1 and 272A.4, Code of Iowa, 1975. A member of the professional teaching pratcices commission, who is also a salaried officer or employee of the state department of public instruction, is entitled to the per diem provided for members of the commission, such being within the "expressly provided" exception to the limitation on compensation of salaried employees. (Turner to Bennett, Director, Iowa Professional Teaching Practices Commission, 9-12-75) #75-9-15

Mr. Don R. Bennett, Director, Iowa Professional Teaching Practices Commission: This is in response to your request for an opinion as to whether that member of the Professional Teaching Practices Commission representing the Department of Public Instruction is entitled to the per diem provided for members of the commission by §272A.4, Code of Iowa, 1975. You have submitted an excellent brief which we find persuasive.

§272A.4 prescribes the membership of the Professional Teaching Practices Commission, including "one member representing the state department of public instruction." The members of said Commission are provided an express statutory compensation by §272A.4, which states that:

"The members of the commission shall be allowed a per diem of thirty dollars and their necessary travel and expense while engaged in their official duties."

§272A.4 clearly applies to all members of the commission, so that as such, the member representing the state department of public instruction is entitled to the per diem.

Authorities which may appear to be to the contrary actually are not. There is authority for the proposition that salaried employees of the state are not entitled to additional compensation because two compensations will not be paid to one person for the same time period. 1922 OAG 278; 1922 OAG 286; 1970 OAG 710; §79.1, Code of Iowa, 1975. Each of these authorities, however, also recognizes the exception that additional compensation is permissible where it is expressly provided for by statute. Since the additional per diem compensation here in question is expressly provided to the commission member representing the state department of public instruction, by virtue of reading §272A.4 in conjunction with §272A.3, the per diem allowance falls within the exception and is therefore valid.

See also OAG, Turner to Musgrove, issued this date.

September 12, 1975

STATE OFFICERS AND EMPLOYEES; COMPENSATION; PER DIEM. §79.1 and 303.2, Code of Iowa, 1975. A member of the state historical board who is also a salaried state employee is entitled to the per diem provided for members of the board, such being within

the "expressly provided" exception to the limitation on compensation of salaried emloyees. (Turner to Musgrove, State Historical Board, 9-12-75) #75-9-16

Mr. Jack W. Musgrove, Secretary, State Historical Board: You have requested an official opinion of the Attorney General as to whether members of the State Historical Board who are also state employees may be paid the per diem allowance specified in §303.2, 1975 Code of Iowa, in addition to their salaries as state employees. You say the comptroller's office denies payment of per diem on authority of §79.1, Code of Iowa, 1975, which, provides in pertinent part:

"Salaries specifically provided for in an appropriation Act . . . shall be in full compensation of all services, *except as otherwise expressly provided.* . . . * * *" (Emphasis added.)

The second paragraph of §303.2 provides:

" * * *

"Members of the board shall be paid a forty-dollar per diem and shall be reimbursed for actual and necessary expenses while engaged in their official duties."

You have asked whether the per diem allowance of §303.2 falls into the category of compensation "except as otherwise expressly provided" in §79.1. There can be no question but that it does.

Assuming that the state employee members of the State Historical Board are lawfully appointed, it would tax the imagination to conceive of a situation which would more clearly fit the exception to §79.1. Compensation in the form of per diem pursuant to §303.2 is certainly "otherwise expressly provided" compensation. The comptroller's office has no discretion in the matter. The statute requires the payment and the comptroller's duty is merely ministerial. Upon determining that the board members performed their official duties on a given day, the comptroller must issue warrants in payment of the per diem regardless of §79.1.

My view of this matter is bolstered by the derivation of §303.2, which was formerly §303.20, Code of Iowa, 1973, as amended by §15, Chapter 124 (HF 704) 65th G.A., 1st, 1973. See Chapter 1175, §§2 and 17, 65th G.A., 2nd Session, 1974. An examination of Chapter 124, 65th G.A., shows that it was an act relating to compensation paid to members of certain boards and commissions (including boards and commissions other than the State Historical Department). Some of the other sections of that law made specific exceptions providing that per diem *not* be paid to members of the boards, commissions and councils "who are employees of the state or any political subdivision." See, for example, §14 with reference to the higher education facilities commission, §17 providing per diem to members of the natural resources council and §20 with respect to the soil conservation commission, Ch. 124, 65th G.A., 1st. But other sections, including §15 which has now become §303.2 made no exception to prohibit payment to a member who was an employee of the state. For example, §5 of Chapter 124, pertaining to the law enforcement academy council, included no such exception for state employees.[1] Clearly, from these sections of Chapter 124, the legislature intended to deny per diem to some state employees for their membership on boards and commissions, but to allow it to others. Expressio unius est exclusio alterius. *State v. Binkley*, 1972 Iowa, 201 N.W.2d 917, 919-920.

Members of the State Historical Board who are state employees and who have been erroneously denied their per diem allowance are entitled to reimbursement for all of their services on the board since the effective date of Ch. 124, July 1, 1973. The comptroller's office cannot deprive these board members of what was (and is) lawfully theirs.

The situation here is easily distinguished from that presented in 1970 O.A.G. 710. In that instance, it was our view that two geology professors, who were salaried state employees, were not entitled to additional compensation from the Iowa Geological Survey. We noted that:

" * * *

"It has been the view of the department that persons in the employ of the state working for a stated salary are not entitled to other compensation from the state *unless expressly so provided by statute.* . . . * * *" (Emphasis added.)

There was no statute in that instance which expressly provided for compensation to the geology professors apart from their salaries.

September 18, 1975

STATE OFFICERS AND DEPARTMENTS: Board of Accountancy, Advisory Committee, Qualifications of Members. §§116.2, 116.7 and 116.9, Code of Iowa, 1975. A person who was employed as chief accountant for the old Iowa Liquor Control Commission is deemed to have been actively engaged in the practice of accounting for purposes of meeting the qualifications required for appointment to the advisory committee of the Board of Accountancy. (Turner to Norpel, State Senator, 9-18-75) #75-9-17

Honorable Richard J. Norpel, Sr., State Senator: You have requested an opinion of the attorney general as to whether a person who has been a licensed accountant, with his own accounting firm, for more than 10 years, but who during that period was also chief accountant for the Iowa Liquor Control Commission, is qualified or eligible for appointment to the advisory committee of the Board of Accountancy, under §116.9, Code of Iowa, 1975, which provides, in pertinent part:

"The advisory committee shall consist of three members appointed by the governor who shall be licensed accounting practitioners. A member shall be actively engaged in the practice of accounting and shall have been so engaged for *five years preceding his appointment*, the last two of which shall have been in Iowa."

An "accounting practitioner" is a term defined in §116.2 as one "who does not hold a certificate as a certified public accountant or public accountant under this chapter, and who offers to perform or performs

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[1] It is interesting that subsequent to enactment of Ch. 124, 65th G.A., 1st, in 1973, the 65th G.A. 2nd Session amended §5 of Ch. 124 to exclude members of the council who are state employees from payment of per diem. Ch. 1108, §2, 65th G.A., 1st, 1974. We are informed that this amendment was adopted at the instance and request of the comptroller. Obviously, if he and the legislature did not consider the amendment necessary to justify his disobedience to Ch. 124, §5, it would not have been passed. We cannot assume such amendment was a futile and meaningless gesture.

for the public, and for compensation, any" of certain services enumerated therein.

A person may be licensed as an "accounting practitioner" under §116.7 who meets certain requirements specified therein, including that of being a resident of the state, or having a "place of business in the state, or, as an employee, is regularly employed in this state."

The first question is whether working for the liquor commission includes performance "for the public, and for compensation" as would of course that of a private accountant who has an office and who serves clientele who come to him for his services from the public. I believe the answer is yes.

Perhaps an accountant for a private corporation might not perform "for the public" but in my view one who is an accountant for a public agency does in fact perform "for the public" in a practical as well as a literal sense.

My view is fortified by the licensing section which authorizes the licensing of one who, among other things, is "an employee * * * regularly employed in this state."

It is unnecessary for us to decide whether the words of §116.9 "five years preceding his appointment" mean that he must have been a licensed accounting practitioner for five years *immediately and continuously* preceding his appointment because from the facts you have given me the person in question has been a licensed accounting practitioner for over ten years immediately and continuously prior to this time.

September 19, 1975

CITIES AND TOWNS: Municipal Support of Industrial Projects — §4.2, 4.4, 4.6; Chap. 135A; §419.1, Code of Iowa, 1975; §§1, 2 of S.F. 526, 66th G.A. (1975). A medical clinic operated for a profit may qualify as a "project" within §419.1 of the Code. (Blumberg to Glenn, State Senator, 9-19-75) #75-9-18

Honorable Gene W. Glenn, State Senator: We have received your opinion request regarding an interpretation of §419.1, 1975 Code of Iowa. You ask whether a medical clinic operated for profit may qualify under that section. Chapter 419 provides for municipal support of industrial projects. Municipalities have the powers to acquire, improve and equip projects; lease projects; sell projects; enter into loan agreements with respect to projects; and, issue revenue bonds to defray the costs of projects.

Section 419.1(2), 1975 Code, as amended by §1, Senate File 526, 66th G.A. (1975), provides in pertinent part:

" '*Project*' means all or any part of or, any interest in, (a) any land buildings or improvements . . . which shall be suitable for the use of any voluntary nonprofit hospital, clinic or health care facility as defned in section 135C.1, subsection 8, or of any private college or university . . . or of any industry or industries for the manufacturing, processing or assembling of any agricultural or manufactured products . . . or of any commercial enterprise engaged in storing, warehousing or distributing

products of agriculture, mining . . . or (b) pollution control facilities which shall be suitable for use by any industry, commercial enterprise or utility. . . ."

Chapter 1219, Acts of the 65th G.A., added to §419.1 the provisions relating to "voluntary nonprofit hospital, clinic or health care facility" and those concerning commercial enterprises for storing and warehousing. The issue here is whether "voluntary nonprofit" modifies "clinic" and "health care facility" as well as "hospital."

Generally, statutes shall be liberally construed with a view to promote their objects and assist the parties in obtaining justice. §4.2, 1975 Code. It is presumed that a just and reasonable result is intended and that public interest is favored over any private interest. §4.4 of the Code. If a statute is ambiguous, the following may be considered in determining the legislative intent: (1) The object sought to be obtained; (2) The circumstances under which the statute was enacted; (3) The legislative history; (4) The common law or former statutory provisions; (5) The consequences of a particular construction; and, (6) The preamble or statement of policy. §4.6 of the Code.

When a statute is construed, a court is required to consider the language used, the object to be accomplished, and to place a reasonable construction on the statute which will best effect its purpose. *State v. One Certain Conveyance,* 211 N.W.2d 297 (Iowa 1973). The court should also consider all parts of a statute together without according undue importance to single or isolated portions. *Osborne v. Edison,* 211 N.W.2d 696 (Iowa 1973); *Wilson v. Iowa City,* 165 N.W.2d 813 (Iowa 1969); *Dingman v. City of Council Bluffs,* 1958, 249 Iowa 1121, 90 N.W.2d 742. A duty exists to seek out and give effect to legislative intent, *Jones v. Iowa State Highway Commission,* 207 N.W.2d 1 (Iowa 1973), but that intent should be as shown by what the legislature said rather than what it should or might have said, *Lindstrom v. Aetna Life Ins. Co.,* 203 N.W.2d 623 (Iowa 1973). The manifest intent of the legislature prevails over the literal import of the words used, *Northern Natural Gas Co. v. Forst,* 205 N.W.2d 692 (Iowa 1973), however, ordinary rules of grammar can be used as an aid to the interpretation, *Dingman v. City of Council Bluffs,* supra; *Zilske v. Albers,* 1947, 238 Iowa 1050, 29 N.W.2d 189. In addition, meanings of various words are to be construed in connection with associated words and given an interpretation in accord with the legislative intent expressed therein. *State v. Bauer,* 1945, 236 Iowa 1020, 20 N.W.2d 431. See also, *Smith v. City of Fort Dodge,* 160 N.W.2d 492 (Iowa 1968). Of course, these rules have no application unless the statute in question is ambiguous, obscure or reasonable minds may and do disagree or be uncertain as to the meaning, *Janson v. Fulton,* 162 N.W.2d 438 (Iowa 1968).

We find that the wording in question is ambiguous and that reasonable minds can disagree or be uncertain. A quick reading of that part of the statute in question leaves two impressions: (1) "Voluntary nonprofit" applies to "hospital", "clinic" and "health care facility," or (2) "voluntary nonprofit" modifies only "hospital." Both interpretations are reasonable. We can find no authority which discusses the problem before us where the modifying words are at the beginning of the sentence rather than in the middle or at the end. The rule of the "last antecedent"

generally prevails in the latter two instances. It is stated in 2A Sands, Sutherland Statutory Construction §47.33, p. 159 (4th ed. 1973), which supercedes the more frequently cited 2 Horack, Sutherland Statutory Construction §4921 (3rd ed. 1943):

"Referential and qualifying words and phrases, where no such contrary intention appears, refer solely to the last antecedent, which consists of 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.' Thus a proviso usually is construed to apply to the provision or clause immediately preceding it."

It is pointed out there that this rule is another aid in discovering the intent or meaning of a statute, and where the sense of the entire act requires that a qualifying word or phrase apply to succeeding sections, the word or phrase will not be restricted to its immediate antecedent. See also, *State v. Wean*, 1965, 86 N.J. Super. 283, 206 A.2d 765; *State v. Congdon*, 1962, 76 N.J. Super. 493, 185 A.2d 21, and, *In re Kurtzman's Estate*, 396 P.2d 786 (Wash. 1964).

In *Webb v. Mayor and City Council of Baltimore*, 1941, issue 179 Md. 407, 19 A.2d 704, the issue concerned the following statute:

"Any expenses incurred by the authorities of any city . . . in maintaining in a hospital . . . a patient who is not a pauper shall be deemed to be a debt due from such patient . . . and may be recovered from him at any time within *twelve months* after the discharge . . ., or from his estate in the event of his dying in such hospital." [Emphasis added]

The question was whether the limitation of twelve months, as set forth above, applied against a patient's estate (succeeding words) or only against the patient (antecedent). The court held that the phrase "twelve months" referred only to the antecedent, "patient," not to any succeeding words. It reasoned that a distinction existed between the patient paying or the estate paying if the patient died. Therefore, it found that if the legislature had intended to put a twelve month limitation upon the estate, it would have repeated the modifying words. See also, *Rhodes v. City of Little Rock*, 1967, 243 Ark., 93 418 S.W.2d 783, 785, where it was held in the dissent that modifying words are not to be extended to following words; *Kizer v. Livingston County Board of Commissioners*, 1972, 38 Mich. App. 239, 195 N.W.2d 884, for the proposition that the rules of grammar are presumed to have been known to the legislature, citing to *United States v. Goldenberg*, 1897, 168 U.S. 95, 18 S.Ct. 3, 42 L.Ed. 394; and, *In Re Estate of Cook*, 1972, 188 Neb. 312, 196 N.W.2d 380. If the rule of "the last antecedent" is analogous here, then we can hold that "voluntary nonprofit" only modifies "hospital."

By reading all of §419.1, both before and after the amendment of 1974, we find that the only indication of a limitation by reason of "nonprofit" is in the term "voluntary nonprofit hospital." All other "projects" within the Chapter can be either profit or nonprofit because of the absence of any such limitation by the legislature. Health Care Facilities under Chapter 135C may be either profit or nonprofit, there being no indication to the contrary within Chapter 135C. In addition, the term "nonprofit hospital" is used in other sections of the Code. It is defined in §135A.2(6) and distinguished from "other nonprofit health facility." It is referred to in §§135A.3(2), 135A.6 and 135A.12, and is distinguished from other hospitals and other health facilities. "Nonprofit hospital" appears to be

a common term and is used in other states. See, e.g., *State v. Willmar Hospital*, 1942, 212 Minn. 38, 2 N.W.2d 564; *Shaker Medical Center Hospital v. Blue Cross of N.E. Ohio*, 1962, 115 Ohio App. 497, 183 N.E.2d 628. In addition, §2 of S.F. 526 made further amendments to Chapter 419, by adding the following language to §419.7:

". . . and with respect to any *health care facility or voluntary nonprofit hospital* the cost of retiring any existing indebtedness of such *health care facility or voluntary nonprofit hospital* which the governing body of the municipality determines to be reasonably necessary in connection with the issuance of the bonds." [Emphasis added]

Here, the Legislature reversed the relevant phrase of §419.1 by placing "health care facility" before "voluntary nonprofit hospital." This lends credence to the proposition that "voluntary nonprofit" applies only to "hospital," for if the Legislature intended otherwise, it would have also placed the modifiers before "health care facility."

Accordingly, we are of the opinion that "voluntary nonprofit" modifies only "hospital." Therefore, a medical clinic operated for porfit may qualify as a "project" under §419.1 of the Code.

September 19, 1975

CONSTITUTIONAL LAW: CIVIL RIGHTS: DISCRIMINATION: BANKING: PUBLIC ACCOMMODATIONS AND SERVICES. U.S. Const. 14th Amend.; Art. I, §6 Const. of Iowa §§601A.6, 601A.7, 601A.8 and 601A.9, Code of Iowa, 1975. The practice of banks offering free checking accounts to persons over age 65 is neither unlawful nor unconstitutional and banks engaging in the practice could not be held liable to refund such charges to patrons under that age. (Turner to Hultman, State Senator, 9-19-75) #75-9-19

Honorable Calvin O. Hultman, State Senator: You have requested an opinion of the attorney general as to whether the practice of banks offering free checking accounts to persons over age 65 is unlawful or unconstitutional as discriminatory and also whether banks engaging in the practice could be held liable to refund charges on checking accounts to patrons under age 65.

Discrimination on account of age was made unfair and unlawful in both employment and housing by Chapter 1032, 64th G.A., 2nd Session in 1972, and in credit practices by Chapter 1054, §4, 65th G.A., 2nd Session, in 1974. See §§601A.6, 601A.8 and 601A.9, Code of Iowa, 1975.

But discrimination on the basis of age has not been made unfair or unlawful in public accommodations or services. §601A.7 with regard to those areas makes it an unfair or discriminatory practice for a public accommodation to "refuse or deny to any person because of race, creed, color, sex, national origin, religion or disability the accommodations, advantages, facilities, services, or privileges thereof" or to otherwise discriminate on any of those bases in the furnishing of "such accommodations, advantages, facilities, *services* or privileges."

Specific mention of "age", along with race, creed, color, sex, etc. in §601A.6(9)(b)(c), §601A.8 and §601A.9, and all but "age" in §601A.7, indicates a clear intention to exclude it as a basis for unlawful discrimination in public accommodations or services. Expressio unius est exclusio alterius.

Thus, nothing in the Iowa law prohibits a movie theatre, for example, from charging a lesser attendance fee to a child than to an adult or, indeed, from charging less to senior citizens. And while §601A.9 prohibits refusal "to loan or extend credit or impose terms or conditions more onerous than those regularly extended to persons of similar economic backgrounds because of *age*, color, creed, national origin, race, religion, marital status, sex or physical disability" a free checking account service is obviously not a loan or extension of credit.

There is no constitutional problem in the practice of a bank giving free checking accounts to persons over age 65. Both the equal protection clause of the 14th Amendment to the Constitution of the United States and Article I, §6, Constitution of Iowa, are directed only to state action. They prohibit the making and enforcing of laws which are discriminatory and neither constitutional provision is directed to persons or banks. 16A CJS 305, Constitutional Law §505. In other words, from a purely constitutional standpoint, persons, including banks, may discriminate against anyone, anytime, anywhere, on any basis, and to any degree, unless prohibited from doing so by law. See, for example, 42 U.S.C. §2000e, the Equal Employment Opportunity Act of 1972 and Ch. 610A, Code of Iowa, 1975, the Iowa Civil Rights Act, which are *laws* prohibiting certain kinds of discrimination. See also *1972 OAG 343*.

Even a state legislature has a wide discretion to make a law which discriminates within classifications if it operates equally upon all within the same class and there is a reasonable basis for the classification. *Dickinson v. Porter*, 1948, 240 Iowa 393, 35 N.W.2d 66, *State v. Abodeely*, 1970 Iowa, 179 N.W.2d 347, *Farrell v. State Board of Regents*, 1970 Iowa, 179 N.W.2d 533; *Brown Enterprises, Inc. v. Fulton*, 1971 Iowa, 192 N.W.2d 773.

Since the practice is neither unconstitutional nor unlawful, no bank which gives free checking accounts to persons over 65 could be held liable to refund charges on checking accounts to pay persons under that age.

September 22, 1975

STATE OFFICERS AND DEPARTMENTS: Employment Security Commission; Unemployment Compensation, Partial Unemployment Defined. §96.19(10), as amended by §§32 and 33 of Senate File 485, Acts, 66th G.A., First Session (1975). "Parital unemployment" for purposes of unemployment compensation means only the situation where an individual has been separated from his regular full-time employment and earns at odd jobs less than the weekly benefit amount plus fifteen dollars. The Employment Security Commission may not administratively readopt a further definition which the legislature repealed. (Haesemeyer to Hultman, State Senator, 9-22-75) #75-9-20

The Honorable Calvin O. Hultman, State Senator: Reference is made to your letter of September 10, 1975, in which you state:

"On July 16, 1975, in a Declaratory Ruling, the Iowa Employment Security Commission interpreted Section 96.19(10)(b) of the Code of Iowa, 1975, as amended by Senate File 485, to mean that regularly employed individuals whose work week has been reduced shall be deemed 'partially unemployed'.

"My reading of this provision of the Code leads me to conclude that only those individuals whose regular full-time employment has been terminated shall be deemed 'partially unemployed', so long as they are working at odd jobs and earning less than the 'weekly benefit amount plus fifteen dollars'.

"I respectfully request your oponion, at your earliest convenience, as to whether or not the Commission's Declaratory Ruling is violative of the statutory provision."

Section 96.19, Code of Iowa, 1975, is the definitions section for Chapter 96, the chapter relating to employment security. Prior to the enactment of Senate File 485, Acts, 66th G.A., First Session (1975), subsection 10 of such §96.19 provided:

" 'Total and partial unemployment'.

"a. An individual shall be deemed 'totally unemployed' in any week with respect to which no wages are payable to him and during which he performs no services.

"b. An individual shall be deemed partially unemployed in any week in which, while employed at his then regular job, he works less than the regular full-time week and in which he earns less than his weekly benefit amount plus six dollars.

"c. An individual shall be deemed partially unemployed in any week in which he, having been separated from his regular job, earns at odd jobs less than his weekly benefit amount plus six dollars."

However, §§32 and 33 of Senate File 485 amended subsections b and c of §96.19(10) so that they now provide:

"b. An individual shall be deemed partially unemployed in any week in which he, having been separated from his regular full-time employment, earns at odd jobs less than his weekly benefit amount plus fifteen dollars.

"c. An individual shall be deemed temporarily unemployed if for a period, verified by the commission, not to exceed four consecutive weeks, he is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from his regular job or trade in which he worked full-time and in which he will again work full-time, if his employment, although temporarily suspended, has not been terminated."

It is clear from the foregoing that prior to the amendment there were two definitions of "partially unemployed" and these were found in subsections b and c of §96.19(10). Section 96B.19(10)(b) related to the situation in which an individual continued to be employed at his regular job but worked less than the regular full-time week. Subsection c provided an additional definition of "partially unemployed" to cover the situation where individual had been separated from his regular job and was earning at odd jobs less than his weekly benefit amount plus six dollars. The effect of the 1975 amendment was to strike the first of these two definitions, renumber the second as b and change the word "job" to "full-time employment" and the word "six" to "fifteen". The amendment also added a new subparagraph c defining 'temporarily unemployed". The result is that "partially unemployed" now includes only the situation where an individual has been separated from his regular full-time employment and is earning at odd jobs less than his weekly benefit amount plus fifteen dollars.

In our opinion, and regardless of whether the effect of the amendment was intentional or inadvertent, the meaning of the statute as we now find it is clear, plain and free from ambiguity and the Employment Security Commission may not by administrative fiat whether characterized as a rule, regulation or declaratory ruling, undue what the legislature has done and effectively restore the statute to what it was before.

In this connection, we would point out that the Commission's own attorney, by a letter dated July 1, 1975, stated in part as follows:

"Should the Commission adopt a rule to define partial unemployment to include an individual who works less than his normal full-time hours for his regular employer because of lack of full-time work it would be in effect legislating a rule which goes beyond the intent of the legislature. The Commission would be going beyond interpretation of the statute. The legislature struck out the statutory provision for such a definition and it is my legal opinion that the Commission does not have the authority to make such a rule which would have the same effect as the law which was struck by the legislature. The Commission does not have the authority to readopt what the legislature has struck from the law. To promulgate such a rule would be outside the rule-making authority of the Iowa Administrative Procedure Act."

We agree with this statement by counsel.

We consider the declaratory ruling of the Commission to be in violation of applicable statutory provisions. An administrative agency may not make the law or by rule change the legal meaning of statutes. *City of Ames v. State Tax Commission*, 1955, 246 Iowa 1016, 1022; *Clarion Ready Mix Co. v. State Tax Commission*, 1961, 252 Iowa 500.

September 25, 1975

CRIMINAL LAW: Possession of Machine Guns. §§696.1, 696.2, 696.4, 696.6, 696.7, 1975 Code of Iowa. It is unlawful for a resident of this State to possess a machine gun unless that gun was in general use prior to 1918, has been rendered permanently unserviceable, and is possessed solely as a relic. (Coleman to Darr, United States Department of Treasury, 9-25-75) #75-9-21

Mr. Thurman W. Darr, Chief, Technical Services Division, Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, Washington, D.C. 20226: You have requested an opinion of the Attorney General of Iowa with regard to the laws of this State concerning machine guns. In your letter, you state:

"This office has the responsibility for approving applications from registered owners for transfer of National Firearms Act weapons.

"Section 5812(a), Title II of the Gun Control Act of 1968 states that our office must deny an application if the transfer, receipt or possession of the firearm would place the proposed transferee in violation of law.

"We have an application from an Iowa resident who proposes to transfer an unserviceable machine gun to another Iowa resident. We request an official opinion from your office on whether it is lawful for an Iowa resident to acquire an *unserviceable* machine gun.

"As you are aware, Section 696.1 of the Iowa State Law prohibits possession of 'any machine gun of any nature or kind.' Is it the intent of the Iowa law to prohibit possession of any unserviceable machine gun?"

Chapter 696, Code of Iowa, 1975, concerns itself with machine guns, and in this regard, Section 696.1 provides:

"No person, firm, partnership, or corporation, except law enforcement officers, shall knowingly have in his or its possession or under his or its control *any machine gun of any nature or kind.*" (emphasis added).

This particular section of the Code was enacted in 1931, and replaced similarly worded Section 12960-b1, Code of Iowa, 1927, which provided:

"No person, firm, partnership, or corporation shall knowingly have in his or its possession or under his or its control *any machine gun which is capable of being fired from the shoulder or hip of a person, and by the recoil of such gun.*" (emphasis added).

This 1927 Code provision, as you will note, prohibited possession of a machine gun which was *capable of being fired; it did not prohibit the possession of a weapon which was incapable of discharging,* or in other words, a weapon which was unserviceable.

The change in the wording of the statute from prohibiting possession of a "machine gun which is capable of being fired" to prohibiting possession of "any machine gun of any nature or kind," appears to us to reflect an apparent legislative intent to prohibit possession of all machine guns, even those that are unserviceable. Moreover, Section 696.2, Code of Iowa, 1975, prohibits aiding an individual in gaining possession of a machine gun:

"No person, firm, partnership, or corporation shall do any act with the intent to enable any other person, firm, partnership or corporation to obtain possession of such gun."

Is it then the general rule of law that no person or entity may possess a machine gun under Iowa law? The answer to this question is readily ascertainable by reference to Section 696.4, Code of Iowa, 1975, which exempts peace officers, national guard troops, governmental persons in the service of the United States, and banks. Another exception is provided for in Section 696.6, Code of Iowa, 1975, dealing with relics:

"It shall be a defense that the machine gun or machine which the accused is charged with possessing was a gun which was in general use prior to November 11, 1918, and was, prior to the commencement of the prosecution rendered permanently unfit for use and was possessed solely as a relic."

An additional exception is found in Section 696.7, Code of Iowa, 1975, relating to inventors and manufacturers of firearms.

From the foregoing enumeration of exceptions to the prohibition of possession of a machine gun by individuals, it appears that only Section 696.6, Code of Iowa, 1975, would provide a vehicle for the transfer of a machine gun to or between residents of this State, and then only if the gun was both in general use prior to November 11, 1918, and was rendered permanently unfit for use.

It is therefore our opinion that it is unlawful to possess or acquire a machine gun, under the laws of this State, unless the gun was in general use prior to November 11, 1918, has been rendered permanently unserviceable, and is possessed solely as a relic. If the gun or guns in question fail to meet these three criteria together, then their possession and transfer would be illegal.

September 29, 1975

STATE OFFICERS & DEPARTMENTS; STATE COMPTROLLER; APPROPRIATIONS. §8.33, Code of Iowa, 1975. A departmental claim voucher presented for payment prior to September 30 following the end of a biennial fiscal term should be approved for payment, and a warrant issued, against the department's appropriation for said term where the department has timely filed a statement of obligations unpaid at the end of that term which includes an estimate of the item or purpose for which the claim is made, even though another supplier or creditor is shown in the claim than the one listed in the statement of obligations. No recertification or amendment of the original statement of obligations is necessary where the expenditure is obviously for the item or purpose listed. The time when the services are to be rendered, or the goods furnished, is a matter within the discretion of the contracting parties. (Turner to Selden, State Comptroller, 9-29-75) #75-9-22

Mr. Marvin R. Selden, Jr., State Comptroller: You have requested an opinion of the attorney general as to whether under §8.33, Code of Iowa, 1975, a voucher presented to you by a state department for the issuance of a state warrant in the name of a supplier or creditor different than the supplier listed on your form of "Statement of Obligations Unpaid" at the end of a biennial fiscal term may be approved for payment out of the funds appropriated to that department for the term to which that statement of obligations relates. Specifically you ask:

"1. Does listing of the supplier's name, certified by the agency, constitute an obligation to the specific supplier, or may the agency substitute another supplier?

"2. If the answer to question one (1) above permits a substitute supplier, must the agency amend or substitute the encumbrance list and certification to this office, and at what point in time?

"3. If the answer to question one (1) above permits a substitute supplier, at what date must the services be rendered in order to be a proper charge to the fiscal year covered by this encumbrance list?"

Your form of statement of obligations requires the department to show whether the obligation is "actual" or "estimated" and no requirement is made therein, or in §8.33, that the items listed on the statement of obligations unpaid be reduced to an actual formal contract. In fact, §8.33 indicates that the statement of obligations on "the last day of the biennial fiscal term" need not be fully binding until September 30 thereafter. In pertinent part, §8.33 provides:

"On September 30, following the close of each biennial fiscal term *all unencumbered or unobligated balances* of appropriations made for said biennial fiscal term shall revert to the state treasury and to the credit of the fund from which the appropriation or appropriations were made . . ." (Emphasis added.)

§8.33 has been liberally construed. See 1948 OAG 76, 1938 OAG 130 and 1934 OAG 480. It does not say that on September 30 "all *unexpended* balances" shall revert or otherwise indicate that the bill must actually be paid on or before September 30. Presumably, between the last day of the biennial fiscal term (June 30) and September 30 following, the "estimated" obligation could vary from the "actual" amount ultimately agreed upon and for which claim is filed. By the same token, a department head may lawfully agree to an expenditure for the same purpose with a different supplier than contemplated on the last day of the fiscal term.

The practice of requiring "actual or estimated" obligations is one of long standing. It is well settled that administrative practices of long standing are entitled to weight. But it is even more persuasive that if it had so intended, the legislature could have required the obligation to be fully binding on June 30 rather than merely on September 30. Reversion is required only when the funds appropriated are "unencumbered or unobligated" on that date.

Accordingly, it is our oponion that you should issue a warrant for any particular item or purpose listed in its statement and for which a lepartment might properly have expended funds prior to June 30 despite the fact that the actual cost varies from the original estimate and even though the supplier is different. No recertification or amendment of the statement of obligations or encumbrances is required where the expenditure is obviously for the item or purpose listed therein.

Finally, you ask on what date the services must be rendered in order to be a proper charge for the fiscal year covered by the encumbrance list. The statute is silent as to when the services must be rendered (or goods furnished). As long as they have been properly ordered before September 30, in such a way as to create a binding obligation prior to that date, the time of rendition of the services or delivery of the goods is a matter within the broad discretion of the contracting parties.

September 30, 1975

COUNTIES: County Attorney. §71.2, Code of Iowa, 1975. Board of Supervisors should pay lawful claims for necessary stenographic work furnished to county attorney for county business and should provide adequate staff for county attorney's office. (Nolan to Green, Mills County Attorney, 9-30-75) #75-9-23

Mr. H. Walter Green, Mills County Attorney: We have your request for an opinion as follows:

"I began my duties as County Attorney of Mills County, Iowa, on January 1, 1975.

"Since that time, I have repeatedly requested the Mills County Board of Supervisors for payment of money for wages to pay for secretarial help necessary to do the work as required by my office. Each request has been refused, and further several claims have been presented to the County Auditor and each claim has been ignored, since no resolution has been entered allowing their payment. As a result I have personally provided the necessary secretarial services by hiring temporary secretaries and paying them personally and of late, hiring a secretary who has not yet been paid. All billings have been properly presented to the Mills County Auditor and filed. Each and every request for reimbursement and payment has been refused. I am enclosing a copy of a resolution which although entered on the 13th day of January, 1975, has nevertheless been effective since January 1st, 1975.

"I would like an opinion as to whether the Mills County Board of Supervisors and Mills County must reimburse me and my unpaid secretary for money paid and owed in the performance of the county's work only; and may an Enrolled Order be entered by the Chief Judge of this judicial district requiring the Board of Supervisors to enter a resolution providing for payment of secretarial help for the county's work in the future."

This office, in an opinion dated April 27, 1970, 1970 O.A.G. 608, advised:

"Numerous opinions of the attorney general have been issued in the past to the effect that the supervisors must furnish the county attorney suitable office space in the county courthouse or make some provision to repay him for rent for an office elsewhere. . . . Moreover, although not mentioned in either §332.9 or §332.10, it has been held that stenographic help is to be supplied to the county officers. . . . * * *

"Under these circumstances, it is our opinion that county boards of supervisors would be obliged to reimburse . . . a portion of his office expenses including secretarial help where he is not furnished a suitable adequately staffed office in the courthouse."

By an opinion dated January 6, 1971, 1972 O.A.G. 1, this office further advised that if the board is clearly acting improperly an action in mandamus would lie to compel their approval of the county attorney's hiring of a secretary for the county attorney's office.

Accordingly, it is our view that the board of supervisors should settle claims for stenographic work furnished to the county attorney for necessary county business unless the payment of such claim is prohibited by §71.2, Code of Iowa, 1975, and should further provide adequate secretarial staff for the county attorney's office.

September 23, 1975

CITIES AND TOWNS: Nepotism; City Council Member. §§64.19, 71.1 and 372.13, Code of Iowa, 1975. A city council is not prohibited from appointing as city clerk the father of one of its members. (Haesemeyer to Pavich, State Representative, 9-23-75) #75-9-24

The Honorable Emil S. Pavich, State Representative: By your letter of September 20, 1975, you have asked for an opinion of the Attorney General on the question of whether or not a conflict of interest would arise in the event an individual were to be elected to the Council Bluffs City Council where the father of the individual in question is City Clerk of Council Bluffs.

Normally a conflict of interest arises only in the situation where the same individual may be holding two offices or employments or where holding an office he participates in decisions which might be considered self-dealing. So far as we can determine, the only possible statutory prohibition which might exist with respect to the situation you describe would be that occasioned by the existence of the nepotism statute, Chapter 71, Code of Iowa, 1975.

Section 71.1, provides:

"It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of the state or by virtue of the ordinance of any city in the state, to appoint as deputy, clerk, or helper in said office or position to be paid from the public funds, any person related by consanguinity or affinity, within the third degree, to the person elected, appointed, or making said appointment, unless such appointment shall first be approved by the officer, board, council, or commission whose duty it is to approve the bond of the principal; provided this provision shall not apply in cases where such person appointed receives compensation at the rate of six hundred dollars per year or less, nor shall it apply to persons teaching in public schools, nor shall it apply to the employment of clerks of members of the general assembly."

There can be no question but that a son is related by consanguinity to his

father within the third degree. However, it is to be observed that the prohibition of the statute runs only to "any person" who is elected to a public office to appoint as deputy, clerk or helper in said office any person related to him within the prohibited degrees of consanguinity or affinity. Under §372.13, the city clerk is appointed not by any individual councilman but by the council as a body.

Accordingly, it is our opinion that the provisions of Chapter 71 do not prohibit a city council from appointing as city clerk the father of one of its members.

Beyond this, it should be noted that even if the statute did apply to this type of appointment, it could still be made if the appointment were approved by the officer whose duty it is to approve the bond of the principal. Under §64.19, the bond of the city clerk is approved by the mayor or as may be provided by ordinance.

September 30, 1975

ELECTIONS: Time of opening polls; change of names; registering high school students; number of voting machines. §§48.1, 48.30, 48.31, 49.19, 49.25, 49.73, Code of Iowa, 1975; House File 700, Acts, 66th G.A., First Session (1975). (1) Polls may be opened at noon in cities with a population of 3,500 or less irrespective of whether or not there is a contest for an office or a public measure on the ballot; (2) The provisions of §48.30 requiring the clerk of the district court to notify the county commissioner of registration of changes of name applies only to name changes occurring through court order and the clerk of the district court should not include in such notification the names of women merely because their names appear on an application for a marriage license or on a marriage license filed with the clerk of court; (3) The commissioner of registration or his employee may visit each high school located in the county only during the month of May of each year; (4) Only one voting machine may be furnished to each precinct unless 451 persons voted in the last similar election held in that precinct. (Haesemeyer to Monroe, State Representative, 9-30-75) #75-9-25

The Honorable W. R. Monroe, State Representative: You have requested an opinion of the Attorney General with respect to the following four questions concerning interpretations of the election laws:

"1. May the polls be opened at noon for a city with 3500 or less population if there is a contest for any office on the ballot or if there is a public question on the ballot? Does section 49.19, Code of Iowa, 1975, apply to cities with a population in excess of 3500 or to all cities?

"2. Does the provision of section 48.30, Code of Iowa, 1975, which requires the clerk of the district court to notify the county commissioner of registration of changes of name allow the clerk to include the names of women who appear on applications for marriage licenses or on the marriage license as filed by the clergy in the district court?

"3. Does section 45 of HF 700 prohibit a commissioner of elections or an employee of the commissioner from visiting any high school located in his county and offering to register any person who is eligible to register during any month except May?

"4. Does section 64 of HF 700, 66GA prohibit a commissioner from providing more than one voting machine for a precinct if less than 451 persons voted in that precinct in the last preceding similar election?"

Section 49.19, Code of Iowa, 1975, provides in relevant part as follows:

"The commissioner may . . . direct that the polls be opened at twelve o'clock noon, as permitted by section 49.73, for any election held for a city, regardless of the city's population, if there is no contest for any office on the ballot and no public question is being submitted to the voters at that election."

Section 49.73, Code of Iowa, 1975, as amended by §76 of House File 700, Acts, 66th G.A., First Session (1975) provides:

"At all elections, except as otherwise permitted by this section, the polls shall be opened at seven o'clock a.m., or as soon thereafter as vacancies on the precinct election board have been filled. The commissioner may direct that the polls be opened at twelve o'clock noon for any election conducted for a city of three thousand five hundred or less population or any school district at which the commissioner concludes, on the basis of voter turnout for recent similar elections and factors considered likely to affect voter turnout for the forthcoming election, that voting will probably be so light as to justify shortened voting hours for that election, except that the commissioner shall not do so for any election if there is filed in the commissioner's office, at least twenty-five days before the election, a petition signed by at least fifty eligible electors of the school district or city, as the case may be, requesting that the polls be opened not later than seven o'clock a.m. All polling places where the candidates of or any public question submitted by any one political subdivision are being voted upon shall be opened at the same hour, except that this requirement shall not apply to merged areas established under chapter two hundred eighty A (280A) of the Code. The hours at which the respective precinct polling places are to open shall not be changed after publication of the notice required by section 49.53. In all cases the polling places shall be closed at nine o'clock p.m."

In our opinion, there is no conflict between §§49.19 and 49.73, as amended. However, even if there were some conflict between the sections, it would be our duty to harmonize the two and give effect to both to the extent possible. Thus, it is our opinion that §49.73 authorizes the opening of the polls at noon in cities with a population of 3,500 or less irrespective of whether or not there is a contest for an office or a public measure on the ballot. If the legislature had intended that the authority to open the polls at noon in cities of 3,500 or less was to exist only "if there is no contest for any office on the ballot and no public question is being submitted to the voters at the election" it would have included that provision in § 49.73 as it did in §49.19. Thus, it is our opinion that §49.19 applies insofar as the time of opening the polls is concerned only to cities of more than 3,500 population.

Section 48.30, Code of Iowa, 1975, provides in part:

"The clerk of the district court shall promptly notify the county commissioner of registration of changes of name . . . of persons of voting age. * * *"

Section 48.31, provides in part:

"The registration of a qualified elector shall be canceled in any of the following instances: * * *

"7. The elector does not record a change of name. * * *"

In our opinion, the provisions of §48.30 requiring the clerk of the district court to notify the county commissioner of registration of changes of name applies only to name changes occurring through court order and the clerk of the district court should not include in such notification the names of women merely because their names appear on an application

for a marriage license or on a marriage license filed with the clerk of court. Mere application for a marriage license does not necessarily mean that the marriage will take place or that the license will be used. Even if the woman in question does get married, it does not necessarily mean that she will assume her husband's surname. Indeed in contemporary society it is becoming more and more common for married women to continue to use their maiden names.

Section 48.1, Code of Iowa, 1975, as amended by §45 of House File 700, Acts, 66th G.A., First Session (1975) provides in relevant part as follows:

"The commissioner of registration or an employee of the commissioner of registration may visit each high school located in the county, during the month of May of each year, and offer to register any person who is eligible under section forty-eight point two (48.2) of the Code to be registered."

In our opinion, this language authorizes the commissioner of registration or his employee to visit each high school located in the county only during the month of May of each year. Expressio unius est exclusio alterius. If it had been the intent of the legislature to make it permissive for the commmissioner to visit high schools during any month, a phrase such as "may at any time", "may periodically", or simply "may visit". However, under the language used, the commissioner may visit the high schools only during the month of May and then only if he elects to do so. If the statute had said "shall" visit during the month of May, it would appear that a specific directive had been given requiring the commissioner to visit during the month of May and visits duing other months would be permissive but not mandatory. It should be pointed out that the limitation would appear to govern only the commissioner and employees of the commissioner and would not operate to prohibit activities to register students during any month using the registration by mail procedure.

Section 49.25, Code of Iowa, 1975, as amended by §64 of House File 700, Acts, 66th G.A., First Session (1975) provides in relevant part as follows:

"* * *

"2. Commissioner shall furnish to each precinct where voting machines are to be used for any election, in advance of that election, one voting machine meeting the requirements of chapter fifty-two (52) of the Code for every three hundred voters or major fraction thereof who voted in the last preceding similar election held in the precinct. * * *"

Since the term "major fraction thereof" was used to modify 300 voters, it appears that only one voting machine may be furnished to each precinct unless 451 persons voted in the last similar election held in that precinct. If the word "major" had been dropped and only the term "fraction thereof" used, it would appear to indicate that the commissioner would be required to add a second voting machine if 301 persons voted in the last similar election held in that precinct. If the modifying phrase "at least one voting machine for every three hundred voters" had been used, it would have given the commissioner a minimum threshold and allowed discretion for adding additional machines. However, these other phrases were not used and we must conclude therefor that only one voting machine may be furnished to each precinct unless 451 persons voted in the last similar election held in that precinct.

October 1, 1975

CITIES AND TOWNS: Annexation — Chapter 362, Code of Iowa, 1973; §4.5 and Chapter 368, Code of Iowa, 1975. Annexation proceedings instituted under Chapter 362, 1973 Code, may be completed after July 1, 1975, but should be done within a reasonable time and with due diligence. Such proceedings may be amended prior to the election and pursuant to the hearing procedures. (Blumberg to Gluba, State Senator, 10-1-75) #75-10-1

Honorable William Gluba, State Senator: We are in receipt of your opinion request of September 8, 1975, regarding annexation proceedings. You indicate that the city of Davenport started annexation proceedings on June 18, 1975, under Chapter 362 of the 1973 Code. A public hearing on the annexation was held on August 19, 1975, and the council indicated that no election on the annexation would take place during the present term of office which expires in January, 1976. You ask the following questions:

1. May the proceedings, begun prior to July 1, 1975, continue after that date?

2. Is a city circumventing or avoiding the change of law by so doing?

3. Is there a reasonable time limitation for the annexation to be completed?

4. If the answer to question one is affirmative, is a city permitted to amend the annexation, or must it act as the proposal was originally made prior to July 1, 1975?

As of July 1, 1975, Chapter 362, 1973 Code, was repealed and Chapter 368, 1975 Code, took its place. Both dealt with the same subject matter, however, the procedures are different. Under Chapter 362, proposals for annexation must entail public hearings before the city council, an election, and a petition filed in the District Court. Pursuant to Chapter 368, the City Development Board holds the hearings, and makes a finding to allow or disallow the annexation. If allowed, an election is held. There is no provision for an action in equity to finalize the annexation.

Section 4.5 of the Code provides that statutes are presumed to be prospective in their operation unless expressly made retrospective. Such is a codification of the common law. See, *Monticello v. Adams*, 200 N.W.2d 522 (Iowa 1972); *Needham Packing Co. v. Iowa Employment Security Comm'n*, 1963, 255 Iowa 437, 123 N.W.2d 1; *Manilla Community School Dist. v. Halverson*, 1960, 251 Iowa 496, 101 N.W.2d 705. Where retrospectivity clearly appears or is very clearly, plainly, and unequivocably expressed, or necessarily implied courts will hold a statute to be retrospective. This is true where a statute attempts to prevent some evil or bar some act. *In re Town of Avon Lake*, 1958, 249 Iowa 1112, 88 N.W.2d 784. See also a prior opinion of this office, Blumberg to Perkins, September 2, 1975, #75-9-1.

Here, the Legislature was not attempting to prevent an evil by repealing Chapter 362 and adopting Chapter 368. The changes were merely procedural. In cases dealing with procedural matters, e.g. voter qualifications, statutes have been held to be prospective only. *Monticello v. Adams*, supra, and *Manilla Community School Dist.*, supra. Accordingly, if the procedures for annexation were started under Chapter 362, 1973

Code, prior to the effective date of Chapter 368, 1975 Code, a city may continue the annexation process accordingly. As such, a city is not necessarily circumventing or avoiding the law.

There is no provision in either Chapters 362, 1973 Code, or 368, 1975 Code, regarding a time limit for completing the process. The Iowa courts have not set any specific limit, but have discussed the problem. In *Town of Clive v. Colby*, 1963, 255 Iowa 483, 121 N.W.2d 115, 123 N.W.2d 331, an annexation case, a considerable amount of time had elapsed since the initial proceedings were begun. Having reversed on other grounds, the Court held it need not decide the issue of promptness in completing the process, but did state: "[T]he proceedings should be conducted with reasonable dispatch and completed within a reasonable time." 255 Iowa at 492.

In *Burd v. Board of Education*, 1967, 260 Iowa 846, 151 N.W.2d 457, dealing with a school district merger, the Court discussed the promptness of completing the merger. There, the process began on September 23, 1965, but no steps had been taken from September 27 to February 3, 1966. An action was commenced declaring that the proceedings had been abandoned. The lower court dismissed the action and the Supreme Court reversed. It was held that jurisdiction to proceed in a reorganization may be terminated by abandonment or failure to complete it within the time required by law, citing to *Davies v. Monona County Board of Education*, 1965, 257 Iowa 985, 990, 135 N.W.2d 663, 665. The Court cited with approval to *In re Incorporation of Village of Brown Deer*, 267 Wis. 481, 66 N.W.2d 33. There, it was held that the proceedings for annexation which had not been completed within ten months had not been prosecuted within reason, and therefore was not a bar to a later annexation proceeding. It was also held there that in the absence of legislation fixing a time limit for the completion of annexation proceedings, such proceedings must be conducted and completed within a reasonable time in view of all the circumstances. The Iowa Court then held: "In reorganization proceedings, as in annexation or other akin proceedings, prompt action, reasonable dispatch and due diligence to complete the undertaking appear to be reasonable requirements to retain jurisdiction." 260 Iowa at 856.

Although we do not know the reason that the council wishes to delay the proceedings, nor all of the facts of the matter, it does appear that such a delay, as stated by the council, may be unreasonable, especially since there will be a city election in November when this matter could be put to the required vote. This is not to be interpreted as a final statement that the city will abandon the process if it does not immediately complete it, but rather that under these facts a court could find such.

We can find nothing in Chapter 362 which prohibits amendments to the annexation proceedings. Thus, such proceedings can be amended. However, since a description of the property must be placed on the ballot it is obvious that any such amendment must be made prior to the election, and should be the subject of a hearing as provided by that chapter.

Accordingly, we are of the opinion that annexation proceedings instituted under Chapter 362, 1973, may continue to completion after July 1,

1975. Such proceedings should be completed within a reasonable time and with due diligence. Said proceedings may be amended prior to the election if a hearing is held.

October 6, 1975

ELECTIONS: Nominating petitions; municipal primary election, number of signatures. §§4.1(36)(b), 43.16, 44.16, 376.4, Code of Iowa, 1975. A city council candidate who does not have enough signatures on his or her nomination papers is not legally allowed to be placed on the ballot for election, notwithstanding the fact that he may have relied in good faith on erroneous advice from election officials as to the number of signatures required. A candidate does not have the right to file additional signatures after he has once filed his nominating papers. (Haesemeyer to Connors, State Representative, 10-6-75) #75-10-2

The Honorable John H. Connors, State Representative: Reference is made to your letter of October 2, 1975, in which you state:

"1. Is the City Council Candidate who does not have enough signatures on his or her nomination papers, legally allowed to be placed on the ballot for election?

"2. Does a candidate have the right to file additional signatures after having filed the original papers?"

In order to more fully understand the situation existing in the City of Des Moines, I asked Mr. Jim Maloney, the Polk County Auditor and County Commissioner of Elections, to furnish me with a summary of the facts surrounding the controversy over nomination papers and he did so by a letter dated October 3, 1975. A copy of this letter is attached hereto and made a part hereof. As can be seen therefrom, one candidate for mayor and two candidates for councilman-at-large failed to file nomination papers containing the number of signatures required by law. In all cases, the shortage was substantial. It also appears that all of the three candidates acted on the basis of misinformation supplied them by the City Clerk's office as to the number of signatures required.

Section 376.4, Code of Iowa, 1975, provides:

"A voter of a city may become a candidate for an elective city office by filing with the city clerk a valid petition requesting that his name be placed on the ballot for that office. The petition must be filed not more than sixty-five days nor less than forty days before the date of the election, and must be signed by voters equal in number to at least two percent of those who voted to fill the same office at the last regular city election, but not less than ten persons. Nominating petitions shall be filed not later than five o'clock p.m. on the last day for filing. * * *"

This statute was part of the Home Rule amendment, Chapter 1088, 64th G.A., Second Session (1972) and became effective July 1, 1975. Prior to that time, the number of signatures required for candidates for elective municipal office was controlled by §363.11, which provided in relevant part:

"Any person desiring to become a candidate for any elective municipal office shall not more than sixty-five days nor less than forty days prior to the election, file with the clerk of the municipal corporation a petition signed by eligible electors equaling in number at least two percent of the greatest number of votes cast for any candidate for such office at the last regular municipal election, and in no case less than ten, requesting

that his (or her) name be printed upon the official election ballot. When a municipal office is filled by the voters of a ward, signers of a nominating petition for a candidate for that office must be eligible electors of that ward. Nomination petitions shall be filed not later than five o'clock p.m. on the last day for filing. Provided that any city having a population of ten thousand or less or any town may by ordinance provide that all candidates for all elective city or town offices shall be nominated under the provisions of chapter 44 or 45. In such event nomination for all such offices in the manner provided for in this chapter shall not be authorized * * *"

As can be seen, the new law substantially enlarges the number of signatures required. It is to be observed that §376.4 uses the mandatory term "must" in referring to the number of signatures required on nomination papers. As stated in §4.1(36):

"Unless otherwise specifically provided by the general assembly, whenever the following words are used in a statute enacted after July 1, 1971, their meaning and application shall be: * * *

"b. The word 'must' states a requirement. * * * "

The language of §376.4 is clear, plain and free of ambiguity. Thus, in the absence of other circumstances, it is our opinion that the answer to your first question simply stated is that a city council candidate who does not have enough signatures on his or her nomination papers is not legally allowed to be placed on the ballot for election. This comports with the great weight of authority on this question. As stated in 25 Am.Jur.2d 851, *Elections*, §156:

"The petition must bear the number of signatures of qualified electors as prescribed by statute, duly authenticated and attested in the manner required by statute."

In an earlier opinion of the Attorney General, 1972 O.A.G. 473, relating to the primary nomination of a congressional candidate, we concluded that in accordance with the applicable statute the candidate was required to have (1) a certain aggregate percentage amount for her entire district and (2) a certain percentage amount for each county within the district. The candidate did not meet the second requirement but did meet the first. In this opinion, we stated:

"Clearly, under the plain language of the statute Virginia Lee Johnston's nomination papers contain insufficient signatures and she should not be certified as a candidate for Congress from the Fourth Congressional District of Iowa in the August, 1972 primary election."

Reported court cases in other jurisdictions have unanimously upheld the requirement on the statutory number of valid signers of nomination petitions. In the case of *Dupre v. St. Jacques*, 153 A. 240 (R.I. 1931), a minimum of fifty signatures were needed for the nomination papers required for aldermen and city council positions. On the petition in the case, the city clerk of the Board of Canvassers and his assistant examined the nomination papers and told the candidate that of the 68 signers, 56 were valid. After the time for filing closed, the Board of Canvassers said only 52 were qualified signatures. During this time, the opposing candidate wished to examine the nomination papers, but the Board of Canvassers refused. After the election, there was a petition to test the winner's title to office. During this trial, the court could not

find the requisite fifty valid signatures on the nominating petition of the winner. The court held that the winner's name should not have been placed on the ballot, and that the winner was not validly in office. In this decision, the court held that there had to be a new election, and that the Board of Canvassers was open to censure for nonperformance of duties relative to the nomination papers.

In the case of *Blackburn v. Welch*, 127 S.W. 991 (Ky. 1910), the court held that although certain provisions of nominating papers are not mandatory and are within the discretion of the clerk charged with filing the papers, his discretion does not extend to the number of valid electors that sign such petition.

The court in *In re Orange*, 4 N.E.2d 417, 419 (N.Y. 1936), states:

"The requirements of justice, however, do not permit a court to find that a petition is legal when it lacks the legal number of signatures."

After the election of a sheriff, it was found that his nominating papers did not contain the requisite amount of qualified signatures and that he could not validly assume his office, *Morgan v. Regis*, 284 S.W. 111 (Ky. 1926).

Other cases holding that the failure of a candidate to have a sufficient number of valid signatures on his nomination papers prohibits his name from being placed on the ballot are: *Carlson v. Power*, 274 N.Y.S.2d 75 (N.Y. 1966); *Davis v. Board of Electors of the City of New York*, 179 N.Y.S.2d 572 (N.Y. 1965); *Williams v. Donovan*, 92 N.W.2d 915 (Minn. 1958); *Stewart v. Burk*, 384 S.W.2d 316 (Ky. 1964); *State v. Morrison*, 268 N.W. 647 (S.D. 1936).

Thus, we must conclude that under ordinary circumstances, the requirement as to the number of signatures on nomination papers is mandatory and the candidate having insufficient signatures may not legally have his name placed on the ballot.

However, in the present Des Moines election situation, there is every indication that the candidates relied in good faith on erroneous information given to them by certain election officers as to the number of signatures required by law. One cannot help but be sympathetic to the plight in which these candidates find themselves and the apparent injustice which would be visited upon them if their names were left off the ballot because of this reliance. On the other hand, other candidates independently determined the correct number of signatures they should have and it would be equally unjust to force them to face candidates in an election who had not been validly nominated. Beyond this, the argument can always be made that all citizens should know the law, and especially those aspirants to public office who, if elected, will be charged with enforcing that law.

There are two possibly contradictory sets of cases dealing with situations where persons relied on erroneous information given them by public officials. First, there are decisions which allowed candidates to be placed on election ballots even though their nomination petitions were filed after the statutory filing due date. Second, there is much general authority that public officials cannot be estopped from enforcing the law.

Both the number of signatures needed on a nominating petition and the date for filing of the petition in municipal elections are specifically set forth by §376.4 an dit is arguable that the same reasoning which allows an extension of the filing time due to reliance on a public official may similarly apply to nominating petitions with an insufficient number of signatures.

Ordinarily, the general rule on compliance with time deadlines as to the filing of nomination papers is as is stated in 29 C.J.S., *Elections*, §114:

"A statutory requirement as to the time for filing a declaration of candidacy is mandatory, and a declaration filed too late is a nullity, at least in the absence of special circumstances or a special showing of excuse."

One of these special circumstances is where there has been reliance on an appropriate public official — an election clerk, secretary of state, or attorney general — even though the information given was erroneous. The candidates who relied on these incorrect opinions on filing due dates were in a number of cases allowed to be placed on the ballots. *State v. Meier*, 115 N.W.2d (N.D. 1962), reliance on a published opinion from the secretary of state who in turn relied on an opinion of the state's attorney general; *Donohoe v. Shearer*, 330 P.2d 316 (Wash. 1958), reliance on an opinion of the secretary of state; *Giblbaugh v. Bogart*, 53 N.E.2d 75 (Ohio 1943), reliance on an election official; *Huse v. Haden*, 163 S.W.2d 946 (Mo. 1942), reliance on the secretary of state and the attorney general; *People v. Ham*, 106 N.Y.S. 312 (1907), reliance on the town clerk in sending petition to the county clerk but not reaching the county clerk in time. *Contra*, *State v. March*, 232 N.W. 99 (Neb. 1930), statutory time period for filing *cannot* be extended by the custom and practice of an election officer since that would be an unauthorized extension of a legislative function.

A close reading of the above cases discloses that the relied upon opinions usually resulted from an erroneous application of statutory formula used in counting the number of days before an election. The incorrect dates were normally just one calendar day from the correct legal date.

We are not persuaded however that these cases dealing with the time of filing are applicable to situations where the number of signatures is involved, especially in view of the virtually unanimous rulings of other courts which we have previously discussed that hold that requirements as to the number of signatures are mandatory. Consideration should however be given also to the suggestion that the public officials in question are estopped from omitting the effected candidates' names from the ballot because of the reliance placed on misinformation given by such public officials.

Equitable estoppel (or estoppel in pais) is primarily a tort or quasi-contractual doctrine. The doctrine is *not* extended to cover enforcement of the law, however. As is stated in 31 C.J.S., *Estoppel*, §138:

". . . no amount of misrepresentation can prevent the government from asserting as illegal that which the law declares to be such."

In *United States v. Certain Parcels of Land*, 131 F.Supp. 65 (S.D. Cal. 1955), the court said:

"Public policy demands that the mandate of the law should override any doctrine of estoppel; so no amount of misrepresentation can prevent a party, whether citizen or Government, from asserting as illegal that which the law declares to be such."

Several United States Supreme Court decisions are cited which support that proposition.

Iowa cases are not as definite as the above federal cases. However, in situations different from the one at hand, the Supreme Court of Iowa has stated that ordinarily the doctrine of equitable estoppel will not be invoked against a municipal corporation in the exercise of its governmental functions. *Alexander v. Randall*, 133 N.W.2d 124 (Iowa 1965); *Halvorson v. City of Decorah*, 138 N.W.2d 856 (Iowa 1965).

You also ask whether or not a candidate has the right to file additional signatures after having once filed his original nominating papers. The general rule on this question is well stated in 29 C.J.S., *Elections*, §138 as follows:

"A nomination petition which is invalid cannot be amended after the time for filing it has passed . . . by adding names to the petition . . . ."

This statement is supported by the following cases: *State v. Wiethe*, 219 N.E.2d 881 (Ohio 1965); *State, ex rel Harry v. Ice*, 191 N.E. 155 (Ind. 1934); *State v. Payne*, 158 N.E. 546 (Ohio 1927); *O'Connor v. Smuthers*, 99 P. 46 (Colo. 1908).

Section 43.16, Code of Iowa, provides:

"A nomination paper, when filed, shall not be withdrawn nor added to, nor any signature thereon revoked."

Section 44.16, Code of Iowa, provides:

"Any error found in such certificate may be corrected by the substitution of another certificate, executed as is required for an original."

In an earlier opinion of the Attorney General, 1974 O.A.G. 266, involving verification of signatures on a nomination petition, we concluded that a defective affidavit of a candidate may be corrected either after the filing date and construed and applied §§43.16 and 44.16. However, in reaching the conclusion we did, we drew a distinction between adding signatures to a nomination petition already filed and merely correcting an affidavit appended thereto and said:

" * * *

". . . §43.16 means only that no new signatures may be added to nomination papers already filed. . . . * * *"

Accordingly, in answer to your second question, it is our opinion that a candidate does not have the right to file additional signatures after he has once filed his nominating papers.

Des Moines, Iowa
October 3, 1975

Mr. Richard E. Haesemeyer
Solicitor General
State of Iowa
Des Moines, Iowa

Dear Mr. Haesemeyer:

The following is a summary of facts surrounding the controversy over nomination papers for the Des Moines primary election.

The City Clerk misinformed candidates for the City of Des Moines primary election regarding the number of signatures needed. City Clerk, Margaret Vernon, informed me that all candidates were provided the same information. An information sheet was circulated in the office so that the entire staff would be able to supply the correct information to prospective candidates. (Copy of the information sheet is attached).

All candidates who filed papers filed sufficient signatures to meet the minimum requirements which they had been given by the City Clerk's Office. It came to my attention after the filing deadline, however, that the published minimum figures were in error and based on a law repealed effective July 1, 1975 (363.11).

I recomputed the number of signatures necessary under the new statute, Section 376.4. In recounting the signatures, we discovered that three candidates had failed to meet the new requirements.

The three candidates who failed to meet the minimum of 376.4 are Larry Gering, a candidate for mayor, and Tim Urban and Michael D. Cross, candidates for the At-Large seat. The candidates for the ward seats all had sufficient signatures under both the old and the new laws, but this appears to be a coincidence. There are three ward seats on the ballot this year, and in two of the prior elections, candidates had no opposition and in the third instance, the incumbent candidate had minor opposition. Thus the computation under the new and old laws in two ward seats was the same, and in the other case the increase in the signatures required was relatively minor. As a result every candidate filed nearly twice the number of signatures needed.

All candidates, with the apparent exception of George Wingert, a councilman candidate for the At-Large seat, acted on the basis of information supplied by the City Clerk's Office. Candidate Wingert has apparently informed the press that he was aware of the new law, but the City Clerk has informed me that he never suggested or questioned the information which was furnished by her office. Mayor Olson informed me that he had his secretary double check with the Clerk's Office to insure that he did have adequate signatures.

It appears that before the City Clerk published this erroneous data, she consulted with my Election Chief, Jack Bird, and he informed her that her computations were accurate. Both Mr. Bird and City Clerk Vernon informed me that on separate occasions they had also checked with the State Elections Commissioner, Louise Whitcombe, but were informed that if the 1974 Edition of the Election Laws had not been changed by House File 700, they could rely on it. I talked to Mrs. Whitcombe, however, and she told me that no one had checked with her on this from my office or the City Clerk's Office, and that she informed those from the other parts of the State, who had checked, of this change. I personally was not aware of the change and assume the responsibility for this error.

The following is a list of the candidates who met the requirements of the old law, but failed to meet the requirements of 376.4, the number of signatures they were told they would need, the number of signatures filed, and the number of signatures required under 376.4 (new law).

	Requirement Furnished	Filed	No. Required 376.4
Candidate for Mayor			
Larry Gering	438	525	862
Candidates for At-Large Seat			
Tim Urban	345	557	678
Michael Cross	345	348	678

I would hope that in view of the fact that the candidates were misinformed by election officials (The City Clerk is a Deputy Commissioner of Elections), and these three candidates acted in good faith by relying on this erroneous information which had been furnished them, and without notice that it was incorrect, that we will be permitted to leave these names on the ballot.

An election in a county of this size requires several days lead time. It takes approximately three days to print our ballots and additional time to have them dried and folded. It is a monumental task to set the machines and get all other things ready that are necessary to conduct an election. I have given it a good deal of thought, and it would be my opinion that Wednesday morning, October 8, at 8:00 A.M., would be the point of no return as far as making any changes in our ballot. As you know, we are planning to print these names on the ballot, but will, of course, remove them if you disagree with this decision, if there is sufficient time. I do not believe that we could make any changes after early October 8th and still be able to bring off the election on October 21.

If you need any more information regarding this or any other matter, please feel free to call me.

Sincerely,
Jim Maloney
Polk County Auditor

JM/mm
Attachment

Nomination papers can be filed, not more than 65 days or less than 40 days prior to election. File with City Clerk. Must be eligible electors.

Candidates can pick up more than one set of papers, but can only file one set of papers.

Number of signers needed on nomination papers.

Mayor 438+ — Ward 2 156+ — Ward 3 164+ — Ward 4 113+ — Councilman-At-Large 345+.

All material verified by election headquarters. See that all candidates get a copy of expense forms when papers are filed.

M. VERNON.

October 9, 1975

STATE OFFICERS AND DEPARTMENTS: Employment Opportunity Board; Appropriations Reversion. H.F. 913, Acts, 66th G.A., First Session (1975). Funds appropriated to the employment opportunity board may not be used in efforts to obtain the federal matching funds required by H.F. 913. Funds appropriated by H.F. 913 revert on October 15, 1975, unless $3,000,000 in federal funds is not made available to the board by that date. Such funds must be new funds and must be made available to the board rather than to some other public agency. (Haesemeyer to Cusack, State Representative, 10-9-75) #75-10-3

The Honorable Gregory D. Cusack, State Representative: You have requested an opinion of the Attorney General with respect to House File 913, Acts, 66th General Assembly, First Session (1975) and state:

"House File 913 imposes certain responsibilities on the Iowa Employment Security Commission when serving as an employment opportunity board.

"Section 7, House File 913, second sentence, states appropriated funds shall revert to the general fund if a specified contingency occurs.

"To make the $3,000,000 available and implement the program, the Commission will be incurring expenses, i.e., travel, salary, printing, etc.

"This creates questions:

"(1) Can part of the $1,000,000 appropriated be used to pay expenses mentioned above, and if so

"(2) Can part of the $3,000,000, if made available, be used to replenish the $1,000,000 for expenses incurred?"

House File 913 is entitled "An Act Creating an Employment Opportunity Board Authorized to Grant Funds for the Creation of Employment and Making An Appropriation". The purpose of the Act as stated in §1, is as follows:

"The purpose of this Act is to foster the creation of new employment opportunities for those citizens of the state who are unemployed."

Section 3 of the Act creates an equal employment opportunity board consisting of the present members of the Employment Security Commission. The balance of the Act is devoted to setting forth the functions of the employment opportunity board, the duties of the executive secretary, the requirements as to applications and the last section, §7, makes an appropriation of $1,000,000 in the following terms:

"There is appropriated from the general fund of the state to the employment opportunity board for the fiscal year beginning July 1, 1975, and ending June 30, 1976, the sum of one million (1,000,000) dollars or so much thereof as may be necessary to carry out this Act. However, if by October 15, 1975, the sum of at least three million (3,000,000) dollars had not been made available *to the board* by the federal government, *all* appropriated funds shall revert to the general fund of the state." (Emphasis supplied)

Since all appropriated funds are to revert to the general fund of the state in the event that the Federal Government has not made at least $3,000,000 available to the board by October 15, 1975, the $1,000,000 state appropriation clearly cannot be used to pay expenses incurred in efforts to make the $3,000,000 federal grant available, because should those efforts fail, it would not be possible to revert "all appropriated funds" since some of them would already have been spent.

In view of the foregoing, it is unnecessary to answer your second question since if, as we have said, it is not permissible to use part of the $1,000,000 state appropriation before the required $3,000,000 federal match is made available, it would not be necessary to replenish the $1,000,000 from the $3,000,000. Our conclusions in this matter are further supported by the Act's legislative history, to which you made reference in your letter as follows:

"I should mention that, in the House, an amendment sponsored by Mrs. Lipsky and I and adopted by the House, would have allowed expenses to be paid from the employment fund. The Senate, however, in

changing the makeup of the employment board also (perhaps inadvertently) deleted that provision."

As recently as a year ago, the Supreme Court of Iowa stated:

"The striking of a provision is an indication the statute should not, in effect, be construed to include it." *Davenport Water Co. v. Iowa State Commerce Commission*, Iowa, 190 N.W.2d 583, 595.

See also, *Builders Land Co. v. Martens*, 255 Iowa 231, 122 N.W.2d 189; *Lever Brothers Co. v. Erbe*, 249 Iowa 454, 87 N.W.2d 649; *Lenertz v. Municipal Court of City of Davenport*, Iowa 1974, 219 N.W.2d 513. Furthermore, in response to your parenthetical suggestion that the omission was inadvertent, an early case decided by the Iowa Supreme Court determined that the courts have no power to supply some matter accidentally omitted from a statute. *Ripley v. Gifford*, 11 Iowa 367.

Subsequent to your first letter you asked certain additional questions relative to House File 913:

"(1) Can monies for facilities (building, cement, pipe, sewer, etc.) be matched against the $1,000,000 for paying participants.

"(2) Can some agreement be reached through which the Employment Security Commission can be a party to the Iowa Department of Environmental Quality's administration of EPA construction grant funds and will such an agreement satisfy Section 7 of H.F. 913?

"(3) Can money already in the State of Iowa from the Federal government, or money 'dedicated' or 'awarded' to agencies in the State of Iowa be used for the $3,000,000 Federal match mentioned by the bill? An example might be CETA funds provided the Governor for Public Service Employment or Training Projects; even Sewer Treatment Facility Money might be matched if legal."

As I understand the matter, what you are suggesting in your first two questions is that perhaps EPA construction grant funds for facilities of the type you describe and granted to entities who would also be eligible for grants under §6 of House File 913 would be considered as going toward making up the $3,000,000 federal match required by §7 of the Act. In our opinion, this construction is not possible. Viewing House File 913 in its entirety it is evident that its manifest purpose was to attract new federal funding in the amount of $3,000,000. In addition, §7 of House File 913 specifically says that the $3,000,000 in federal funds must be made available "to the board" and not to some other public agency.

Thus, the answer to the first two questions in your second letter is no.

Next, you ask whether or not money already in the State of Iowa from the Federal Government or money dedicated or awarded to the agencies in the State of Iowa can be used for the $3,000,000 federal match. You cite as an example Comprehensive Employment and Training Act (CETA) funds provided the Governor for public service employment or training projects. Our answer to this question must also be no. In the first place, the funds were not made available to the board created by House File 913 to the Governor. Beyond this, there is some question as to whether or not the CETA funds represent new federal money but only funds for pre-existing and ongoing programs. However, even if new CETA funds could be made available it is our understanding that the federal requirements are that the money be used only for providing

employment through grants to public agencies. Section 6 of the Act authorizes use of funds made available to the board for grants to private as well as public agencies. Thus, acceptance of CETA funds as match for the one million dollars appropriated by House File 913 would force the board to limit the use not only of the federal funds but also of the appropriated state funds for narrower purposes than the statute specifically contemplates. This we do not think is permissible.

October 9, 1975

STATE OFFICERS AND DEPARTMENTS: Iowa Public Employees Retirement System; Des Moines Metropolitan Transit Authority. §§28B.2, 28E.2, 97B.42, 97B.53, Code of Iowa, 1975. The Des Moines Metropolitan Transit Authority is an employer subject to IPERS. Membership in IPERS is mandatory for new employees of the Des Moines Metropolitan Transit Authority. Employees of the old Iowa Regional Transit Corporation who continue working for the Transit Authority can, if they wish, elect to continue to be covered by the corporation pension plan. There is nothing in Chapter 97B which would make it possible for persons who are already retired to become eligible to receive benefits under IPERS. An employee who works less than four years is therefore entitled only to a refund of his contributions made to IPERS. (Haesemeyer to Clayman, Chairman, Iowa Employment Security Commission, 10-9-75) #75-10-4

Mr. Abe D. Clayman, Chairman, Iowa Employment Security Commission: Reference is made to your letter of July 22, 1975, in which you requested an opinion of the Attorney General and state:

"The Des Moines Metropolitan Transit Authority was created pursuant to Chapter 28G, 1975 Code of Iowa. The Authority is comprised of Des Moines and four suburbs: Urbandale, West Des Moines, Windsor Heights and Clive. To commence operations, the Authority acquired the assets of the Iowa Regional Transit Corporation (which formerly operated the bus service in the Des Moines metropolitan area), hired its employees and assumed the obligations of the Transit Corporation's pension plan.

"A question has arisen as to whether or not the Authority is an 'employer' as contemplated by Chapter 97B of the 1975 Code of Iowa relating to the Iowa Public Employees' Retirement System. We respectfully request your opinion on that question and the following related matters, to-wit:

"1. If in fact the Authority is an 'employer,' must the Authority and its employees contribute to the Iowa Public Employees' Retirement System or may the Authority and its employees continue to contribute to the company pension plan?

"2. If the Authority and its employees must contribute to IPERS, may they also continue to contribute to the company pension plan for certain employees who, because of age and years of service, would not be eligible for benefits under IPERS?

"3. The Authority has a number of employees who have already retired and the question has arisen as to whether or not there is any provision in Chapter 97B for making these persons eligible to receive benefits under IPERS.

"4. Finally, if an employee works less than four years prior to his retirement or does not otherwise become vested in the plan, what happens to his contributions made to the plan during his employment?"

(1) Section 28G.2, Code of Iowa, 1975, provides:

"Any two or more public agencies, as defined in section 28E.2, may enter into an agreement pursuant to the provisions of chapter 28E to jointly and co-operatively create a separate public agency for the purpose of establishing or acquiring any urban mass transit system and to pro-

vide for its equipment, enlargement, extension, improvement, maintenance, and operation under the terms of, and subject to, any conditions of such federal assistance. The agreement shall be entered into by the governing body of each participating public agency and may be entered into and implemented without an election."

As you state, the Des Moines Metropolitan Transit Authority was created pursuant to Chapter 28G and it is clear that it is a public agency within the meaning of §28E.2. The Iowa Public Employees' Retirement System was established by Chapter 97B of the Code and is governed by its provisions. Section 97B.41(3)(a) defines employer for the purposes of Chapter 97B as follows:

"'Employer' means the state of Iowa, the counties, municipalities, and public school districts therein and all of the political subdivisions thereof and all of their departments and instrumentalities, including joint planning commissions created under the provisions of chapter 473A, all hereinafter called political subdivisions, as of July 4, 1953."

In our opinion, the foregoing definition of employer is sufficiently broad to include a statutorily created public agency such as the Des Moines Metropolitan Transit Authority.

Section 97B.42 provides:

"Each employee whose employment commences after July 4, 1953, or who has not qualified for credit for prior service rendered prior to July 4, 1953, or any publicly elected official of the state or any of its political subdivisions, other than individuals who are students and who devote their time and efforts chiefly to their studies, rather than to incidental employment, shall become a member upon the first day in which such employee is employed. He shall continue to be a member so long as he continues in public employment except that he shall cease to be a member if after making said election he joins another retirement system in the state which is maintained in whole or in part by public contributions or payments which has been in operation prior to July 4, 1953, and was subsequently liquidated and may have thereafter been re-established. However, the participation in such other retirement system shall be voluntary and shall not be a condition for continuance of employment.

"Nothing in this chapter shall be deemed to exclude from coverage, under the provisions of this chapter, any public employee who was not on or as of July 4, 1953, a member of another retirement system supported by public funds. All such employees and their employers shall be required to make contributions as specified as to other public employees and employers. Nothing in this chapter shall be deemed to prohibit the re-establishment of a retirement system supported by public funds which had been in operation prior to July 4, 1953, and was subsequently liquidated.

"Persons who are members of any other retirement system in this state which is maintained in whole or in part by public contributions other than persons who are covered under the provisions of chapter 97, Code 1950, as amended by the Fifty-fourth General Assembly on the date of the repeal of said chapter, under the provisions of sections 97.50 through 97.53 shall not become members.

"Nothing herein contained shall be construed to permit any person in public employment to be an active member of the Iowa public employees' retirement system and of any other retirement system in the state which is supported in whole or in part by public contributions or payments except as heretofore provided."

Under such §97B.42, membership in IPERS is mandatory for new employees of the Des Moines Metropolitan Transit Authority and both the employees and Authority would be obliged to make contributions to the IPERS system. However, with respect to employees of the old Iowa Regional Transit Corporation who continue to work for the Transit Authority, it would be our opinion that it would be optional with such employees as to whether or not they wish to be covered by the old Transit Corporation's pension plan or IPERS. You have pointed out that the Transit Authority has assumed the contractual obligations of the Transit Corporation under the latters pre-existing pension plan. Article I, §21, Constitution of Iowa, provides that no law impairing the obligation of contracts shall be passed.

(2) As is clear from the last paragraph of §97B.42 quoted above, no person in public employment can at the same time be a member *both* of IPERS and any other retirement system supported in whole or in part by public funds. However, as we pointed out in answer to your first question, employees of the old Transit Corporation's pension plan can elect to continue to be covered under such plan *in lieu* of going under IPERS.

(3) In answer to your third question, it is our opinion that there is nothing in Chapter 97B which would make it possible for persons who are already retired to become eligible to receive benefits under IPERS since such persons would not have been public employees during thir years of service by reason of the fact that they retired before their employer became a public agency subject to the provisions of Chapter 97B.

(4) Finally, you ask if an employee works less than four years prior to his retirement or does not otherwise become vested in the plan what happens to his contributions made to the plan during his employment. Under 97B.53, vesting in IPERS occurs after an employee has completed at least four years' service or has attained the age of 55. An employee who works less than four years is therefore entitled only to a refund of his contributions made to IPERS. Section 97B.53(1). However, consideration should also be given to §97B.53(7) which provides:

"Any member whose employment is terminated after one year of employment but before he has accumulated four or more years of employment, either under the provisions of this chapter or as a result of prior service credits, may elect to leave his accumulated contributions in the retirement fund. In the event he returns to public employment at any time within four years after his termination of employment, he shall be entitled to resume membership in the system with the same credits for prior service and accumulated contributions that he had earned when his original employment was terminated. No interest shall be credited on his accumulated contributions nor on his employer's accumulated contributions during the period from the time of his termination of employment to his resumption of employment.

"Any member who has resumed employment under the provisions of this subsection shall not be eligible for any second period of absence from membership as a result of termination of service."

October 9, 1975

STATE OFFICERS AND DEPARTMENTS; EXECUTIVE COUNCIL; COURT COSTS AND EXPENSES. §19.10, Code of Iowa, 1975, as amended by SF 114, 66th G.A., 1st, 1975 and §4.1(36). The long-standing statutory authorization which provides that the executive council "may" pay expenses incurred, or costs taxed to the state, in a proceeding brought by or against the state, is mandatory and means that the executive council must pay such expenses and costs, except the travel or personal expenses of state officers or employees, where no other funds are appropriated therefor and no duty is imposed on any other officer to pay them. §4.1(36) which indicates that "may" merely confers a power, not a duty or requirement, is not applicable to §19.10, which was enacted prior to July 1, 1971. (Turner to Smith, State Auditor, 10-9-75) #75-10-5

Honorable Lloyd R. Smith, State Auditor: You have requested a clarifying opinion of the attorney general as to whether the Executive Council must under the provisions of §19.10, Code of Iowa, 1975, as amended, pay court costs taxed to the state. The question of what claims may, can or should be paid under §19.10 is one which has been raised repeatedly at Executive Council meetings in the past few years and one which we have several times been asked about. Hopefully, we can now at last lay to rest the vital issue of whether court costs taxed to the state *must* or ought to be paid thereunder.

§19.10 was amended by Senate File 114, 66th G.A., 1st Session, 1975, which provides:

"Section 1. Section nineteen point ten (19.10), Code 1975, is amended to read as follows:

19.10 COURT COSTS. The executive council may pay, out of any money in the state treasury not otherwise appropriated, [any expense] *expenses* incurred, or costs taxed to the state, in any proceeding brought by or against any of the state departments or in which the state is a party or *is* interested. *This section shall not be construed to authorize the payment of travel or other personal expenses of state officers or employees.*"

With the exception of adding the underscored "is," substituting "expenses" for "any expense" and the addition of the last sentence by SF 114, §19.10 has been in the Code in identical form, since its enactment in Acts 1923-24, Ex. Sess. (40 G.A.) HF 14, §12 (unpublished). See, for example §289, Code of Iowa, 1939. Thus, for more than 50 years, the law has provided that the Executive Council *"may"* pay out of any money in the state treasury not otherwise appropriated *"any expense incurred, or costs taxed to the state,* in any proceeding brought by or against any of the state departments or in which the state is a party or interested." The Code Editor has always during that time captioned this section "Court Costs." Doubtless this unlimited open end appropriation for court expenses and costs was enacted because such are impossible to estimate and it is essential they be paid. The state cannot afford not to afford investigation and litigation.

§4.1(36) concerning the rules of statutory construction which the General Assembly has directed to be observed, provides:

"Unless otherwise specifically provided by the general assembly, whenever the following words are used in a statute *enacted after July 1, 1971,* their meaning and application shall be:

a. The word 'shall' imposes a duty.

b. The word 'must' states a requirement.

c. The word *'may'* confers a power." (Emphasis added.)

In my view, §4.1(36) has no application to §19.10 as it concerns construction of the word "may" therein because §19.10 was adopted long before July 1, 1971.

Our Supreme Court has many times construed the word "may" as it appears in various statutes, and often held it mandatory.

"The verb 'may' usually is employed as implying permissive or discretional rather than mandatory action or conduct. It imports a grant of opportunity or power . . . A mandatory construction will not be given it unless it plainly appears the legislative intent was to impose a duty and not merely a privilege or discretionary power and where third persons have a claim de jure to have the power exercised. (citations)" *John Deere Waterloo Tractor Works v. Derifield,* 1961, 1389, 1392, 110 N.W.2d 560, 562.

But as late as December 18, 1974, our highest court said of "may" that "there are many circumstances under which it may be given a mandatory meaning." *Iowa National Industrial Loan Company v. Iowa State Department of Revenue,* 1974 Iowa, 224 N.W.2d 437, 440, citing *Schultz v. Board of Adjustment,* 1966, 258 Iowa 804, 810, 139 N.W.2d 448, 451-452.

"Ordinarily 'may,' in construing a statute, is permissive, but it is generally mandatory when employed to delegate a power the exercise of which is important for the protection of public or private interests." *Queeny v. Higgins,* 1907, 136 Iowa 573, 114 N.W. 51.

The word "may" in a statute is sometimes interpreted to mean "shall" or "must," where it appears from legislation and context that the legislature intended to impose a positive duty, rather than discretionary power. Mandatory construction is usually given the word "may" in a statute when public interests are concerned, but never for the purpose of creating a private right. *Bechtel v. Board of Supervisors of Winnebago County,* 1934, 217 Iowa 251, N.W. 633.

"May" is construed to mean "shall" whenever rights of the public or third persons depend upon exercise of the power or performance of the duty to which the quoted word refers . . . *School Township 76 of Muscatine County v. Nicholson,* 1939, 227 Iowa 290, 288 N.W. 123; *Whitfield v. Grimes,* 1940, 229 Iowa 309, 294 N.W. 346; *State ex rel. Wright v. Iowa State Board of Health,* 1943, 233 Iowa 872, 10 N.W.2d 561; *Wolf v. Lutheran Mutual Life Insurance Company,* 1945, 236 Iowa 334, 18 N.W.2d 804. Rights of *both* the public and third persons are involved in payment or refusal to pay court costs.

Applying the foregoing Iowa cases, we think the word "may" in §19.10 means "shall" or "must" and that it is mandatory rather than discretionary that the Executive Council pay *both* "expenses incurred" and "costs taxed to the state, in any proceeding brought by or against any of the

state departments or in which the state is a party or is interested." Who else would pay them? As nearly as I can determine, no money is appropriated to any other department or agency specifically for the payment of court costs or expenses related to a state case. Certainly no money is appropriated to the department of justice for that purpose. And as far as I am able to determine, until now, the Executive Council has always paid the state's case related expenses and court costs under §19.10. Now only travel and personal expense of state officers and employees are excepted.

This construction is supported by the fact that the legislature, at the request of the Governor and State Comptroller, amended §19.10 by adding the last sentence to provide "This section shall not be construed to authorize the payment of *travel or other personal expenses of state officers or employees.*" SF 114. Prior to this amendment, the attorney general, his assistants and other officers, investigators and employees of the department of justice were able to claim from funds not otherwise appropriated travel expenses related to specific cases and investigations in which the state was a party or interested.

An explanation added to SF 114 says: "This bill clarifies the law relating to payment by the executive council of court costs and expenses by disallowing any payment for travel and similar expenses. All travel and related expenses are to be charged against funds appropriated for that purpose."

Your audit of February 10, 1975, shows court costs and expenses paid to assistant attorneys general under §19.10 as follows:

Fiscal Year	Attorney General Travel Expenses[1]	State Court Costs[2]	Total
1968	$ 275.00	$ 81,994.34	$ 82,269.34
1969	179.49	70,148.80	70,328.29
1970	1,350.31	85,716.85	87,067.16
1971	4,194.13	59,372.07	63,566.20
1972	10,480.28	70,568.06	81,048.34
1973	26,267.22	59,470.70	85,737.92
1974	25,426.76	48,168.84	73,595.60
1975 — 7 months	15,858.56	59,464.48	75,323.04
Total	$84,031.75	$534,904.14	$618,935.89

Of course, we were concerned about where the department of justice would get the money for the travel expenses of its officers and employees if SF 114 were to be enacted. When we expressed our concern to the legislature, it looked at the foregoing figures and added $25,000 to the governor's recommendation for the express purpose of paying for

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[1] Related to specific cases or investigations.

[2] Court costs includes fees and expenses of outside counsel the Executive Council employed pursuant to §13.7, Code of Iowa, 1975. For example, in 1974, outside counsel fees comprised $34,943.14 of the $48,168.84 listed for court costs. It should also be noted that these figures do not reflect reimbursement of court costs advanced and later taxed against the other side. Receipts for these amounted to $2,456.98 in 1974.

such travel. But no additional appropriation was made to the attorney general for court costs because §19.10 remained unchanged with reference to other expenses incurred or court costs taxed to the state.

Yesterday I received from the Executive Council notice that it wanted "again to review" with me nine (9) court cost claims I submitted in connection with state cases, payment of which the Council deferred at its meeting on October 6, 1975. The largest of those claims was for $199.60, but five (5) of them were for amounts of less than *$15.00!* One of these was for sheriff's fees in a state case in the amount of only $3.40. (Sheriff's fees are taxed as court costs.) These claims, which the governor, secretary of state, state auditor and state treasurer agonized over for the better part of an hour before solemnly concluding that their legality should be "reviewed," with the attorney general totaled only $383.85! (Needless to say, I would not have presented these claims for payment under §19.10 had I thought it improper to do so.)

Indications are that Executive Council consideration of these bills centered around whether the Executive Council "must" pay them when the statute says it "may" do so. Of course, implicit in their consideration was the notion that the attorney general would pay if the Executive Council did not. But having no statutory *duty* to do so, and the General Assembly having appropriated $25,000 only for *travel* expenses, in connection with state cases, there is no way the attorney general can pay from his appropriation these *other* costs which have totaled as much as $85,716.85 in one year (1970). Indeed, there is no reason why they *should* be paid from the attorney general's appropriation any more than they should be paid from the appropriation to the governor or some other state officer. The cases are for the benefit of the state of Iowa. The attorney general has no control of the number of tort claims against the state or how often the state is sued in court, and no way of limiting the countless criminal appeals his department is saddled with. And certainly he should not be discouraged from initiating actions on behalf of the state and consumers when he determines such to be in the interest of the state. §13.2(2).

A law providing regulations conducive to the public good and welfare is ordinarily remedial and as such should be liberally construed. *Johnson County v. Guernsey Ass'n.*, 1975 Iowa, 232 N.W.2d 84; *State ex rel. Turner v. Koscot Interplanetary, Inc.*, 1971 Iowa, 191 N.W.2d 624. The ultimate goal of statutory construction is giving the statute a reasonable construction which will acomplish rather than defeat its purpose. *Domain Industries v. First Sec. Bank & Trust*, 1975 Iowa, 230 N.W.2d 165.

In any case, I submit that whether it "must" do so or not, and whether it "may" decide not to pay expenses incurred and costs taxed to the state in connection with lawsuits, the Council obviously "ought" to pay them. Such expenses and costs must be paid by the State whether they are taken out of one pocket or another. But they cannot be paid from an empty pocket.

Finally, I don't understand why the Governor and State Treasurer would want to hamper the operation of my office and waste our time as well as their own. This tempest in a teapot is detrimental to the

interests of the state. The Executive Council has better things to do than to fuss with the Governor's gripes about court costs so necessary and fundamental to the operation of our government and which §19.10 so *clearly* authorizes them to pay from an *unlimited* standing appropriation. Perhaps it should be more concerned about paying the $93,000 September bill, and the yet unknown October bill, incurred by the Governor and State Treasurer on the million dollar restoration of the governor's new mansion. I understand there are no funds left to pay contractors' bills already incurred and consideration is being given to melting Terrace Hill medallions and hocking the crown jewels. As Secretary of State Synhorst pointed out at the same October 6th meeting in which these court cost claims were questioned, the Executive Council cannot expend money it doesn't have. Why did the Governor ask the Council to approve payment of claims for restoring the mansion after the appropriation therefor had temporarily run dry? See §§8.19 and 8.38.

October 16, 1975

ELECTIONS: Primary Election, Special Charter City, Votes Required for Nomination. §§43.53, 43.112, 43.117, 420.137, Code of Iowa, 1975. A person whose name is not printed on the primary ballot for an office to be filled by the voters of a special charter city must in order to be nominated receive the greater of at least 5 votes or a number of votes equal to at least 5% of the votes cast in the city or subdivision thereof at the last preceding general election for the party's candidates for President of the United States or for Governor, as the case may be. (Haesemeyer to Gallagher, Assistant Scott County Attorney, 10-16-75) #75-10-6

Mr. Robert H. Gallagher, Assistant Scott County Attorney: Reference is made to your letter of October 14, 1975, in which you request an opinion of the Attorney General and state:

"The City of Davenport conducted its biennial city primary election on October 7, 1975, in accord with Section 43.114 of the Code. The deadline for filing nomination papers with the City Clerk was September 6, pursuant to Section 43.115 of the Code.

"No persons filed nomination papers in the Democratic primary for the offices of City Clerk, City Treasurer, Sixth Ward Alderman, and Seventh Ward Alderman by the September 6th deadline.

"Further, the Democratic City Central Committee and/or the members of the City Central Committee in the sixth and seventh wards failed to fill the vacancies by September 10 as provided in Sections 43.78(a) (f) and 43.78(3).

"At the primary, however, various individuals received 283 write-in votes for City Clerk, 438 write-in votes for City Treasurer, and three persons received one write-in vote each for Seventh Ward Alderman.

"Section 420.137 of the Code provides 'All laws or other provisions of the Code governing political parties and the nomination of candidates in elections shall, as far as applicable, govern the political parties and nomination and election of candidates in cities acting under a special charter which has a population of fifty thousand or more.' . . . i.e., Davenport.

"Further, Section 43.117 provides that 'A plurality shall nominate the party candidates for all offices filled by elections authorized by Section 43.112, and a plurality shall elect the precinct committeemen.' — i.e., elections in Davenport.

"Note also that Section 43.52 provides that 'the person receiving the highest number of votes cast in the primary election', i.e. a plurality, is nominated.

"However, Section 43.66 provides, in part, 'if there is no candidate on the official primary ballot of a political party for nomination to a particular office, a write-in candidate may obtain the party's nomination to that office referring to offices mentioned in Sections 43.52 and 43.65 in the primary if the candidate receives a number of votes equal to at least 35 per cent of the total vote cast for all of that party's candidates for that office in the last preceding primary election for which the party had candidates on the ballot for that office.'

"Under this Section, a write-in candidate for City Clerk required 805 write-in votes, and a candidate for City Treasurer required 1009 write-ins.

"Section 43.53 provides 'A person whose name is not printed on the official primary ballot for an office to be filled by the voters of a political subdivision within a County shall not be declared nominated as a candidate for such office in the general election unless that person receives the greater of at least five votes or a number of votes equal to at least five percent of the votes cast in the subdivision at the last preceding general election for the party's candidate for . . . governor . . .'

"In 1974, the Democratic candidate for Governor received 10,089 votes in Davenport, and 1,489 votes in the Seventh Ward.

"These questions therefore, arise:

"1. Does the word 'plurality' as used in Section 43.117 — and construed in light of Section 420.137 — refer only to those races in which there is at least one name printed on the ballot, or two names in those cases (such as precinct committee positions) where two persons must be elected? In short, does Section 43.117 apply only to those races for which there is competition?

"2. Do Sections 43.53 and 43.66 (as specific statutes) require that a certain number of write-in votes be received before a person is nominated, if no other name appears on the ballot?

"3. If the answer to question #2 is in the affirmative, does Section 43.66 apply to the offices of City Clerk and City Treasurer — or does Section 43.53 apply to those offices? Further does Section 43.53 apply to the offices of ward alderman?"

Chapter 43 of the Code contains the statutory provisions governing the nomination of candidates by primary election and as you point out, §420.137, Code of Iowa, 1975, makes such Chapter 42 applicable to special charter cities such as Davenport. Section 43.112 is to much the same effect at §420.137. Section 43.117 as you point out, provides that,

"A plurality shall nominate the party candidate for all offices filled by elections authorized by section 43.12, and a plurality shall elect the precinct committeemen."

and as far as it goes, it's consistent with the first paragraph of §43.52, as amended by §15 of House File 700, Acts, 66th G.A., First Session (1975) and the first sentence of §43.53, as amended by §16 of House File 700. However, it is to be observed that §43.66, which you have quoted in relevant part, operates as a qualification of the requirements in §43.52 in those cases where there is no candidate on the official primary ballot of a political party for nomination to a particular office to be filled by the voters of an entire county or for the office of county supervisor elected from a district within a county. By the same token,

the second sentence of §43.53 operates as a qualification on the number of votes required for nomination in a primary election for any office to be filled by the voters of a political subdivision within a county in those cases where no persons name is printed on the official primary ballot, and in our opinion, such second sentence of §43.53 is also a qualification on the number of votes required for nomination stated in §43.117. In other words, in a special charter city, as in any other city, if there were no names printed on the primary election ballot, a write-in candidate in order to be nominated would have to receive the greater of at least 5 votes or a number of votes equal to at least 5% of the votes cast in the city or subdivision thereof at the last preceding general election for the party's candidates for President of the United States or for Governor, as the case may be.

Section 43.52 by its terms applies only to nominees of political parties for offices to be filled by the voters of an entire county or to the offices of county supervisor elected from a district within a county and §43.56 by its terms applies only to the same offices and to offices to be filled by the voters of the entire state, seats in the United States House of Representatives, the Iowa House of Representatives and the Iowa Senate. Thus, §43.66 does not apply to the offices of the city clerk and the city treasurer. However, §43.53 does apply to the offices of city clerk and city treasurer and to the offices of ward alderman.

October 16, 1975

GENERAL ASSEMBLY; STATUTES; TITLES; SUBJECT MATTER. Art. III, §29, Const. of Iowa. House File 700, 66th G.A., 1st, 1975, §279.3, Code of Iowa, 1975. Only §134 of HF 700, which amends §279.3, relating to the appointment of a secretary and treasurer of a school board, is unconstitutional as being a separate subject matter and not expressed in the title. The remainder of the Act, including §279.3 prior to its amendment, is constitutional, at least as Art. III, §29, applies to §§125, 126, 127, 128, 130, 131, 132, 133, 134, 135, 136, 137, 138, 141, 142, 143 and 144 because all of said sections relate to a single subject matter: elections. (Turner to Lipsky, State Representative, 10-16-75) #75-10-7

Honorable Joan Lipsky, State Representative: You have requested an opinion as to whether House File 700, Acts of the 66th General Assembly, 1st Session, 1975, is unconstitutional in whole or in part, as violating Article III, §29, Constitution of Iowa, which provides:

"Every Act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

HF 700 is entitled:

"An Act relating to procedures for preparing for, giving notice of, conducting and canvassing elections, to the election of presidential electors, and to the registration of voters, and prescribing penalties."

You direct our attention specifically to "several new sections" which you say "were included by amendment" to HF 700 as it was originally introduced and which appear to "deal with several separate subjects, none of which are covered by the title . . .:" §§125, 126, 127, 128, 130, 131, 132, 133, 134, 135, 136, 137, 138, 141, 142, 143 and 144.

HF 700 is a very broad bill relating to elections, as its title indicates. It relates to elections as follows:

1) Procedures for elections.
2) Preparing for elections.
3) Giving notice of elections.
4) Conducting of elections.
5) Canvassing elections.
6) Election of presidential electors.
7) Registration of voters for elections.
8) Prescribing penalties for violation of the election laws.

The opening sentence of a page and a half explanation of HF 700 attached to the bill as originally filed suggests its exceptionally broad scope: "This bill revises and updates a number of Iowa statutes relating to elections." Countless amendments were filed.

The enrolled Act, as approved by the Governor, consists of 154 sections in 91 pages of printed materials. Each of the sections you enumerate, except §134, seems to relate in some manner "to elections" whether it falls within the above enumerated categories pertaining to elections or not. "Procedures for," "preparing for" and "conducting" are, themselves, when taken together, categories so broad as to be nearly all inclusive of any thing relating to elections.

As I noted in OAG Turner to Senator Coleman, June 18, 1975, virtually all cases, Iowa and foreign, hold that a constitutional prohibition against more than one subject matter is to be liberally construed so that one act may embrace all matters reasonably connected with, and not incongruous to, the subject expressed in the title. *Long v. Board of Supervisors of Benton County*, 1966, 258 Iowa 1278, 142 N.W.2d 378; *Lee Enterprises v. Iowa State Tax Commission*, 1968 Iowa, 162 N.W.2d 730; 8 Drake Law Review 66. The *Lee Enterprises* case held that when the subject is expressed in the title the constitution does not require that the title "be an index or epitome of the act or its detail. The subject of the bill need not be specifically and exactly expressed in the title. It is sufficient *if all the provisions relate to the one subject indicated in the title and are parts of it or incidental to it or reasonably connected with it or in some reasonable sense auxiliary to the subject of the statute.* * * *" (Emphasis added.)

"Elections" is the one subject — the common thread — connecting virtually every section which you enumerate as having been added by amendment to HF 700. In *Long v. Board of Supervisors*, supra, our court said the primary purpose of the one-subject constitutional provision in Article III, §29, is to prevent logrolling in enactment of laws, the practice of several minorities combining their several proposals as different provisions of a single bill, thus consolidating their vote so that a majority is obtained for an omnibus bill where perhaps no single proposal of each minority could have obtained majority approval separately. It was designed to prevent riders from being attached to bills that are popular and so certain of adoption that riders will secure adoption, not on their own merits, but on the merits of the measure to which they are attached. The court there also found that another purpose was to facilitate orderly legislative procedure. And the primary purpose of the requirement that the subject matter be expressed in the title of

the act is to prevent surprise and fraud upon the people and the legislature.

In *Long* the Court held that a section providing that courthouses be kept open for transaction of business on Saturday mornings was related and germane to the expressed subject of compensation of county officers — "reasonably connected with the expressed subject in the title and could reasonably be expected to be in such a bill" although the title in *Long* made no mention of courthouses remaining open on Saturday mornings. The court noted that while "it might have been better to have stated the act related to *duties and* salaries of county officers we think ['compensation'] was sufficient, and reasonably would not mislead the legislators or the public."

Long holds that to "constitute duplicity of subject," the act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other. There is no violation where matters treated in the act fall under some one general idea and are so connected with each other, either logically or by popular understanding, as to be part of or germane to one general subject. Thus, whole recodifications have been upheld as part of one subject: code revision. OAG Turner to Senator Coleman, June 18, 1975, and authorities cited therein.

In my opinion, only §134 of those sections of HF 700 about which you inquire, is not germane. It provides:

"Sec. 134. Section two hundred seventy-nine point three (279.3), Code 1975, is amended to read as follows:

279.3 APPOINTMENT OF SECRETARY AND TREASURER. At the meeting of the board the first secular day after the seventh day in July the board shall appoint a secretary who shall not be a teacher or other employee of the board. It shall also, [except in districts composed in whole or in part of a city,] appoint a treasurer. [Such] *These* officers shall be appointed from outside the membership of the board for terms of one year beginning with the first secular day after the seventh day in July which appointment and qualification shall be entered of record in the minutes of the secretary. They shall qualify within ten days following [their] appointment by taking the oath of office in the manner required by section 277.28 and filing a bond as required by section 291.2 and shall hold office until their successors are appointed and qualified."

§134 does not relate in any way to elections but rather to the *appointment* of a secretary and treasurer of a school board. But even then, §134 appears to be only a minor amendment to §279.3, Code of Iowa, 1975, which latter remains unaffected by the unconstitutional amendment.

October 17, 1975

COUNTIES: Compensation Board. H.F. 802, 66th G.A., 1975 Session. All mayors of cities and towns within a county are eligible members of the convention to be called by the Auditor for the selection of a member representing the general public on the County Compensation Board. All school districts located in the county are included for the selection of a second member representing the general public. However, only those school board members residing in the county would be eligible to vote as a member of the convention. A quorum is a majority of the number of members of the convention and if such quorum is not

present the convention should be recessed until a quorum can be obtained. (Nolan to Griffin, State Senator, 10-17-75) #75-10-8

The Honorable James W. Griffin, Sr., State Senator: You have requested the opinion of the attorney general interpreting House File 802, enacted by the 66th General Assembly, 1975. In your request you have stated:

"The above referenced subject matter is to create County Compensation Board composed of 5 members or residents of individual county.

"One member shall be selected representing general public selected by a convention of the members of the Board of Directors of *all* school districts located within the county.

"One member shall be representing the general public by the committee of Mayors of *all* incorporated located within the county.

"I would respectively ask for an opinion from your office as to the interpretation of the above language spelling out the requirements to be met by the word *'all'*.

"Does *'all'* mean everyone, the majority of all or a minority representation.

"If your opinion states that the majority shall be present, what happens then when this is not accomplished at the convention?"

In answer to your first question, it is my opinion that the word "all" as used in §1, House File 802, supra, should be construed in reference to the total number of incorporated cities within the county and the total number of school districts located within the county. With such construction, all mayors of incorporated cities and towns would be covered by the language of the act. However, due to language contained in §2 pertaining to school districts lying in more than one county, only those school board members who reside in the county would be eligible to attend the convention of the members of the boards of directors of the school boards located within the county, although the total number of school district boards would be covered.

Your second question raises the matter of a quorum at the convention provided for in §1 of the Act. The answer to your question is found in §3 which provides:

"Each member of the county compensation board to be selected by the convention shall be elected by a majority vote of the members of such convention."

This language is, in our view, ambiguous. Had the legislature specified that the majority vote of the members of the convention meant the members eligible to attend a convention convened by the county auditor, pursuant to §2, the matter would be resolved. However, since the legislature did not choose such precise language, we construe what was said to mean that a member of a county compensation board to be selected by the convention shall be elected by the majority vote of the members present at such convention.

Further, in the absence of statutory language specifying the number of eligible members required to constitute a quorum at the convention, §4.1(30), Code of Iowa, 1975, provides:

"A quorum of a public body is a majority of the number of members fixed by statute."

If such quorum is not present, the convention should be recessed until a quorum can be obtained.

October 22, 1975

STATE OFFICERS AND DEPARTMENTS: Manufacturer's Representative's Possession of Prescription Drugs — §155.26, §155.30, §204.302 (3)(a), Code of Iowa, 1975. Manufacturer's representatives who possess prescription drugs in the usual course of business is not subject to criminal penalties. (Roberts to Monroe, State Representative, 10-22-75) #75-10-9

Honorable W. R. Monroe, State Representative: You have requested an opinion regarding a manufacturer's representative's possession of prescription drugs. You specifically asked:

"My question is; given that a manufacturer's representative is not a 'licensed pharmacy, licensed wholesaler, physician, veterinarian, dentist, podiatrist, or nurse acting under the direction of a physician or the board of pharmacy examiners, its officers, agents, inspectors, and representatives' nor is said manufacturer's representative a 'common carrier or messenger . . . ,' are not such manufacturer's representatives liable for the penalties in sections 155.26 and 155.30 if they are convicted of possessing prescription drugs?"

Sections 155.26 of the 1975 Code of Iowa reads as follows:

"155.26 Possession of prescription drugs. Any person found in possession of a drug or medicine limited by law to dispensation by a prescription, unless such drug or medicine was so lawfully dispensed, shall be deemed guilty of violating the provisions of this section, and upon conviction thereof, shall be fined not more than one thousand dollars or be imprisoned in the county jail for not more than one year, or both. This section shall *not* apply to a *licensed pharmacy, licensed wholesaler, physician, veterinarian, dentist, podiatrist, or nurse acting under the direction of a physician or the board of pharmacy examiners, its officers, agent, inspectors, and representatives, nor to a common carrier of messenger when transporting such drug or medicine in the same unbroken package in which the drug or medicine was delivered to him for transportation.*" (Emphasis added.)

A fundamental rule of statutory construction is that statutes relating to the same subject matter, and hence which are in *pari materia,* must be construed and considered in line with the common legislative intent. *Lewis Consolidated School District v. Johnston,* 256 Iowa 236, 127 N.W.2d 118 (1964), and *Northwestern Bell Telephone Co. v. Hawkeye State Telephone Co.,* 165 N.W.2d 771 (Iowa 1969). Legislative intent, of course, is the polestar of statutory construction. Another important rule of statutory construction applicable to the matter at hand is set forth in *State v. Iowa Southern Utilities Co.,* 231 Iowa 784, 2 N.W.2d 372 (1942), at 231 Iowa page 830:

"It is a general rule of statutory construction, that, where there is a statute covering a general subject matter, and another statute covering a special part of that subject matter, the special statute will conrol and take precedence over the general statute. This would seem to be particularly true where the special statute is enacted later. In such matters, it is uniformly held that the general must yield to the particular."

See also §4.7 of the 1975 Code of Iowa.

It is the opinion of this office that §155.26 must be construed in the light of Chapter 204, of the Iowa Code, the Uniform Controlled Substance Act. Specifically, §204.302(3) which states in part that: "An agent or employee of any registered manufacturer" may lawfully possess any controlled substance if he is acting in the usual course of his business or employment, must be harmonized with the apparent criminal liability that a manufacturer's representative is subject to under §155.26. In this regard it is helpful to first note that every prescription drug as defined in §155.3(10), is also a controlled substance as the latter term is defined in §204.101(6). It should also be noted that Chapter 155 in general, sets forth the requirements that must be met in order to be licensed to practice pharmacy or to operate a pharmacy business. The Controlled Substance Act evinces a legislative intent to maintain a closed regulatory system aimed at preventing illicit trafficking in drugs through detail regulations. More particularly, §204.302 specifically articulates registration requirements for persons who manufacture controlled substances. In relation to §155.26 §204.302(3)(a) clearly represents a specific legislative attempt to regulate the matter of whether or not a manufacturer's representative can lawfully be in possession of a controlled substance. Under §204.302(3)(a), "agent or employee of any registered manufacturer" clearly covers a manufacturer's representative who possesses a controlled substance (which includes all prescription drugs) in the usual course of business.

The conclusion that a manufacturer's representative is not subject to criminal liability under Chapter 155 is further strengthened, when it is recalled that Chapter 155 predates the adoption in 1970 of the Controlled Substance Act. So then, the Iowa Supreme Court's pronouncement in *State v. Iowa Southern Utilities*, supra, regarding the precedence of a special statute over a general statute is particularly applicable to the present discussion.

In addition to what has been said thus far, it would be well to focus attention upon those manufacturer's representatives whose activities are strictly limited to interstate commerce. The Supreme Court in *Lilly & Co. v. Sav-On Drugs*, 366 U.S. 276, 81 S.Ct. 1316, 6 L.Ed.2d 288 (1961), stated that a foreign corporation dealing in phamaceutical products was free to send its sales representatives into New Jersey to promote its interstate trade, without having to comply with a New Jersey statute that required a foreign corporation to obtain a certificate authorizing it to do business. In *State Rasmussen*, 213 N.W.2d 661 (Iowa 1973), the Iowa Supreme Court held that the state could not require nonresident physicians to register under the Iowa Controlled Substance Act in order to have their prescriptions filled in the state, since such a requirement would have the practical effect of negating the operation of the Federal Comprehension Drug Abuse Prevention and Control Act in Iowa.

In light of *Lilly*, supra, it is clear that attempts to impose criminal penalties upon manufacturer's representatives whose promotion and sales amount to strictly interstate business (e.g., sales to wholesalers as opposed to sales to hospitals, physicians and retailers) are constitution-

ally doomed to failure since the interstate business of foreign manufacturer's is deemed of an exceptional character beyond the power of the state to interfere. See *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355 (1910). It is equally clear from the Iowa Supreme Court's pronouncements in *Rasmussen*, supra, that the federal interest in the control of drug abuse under federal legislation is superior to that of the state's interest in the subject matter; consequently, the Iowa Uniform Controlled Substance Act regulates only the intrastate distribution and possession of drugs. Drug manufacturer's who are registered under the Federal Comprehensive Drug Abuse Prevention and Control Act, and whose representatives are solely involved in interstate activities are governed solely by federal drug legislation.

In conclusion, for all of the reasons discussed above, it is the opinion of this office that manufacturer's representatives who possess prescription drugs in the regular course of business are not subject to the criminal penalties imposed under §§155.26 and 155.30.

October 22, 1975

CITIES AND TOWNS: Curfews — A municipality may enact a curfew ordinance for minors. (Blumberg to Nystrom, State Senator, 10-22-75) #75-10-10

Honorable Jack Nystrom, State Senator: We have received your opinion request of September 30, 1975, regarding curfews. You wish to know whether a city may lawfully enact an ordinance setting a curfew for minors.

There is no specific Code section regarding curfews. Curfew laws for minors are generally enacted to reduce juvenile crime and misconduct. 107 Penn. L.Rev. 66, 67. There can be no doubt that a municipality may enact a curfew ordinance. *In Re C.*, 1972, 28 Cal. App. 3d 747, 105 Cal. Rptr. 113; *Alves v. Justice Court of Chico Judicial District*, 1957, 148 Cal. App. 2d 419, 306 P.2d 601; *Thistlewood v. Trial Magistrate for Ocean City*, 1964, 236 Md. 548, 204 A.2d 688; *City of Eastlake v. Ruggiero*, 1966, 7 Ohio App.2d 212, 220 N.E.2d 126; and, *State v. Dobbins*, 1971, 277 N.C. 484, 178 S.E.2d 449. However, such an ordinance must not exceed bounds of reasonableness. *Thistlewood*, supra. Nor may the ordinance be arbitrary, capricious or deny equal protection and due process. *Alves*, supra. We also call your attention to 1972 OAG 260 where we held that curfews could be imposed upon minors.

Accordingly, we are of the opinion that a municipality may enact a curfew ordinance for minors, providing it does not violate constitutional safeguards.

October 22, 1975

CITIES AND TOWNS: Park Board — §§362.2(8) and 372.13(8), Code of Iowa, 1975; §23, S.F. 526, 66th G.A., (1975). A city employee may be elected to a park board, but shall not receive compensation as a city employee while serving on the board. (Blumberg to Mennenga, State Representative, 10-22-75) #75-10-11

Honorable Jay Mennenga, State Representative: We have received your opinion request of October 16, 1975. In it you ask whether a city employee may also serve on a municipal park board. The board position is elective.

We can find no statute which prohibits a city employee from so serving. However, §372.13(8), 1975 Code, as amended by §23, S.F. 526, 66th G.A. (1975), provides in part:

"No elected city officer shall receive any other compensation for any other city office or city employment during his term of office, but may be reimbursed for his actual expenses."

This amendment prohibits, for instance, a council member from also receiving compensation for another city position. It is not limited to that situation, though. Section 362.2(8) defines "officer" as a natural person elected or appointed to a fixed term and exercising some portion of a city's power. A member of a park board would fall within this definition. Thus, the prohibitions of the amendment apply to your situation.

Accordingly, we are of the opinion that a city employee may be elected to a park board, but shall not receive his or her salary as a city employee while serving on the board.

October 22, 1975

STATE OFFICERS AND DEPARTMENTS: Banking. §533.14, Code of Iowa, 1975. (1) State Banking Board is not prohibited from acting in an advisory capacity to the Superintendent on matters pertaining to credit unions. (2) Credit unions may use withdrawal slips in form of share-drafts. (3) Credit unions may make loans at rates authorized by §533.14, Code of Iowa, 1975. (4) Banks making loans on real estate located in states adjoining Iowa may require title insurance on such loans as an alternative to the title opinion of a lawyer practicing in this state. (Nolan to Houston, State Superintendent of Banking, 10-22-75) #75-10-12

Mr. Thomas H. Huston, State Superintendent of Banking: You have requested an attorney general's opinion on four questions, which are as follows:

1. Does the state banking board have any authority over credit unions?

2. Can state supervised credit unions make available to their members, plans for making withdrawals by share-draft when the plan entails the utilization of services of a New York City bank expressly chosen to provide time to create a "float", thus permitting the credit union to continue to earn interest on the money deposited with it while the draft is in transit.

3. Can credit unions make loans to their members at interest rates in excess of 12% or 1% per month?

4. Can Iowa banks require the use of title insurance in place of an abstract and title opinion in connection with loans on real estate located in states bordering the State of Iowa?

I. The applicable provisions of the Code of Iowa pertaining to the State Banking Board are contained in Chapter 524 of the Code of Iowa. This chapter is known as the "Iowa Banking Act of 1969". Under §524.205(4), the following language appears:

"The state banking board shall act with the superintendent in an advisory capacity concerning all matters pertaining to the conduct of the administration of the provisions of this chapter and shall perform such other duties as are specifically provided for by the laws of this state."

The provisions for the regulation of credit unions in this state are to be found in Chapter 533 of the Code of Iowa. A close study of the provisions of Chapters 524 and 533 reveals no express direction for the exercise of any supervisory authority over credit unions by the State Banking Board. Section 533.1 provides that the "superintendent of banking shall be charged with the execution of the laws of this state relating to credit unions". While there is no requirement that the banking board act as an advisor to the superintendent of banking in credit union matters, the Department of Banking consists of "such employees as are necessary for the discharge of such duties and responsibilities as are imposed upon the superintendent by the laws of this state". (§524.206) This section necessarily then must include such employees of the department as are required for the proper administration of Chapter 533. Accordingly, it is the view of this office that the State Banking Board is not prohibited from acting in an advisory capacity to the State Superintendent of Banking with respect to matters pertaining to credit unions.

II. A credit union may make available to its members withdrawal slips in the form of share-drafts which may be treated by the general public as non-negotiable third-party paper.

However, I find no authority for the credit union to deliberately create a float even under the broad language of §533.4(11), authorizing credit unions to "exercise such incidental powers as may be necessary or requisite to enable it to carry on effectively the business for which it is incorporated". The stated purpose of credit unions is set out in §533.1:

"A credit union is hereby defined as a co-operative, nonprofit association, incorporated in accordance with the provisions of this chapter for the purpose of creating a source of credit at a fair and reasonable rate of interest, of encouraging habits of thrift among its members and of providing the opportunity for people to use and control their savings for their mutual benefit."

III. Under §533.14, credit unions may now charge interest rates on loans at a rate which does not exceed one percent a month on unpaid balances "except that with respect to consumer loans, a credit union may charge the finance charge permitted in sections 537.2401 and 537.2402".

The maximum interest rate charged by credit unions is determined to some extent by the provisions of the individual credit union By-laws. Under §533.1, the superintendent of banking is directed to prepare "an approved form of articles of incorporation and a form of by-laws, consistent with this chapter which may be used by credit union incorporators for their guidance, and . . . shall supply them without charge with blank articles of incorporation and a copy of said form of suggested by-laws". The law provides that the by-laws must be approved by the superintendent of banking before they become effective.

The maximum interest rate which an individual credit union is authorized to charge to its borrowers may not exceed the rate authorized by

§533.14 and the superintendent should consider the current rates of such section in connection with any By-law amendment submitted for his approval.

IV. With respect to the use of title insurance in lieu of a title opinion, the following provisions of §524.905(5) apply:

"Any loan made pursuant to this section shall be subject to the following requirements: * * *

"f. The state bank shall obtain a written opinion by an attorney admitted to practice in Iowa stating that the mortgage, deed of trust or similar instrument is a first lien on the real property.

"g. Real property securing loans under this section shall be located in this state or an adjoining state.

"h. The customer shall pay all expenses in connection with the loan for preparation and examination of abstracts, opinions or title insurance, abstract certificates, and appraisal and recording fees. * * *"

We construe §524.905(5)(f) as applying only to loans secured by land located in the State of Iowa. The use of title insurance in adjoining states is well known and this form of insurance will no doubt provide a better method of obtaining assurance of a preferred lien in such states than the opinion of a lawyer who does not practice law in such state. It is our view that subparagraph (h) contemplates the use of title insurance in connection with loans involving out-of-state real property and that title insurance in such cases is a proper alternative to a title opinion.

October 24, 1975

STATE OFFICERS AND DEPARTMENTS: Superintendent of Banking; Questions Relating to Electronic Fund Transfers. §§4.1, 452.10, 453.1, 524.803, Code of Iowa, 1975. S.F. 536, Acts, 66th G.A., 1st (1975). (1) The Executive Council of Iowa will transfer funds of the state deposited in banks violating S. F. 536. (2) The State of Iowa has the power to determine the deposit of local government funds. (3) The State of Iowa has authority under U.S. Constitution and federal law, to determine that state and local government funds may not be deposited in federally-chartered banks violating S.F. 536. (4) The privileges of state banks extend to national banks. The conditions for the exercise of such privilege are the same for both state and national banks to the extent that national banks are authorized to participate by federal law. (5) The State Superintendent of Banking is authorized to "approve a limited number of experimental plans" (S.F. 536, §2). The "same conditions" should apply for both state- and federally-chartered banks wishing to participate in an electronic fund transfer program. (6) The Superintendent's authority over the establishment of electronic fund transfer facilities by federally chartered banks is found not in federal but in state law. (7) It is unlawful for any person to possess, maintain or permit on his premises, any terminal or installation of a satellite facility utilized in transactions constituting or incidental to the conduct of business of a bank, savings and loan association or credit union, unless prior expressed approval from the Superintendent of Banking has been obtained. (8) It is within the discretion of the Superintendent as to whether or not he should approve a plan for the operation of such electronic fund transfer facilities after January 1, 1976, and regardless of when the plan is submitted. (9) A satellite facility utilized only by a federally-chartered bank in accordance with an experimental plan required by the Superintendent would be required to be available for use by any bank. (10) The Superintendent

cannot, by regulation, suspend the mandatory sharing requirements of the statute with respect to the satellite facilities utilized in accordance with an approved experimental plan and utilized (a) only by federally chartered banks, (b) by state banks. (Turner to Huston, State Superintendent of Banking, 10-24-75) #75-10-13

Mr. Thomas H. Huston, State Superintendent of Banking: In response to a request from the Department of Banking submitting the following questions for opinion of the Attorney General, we have given careful consideration to the provisions of Senate File 536, Acts of the 66th General Assembly, relating to the use of electronic facilities and electronic transfers of funds by banks, credit unions and savings and loan associations and which amends §524.803(1), Code of Iowa, 1975, specifying the powers of state banks. The questions which have been submitted and our answers with respect thereto all relate to SF 536 and are as follows:

1. Does the State of Iowa have the power to determine what bank or banks state funds may or may not be deposited in?

Under §453.1, Code of Iowa, 1975, the Executive Council is given authority to approve the banks in which funds of the state are deposited. Under §2 of Senate File 536, the state treasurer is authorized to notify the Executive Council when he determines that an approved bank is in violation of §524.803, in which case the Executive Council shall "forthwith approve and order the transfer of public funds to another bank."

2. Does the State of Iowa have the power to determine what bank or banks local government funds may or may not be deposited in?

Yes, the State has virtually unlimited power in this area. To the extent that the state treasurer may make the determination of a violation of Code §524.803, with respect to electronic transfers of funds, the State of Iowa has the power to order the transfer of local government funds. However, this power does not authorize direction of a change of deposit in the form of time certificates where the municipality would suffer a penalty for early withdrawal nor to the power to designate an alternate depository.

3. Does the State of Iowa have authority under U.S. Constitution and federal law, to determine that state and local government funds may not be deposited in federally-chartered banks?

Yes. The matter of the deposit of state and local governmental funds is wholly within the purview of state law.

4. May the State of Iowa determine that certain federally-chartered banks may be depositories of state or local funds and other federally-chartered banks may not be such depositories, if the determination is based on considerations other than the safety and return on the funds and the needs and convenience of the depositing governmental unit?

Yes. Under §13 of Senate File 536, the privileges of state banks extend to national banks. The conditions for the exercise of such privilege are the same for both state and national banks to the extent that national banks are authorized to participate by federal law.

5. To what extent must federally-chartered banks in the performance of banking transactions, conform with specific state laws or recommendations of the Superintendent of Banking, where such compliance is mandated by the law or regulation in question, but is not required by any specific federal law or regulation?

The State Superintendent of Banking is authorized to "approve a limited number of experimental plans" (Senate File 536, §2). The "same conditions" should apply for both state- and federally-chartered banks wishing to participate in an electronic fund transfer program.

6. Under the U.S. Constitution and the federal law, does the Iowa Superintendent of Banking have any authority over the establishment or operation of unmanned electronic fund transfer facilities by federally-chartered banks? If so, to what extent?

The Superintendent's authority is limited to approval of a limited number of installations under Senate File 536, as discussed above.

7. If the Iowa Superintendent of Banking did not have authority to regulate EFT facilities operated by a federally-chartered bank, to what extent and by what means may he prohibit local or interstate business, individually rather than by general classification, from allowing the performance on their premises of EFT functions by a federally-chartered bank?

Under §3 of Senate File 536, it is unlawful for any person to possess, maintain or permit on his premises, any terminal or installation of a satellite facility utilized in transactions constituting or incidental to the conduct of business of a bank, savings and loan association or credit union, unless prior expressed approval from the superintendent of banking has been obtained.

8. May the Superintendent approve an experimental plan of EFT operation if such approval is given prior to January 1, 1976, but the plan commences after January 1, 1976, or permit the operation of satellite facilities after January 1, 1976?

Sections 2 and 3 of Senate File 536 both relate to the approval by the Superintendent of Banking of a limited number of experimental plans for the operation on a limited scope of satellite facilities and the operative language for the purpose of answering your questions is the same in both sections. It is as follows:

"A plan may not be approved by the superintendent of banking to permit the operation of such satellite facilities after the first day of January, 1976."

A perfunctory reading of this sentence would lead any reasonable and fair minded person to conclude that it means that any plan which provides for the operation of satellite facilities after January 1, 1976, whether submitted to the superintendent of banking before or after that date, and whether or not the facilities were already in operation before January 1, 1976, could under no circumstances be approved by the superintendent of banking. Any person possessed of even the most rudimentary grasp of the English language could not fail to reach the conclusion that the words "may not" used in the aforementioned sentence mean the same as "shall not" or "must not." This is consistent with a number of decisions of the Iowa Supreme Court that the language of a statute is to be construed according to its plain or ordinary meaning. *In Re Klugs Estate*, 1960, 104 N.W.2d 600, 251 Iowa 1128. As stated in *Dingman v. City of Council Bluffs*,

"The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense which may be uncovered by ingenuity and study of an acute and powerful intellect." 90 N.W.2d 742, 249 Iowa 1121 (1958).

Indeed this doctrine is so well settled that the legislature has seen fit to make it a matter of statute. Section 4.1, Code of Iowa, 1975, provides in relevant part:

"In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute: * * *

2. Words and Phrases. Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning. * * *"

Prior to 1971, this salutary and eminently sensible rule of construction would have in all likelihood inexorably led us to the conclusion that after January 1, 1976, no satellite facilities could operate because the superintendent was forbidden from approving plans whether submitted before or after January 1, 1976, calling for the operation of such facilities after that date. However, in its great wisdom, which we are powerless to question, the 64th General Assembly in 1971 enacted Chapter 77 which added, among others, a new subsection 37 to §4.1 of the Code to provide as follows:

"Unless otherwise specifically provided by the general assembly, whenever the following words are used in a statute enacted after July 1, 1971, their meaning and application shall be:

a. The word 'shall' imposes a duty.
b. The word 'must' states a requirement.
c. The word 'may' confers a power." * * *"

It is to be observed that Senate File 536 was enacted after July 1, 1971, and is therefore subject to the provisions of §4.1(37)(c), which latter is tantamount to a legislative definition of the word "may." The doctrine is well settled in this state and elsewhere that the legislature may be its own lexicographer. *State, ex rel Turner v. Koscot Interplanetary, Inc., Iowa* 1971, 191 N.W.2d 624. As stated in *State v. Steenhoek*, Iowa 1970, 182 N.W.2d 377, appeal dismissed 92 S.Ct. 195, 404 U.S. 878, 30 L.Ed.2d 159,

"Ordinarily, where the legislature defines its own terms and meanings in a statute, the common law and dictionary definitions which may not coincide with the legislative definition must yield to the language of the legislature."

Thus, when we take the definition of the word "may" which our legislative lexicographers have given us and substitute it in the crucial sentence of §§2 and 3 of Senate File 536, we are constrained to conclude that the sentence properly means that a power is conferred on the superintendent not to approve a plan to permit the operation of satellite facilities after the first day of January, 1976. In other words, it is within the discretion of the superintendent as to whether or not he should approve a plan for the operation of such facilities after January 1, 1976, and regardless of when the plan is submitted.

Section 4.1(37) compels us to believe that the legislature was aware of some difference between "may not" and "shall not" not apparent

to the ordinary student of our native tongue. Thus had it intended to end the experiment on January 2, 1976, it would have said "shall not" rather than "may not." Or it could have simply said that operation of such satellite facilities shall cease after January 1st. In construing statutes, the courts search for the legislative intent as shown by what the legislature *said*, rather than what it should or might have said. Rule 344(f)(13), Iowa Rules of Civil Procedure. Accordingly, it is our judgment that the legislature intended to leave the decision of whether the experiment continue after January 1st, 1976, to the Superintendent of Banking (and certainly not to the attorney general).

This conclusion, which may seem remarkable to some viewers, is however, consistent with the manifest purpose and intent of House File 436 to authorize a limited number of experimental satellite operations which are to be studied by the superintendent. And, under subsection 3 of §2 of Senate File 536, the superintendent is required to submit a report to the general assembly not later than February 1, 1976, on the operation of such experimental satellite facilities with his findings and recommendations with respect to the potential uses thereof. The statute evidently contemplates that further legislative action will be taken since subsection 4 of §2 and the last sentence of §3 would repeal such §§2 and 3 effective July 1, 1976. In other words, absent legislative action in the next session, the experiment self destructs at that time anyway.

9. Under Senate File 536, would a satellite facility utilized only by a federally-chartered bank in accordance with an experimental plan required by the Superintendent be required to be available for use by any bank?

Yes. Among the requirements for the approval of a satellite facility under 10 of Senate File 536, is the following:

"The satellite facility is available for use, on a nondiscriminatory basis, by any Iowa bank and by all customers designated by any bank which uses the satellite facility."

10. May the Superintendent, by regulation, suspend the mandatory sharing requirements of the statute with respect to the satellite facilities utilized in accordance with an approved experimental plan and utilized (a) only by federally chartered banks, (b) by state banks.

The Superintendent is not authorized to suspend requirements made mandatory by statute.

October 28, 1975

CRIMINAL LAW: Swindling in the sale of grain or seed. §§713.11 and 713.12, Code of Iowa, 1975. A violation of §713.11 occurs when the following exists: (1) any person receives anything of value as consideration in whole or part (2) for any bond, contract, or promise given the purchaser of any grain, seed or cereal (3) in connection with the purchase of the grain, seed or cereal (5) at a fictitious price or a price equal to or more than four times the market price. §713.12 prohibits the subsequent transfer of a note or other instrument used for consideration if the person so transferring knows that it was part of a transaction as described in §713.11. (Raisch to Miller, State Representative, 10-28-75) #75-10-14

Honorable Kenneth D. Miller, State Representative: You have requested an opinion from this office on the following question:

". . . whether seed corn companies and their agents are operating within Iowa law"; and specifically interpreting Chapter 713, Sections 713.11 — 713.12, Code of Iowa, 1975, regarding the swindling in sale of grain or seed.

Section 713.11 provides as follows:

"Whoever, either for his own benefit or as the agent of any corporation, company, association, or person, obtains from any other person any thing of value, or procures the signature of any such person as maker, endorser, guarantor, or surety thereon to any bond, bill, receipt, promissory note, draft, check or any other evidence of indebtedness, as the whole or part consideration of any bond, contract, or promise given the vendee of any grain, seed, or cereal; binding the vendor or any other person, corporation, company, association, or agent thereof, to sell for such vendee any grain, seed, or cereal at a fictitious price, or at a price equal to or more than four times the market price thereof, shall be imprisoned in the penitentiary not more than three years, or be fined not more than five hundred nor less than one hundred dollars, or both."

Section 713.12 provides as follows:

"Whoever sells, barters, or disposes of, or offers to sell, barter, or dispose of, either for his own benefit, or as the agent for any corporation, company, association, or person, any bond, bill, receipt, promissory note, draft, check or other evidence of indebtedness, knowing the same to have been obtained as the whole or part consideration for any bond, contract, or promise given the vendee of any grain, seed, or cereal, binding the vendor or any other person, corporation, company, association, or the agent thereof, to sell for such vendee any grain, seed, or cereal at a fictitious price, or at a price equal to or more than four times the market price thereof, shall be imprisoned in the penitentiary not more than three years, or be fined not more than five hundred nor less than one hundred dollars or both."

No decisions of the Iowa Supreme Court or opinions of this office have been reported or published interpreting Section 713.11 and 713.12 since their enactment in 1888, Chapter 78, Acts 22 G.A. Therefore, interpretation of Section 713.11 and 713.12 is a first impression.

References to Chapter 78, Acts 22 G.A., were made in *Hanks v. Brown*, 1890, 79 Iowa 560, 44 N.W. 811; and *Merrill v. Hole*, 1892, 85 Iowa 66, 52 N.W.4. Both *Hanks v. Brown, supra* and *Merrill v. Hole, supra*, dealt with "Bohemian Oats Notes" as did a series of other cases, notably; *Payne v. Raubinek*, 1891, 82 Iowa 587, 48 N.W. 995; *Merrill v. Packer*, 1890, 80 Iowa 542, 45 N.W. 1076; *Shipley v. Reasoner*, 1890, 80 Iowa 548, 45 N.W. 1077. Each of the above cases centers on transactions entered into prior to the enactment of Chapter 78, Acts 22 G.A., although the Supreme Court decisions followed the enactment of Chapter 78, Acts 22 G.A. in 1888. In each case the Defendant farmer would give a note for consideration of the purchase of seed and for a so-called bond of the seed company entitling the Defendant farmer to have the seed company sell a number of bushels of oats at a specified price. *Hanks v. Brown, supra*, provides a typical example of this type of transaction: "It was finally agreed that the appellant (Brown) should purchase fifteen bushels of the oats at ten dollars per bushel, for which he should give his note. In addition to the oats, he was to have the benefit of an agreement by virtue of which thirty bushels of oats were to be sold for him, at ten dollars per bushel." (at 561). Brown raised one hundred bushels of oats but none were sold for him at the ten dollar per bushel price. In *Merrill v. Packer, supra*, the Supreme Court declared these types of contracts

(Bohemian Oats Notes) as void and as being against public policy. The Court stated that such contracts would consummate a fraud on the ultimate purchaser of the oats when the seed company carried out its promise to sell the harvest, at an extravagant price; and if the company did not intend "to carry out the contract, then the fraud was consummated sooner." (at 546). Each "Bohemian Oats Notes" case also dealt with the transfer of the note for consideration to subsequent purchasers, as the seed company would sell the note to a bona fide purchaser without notice of the fraudulent contract upon which it was based. It was this lack of knowledge which the legislature would incorporate into the language which would later become Section 713.12.

It is rather obvious from the references cited above that this "Bohemian Oats Note" was the object of Chapter 78, Acts 22 G.A., as well as the subsequent sale of the note received in consideration thereof if the subsequent purchaser had knowledge of the fraudulent contract. A newspaper article in the *Times-Republican* reprinted in *Merrill v. Hole, supra,* indicates that "Bohemian Oats Notes" were widespread as of August 2, 1887 (at 68): "'. . . sold two of our farmers . . . a number of bushels at fifteen dollars per bushel taking their notes for the purchase price, and giving them what they call a 'bond' to sell twice the number of bushels from the crop at fifteen dollars per bushel, retaining only the nominal sum of five dollars per bushel as commission . . . it is currently reported that at this price from ten thousand to fifteen thousand dollars' worth of seed oats have been sold in this community'."

Much of the concern in the "Bohemian Oats Notes" cases focused on the actual or market price of the seed as opposed to the fictitious price at which the seed company intended to eventually sell the farmer's crop to a third party. This apparently is the reason for the language of a "fictitious price" or a "price equal to four times the market price thereof;" parameters used in determining when a fraud has been committed. Some of the "Bohemian Oats Notes" called for the sales of oats up to thirty times the market value (the cash market value at the time of the purchase).

A "vendor" is defined by Black's Law Dictionary (1968) as "the person who transfers property by sale . . ." A "vendee" is defined by Blacks Law Dictionary (1968) as "a purchaser or buyer . . ." Therefore Section 713.11 is interpreted to prevent exactly the same type of behavior apparent in the "Bohemian Oats Notes" cases, i.e., where the following elements exist: (1) any person receives anything of value as consideration in whole or part (2) for any bond, contract, or promise given the purchaser of any grain, seed, or cereal (3) in connection with the purchase of the grain, seed, or cereal, (4) binding any person to sell for such purchaser any grain, seed, or cereal (5) at a fictitious price or a price equal to or more than four times the market price. Likewise, Section 713.12, would not prohibit the subsequent transfer of a note or other instrument used for consideration if the person so transferring knows that it was part of a transaction as described in Section 713.11.

The legislature intended Sections 713.11 and 713.12 to encompass the sale of every seed, grain, or cereal by using the word "any" to modify grain, seed, or cereal. No grain, seed, or cereal transaction would be

exempt from an action pursuant to Sections 713.11 and 713.12, and any such transaction executed in the manner described in Sections 713.11 and 713.12, as interpreted herein, would subject the perpetrator thereof to criminal prosecution.

October 28, 1975

STATE OFFICERS AND DEPARTMENTS: Iowa State Fair Board. Chapter 173, Code of Iowa, 1975. The secretary and treasurer of the Fair Board may be elected from either "existing" Board members or persons not on the Board. Chapter 173, Code of Iowa, 1975. (Kelly to Harlan, Department of Agriculture, 10-28-75) #75-10-15

James I. Harlan, Director of Regulatory Division, Iowa Department of Agriculture: This opinion is in response to your request concerning the election of the secretary and treasurer of the State Fair Board. Your request stated:

"In response to an Opinion from your Department written by Mr. Joseph Kelly, Assistant Attorney General, dated January 15, 1975, regarding the Iowa State Fair Board, the last sentence of the first full paragraph on page two states 'Therefore, it is this office's opinion that the secretary and treasurer of the Fair Board do not have to be elected from "existing" members of the Fair Board.'

"*Question*: Even though the secretary and treasurer do not have to be elected from 'existing' members of the Fair Board, is there a prohibition and if not, may they be chosen from the existing Board members?"

Section 173.1(1), (2), (3), (4) contains a list of those persons who can serve on the Fair Board, the selection process for the various directors, and the election of the president, vice-president, secretary and treasurer of the Fair Board. Subsections (3) and (4) of Section 173.1 specifically provide:

"The Iowa state fair board shall consist of:

"3. A president and vice-president to be elected by the state fair board from the nine elected directors.

"4. A secretary and a treasurer to be elected by the state fair board."

The Legislature clearly stated in subsection 3 that the president and vice-president are to be elected from the "nine elected directors", while subsection 4 is silent on where the secrtary and trasurer ar to be electd from. This office determined that the practice in the last twenty years has been that the secretary and treasurer of the Iowa Fair Board are elected from persons not on the "existing" board. There are obvious practical reasons for this type of selection process, but there is nothing within Chapter 173 or the rest of the Code that mandates this limited selection.

Therefore, it is the opinion of this office that the secretary and treasurer may be elected from not only non-Fair Board members but also Board members themselves.

October 28, 1975

HOSPITALS: Voluntary Sterilization. Where a spouse is competent to give consent to a voluntary sterilization, consent of the other spouse is

not necessary. (Blumberg to Redmond, State Senator, 10-28-75) #75-10-16

Honorable James M. Redmond, State Senator: We have received your opinion request of September 10, 1975, regarding voluntary sterilization. You specifically asked:

"1) Must a hospital obtain or attempt to obtain the spousal consent of the spouse not being sterilized before making the hospital's facilities available for performing a voluntary sterilization?

"2) Must a physician participating in a voluntary sterilization obtain or attempt to obtain the consent of the other spouse prior to the performance of the sterilization procedures?"

The questions are very nearly the same, so the answer to one is the answer to the other.

There is no doubt that voluntary sterilizations are not contrary to any statute or public policy. See, 1964 OAG 112 and the cases cited therein. Nor do we find any pronouncement that consent of both spouses is necessary in order for sterilization to be performed. Two prior opinions of this office have so indicated. In 1932 OAG 35 we held that doctors may perform a sterilization on a man who has given consent. That opinion dealt with the Eugenics Board. In 1962 OAG 368, we held that a husband's consent was not necessary for a sterilization procedure on his wife, where she was competent to give consent. That opinion also dealt with the Eugenics Board and Chapter 145 of the Code. However, the reasoning in those opinions are not limited just to Chapter 145, as evidenced by the cases cited in the latter opinion. There, the result was reached after an examination of cases concerning the common law concept of the necessity of the husband's consent for the wife's operations. We agree with the pronouncements of the above opinions and find that they are applicable to voluntary sterilization.

Further support for our holding can be found in *Roe v. Wade*, 1973, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, more specifically the concurring opinion of Mr. Justice Douglas, when he referred to certain rights of a person: (1) Autonomous control over the development and expression of one's intellect, interests, tastes and personality; (2) Freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the like; and, (3) Freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf. In the majority and concurring opinions of *Roe*, and *Doe v. Bolton*, 1973, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed. 2d 201, the theme that the decision to procure an abortion is a private one is consistent throughout. That reasoning is applicable to voluntary sterilizations.

Accordingly, we are of the opinion that where a spouse is competent to consent to a voluntary sterilization, consent of the other spouse is not necessary.

October 31, 1975

OBSCENITY; CRIMINAL LAW; CONSTITUTIONAL LAW; HOME RULE; CITIES AND CITY OFFICIALS; COUNTIES AND COUNTY OFFICERS: — Amendment 2, Amendments of 1968, Iowa Constitution;

§§364.1, 725.1(1), 725.2, 725.9, 1975 Code of Iowa; §366.1, 1973 Code of Iowa; Ch. 1267, Acts of the 65th G.A., 2nd Sess.; Ch. 1088, §10, Acts of the 64th G.A., 2nd Sess. The United States Supreme Court's "Carnal Knowledge decision" permits a state to leave vague the concept of "community" in the "contemporary community standards" guideline, which Iowa has done. Nothing in the "Home Rule Amendment" or the "Home Rule Act" invalidates the bar in §725.9 on municipalities and counties passing their own obscenity laws and ordinances and such bar is fully effective. (Haskins to Wells, State Representative, 10-31-75) #75-10-17

Representative James Wells: You ask our opinion as to the effect of the "Home Rule Amendment" on the regulation of obscenity by municipalities and counties. You also ask what effect the United States Supreme Court's "Carnal Knowledge decision" on community standards has on the Iowa Obscenity Act. We will consider your questions in reverse order.

The Iowa Obscenity Act, Ch. 1276, Acts of the 65th G.A., 2nd Sess. (effective July 1, 1974), is codified in Ch. 725, 1975 Code of Iowa. The act prohibits the dissemination or exhibition of "obscene material" to a minor. *See* §725.2, 1975 Code of Iowa. The phrase "obscene material" is defined in §725.1(1), 1975 Code of Iowa, as follows:

" 'Obscene material' is any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sado-masochistic abuse which the average person, taking the material as a whole and applying *contemporary community standards* with respect to what is suitable material for minors, would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political or artistic value." [Emphasis added]

The act makes no attempt to define the exact scope of the "community" in the phrase "contemporary community standards." The "Carnal Knowledge decision" to which you refer makes clear that this is constitutionally permissible. That decision, *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 2753, 41 L.Ed.2d 642, 648 (1974), states:

"We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use. What *Miller* makes clear is that state juries need not be instructed to apply 'national standards.' We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply 'community standards' without specifying what 'community.' *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. *A State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in Miller without further specification,* as was done herein, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller.*" [Emphasis added]

In other words, while a state may fix a precise geographical unit for the "community", it need not do so, but may leave the concept vague. As indicated, Iowa has chosen to do the latter and is acting constitutionally in doing so.

It should be noted that what the "Carnal Knowledge decision" does stand for in terms of limitations on the powers of the states to regulate obscenity is that the proscribed film or literature must be "patently offensive" within the special meaning of the *Miller v. California*, 413 U.S. 15, 25, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973) decision. The film "Carnal Knowledge" was held not to be "patently offensive", because while nudity was depicted, there was not the kind of graphic, "hard-core", depiction of ultimate sex acts, normal or perverted, actual or simulated, necessary to meet the "patently offensive" test. *See Jenkins*, 94 S.Ct. at 2755. Hence, while the "community" of the "contemporary community standards" guideline may apparently be as localized as a state chooses, jurors applying the contemporary standards of the "community", however small, cannot ignore the other constitutional requirements for finding material to be obscene, including the special "patently offensive" test.

Turning, to the next question, municipalities now have full "Home Rule" powers. However, such powers exist only to the extent that they are not exercised in a manner inconsistent with the laws of the General Assembly. The "Home Rule Amendment", or Amendment 2, Amendments of 1968, Iowa Constitution, states:

"Municipal corporations are granted home rule power and authority, *not inconsistent with the laws of the General Assembly*, to determine their local affairs and government, except that they shall not have power to levy and tax unless expressly authorized by the General Assembly. The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state." [Emphasis added]

The phrase "laws of the General Assembly" includes laws passed subsequent to the effective date of the "Home Rule Amendment" on November 7, 1968, and not simply those existing on that date. *See Bechtel v. City of Des Moines*, 225 N.W.2d 326, 332 (Iowa 1974). The "Home Rule Act", Ch. 1088, §10, Acts of the 64th G.A., 2nd Sess. (effective July 1, 1975), contains hte same limitation found in the "Home Rule Amendment" on municipalities passing ordinances inconsistent with the laws of the General Assembly. §364.1, 1975 Code of Iowa, states:

"A city may, except as expressly limited by the Constitution, and *if not inconsistent with the laws of the General Assembly*, 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. This grant of home rule powers does not include the power to enact private or civil law governing civil relationships, except as incidents to an exercise of an independent city power." [Emphasis added]

Indeed, the predecessor to the "Home Rule Act" has that limitation. §366.1, 1973 Code of Iowa, states:

"Municipal corporations shall have power to make and publish, from time to time, ordinances, *not inconsistent with the laws of the state*, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants

thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days." [Emphasis added]

Under the Obscenity Act, municipalities and counties are barred from passing obscenity laws or ordinances. §725.9, 1975 Code of Iowa, states:

"In order to provide for the uniform application of the provisions of sections 725.1 to 725.10 relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene material shall be under the provisions of these sections, and *no municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials.* All such laws, ordinances or regulations, whether enacted before or after said sections, shall be or become void, unenforceable and of no effect upon July 1, 1974." [Emphasis added]

Clearly, §725.9 is a "law of the General Assembly" with which any municipal ordinance on obscenity would be inconsistent. Hence, §725.9 serves to limit the scope of the "Home Rule" powers of a municipality. Accordingly, nothing in the "Home Rule Amendment" or "Home Rule Act" invalidates the bar of §725.9 and that bar is fully effective.

As a related question, you ask whether, in the event of repeal of §725.9, the following proposed section in the Iowa Obscenity Act would authorize "local option" on obscenity regulation. By "local option", you presumably mean the power of a muncipality or county to pass its own obscenity law or ordinance. The proposed section is as follows:

"Nothing contained in this Act shall be construed as prohibiting or in any way limiting the power of any city, county or other governmental unit within this State from enacting any law, ordinance or regulation relating to the availability of obscene materials."

Clearly the proposed section, if coupled with the repeal of §725.9, would have the effect of granting "local option" in obscenity regulation for municipalities. It should be noted that counties still would not be able to pass obscenity laws since they have no general, or special obscenity, ordinance of law making power. The proposed section is unnecessary to empower municipalities to enact their own obscenity ordinances, because, in the absence of §725.9, they have this power under the general terms of the "Home Rule Amendment" and "Home Rule Act." However, the proposed section would be useful in manifesting an intent by the legislature to not occupy the field of obscenity regulation to the exclusion of the municipalities. *See Cedar Rapids, etc., v. Cedar Rapids Commun. Sch.*, 222 N.W.2d 391, 398 (Iowa 1974).

In conclusion, the United States Supreme Court's "Carnal Knowledge decision" permits a state to leave vague the concept of "community" in the "contemporary community standards" guideline, which Iowa has done. Nothing in the "Home Rule Amendment" or the "Home Rule Act" invalidates the bar in §725.9 on municipalities and counties passing their own obscenity laws and ordinances and such bar is fully effective.

November 3, 1975

COUNTIES AND COUNTY OFFICERS: COUNTY ATTORNEY: PUBLIC DEFENDER: COMPENSATION: H.F. 802, 66th G.A., 1st Session, 1975, §§336A.1; 336A.2; 336A.5(1), Code of Iowa, 1975. The $1,500 salary raise schedule authorized in §12, H.F. 802, as applied to county

attorney compensation, is in addition to the county attorney's salary as such existed on June 30, 1975, and is the maximum allowable increase until such time as the county compensation board shall recommend, and the county board of supervisors approve, an additional increase. The salary or compensation of a public defender shall not exceed the salary of the county attorney. (Coleman to Brice C. Oakley, State Representative, 11-3-75) #75-11-1

The Honorable Brice C. Oakley, State Representative: This is to acknowledge receipt of your letter dated October 24, 1975, in which you requested an opinion of the Attorney General on the following question:

"Assuming that there is to be instituted in Clinton County a public defender program pursuant to Chapter 336A and that the County Board of Supervisors has received the required two recommendations from the District Court Judges and have passed a resolution hiring one of the candidates at an annual salary of $18,000. Assume further that the Clinton County Attorney is a part time attorney and is presently paid $15,000 per year. May the County Board of Supervisors in implementing Section 336A.5(1) by their own resolution increase the salary of the County Attorney to $18,000 in order to hire the individual they had selected by prior resolution or is it necessary for that salary determination to go through the newly-formed County Compensation Boards which have just been organized?"

As you point out in your request, Chapter 336A, Code of Iowa, 1975, concerns itself with the implementation of a public defender program. Specifically, Section 336A.1, Code of Iowa, 1975, provides in pertinent part:

"In any county, the board of supervisors may establish or abolish by resolution of the board, the office of public defender . . . ."

In establishing this office, the county may accept monies or contributions from both public and private sources. Section 336A.2, Code of Iowa, 1975. However, the compensation or salary of the public defender is tied, by statute, to the salary or compensation paid to the county attorney. Section 336A.5(1), Code of Iowa, 1975, states:

"The compensation of the public defender shall be fixed by the board(s) of supervisors. *The compensation shall not be more than that paid the highest paid county attorney of the county or counties the public defender serves.*" (emphasis added).

According to your letter, the public defender is to be paid $18,000 per year. Therefore, as per the requirement of §336A.5(1), quoted above, the county attorney must also receive at least $18,000 per year, in order for the public defender's salary to be legal.

It is our understanding that on June 30, 1975, the Clinton County Attorney was receiving an annual salary of $13,500. Subsequent to July 1, 1975, the County Attorney's salary was raised to $15,000 per year in accordance with the guidelines of Section 12, H.F. 802, Acts of the 66th General Assembly, 1975 Session, which provides:

"Effective July 1, 1975, the annual salary or per diem compensation of the members of the board of supervisors, county treasurer, county auditor, county recorder, *county attorney,* sheriff, and clerk of the district court *as such salary or per diem exists June 30, 1975, may be increased* by resolution of the board of supervisors, *according to the following schedule which shall remain effective until modified by the county compensation board as provided in this Act. The increase shall be consistent with the following schedule:*

* * *

"3. *For the* county auditor, county treasurer, county recorder, clerk of district court, sheriff, and *county attorney, a sum not to exceed one thousand five hundred dollars.*" (emphasis added).

You will note that "effective July 1, 1975" the Clinton County Attorney could have his salary, as it existed on June 30, 1975, *increased, but only to the degree consistent with the schedule, and not to exceed $1,500.* In fact, the Clinton County Board of Supervisors did raise the County Attorney's salary from $13,500 to $15,000.

It is also clear, that while §12, *supra*, allows a $1,500 increase in the county attorney's salary, it simultaneously directs that the scheduled increase "*shall remain effective until modified by the county compensation board as provided in this Act.*" The procedure for "modification" under the Act is set forth in Section 6, H.F. 802. It provides:

"The county compensation board annually shall review the compensation paid for comparable offices in other counties of this state, other states, private enterprise, and the federal government. *The board shall prepare a recommended compensation schedule for the elective county officers.* Following completion of the compensation schedule, the board shall publish the compensation schedule in a newspaper having general circulation throughout the county. If a county officer compensation study has been received from the general assembly within the preceding five years, a comparison of the compensation recommendations of such study and the compensation schedule prepared by the board shall be included in the publication. The pubilcation shall also include a public notice of the date and location of a hearing to be held by the board not less than one week nor more than three weeks of the date of notice. *Upon completion of the public hearing, the county compensation board shall prepare a final compensation schedule recommendation.*

"*During the month of December, 1975, and each year thereafter, the county compensation board shall transmit its recommended compensation schedule to the board of supervisors. The board of supervisors shall review the recommended compensation schedule and determine the final compensation schedule of the elected county officers which shall not exceed the recommended compensation schedule.* In determining the final compensation schedule if the board of supervisors wishes to reduce the amount of the recommended compensation schedule, the annual salary of each elected county officer shall be reduced an equal percentage. A copy of the final compensation schedule adopted by the board of supervisors shall be filed with the county budget at the office of state comptroller. *The final compensation schedule shall become effective on the first day of July next following its adoption by the board of supervisors.*" (emphasis added).

It appears to us that the legislature intended the $1,500 raise to "tide over" the county attorneys for one year, until the county compensation boards could begin to function and make their recommendations. The procedures of §6, *supra*, are now the *only* procedures for increasing an elected county official's salary, once the scheduled increases under §12 have been awarded.

It is our opinion that the maximum salary that the Clinton County Attorney can receive in his elective post is $15,000. Therefore, the public defender can receive no more than $15,000. Certainly, if the county compensation board determines in December of this year that the County Attorney's salary should be $18,000, and the board of supervisors ap-

proves it, the public defender could also go to $18,000 per year — but neither until July 1, 1976. It is our belief that to now pay the public defender $18,000 per year would be in contravention to the law.

November 5, 1975

CONSTITUTIONAL LAW: Price Controls on Fuel. State may pass statute controlling or fixing prices at which fuel is sold in Iowa unless federal government has pre-empted the field with legislation or indicates its desire to have the field left free from any and all regulation. The Federal Energy Administration Act of 1974 does not terminate until June 30, 1976, and until it does terminate the states are pre-empted from enacting price control legislation. The question of whether the Congress will intend to allow any type of price control legislation by the states, if and when the FEAA terminates, is too remote and speculative to answer. (Perkins to Gallagher, State Senator, 11-5-75) #75-11-2

Honorable James V. Gallagher, State Senator: This letter is in response to your opinion request of August 27, 1975, as to whether "the State of Iowa may constitutionally regulate and or control the retail price of gasoline and other fuels sold in Iowa", in case federal legislation is not continued.

Congress has passed the Emergency Petroleum Allocation Act of 1973 (EPAA) and the Federal Energy Administration Act of 1974 (FEAA), both of which deal with the energy problems of this country. The EPAA, among other things, empowered the President of the United States to regulate the price of gasoline and other fuels. The FEAA set up a central administrative body to deal with the energy shortage. As of the date of this opinion, the EPAA has been extended until November, 1975. The FEAA terminates on June 30, 1976.

Your opinion request raises one and possibly two constitutional questions. The first is whether the State of Iowa has the police power to regulate the price of commodities sold within its borders, such as gasoline and other fuels. If it is within its police power to do so, the second constitutional question arises as to whether the state is prohibited, because of the actions of the federal government, from acting in this area.

In 1928 the U.S. Supreme Court held in *Williams v. Standard Oil*, 278 U S 234, 73 L ed 278, 49 S Ct 115, that the states did not have the police power to fix prices at which commodities could be sold unless the commodity was "affected with a public interest." In this case the court held that gasoline was not a commodity which was affected with a public interest. Consequently, a state could not fix the price at which it was sold.

Five years later the Supreme Court held in *Nebbia v. New York*, 291 U S 502, 78 L ed 940, 54 S Ct 505, that the phrase "affected with a public interest" was not a satisfactory test of the constitutionality of legislation fixing prices and that decisions in this area must rest, in the end, on whether the requirements of due process were met, i.e., whether the laws were arbitrary in their operation or effect.

The Supreme Court then set out guidelines in this area holding that:

"If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences, may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public . . . Price Control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstratably irrelevant to the policy the legislature is free to adopt and hence an unnecessary and unwarranted interference with individual liberty."

It is the opinion of this office that, although the clear pronouncement in the Williams Case is that the sale of gasoline is not one that affects the public interest and therefore may not be the subject of legislation setting the price at which it is sold, the later case of Nebbia, modifying the test to determine whether the legislature may regulate price, coupled with the obviously increased dependence of the citizens of this country upon gasoline and other fuels and its current shortage, may make legislation in this area constitutional from this standpoint, assuming the guidelines of Nebbia are followed.

It being within the police power of the State of Iowa to regulate the price of gasoline and other fuels, the second question of whether the federal government has pre-empted this field must now be answered.

It is, of course, clear that while federal price controls on gasoline and other fuels are in effect, no state may regulate in this area.

It is a more difficult question as to whether the state may regulate a specific area that has been regulated by the federal government in the past, but is no longer so regulated.

Generally, a state may not legislate in an area even if Congress has not legislated in that area if the subjects of the police power are national in their nature or where it is desirable to have a uniform plan,

"and the failure of Congress to exercise the power of regulation is deemed to be an expression of its will that the subject should remain free from restrictions or impositions upon it by the several states." 16 AmJur 2d, Constitutional Law §209.

Can it be said that control of the pricing of gasoline and other fuels is an area of such a national nature that the absence of federal legislation controlling these prices is an expression of Congress that it does not want the states to control the price? This is a fact question.

In *California v. Zook*, 336 U S 725, 93 L ed 1005, 69 S Ct 841, reh den 337 U S 921, 93 L ed 1729, 69 S Ct 1152, the U. S. Supreme Court held:

"Absent congressional action, the familiar test is that of uniformity verses locality: if a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominately local interest, state action is sustained."

How Congress views the energy crisis and pricing controls is a major factor to be taken into consideration when making a determination of

whether a particular area is one which demands a uniform plan or is only one of local interest. Their intent can be derived from various sources. House Report No. 93-748 contained in Volume 2 of the 1974 U. S. Code Congressional and Administrative News states in the section devoted to the need for the Federal Energy Administration Act of 1974 that:

". . . there is little disagreement that this Nation is confronted with an energy crisis and must take remedial measures immediately to conserve energy and insure that scarce supplies are fairly and efficiently distributed at reasonable prices. And our Government must begin at once to put its house in order for the expansion of energy sources to provide for the years and generations to come."

Price controls on gasoline and other fuels was considered an essential part of the mandatory allocation program set up under the EPAA. The notes of the joint conference committee of the House and Senate states with regard to price controls that:

"This [pricing authority] has been included on the premise that it does no good to require the allocation of products if sellers are then permitted to demand unfair and unrealistic prices."

Later on in these same notes is found the statement:

"The reference to equitable prices in the bill is specifically intended to emphasize that one of the objectives of the mandatory allocation program is to prevent price gouging or price discrimination which might otherwise occur on the basis of current shortages. On the other hand, it is contemplated that prices for allocated fuels will be set at levels or pursuant to methods which will permit adequate compensation to assure that private property is not implicitly confiscated by the government. Most importantly, the President must, in exercising this authority, strike an equitable balance between the sometimes conflicting needs and providing adequate inducement for the production and an adequate supply of product and of holding down spiraling consumer costs."

The FEAA itself provides a clear picture of the importance Congress places on price controls. Section 2(a) of the FEAA states:

"The Congress hereby declares that the general welfare and the common defense and security require positive and effective action to conserve scarce energy supplies, to insure fair and efficient distribution of, and the *maintenance of fair and reasonable consumer prices*, for such supplies, to promote the expansion of readily usable energy sources and to assist in developing policies and plans to meet the energy needs of the nation." (Emphasis supplied)

Section 5(b)(5) of the FEAA directs the Administrator to:

"Promote stability in energy prices to the consumer, promote free and open competition in all aspects of the energy field, prevent unreasonable profits within the various segments of the energy industry and promote free enterprise."

It seems clear that Congress views price controls, whether set up under the EPAA or the FEAA as an important part of the federal government's total energy plan.

It is the opinion of this office that if the EPAA is allowed to expire, the above cited provisions of the FEAA make it clear that the pricing of energy sources is still of paramount concern to Congress and they intend to occupy this field to the exclusion of the states, while the FEAA is in effect.

The FEAA will not terminate until June 30, 1976. Whether the State will be able to enact any price controls after that is too remote a question for consideration. As has been pointed out, a state may not enact legislation in an area Congress occupies when that legislation would be in conflict with the federal legislation. Likewise, if Congress has not legislated in an area, but the area is national in nature or demands uniformity in its regulation, its silence is an expression of its will that no one should regulate it. Whether an area is national in nature or demands uniformity in its regulation is a fact question which, as has been pointed out, depends on how Congress views the situation and what the actual situation is at that time. What the facts will be after June 30, 1976, assuming the FEAA is allowed to terminate, is too speculative a question to answer.

November 10, 1975

ELECTIONS: Voter Registration — §51, H.F. 700, Acts 66th G.A., §§48.7, 49.3, Code of Iowa, 1975. (1) Where the voter registration discloses that the person seeking to vote was registered in her maiden name but signed the registration using her married name it must be determined if from the facts she intended a name change by accepting registration in a formerly used name or if the registration official made an error which was unnoticed by the voter. In the latter case on proper affidavit the voter should be permitted to vote and the ballot counted. (2) Mere direction by election officials to voters to vote for two where that is the number of offices to be filled is not improper. (Nolan to Baker, Marshall County Attorney, 11-10-75) #75-11-3

Mr. Carl D. Baker, Marshall County Attorney: You have requested an opinion on the following:

"The Green Mountain voters were to elect two candidates from a total of five on the ballot. One candidate was a clear winner and a dispute surrounded the election of the second board member because of a question concerning one ballot. This ballot was questioned because when the lady whose ballot it was registered to vote, the registrar put this individual's name at the top of her registration card in its maiden form. The individual signed the registration at the bottom with her married name. The question presented is: Does this make the ballot invalid? I advised the canvassing board that the ballot could be accepted. The effect of accepting the ballot was to throw the vote into a tie. Would you please give me your prompt opinion on this question.

"A question further arose concerning the following: Some voters complained that when they went to the polls, election officials told them that they must vote for two candidates. Does the fact that an election official tells voters they must vote for two candidates affect the validity of the election?"

On the basis of the facts submitted in your request, it would appear that a genuine question exists as to whether or not the lady whose ballot was questioned had in fact or by intention, changed her name for purposes of registration by accepting the registration card made out by the registrar without checking it to make sure that it correctly stated her name. If on a presentation of all of the facts this appears to be the case, then the provisions of §51 of House File 700, Acts of the 66th General Assembly, 1975, should be considered. This legislation amends §48.7 of the Iowa Code to provide that if a qualified elector "fails to notify the commissioner of registration of a change of legal name or of residence

address before the close of registration for any election, elector shall not be qualified to vote at that election . . .". However, if from all the available facts it appears that the lady had not in fact changed her legal name and had signed her correct name to the registration form, then the name which the lady herself uses, rather than the name typed in by the official, is the correct name, and the question is not one of a change of name, but rather how to correct an error of the registrar. In an opinion issued by this office on August 20, 1971, 1972 O.A.G. 230, at 231, the following appears:

". . . In two previous attorney general's opinions, 1936 O.A.G. 640 and 1938 O.A.G. 594, we held that defects in registration lists which were beyond the voter's control would not bar a duly registered elector from voting."

The opinion further cites the Iowa case of *Younkers v. Susong*, 1916, 173 Iowa 663, 670, 156 N.W.24, which contains the citation to 15 Cyc. 307 as follows:

". . . as a general rule, a statute prescribing the powers and duties of registration officers should not be so construed as to make the right to vote by registered voters depend upon a strict observance by the registrars of all the minute directions of the statute in preparing the voting list, and thus render the constitutional right of suffrage liable to be defeated, without the fault of the elector, by the fraud, caprice, ignorance, or negligence of the registrars; for if an exact compliance of these officers with all statutory directions should be deemed essential to the right of an elector to vote, elections would often fail, and electors would be deprived without their fault of an opportunity to vote."

The object of registration laws and procedures is to prevent fraudulent manipulation of elections at the polling places. In the case which you present, if the lady properly affirmed that she is, in fact, the person entitled to vote under the name which she signed on both the registration slip and at the polls, she should be permitted to vote, and such ballot when cast in the absence of other disqualifying factors, is not an invalid ballot.

With respect to the second question presented in your request, §49.93 of the Iowa Code provides:

"No voter shall vote for more than one candidate for the same office, nor more than a greater number of candidates for two or more offices o fthe same class than there are offices of such class to be filled at such election."

Election officials should make every attempt not to be misunderstood when giving assistance to voters, and in this case, it appears merely that such a misunderstanding occurred. Accordingly, it is our view that the election being completed, in the absence of fraud, or other overriding circumstances, the validity of the election is not defeated by an election official telling voters to vote for two candidates when there were, in fact, two offices to be filled at that election.

November 11, 1975

CRIMINAL LAW: GAMBLING. §§8 and 14, SF 496, Acts 66th G.A., First Session (1975). Social games may be played for fun on the premises of a Class A, B, C or D liquor control licensee, or a Class B

Beer permittee licensed under §§8 and 14 of SF 496, except if dues, a cover charge, participation charge, entrance fee, or other charge is exacted for admission. (Turner to Priebe, State Senator, 11-11-75) #75-11-4

Honorable Berl E. Priebe, State Senator: You have requested an opinion of the attorney general as to whether social games may be played for fun on the premises of a Class A, B, C or D liquor control licensee, or a Class B beer permittee licensed under §§8 and 14 of SF 496, where dues, cover charge, participation charge, entrance fee, or other charge may be exacted for admission.

It is universally held that there are three elements to gambling: (1) a consideration paid, (2) an element of chance, and (3) receipt of a prize.

If there is a cover charge, admission fee or dues paid in order to gain access to play in a card game for fun, then the elements of consideration and chance are both present. However, where there is no prize the social game is not gambling.

Thus, my answer to your question is yes, assuming the element of prize has been eliminated.

Of course, if the liquor licensee or beer permittee knows that the participants are playing the game as a subterfuge as for example where money is passed under the table or is to be exchanged later, he would be guilty of keeping a gambling house. *State v. Book,* 1875, 41 Iowa 550, 20 Am.Rep. 609, and *Jacobs v. City of Chariton,* 1954, 245 Iowa 1378, 65 N.W.2d 561.

November 6, 1975

ELECTIONS: Municipal Elections; Votes Required for Election; Write-in Votes. §§49.31(4), 50.45, 376.6, 376.8, 376.9, Code of Iowa, 1975. Where a city has not adopted the runoff election or Chapters 44 or 45 options and has not held a primary election because the number of individuals for whom valid nominating petitions were filed was not more than twice the number of positions to be filled, the winning candidate is the person receiving the most votes. Write-in votes should be counted in arriving at the votes cast for purposes of determining a majority under §§376.8 and 376.9. Where multiple offices are involved, a majority is determined by taking all the votes cast (not voters voting) for the multiple offices, dividing by the number of offices and finding a majority of that number. A space would have to be provided for write-in votes in a runoff election. (Haesemeyer to Synhorst, Secretary of State, 11-6-75) #75-11-5

The Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your letter of today in which you state:

"(1) Where a city has not had a primary election because it was not necessary to do so and has not chosen by ordinance to have a run-off election and has not chosen by ordinance to have nominations made in the manner provided by Chapter 44 or 45, what number of votes is required for election in the regular city election?

"(2) In arriving at the votes cast for purposes of determining a majority thereof under Chapter 376, are write-in votes counted?

"(3) In run-off elections held under §376.9, is it necessary that a space be provided for write-in candidates?"

(1) Section 376.6, Code of Iowa, 1975, provides:

"An individual for whom a valid petition is filed becomes a candidate in the regular city election for the office for which he has filed, except that a primary election must be held for offices for which the number of individuals for whom valid petitions are filed is more than twice the number of positions to be filled. However:

"1. The council may by ordinance choose to have a runoff election, as provided in section 376.9, in lieu of a primary election.

"2. If the council has by ordinance chosen to have nominations made in the manner provided by chapter 44 or 45, neither a primary election nor a runoff election is required."

Under this section, it is evident that a primary election *must* be held for offices which the number of individuals for whom valid nominating petitions are filed is more than twice the number of positions. In the alternative, however, a city council may by ordinance choose to have a runoff election instead of a primary or it may, by ordinance, choose to have nominations made under Chapters 44 or 45. The statute does not address itself to the situation where a city has not adopted the runoff election or Chapters 44 or 45 options and has not held a primary election because the number of individuals for whom valid nominating petitions were filed was not more than twice the number of positions to be filled, although this is a situation which has evidently occurred in a number of localities.

Section 376.8 relating to the number of votes required for election in city elections provides:

"In a regular city election following a primary, the candidates who receive the highest number of votes cast for the office for which they have filed are elected, to the extent necessary to fill the positions for which they have filed. In a regular city election when a council has chosen a runoff election in lieu of a primary, the candidates who receive the highest number of votes and a majority of the votes cast for the office for which they have filed are elected, to the extent necessary to fill the positions for which they have filed. In a regular city election when a council has chosen to have nominations made in the manner provided by chapter 44 or 45, the candidates who receive the highest number of votes for the office for which they are nominated are elected, to the extent necessary to fill the positions for which they are nominated."

This section contemplates three situations, (1) where a regular city election is held following a primary or (2) where a council has chosen a runoff election in lieu of a primary and (3) where the council has chosen to have nominations made in the manner provided by Chapters 44 or 45. Here again, the statute does not contemplate the situation where a primary was not held because it was not necessary to do so by reason of the fact that a sufficiently large number of individuals had not filed for one or more of the offices on the ballot. However, in our opinion, the requirement is that the votes required for election should be the same in this situation as if a primary election had been held. The only purpose of the primary is to narrow the field of candidates and in the situation we are contemplating here that narrowing of the field has already occurred through the failure of a sufficient number of individuals to file for the office in question. In that case, the candidate or candidates who receive the highest number of votes cast for the office

or offices are elected irrespective of whether or not they may have received a majority. Section 376.1 incorporates by reference the provisions of Chapters 39 to 53, except as otherwise specifically provided in Chapters 362 to 392 and §50.45 provides:

"All canvasses of tally lists shall be public, and the persons having the greatest number of votes shall be declared elected."

This is the rule with respect to elections generally and should apply to the situation we are considering where the special provision of Chapter 376, specifically §376.8, is silent on the question.

(2) In our opinion, write-in votes should be counted in arriving at the votes cast for purposes of determining a majority under §§376.8 and 376.9. The fact that a vote is cast for a write-in candidate does not make it any less a vote cast in the election in question. Where multiple offices are involved, a majority is determined by taking all the votes cast (not voters voting) for the multiple offices, dividing by the number of offices and finding a majority of that number.

(3) Section 376.9 provides in the last sentence of the first paragraph thereof:

" * * *

"Candidates who do not receive a majority of the votes cast for the office for which they have filed, but who receive the highest number of votes cast for that office in the regular city election, to the extent of twice the number of unfilled positions, are candidates in the runoff election."

However, the last sentence of §49.31(4) provides:

" * * *

"Provisions shall be made on the ballot to allow the elector to write in the name of any person for whom he or she desires to vote for any office or nomination on the ballot."

As we have seen, §376.1 makes the provisions of Chapter 49 applicable to elections held under Chapter 376 and it would therefore be our opinion that a space would have to be provided for write-in votes in a runoff election.

November 10, 1075

MUNICIPAL ELECTIONS, Runoffs; Write-in Candidates. §§49.31(4), 376.1, 376.8 and 376.9, Code of Iowa, 1975. In municipal elections where the city has by ordinance chosen to have a runoff election, a write-in candidate who received the most votes as well as a "filed" candidate who received the next most votes are the candidates in a runoff election. (Haesemeyer to Swanson, Assistant Montgomery County Attorney, 11-10-75) #75-11-6

Mr. R. John Swanson, Assistant Montgomery County Attorney: Reference is made to your letter of November 5, 1975, in which you state:

"This confirms the telephone conversation I had with you this date concerning your interpretation of Section 376.9 of the 1975 Code of Iowa as amended.

"As stated on the telephone, I request a formal opinion from your office to verify the interpretation you gave me on the telephone.

"The facts of our case are these:

"1. There were three candidates who had 'filed' for the office of mayor of the city of Villisca.

"2. A write-in candidate who had not 'filed' for election received 227 write-in votes.

"3. The three candidates who had 'filed' for election received 206 votes, 27 votes and 7 votes respectively.

"The language of Section 376.9 would initially lead one to believe that only those candidates who had 'filed' for election would be entitled to be considered in a run-off election.

"On the basis of my telephone conversation with you, I have advised our County Auditor that the run-off ballot to be prepared for the election to be held on November 18 should include the printed names of the write-in candidate and the 'filed' candidate who received 206 votes. The names of the other two candidates would not appear on the run-off ballot."

This will confirm the opinion I gave you orally over the telephone to the effect that the ballot in the runoff election should contain the names of the write-in candidate who received 227 votes and the candidate who had filed for the office who received 206 votes. Although §376.8 and §376.9 speak generally in terms of candidates who have "filed", we do not believe that we can construe these sections so as to make it impossible for a write-in candidate to be elected or to be a candidate in the runoff election. Section 49.31(4), provides in relevant part:

" * * *

"Provision shall be made on the ballot to allow the elector to write in the name of any person for whom he or she desires to vote for any office for nomination on the ballot."

Section 376.1 makes the provisions of Chapter 49 applicable to municipal elections held under Chapter 376 and we think that §49.31 implies that persons may be candidates and win elections as write-ins.

I am assuming that the city of Villisca has by ordinance chosen to have a run-off election. Otherwise, in accordance with our opinion of November 6, 1975, to Secretary of State Melvin D. Synhorst, a run-off would not be necessary and the write-in candidate receiving 227 votes would have won.

November 10, 1975

STATE OFFICERS AND DEPARTMENTS: Iowa American Revolution Bicentennial Commission; Appropriations, Matching Funds. Senate File 353, Acts, 66th G.A., 1st Session (1975). Funds appropriated to the Iowa Bicentennial Commission may be used to match other state funds as well as county money, city funds or federal funds. However, the required match for approved projects must be in cash. (Haesemeyer to Redfern, Deputy Director, Iowa American Revolution Bicentennial Commission, 11-10-75) #75-11-7

Mr. R. Edwin Redfern, Deputy Director, Iowa American Revolution Bicentennial Commission: By your letter of October 6, 1975, you have requested an opinion of the Attorney General and state:

"The Iowa Bicentennial Commission would like to know if we are able to match the funds we received from the Iowa Legislature with Senate File 353 (see attached), with other state funds such as Arts Council or Council on Aging funds. Or are we able to match county money, city funds, or Federal funds? We have had requests for this from other agencies. Also, does this have to be in cash or can it be in soft match?

"The Iowa Bicentennial Commission plans to spend the funding at its November meeting and would appreciate it if prompt attention could be made available."

Senate File 353, Acts, 66th G.A., 1st Session (1975) is "An Act making an appropriation from the general fund of the state to the Iowa American revolution bicentennial commission." The act appropriates $200,000 to the American Revolution Bicentennial Commission to be used to encourage maximum participation by Iowans in activities commemorating the historic events of the American Revolutionary period at the heritage of the state. The only limitations on the use of these funds are those found in §2, i.e., that they be used for bicentennial projects endorsed by the Iowa American Revolution Bicentennial Commission and that they "shall be allocated by the commission to bicentennial projects only if matched by an equal amount of money raised by the sponsors of the bicentennial project from other sources. In our opinion, the words "other sources" means sources other than the appropriation made by Senate File 353 and would not preclude the use of other state appropriated funds as match for approved projects. Thus, in answer to your question, Senate File 353 funds could be used to match Arts Council or Council on Aging funds, county money, city funds, or federal funds.

Money, in its popular sense, means cash or its equivalent, and includes everything which, by common consent, is made to represent property and passes currently from hand to hand, and includes, in common parlance, gold and silver coin as well as various kinds of paper money issued by the government. Since the legislature has seen fit to use the term "money" to describe the required match for approved projects, it is our opinion that soft match would be unacceptable and all matching funds would have to be in cash.

November 12, 1975

CITIES AND TOWNS: Home Rule Charter — §§372.1, 372.2, 372.5, 372.9 and 372.10, Code of Iowa, 1975; §§20, 21, S.F. 526, 66th G.A. (1975). A home rule charter commission may not merely endorse an increase in council members from three to five as its charter. Nor may it set forth a charter embodying a form that is the same as the existing form or another form provided in Chapter 372. (Blumberg to Coleman, State Senator, 11-12-75) #75-11-8

Honorable C. Joseph Coleman, State Senator: We have received your opinion request of October 13, 1975, regarding a Home Rule Charter Commission. You specifically asked:

"1. Fort Dodge presently has a three-man commission form of government. Is it possible for our committee to return with a proposal endorsing the five-man commission form of government and still be within the permissible scope of Iowa Code Section 372.9(6)?

"2. Is the change from a three to five-man commission form of city government a sufficient proposal of change as contemplated by the Home Rule Charter Act?

"3. Can the Home Rule Charter Commission merely endorse the present form of government and have this satisfy the requirement of Iowa Code Section 372.9(1)(B) wherein it states that 'the Charter commission shall . . . prepare and file with the council a proposed charter?' "

Chapter 372, 1975 Code, concerns the organization of city government. Section 372.1 lists six forms of government, including the Commission and Home Rule Charter forms. Section 372.5 provides that a city governed by the Commission form shall have a mayor and four councilmen. The third paragraph of that section, as amended by §20, S.F. 526, 66th G.A. (1975) reads:

"A city governed by the commission form and having a council composed of a mayor and two councilmen elected at large may continue with a council of three until the form of government is changed as provided in section 372.2 or section 372.9 or without changing the form, may submit to the voters the question of increasing the council to five members assigned to the five departments as set out in this section."

Section 372.9, as amended by §21, S.F. 526, provides in pertinent part:

"A city to be governed by the home rule charter form shall adopt a home rule charter in which its form of government is set forth. A city may adopt a home rule charter only by the following procedures:

"1. . . . * * *

"b. Eligible electors of the city equal in number to at least twenty-five percent of the persons who voted at the last regular city election petitioning the council to appoint a charter commission to prepare a proposed charter. The council shall, within thirty days of the filing of a valid petition, appoint a charter commission composed of not less than five nor more than fifteen members. The charter commission shall, within six months of its appointment prepare and file with the council a proposed charter. * * *

"6. The ballot submitting a proposed charter or charters must also submit the existing form of government as an alternative."

Home rule charters ordinarily indicate the structure of government, broadly defining the qualifications, duties, powers and the manner of securing office. They also contain provisions describing the governing body, its powers, duties and limitations, and the manner in which its members are chosen, along with their qualifications. 3 Antieau, *Municipal Corporation Law* §25.02 (1975). These types of charters are commonly referred to as freeholder's charters since the citizens draft them and set forth the powers of the government. 1 Antieau, *Municipal Corporation Law* §3.07 (1975). These charters are normally provided by the Constitution.

Not all home rule charters are like this, however. In some states, home rule granted by the Constitution or legislature is self-executing. In other words, the constitutional provision or legislative enactments define and provide for home rule and may include limitations. Under such circumstances a home rule charter is not needed. Where charters are drafted in these states they mainly refer to the form of government. 1 Antieau, supra, §307, citing to *Perrysburg v. Ridgway*, 1923, 108 Ohio St. 245, 140 N.E. 595. Such charters have been viewed by some courts

as limitations of powers since they do not, nor cannot, grant power. See, 1 Antieau, supra §3.07, and 3 Antieau, supra §25.02.

Iowa's grant of home rule by the Constitution is self-executing. It grants all powers to cities with the exception of taxation and anything in conflict with the Constitution or a statute. Thus, the home rule charter of Chapter 372 is not of the freeholder variety that grants power. That Chapter provides the manners in which such a charter is adopted and provides what the charter must contain. From reading §372.9 and 372.10, along with the rest of the chapter, it is evident that the home rule charter in Iowa is merely to establish a form of government, setting forth the number of councilmen, a mayor, whether the mayor may vote, the terms, and the powers and duties of the council and mayor not inconsistent with Title XV of the Code. That is no more than what the previous sections of the chapter prescribe. The home rule charter does, however, allow a city to select another form of government than is previously listed and to set forth more options regarding that form of government. It does not grant a city operating thereunder more home rule powers than are available to other cities.

To specifically answer your questions, §372.10 provides that a charter must contain provision for a council of an odd number, not less than five; a mayor, who can be given the power to vote; two or four year staggered terms; and the specific powers and duties of the mayor and council members. Pursuant to that section, it is not enough for a charter commission to just endorse increasing the number of council members in the existing government from three to five. The Charter must go into detail as to the form of government and the powers and duties of the mayor and council members. Nor may the charter commission endorse the present form of government and set that forth as a charter. Section 372.9(6) provides that the Charter and the existing form shall be placed on the ballot as alternatives. There can be no alternatives if the Charter and the existing form are the same. Section 372.5, as set forth above, provides for an election for the mere purpose of increasing the number of council members from three to five in the commission form. If that change is proposed, then the provisions of §372.5 should be followed rather than §372.9.

There is nothing in the Code which limits the form of government under a charter. Likewise, there is nothing providing that the charter form must be different than the other forms listed in §372.1. If the form of government set forth in the charter is the same as one of the other forms, there is no need to follow §372.9, and the form of government should be changed pursuant to §372.2. A home rule charter should, realistically, encompass a form of government that is different than the other available forms. This does not mean entirely different, but connotes some type of variance. For instance, the charter may provide for a form similar to the commission form in §372.5, but has more than five council members, or does not give the mayor the power to vote. Likewise, the charter form may be similar to the mayor-council form, and allow the mayor to vote. These are possibilities contemplated by the Legislature to give the citizens the opportunity to set the form of government best suited to their city.

Accordingly, we are of the opinion that a charter commission may not simply endorse a change in the number of council members (such change already provided for in another statute) instead of setting forth a charter. Nor may it set forth a charter embodying a form that is the same as the existing form or another form provided in Chapter 372. This is not to be interpreted as meaning that a charter commission must adopt a charter.

November 12, 1975

STATE OFFICERS AND DEPARTMENTS: DEPARTMENT OF PUBLIC SAFETY; EMPLOYMENT SYSTEM; RULES. Section 80.15, Code of Iowa, 1975. The employment system rules of the Iowa State Patrol Division of the Department of Public Safety do not now allow a leave of absence to assume position of county sheriff. (Linge to Richter, Chief Deputy Pottawattamie County Attorney, 11-12-75) #75-11-9

Mr. David E. Richter, Chief Deputy Pottawattamie County Attorney: Reference is made to your request for an opinion of the Attorney General in which you ask what personnel rules apply to a peace officer member of the Iowa State Patrol division of the Iowa Department of Public Safety, and how they apply to these facts:

". . . whether or not a Highway Patrolman, who would be appointed as sheriff upon the retirement of the present sheriff before expiration of his term, would be returned to his position, under civil service, of Sergeant, with the Highway Patrol, if he ran for election upon expiration of the term, but was not elected."

Chapter 80 of the Code of Iowa creates the Department of Public Safety and section 80.15, Code of Iowa, 1975, provides in part:

"All rules regarding the enlistment, appointment, and employment affecting the personnel of the department shall be established by the commissioner with the approval of the governor."

The General Assembly, by this language in section 80.15, grants authority to the Commissioner of Public Safety to establish an employment system separate from and exclusive of any other provided by the Code. 1970 O.A.G. 78 and 1972 O.A.G. 324.

Personnel rules authorized by section 80.15 have been established for the peace officer members of the Patrol. No provision in these rules provides that a member may request or obtain a leave of absence for the purpose described in your statement of fact. It would appear that a member of the Patrol that would take the full-time position of county sheriff would resign the Patrol position and could only return after successfully passing through the Department's employment system selection procedures.

Therefore, the employment system rules of the Department of Public Safety now provide that a member of the Patrol leaving under the circumstances you described would not be allowed to automatically return to that position in the Department.

November 17, 1975

INDIVIDUAL DRAINAGE RIGHTS. Restoration of Lost Records. §465.30, Code of Iowa, 1975. The provisions of §465.30 may be utilized to resolve problems of a common drain involving private property and state owned property devoted to use as a primary highway when said property is not part of an established drainage district, and records of said common drain are lost or non-existent. (Schroeder to Howell, State Representative, 11-17-75) #75-11-10

The Honorable Rollin Howell, State Representative: Your recent letter described a problem with a common drain which involved both private property and State owned property, devoted to primary highway right of way. There is no established drainage district, and records for the mutual drain involved, are either lost or non existent. You have also stated that the Mitchell County Board of Supervisors has been requested to utilize the provisions of §465.30 of the 1975 Code of Iowa. However, they have hesitated to do so, because of a reference therein to "Drainage districts" as opposed to "highway drainage districts".

Your question then, would appear to be as follows:

When both privately owned land and publicly owned land (devoted to primary highway right of way) are involved in a problem involving a common drain as a result of lost or non existent records, may the provisions of §465.30 of the 1975 Code of Iowa, be utilized to resolve that problem?

The answer to the question is, Yes. Chapter 460 of the 1975 Code of Iowa, is entitled Highway Drainage Districts, however its applicability is limited to drainage problems involving highways under the Boards of Supervisors' jurisdiction. Your letter refers only to a primary highway, it does not mention secondary roads.

The procedures set forth in Chapter 465 of the 1975 Code of Iowa, enable the Board to determine individual rights and duties when a mutual drainage problem is raised. The Board in this instance, may proceed, once a petition seeking relief is filed with it, and to do all things necessary to re-establish said records, to order repairs, and assess costs of same to each of the parties involved, upon such basis as they may establish.

November 17, 1975

BUILDING ACCESS FOR HANDICAPPED PERSONS. §§104A.1 and 104A.2, Code of Iowa, 1975. Multiple dwelling buildings containing five or more units, but not intended for use by the general public are not subject to the requirements of §104A.2. (Conlin to Huffman, Pocahontas County Attorney, 11-17-75) #75-11-11

Mr. H. Dale Huffman, Pocahontas County Attorney: You have requested an opinion of the Attorney General with reference to Chapter 104A, Code of Iowa, 1975, governing Building Entrances for Handicapped persons. Specifically you inquire:

"Is a multiple-dwelling-unit building containing five or more individual dwelling units which *is not used by the general public* subject to the requirements of Chapter 104A of the Code which apply to apartments?" [emphasis in the original].

Sections 104A.1 and 104A.4, Code of Iowa, 1975, provide in pertinent part as follows:

"104A.1 It is the intent of this chapter that standards and specifications are followed in the construction of public and private buildings and facilities *which are intended for use by the general public.*

104A.2 *Applicability* . . . [Notwithstanding Section 104A.6] in every multiple-dwelling-unit building containing five or more individual dwelling units *the requirements of this chapter which apply to apartments shall be met.* . . . [emphasis supplied].

This chapter applies only to buildings that are intended for use by the general public. If, as you state, the apartment complex to which you refer is not used by the general public, then Chapter 104A has no application, and the building would not fall within its requirements. Words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary. *Burns v. Alcala,* ... U.S. ... , 95 S.Ct. 1180, 43 L.Ed. 469, 475 (1975). Where language is clear and plain, there is no room for construction. All parts of the enactment should be considered together and undue importance should not be given to any single or isolated portion. *Iowa Natural Industries Loan Co. v. Iowa State Department of Revenue,* 224 N.W.2d 437, 440 (Iowa 1974).

In short, Chapter 104A applies to buildings intended for use by the general public, and the special application to "multiple-dwelling-unit buildings" of five or more units applies only to apartments intended for use by the general public. If a multiple-dwelling-unit building is not open to the general public, the act does not apply.

November 20, 1975

CONSTITUTIONAL LAW: House File 550, Acts, 66th G.A., 1st (1975). House File 550, which prohibits major petroleum corporations from owning and operating retail outlets is unconstitutional for the reasons that it violates the due process and equal protection clauses of the Iowa and United States Constitutions. (Hudson to Gallagher, State Senator and Hullinger, State Representative, 11-20-75) #75-11-12

The Honorable James V. Gallagher, Senator; The Honorable Leon Hullinger, Representative: You have requested an opinion of this office as to the constitutionality of House File 550. This bill regulates and restricts the activities of producers, refiners, and distributors of motor fuels and fuels used for power and heating purposes in the retail operation of the petroleum industry. The controversial provisions of the bill, and those of questionable constitutionality are Sections 5 and 6. Section 5 prohibits producers, refiners, and distributors of fuels from opening and operating retail service stations commencing on July 1, 1975. Commencing on July 1, 1976, producers, refiners, and distributors may not operate more than one retail service station in a state (Section 6). Section 6, by implication also requires major oil corporations to divest themselves of all but one retail service station within a 120 day period after July 1, 1976. Other provisions of the bill impose new registration and regulatory requirements for major oil companies. These requirements are by comparison of minor significance, and the remainder of this opinion shall focus on Sections 5 and 6.

The State of Florida has passed a similar statute (Chapter 74-387, Laws of Florida, 1974). Section 526.151 provides:

"No producer, refiner, or a subsidiary of any producer or refiner, shall operate with company personnel, in excess of three per cent of the total number of all classes of retail service stations selling its petroleum products, under its own brand or a secondary brand."

In the case of *Exxon et.al. v. Conner*, case No. 74-1772, the Circuit Court of the Second Judicial Circuit in Leon County, Florida, declared this statute unconstitutional. The opinion states:

"The statute is assailed as being an unconstitutional invasion of rights to operate a legitimate business; that it is an invalid exercise of police power; that it is unconstitutionally vague, indefinite and ambiguous; that it is a burden on interstate commerce; that it denies due process of law; is a taking of private property without just compensation; and is in conflict with the purpose and effect of the Federal Emergency Petroleum Allocation Act of 1973 (87 Stat. 627)."

In sustaining the plaintiff's challenge to the statute the Court stated:

"As has been previously stated, legislation damaging to one segment of a class on legitimate business and beneficial to another, with the general public not being protected or served, is an invasion of the liberties involved in constitutional guarantees of the right to acquire, own, and enjoy property and to enter into and perform contracts. The statute under examination is found to serve no protection to public welfare but is discriminatory to that segment of petroleum retail service stations which are company operated. There is shown no constitutional impediment to what is described as vertical integration in the market place, namely the selling directly to the consumer of goods by those who produce and process them. (The statute is unconstitutional.)

The *Exxon* decision from Florida is the case most directly on point to the question being considered here. A similar statute in Maryland (Chapter 954, Laws of Maryland) is now facing a constitutional challenge in Maryland Courts. No decision has been rendered in this case. (*Exxon Corp. v. Mandel et.al.*, Circuit Court for Anne Rundel County Equity No. 22069). The Iowa Supreme Court is not bound by the decisions of another state tribunal. *Warner v. Hansen*, 251 Iowa 685, 102 N.W.2d 140 (1960); *Handeland v. Brown*, 216 N.W.2d 574 (1974). The rule is that "in construction of statutes, logic and reasoning of outside authorities involving similar statutes can be of use, *Goergen v. State Tax Commission*, 165 N.W.2d 782 (1969)."

The *Exxon* case from Florida relied heavily on Florida constitutional law. The Iowa law on this subject is not as fully developed as it is in Florida. There are, however, a number of Iowa cases that must be considered. The familiar rule that a statute of the General Assembly carries a heavy presumption of constitutionality should also be emphasized. cf. *Central States Theater Corporation v. Sar*, 1954, 66 N.W.2d 450; *Lee Enterprises v. Iowa State Tax Commission*, 1969, 162 N.W.2d 730.

Section 2 of this bill states: "The provisions of this act are enacted in the exercise of the police power of this state." A leading case which attempted to define the police power of the state is *City of Des Moines v. Manhattan Oil Company*, 1921, 193 Iowa 1096, 184 N.W. 823, 827. In this opinion the Court stated:

"The police power is that reserve element of sovereignty from which is demanded such reasonable supervision and regulation as the state may impose to insure observance by the individual citizen of the duty to use his property and exercise his rights and privileges of others.

The state, through its Legislature, may select the subjects of and prescribe rules for the enforcement of police regulations and to justify the exercise of such authority, it is not necessary that the subject thereof by inherently wrong, nor does the fact that such regulations may restrict the individual citizen in the use of his own property or even in his liberty, render them void."

There are many other cases that attempt to define the scope of the police power. Most often the power is invoked to protect the health or safety of the public, but it is clear that the power extends beyond this narrow view and includes laws designed to promote the public convenience and general prosperity. *Benschoter v. Hakes*, 1943, 232 Iowa 1354, 8 N.W.2d 481.

While the authority of the General Assembly to act under the police power is very broad, there are well recognized limits to this power. The following are statements from the Iowa Supreme Court regarding the limits of this power:

"No precise definition of what constitutes the police power of the State has been or can be given. In each case it is a question of whether or not the collective benefit outweighs the specific restraint. *Benschoter v. Hakes*, 1943, 232 Iowa 1354, 8 N.W.2d 481, 485."

"The right to follow any of the common occupations of life, subject only to reasonable regulations under the police power in the interest of public health, safety, and welfare, is succinctly and comprehensively stated in *Scully v. Hallihan*, 365 Ill. 185, 6 N.E.2d 176, 179. We quote from this opinion: 'It is one of the fundamentals of our democratic form of government that every citizen has the inalienable right to follow any legitimate trade, occupation, or business which he sees fit. His labor is his property, entitled to the full and equal protection of the law under the due process clause of the Federal Constitution. It is also embraced within the constitutional provision guaranteeing to everyone liberty and the pursuit of happiness.' *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832. This right to pursue any trade or calling is subordinate to the right of the state to limit such freedom of action by statutory regulation where the public health, safety or welfare of society may require. *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469. However, in those instances where the police power is invoked to regulate and supervise a legitimate occupation the restraint imposed must be reasonable. The determination by the General Assembly that such regulations upon a trade are needful is not conclusive and is always subject to review. *State v. Harrington*, 1941, 229 Iowa 1092, 296 N.W. 221, 223."

"The limitations upon the legislature, in the exercise of the police power, appear to be well stated in the case of *Baker v. Daly*, D. C., 15 F.2d 881, 882, which held that the Oregon Statute, regulating cosmetology, was unconstitutional. In the court's opinion, the court refers to certain rights guaranteed by the constitution, and the police power of the state to interfere with such rights, by the following language: The right thus granted is, of course, subject to the police power of the state to enact laws essential to the public safety, health, or morals; but, to justify a state in that the interest of the public requires such interposition, and that the means are reasonably necessary for the accomplishment of the purpose and not duly oppressive to individuals.

The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose undue

and unnecessary restrictions upon lawful occupations. *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385. *State v. Thompson's School of Beauty Culture*, 1939, 226 Iowa 556, 285 N.W. 133, 135, 136."

"It is true the right to operate a legitimate business is one which the State may not prohibit or unreasonably restrict, but may only regulate. *Plaza Recreational Center v. Sioux City*, 1961, 253 Iowa 246, 111 N.W.2d 785, 764."

These cases are only illustrative of the law in this area and myriad other cases from Iowa and other jurisdictions could be cited for similar propositions. These cases suggest, that the proper mode of analysis for determining the constitutionality of House File 550, is to ask the following questions: (1) Is the retail oil business a legitimate business and is there an evil that needs to be corrected by the Legislature?; (2) Is the restraint imposed upon the business a reasonable one and does the collective benefit outweigh the specific restraint? I shall attempt to answer these questions in the following paragraphs.

What this bill seeks to prohibit is known as vertical integration. This term was defined in *U.S. v. New York Great Atlantic and Pacific Tea Company*, D.C. 67 F.Supp. 626, 642 as a "combination under one management of different business functions at more than one level." Under the federal antitrust statutes, such arrangements have often been attacked as anticompetitive and therefore, in violation of the Sherman or Clayton Acts. The cases on this point have consistently held that vertical integration is not a per se violation of the federal antitrust laws. cf. *U.S. v. Paramount Pictures*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260; *Columbia Steel Corporation v. U.S.*, 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533. [Also see Strickells, Antitrust Laws §53 (1972); Toulmin, Antitrust Laws, Vol. 5 § 11.10 (1950).]

What these cases have demonstrated is that arrangements such as those which Section 5 and 6 of the bill seek to prohibt are not necessarily in and of themselves anticompetitive. Thus the implication of the statement in Section 2 of this bill that independent gasoline dealers cannot compete with major oil companies and that such vertical arrangements are not in the public interest has not been well received in the federal courts.

The Florida court in the *Exxon* case, *supra*, found there was no detriment to the public caused by company owned retail service stations. On the contrary, the court stated numerous advantages inhering to the public from the continued operation of such retail outlets:

". . . The evidence indicates that company operated stations generally sell gasoline at lower prices than the independents . . . The company operated station is employed largely when a company is breaking into new territory when there is a natural reluctance on the part of the independent dealers or jobbers to make the investment and effort to market an untried product . . . Another instance of company operations is in certain specialized or innovative marketing techniques . . . The company station also functions to provide standards of service to promote public relations, and customer acceptance of its brand products. This serves to provide an incentive to independents who may not be otherwise motivated to attend to the public needs for service station services . . . *Exxon et.al. v. Conner*, *supra*, pp. 5-6."

The voracious American appetite for all forms of fuel leaves no doubt

that the petroleum industry is a legitimate and necessary business and not an inherent evil. Judicial decisions on vertical integration and the Florida case construing a similar statute indicate that there is no detriment to the public interest from the continued operation of retail outlets owned by petroleum companies. Thus there is not a proper subject for legislation under the police power of the State.

If it is determined that there is a public detriment of inconvenience which is the proper subject of the police power, the second requirement is that the restraint imposed by the legislation be a reasonable one. [See *City of Des Moines v. Manhattan Oil Co., supra; Benschoter v. Hakes, supra; State v. Harrington, supra; State v. Thompson School of Beauty, supra; Plaza Recreational Center v. Sioux City, supra.*]

A prohibition of all but one retail outlet and forced divestiture is a radical remedy for the problem the bill addresses itself to. The bill could go almost no further to correct the situation of major oil corporation ownership of retail fuel outlets than it does in Section 5 and 6. If the problem is the inability of "independent service stations to compete with major petroleum corporations in the sale of motor fuel (Section 2)," there must be some other less drastic means of curing the problem. The case of the *Plaza Recreational Center v. Sioux City, supra*, states that the state may not prohibit or unreasonably restrict a legitimate business, but may only regulate." Sections 5 and 6 of House File 550 prohibit all but one company owned retail facility.

The prohibition of Section 5 and 6 is effective without any finding that such ownership by petroleum companies is anti-competitive. This is true despite the federal case rulings that vertical type arrangements are not per se violations of the federal antitrust statutes. Thus it seems that the bill is over-broad and that it would prohibit company ownership in situations where there is no anti-competitive impact. This is an unreasonable restriction on a legitimate business and would likely be declared invalid by the Iowa Supreme Court.

Thus, it is my opinion, the Iowa Supreme Court would likely hold Sections 5 and 6 of House File 550 to be an unconstitutional exercise of the police power for the reasons that there is not a legitimate reason for the exercise of the police power and that the nearly absolute prohibition of the bill unreasonably interferes with the conduct of a legitimate business. The bill therefore, violates the due process and equal protection clauses of the Iowa and U. S. Constitutions and would be declared void.

November 20, 1975

CITIES AND TOWNS: Group Insurance for Employees' Dependents: §364.1, and Chapter 509A, Code of Iowa, 1975. Municipal utilities may purchase insurance to cover employees' dependents. (Blumberg to Hansen, State Senator, 11-20-75) #75-11-13

Honorable Willard R. Hansen, State Senator: We have received your opinion request of August 14, 1975, regarding insurance for dependents of employees of municipal utilities. You wish to know whether it is prohibited for a municipal utility to supply insurance for such dependents.

This office issued a prior opinion on this question and held that municipal utilities may not purchase insurance for employees' dependents. 1974 O.A.G. 46. That opinion was based upon Chapter 509A which only provided for insurance for employees, and upon two prior opinions issued in 1957 and 1970. Chapter 509A of the 1975 Code has been amended as of July 1, 1975, by removing all references to cities and towns. Thus under the concept of home rule it is apparent that municipalities may now purchase insurance for their employees without specific statutory authority. The Home Rule Amendment to the Constitution provides that municipal corporations are granted power and authority not inconsistent with the laws of the General Assembly. Section 364.1, 1975 Code, provides that unless expressly limited by the Constitution or inconsistent with a statute, a city may exercise any power and perform any function it deems appropriate to protect the rights, privileges and property of the city or its residents, and to preserve the health, safety, welfare, comfort and convenience of the residents.

There is nothing in the Code which specifically prohibits the purchase of insurance for municipal employees' dependents. Nor does the Constitution speak on this subject. Accordingly, we are of the opinion that municipal utilities may purchase insurance to cover not only the employees but also their dependents. The opinion found in 1974 O.A.G. 46 is hereby superceded.

November 24, 1975

EDUCATIONAL T.V. Leased property. §427.1, Code of Iowa, 1975. Personal property leased from a private owner is not exempt from taxation by virtue of being leased by a state agency. (Nolan to Haddad, Iowa Educational Broadcasting Network, 11-24-75) #75-11-14

Mr. Amin K. Haddad, Business Manager, Iowa Educational Broadcasting Network: In response to your inquiry pertaining to the state's liability for the payment of property taxes on equipment leased by Iowa Educational Radio & Television Facilities Board from the Ampex Corporation, I have reviewed the agreement and find that under Paragraph II(B) the lessee is required to pay all property taxes assessed against the property. Accordingly, the lessee is required to pay such taxes as a matter of contract.

You also asked whether there might be an exemption available for the state in connection with the taxation of personal property leased from a private owner. This office issued an opinion on December 18, 1972 (Griger to Hughes, Assistant Dubuque County Attorney), at 1972 O.A.G. 681, which discusses the exemptions from property tax provided in §427.1 of the Code of Iowa. In that opinion this office advised that the property was not exempt from taxation by virtue of its being leased by the county. The same rule would apply to the property in question here, which is being leased by a state agency.

November 25, 1975

COUNTIES: Supervisors — §331.19. A motion of substance when made by a member of the board of supervisors should be recorded in the minutes and published as part of the proceedings of the board meeting,

unless withdrawn by the originator even though such motion dies for lack of a second. (Nolan to Whitehead, Jasper County Attorney, 11-25-75) #75-11-15

Mr. Kenneth L. Whitehead, Jasper County Attorney: We have your request for an opinion on the following question:

"I would like to know whether a motion made during a regular meeting of the Board of Supervisors by a Supervisor which died for a lack of a second must be preserved in writing in the minute book required to be kept by Code Section 331.19 (1) of the 1975 Code of Iowa, and whether or not said motion must be published in the proceedings of the Board of Supervisors in the newspaper of general circulation, etc."

Assuming that the board has not adopted special rules of procedure for the conduct of its meetings contrary to general parliamentary law, we conclude that the general parliamentary law applies to meetings of the board of supervisors.

General parliamentary law requires that main motions be published in the minutes when made by a member of the board regardless of whether or not such motions are seconded by another member. *Robert's Rules of Order Newly Revised*, General Henry M. Robert, Scott Forseman & Company, 1970 Edition, states at page 405 that rules governing board meetings of a dozen or fewer members differ from rules in larger assemblies in that all "motions need not be seconded". Since motions need not be seconded to be voted upon, presumably they need not be seconded to require being recorded in the minutes, despite death for a lack of a second. *Robert's* provides more persuasive authority for the mandatory recording of all main motions whether seconded or not at page 390. "The body of the minutes should contain a separate paragraph for each subject matter, and in such a format, should show: . . . all main motions (Sec. 10) or motions to bring a main question again before the assembly . . . except any that were withdrawn". *Robert's* further states that the recording of the motions should give:

"a) the wording in which each motion was adopted or otherwise disposed of (with the facts as to how the motion may have been debated or amended before disposition being mentioned only parenthetically);

"b) the disposition of the motion, including — if it was *temporarily* disposed of (p. 77) — any primary and secondary amendment and all adhering secondary motions that were then pending; and

"c) usually, in the case of all important motions, the name of the mover; and * * * "

Robert's further indicates that points of order and appeals, whether sustained or lost, together with the reasons given by the chair for his ruling, should be included. Furthermore, *Robert's* clarification of parliamentary law provides that "when minutes are to be published, they should contain . . . a list of the speakers on each side of every question, with an abstract or the text of each address". (Op. cit., page 394).

It should be noted, of course, that deliberative bodies, in general, and the board of supervisors in particular, have the right to adopt rules of procedure in conducting their meetings. (§332.3(2), Code of Iowa, 1975). However, it will be assumed that such bodies operate under recognized rules of order and parliamentary procedure unless they have

affirmatively adopted rules to the contrary or voted to suspend rules. In such case, the minutes should show that there has been a required two-thirds vote for suspension of the rules.

Accordingly, each of the questions you have submitted must be answered affirmatively.

November 25, 1975

STATE OFFICERS AND DEPARTMENTS: Iowa Public Employment Relations Board; §17A.2(1), §20.19, .20, .21, and .22, 1975 Code of Iowa. 1) Statements of general applicability interpreting, implementing and prescribing law or policy are rules under the Administrative Procedures Act. 2) Mediation is a prerequisite to the appointment of a fact-finder under the statutory impasse procedure of Chapter 20. 3) Mediation and fact-finding are prerequisites for arbitration under Section 20.22. (Beamer to Millen, House Minority Leader, 11-25-75) #75-11-16

Honorable Floyd H. Millen, House Minority Leader: Reference is made to your letter of October 23, 1975, in which you request opinions on the following questions:

"1. May an agency, as defined in Section 17A.2(1), 1975 Code of Iowa, issue statements of general applicability interpreting, implementing and prescribing law or policy, without following the Iowa Administrative Procedures Act rule making procedure?

"Your attention is called to a 'Statutory Impasse Calendar' and 'Statutory Impasse Procedures' issued by the Iowa Public Employment Relations Board on October 15, 1975, (copies of both are enclosed for your perusal). Your attention is also called to Sections 20 to 22, inclusive, of the Iowa Public Employment Relations Act (Chapter 20 of the 1975 Code of Iowa) and to Chapter 7 of the Rules of the Iowa Public Employment Relations Board.

"2. Is mediation a prerequisite or condition precedent in the statute to the appointment of a fact-finder under Section 20.21, 1975 Code of Iowa?

"3. Are mediation, as specified by Section 20.20, and fact-finding, as specifed by Section 20.21, or either of them, a condition precedent to the arrangement for arbitration under Section 20.22, 1975 Code of Iowa?"

The first question presented for opinion is whether the "Statutory Impasse Calendar" and "Statutory Impasse Procedures" issued by the Iowa Public Employment Relations Board must be promulgated as rules under the procedure created in Section 17A.4, Code of Iowa, 1975.

A rule is defined in Section 17A.2(7), Code of Iowa, 1975:

"Rule means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of an existing rule . . ."

The broad definition is made subject to certain exceptions, but none is relevant here.

Clearly, both the "Statutory Impasse Calendar" and "Statutory Impasse Procedures" are statements of general applicability implementing and interpreting law. They do not pertain to particular persons or bodies and they procedurally implement and interpret Chapter 20, Code of Iowa, 1975.

"[T]he definition of 'rule' is clearly not restricted to agency statements which declare principles of substantive law or policy as distinguished from procedural law or policy." Bonfield, *Administrative Procedure Act: Rulemaking*, 60 Iowa L. Rev. 731, 831 (1975).

The fact that the "Statutory Impasse Calendar" may change is irrelevant. The definition of "rule" in Section 17A.2(7) contains no exception for agency statements of general applicability implementing law which are temporary in nature. Accordingly, both the "Calendar" and the "Procedures" must be promulgated as rules.

The second and third questions presented for opinion are whether mediation is a prerequisite to the appointment of a fact-finder and whether mediation, fact-finding or both are condition precedent to the arrangement for arbitration under Section 20.22, Code of Iowa, 1975. The answer to both questions is in the affirmative. However, this assumes that the public employer and the employee organization have failed to agree upon impasse procedures as set forth in Section 20.19 which provides as follows:

"As the first step in the performance of their duty to bargain, the public employer and the employee organization shall endeavor to agree upon impasse procedures. Such agreement shall provide for implementation of these impasse procedures not later than one hundred twenty days prior to the certified budget submission date of the public employer. If the parties fail to agree upon impasse procedures under the provisions of this section, the impasse procedures provided in sections 20.20 to 20.22 shall apply."

Section 20.19 is explicit in providing for an impasse procedure if the parties cannot agree. Mediation, fact-finding and arbitration are forced upon the parties as the impasse procedures. Nor can these mandatory provisions of the statutory impasse procedures be waived by the parties even by agreement. In *Dearborn Fire F.U. Loc. No. 412 v. City of Dearborn*, 201 N.W.2d 650 (Mich. 1972), City of Dearborn argued that the arbitration award was invalid for failure to comply with the procedural provisions of the statute. This argument was advanced despite the fact that it was the defendant City's own noncompliance with the express statutory provision that created the situation. The court stated the following on page 653 of the opinion:

"The statute speaks in mandatory terms, and in these terms sets forth a step-by-step procedure which must be followed in order for the panel to render a record."

In *Dearborn Fire F.U. Local No. 412 v. City of Dearborn, supra*, the Court ruled that even though the City of Dearborn was at fault in failing to perform a statutorily mandated duty, the City was not estopped from asserting a jurisdictional defect. The Court ruled at page 653:

"A lack of jurisdiction being always fatal, the decisions below, in both Dearborn Fire Fighters (the case which raised the issue) and Dearborn Police, should be reversed on this basis."

Under §20.20, Code of Iowa, 1975, the board appoints a mediator, who may not compel the parties to agree. Under §20.21 the board appoints a fact-finder, but only "if the impasse persists ten days after the meidator has been appointed." Thus, the appointment of a mediator is a prerequisite for the appointment of a fact-finder. After conducting a

hearing, the fact-finder makes written findings of fact and recommendations, which are not binding on the parties, but which, after a certain period of time, are made public. Under §20.22, 1975 Code of Iowa, if the parties are still at an impasse after the fact-finder makes his report public, the PER board has the power to order arbitration, which is binding. It is clear from the logical progression of impasse procedures created by Ch. 20 that submission of the matter to the fact-finder must take place before binding arbitration. "Fact-finding is the crucial step in the statutory impasse procedure." Pope, *Iowa Public Employment Relations Act*, 24 Drake L. Rev. 1, 37 (1974). Indeed, under §20.22(3), 1975 Code of Iowa, "submission of the impasse items to the arbitrators shall be limited to those issues that had been considered by the fact-finder and upon which the parties have not reached agreement." Obviously, if the fact-finder has been by-passed, there could not, by reason of §20.22(3), be any submissible issues for binding arbitration.

Accordingly, under the statutory impasse procedure mediation is a condition for fact-finding and both mediation and fact-finding are prerequisites for arbitration.

December 1, 1975

IOWA CONSUMER CREDIT CODE: Cure Notice Requirements, §537.5110, Code of Iowa, 1975. The cure notice requirements in the Iowa Consumer Credit Code are procedural only and therefore are to be applied retroactively to consumer credit transactions entered into before July 1, 1974. (Garrett to Anderson, State Representative, 12-1-75) #75-12-1

Honorable Robert T. Anderson, State Representative: You have asked whether §537.5110, Code of Iowa, 1975, regarding the Notice of Right to Cure applies to consumer credit transactions which were entered into prior to July 1, 1974, when the Iowa Consumer Credit Code took effect. You state as an example a consumer credit transaction which a debtor entered into on August 1, 1970, with a default by the consumer. On September 1, 1975, the creditor commences a suit without sending the debtor a notice of his right to cure. You ask whether the creditor is in violation of §537.5110.

Your question has to do with whether the sections of the Iowa Consumer Credit Code having to do with the notice of right to cure can be applied retroactively or only prospectively. The Iowa Supreme Court has recently discussed the question of whether statutes are to be interpreted as operating both prospectively and retroactively or only prospectively. In respect to a given statute, the Court has said:

"The general rule is that it operates prospectively only unless it clearly appears the legislature intended the law to have retrospective affect. However, we recognize an exception to this rule when dealing with matters which are procedural rather than substantive."

Walker State Bank v. Chipokas, 228 N.W.2d 49 (Iowa 1975) p. 51

Therefore, if the provisions on the cure notice requirement are procedural, they are to be applied retroactively and if they are substantive, then they are to be applied only prospectively. The United States Eighth

Circuit Court of Appeals in discussing the general rule that statutes apply prospectively only has stated:

"But this rule does not apply to statutes which effect merely changes in remedies or modes of procedure for enforcing existing liabilities."

Beatty v. United States, 191 F.2d 317, (8th Cir. 1951) p. 320

We must therefore determine whether the cure notice requirements are procedural or substantive. It is clear that the substantive rights that a creditor has in his contract have to do with what contributes a breach of the contract. There are procedures set up for the use of either party to a contract in enforcing the contracts. The cure notice requirements do not affect a person's rights in the contract but merely have to do with the procedure that the creditor uses in enforcing his rights. The creditor has the same basic cause of action that he had before the credit code was passed, but there is a certain procedure now which must be followed which did not exist previously.

I believe it is very clear that the cure notice requirements are procedural and therefore are to be applied retroactively to transactions which were entered into before July 1, 1974, as well as prospectively.

December 2, 1975

STATE MOTOR VEHICLES: PRIVATE USE; DEPARTMENT OF REVENUE. §§18.117 and 740.20, Code of Iowa, 1975. Department of Revenue fieldmen working in a geographic area of the state from a field office located therein, although occasionally in the office for a number of days, may drive state motor vehicles from their homes to their places of work and return or from their place of work to their hotel or motel after a day's duties are completed. The test is whether the employee is serving a public as well as a private purpose and if he is regularly on call at home or some other place, frequently required to do state work at home or to depart from his home on state business at odd hours, the vehicle may be taken home. The factual determination of whether a motor vehicle is used or operated for private purpose, or properly for a dual purpose, public as well as private, must ordinarily be left to the head of the employee's department. (Turner to Bair, Director, Dept. of Revenue, 12-2-75) #75-12-2

Mr. Gerald D. Bair, Director, Department of Revenue: You have requested an opinion of the Attorney General as to what constitutes "personal private use" of a state-owned motor vehicle within the meaning of §18.117, Code of Iowa, 1975, and state:

"In your January 29, 1975, letter to Mr. McCausland, Director, Department of General Services, you point out that Chapter 740.20, Code of Iowa, prohibits the private use of state property. A portion of your letter addresses the problem of driving to and from work and primarily concerns commuting in the Des Moines area. Sections 18.116, 18.117 and 18.118 discuss violations of using state cars for private purposes. However, neither paragraph defines the term private use.

"The Department of Revenue maintains a number of field offices throughout the state of Iowa for conducting the Department's business with the public. These offices are staffed with a supervisor, auditors and agents and a few of them have an office clerk. The offices are used as a focal point for meetings of area personnel and as a place of contact for the public in the surrounding area.

"None of the offices are large enough so that all personnel in the area have the facilities to work in the office at any one time. The agents

and the auditors may be in the office for a number of days and then work in the surrounding area for the same period of time. They may also be in the office for a short period of time during the day before traveling throughout the area to complete assignments for the balance of the day. They may either return to the office after an assignment at the close of the day or go directly to their home.

"These field offices cannot be corelated with our main office in Des Moines where personnel drive to the office and remain there the full day. Each of them have desks, equipment and other materials which are assigned to them for conducting their duties.

"The fieldmen, in some instances, are driving to and from the area office, on a daily basis, given the above circumstances. Some of them have state cars while others are paid 15 cents a mile for use of their personal cars. The field personnel must maintain a state of mobility whereas they are required to drive in their surrounding area after they arrive at their respective field offices to conduct an audit or to carry out the enforcement provisions of the Department.

"Considering the above information, are the Department of Revenue field personnel utilizing state vehicles for their personal private use as stated in Section 18.117 or are they on official state business once they leave their home to travel to the field office?"

Section 18.117, provides in relevant part:

"No state officer or employee shall use any state-owned motor vehicle for his own personal private use, nor shall he be compensated for driving his own motor vehicle except if such is done on state business with the approval of the state vehicle dispatcher, and in such case he shall receive fifteen cents per mile. . . . "

Section 740.20 provides:

"No public officer, deputy or employee of the state or any governmental subdivision, having charge or custody of any automobile, machinery, equipment, or other property, owned by the state or a governmental subdivision of this state, shall use or operate the same, or permit the same to be used or operated for any private purpose."

The critical words for the purpose of answering your question are, of course, "personal private use" as found in §18.117 and "private purpose" as used in §740.20. While we think these two terms mean essentially the same thing, we have been unable to find any authorities defining either one. But we think the purpose of the legislature in enacting these two statutes is manifest. Plainly what was sought to be prohibited was the use of state-owned motor vehicles for purposes unrelated to the driver's duties as a state officer or employee and from which the state derived no benefit.

However, the construction of any statute must be reasonable and must be sensibly and fairly made with the view of carrying out the obvious intention of the legislature in enacting it. If fairly possible, a construction of a statute resulting in unreasonableness as well as absurd consequences is to be avoided. *Jansen v. Fulton*, Iowa 1968, 162 N.W.2d 438. As you correctly observe, my letter of January 29, 1975, to Stanley McCausland, Director, Department of General Services, was aimed primarily at the problem of persons with office jobs in the Des Moines area driving to and from work in state-owned motor vehicles. Thus I pointed out in that letter, ". . . driving a vehicle between home and work is invariably a private purpose, . . . " assuming the employee had but one

place of work. But the place of one's "work" is not necessarily the same for all public employees and indeed an employee may well work at two or even many different places. In the situation you describe, the place of work for Revenue Department fieldmen, auditors and agents may well be the geographic area of the state in which they operate rather than the field office for that area. The fact that they may occasionally be in the office for a number of days would not change the fact that their place of work is the general area in which they carry out their assignments. We do not think it was the purpose of the statutes to impose undue burdens or hardships on state employees by requiring them to provide their own transportation to the field office in order to pick up the state-owned automobile to travel to their assignments in the field.

Accordingly, it is our opinion that your fieldmen, whose primary place of work is not at a field office, but rather in the area being served by that field office, may drive their state-owned motor vehicles from their homes to their place of work and return, even though in some cases they may be working in the field office for a period of time. Similarly, where they are out of town over night, they may drive their state-owned motor vehicles from their place of work to their hotel or motel after a day's duties are completed.

The test should be whether the employee, in using his vehicle to go to or from a hotel or motel, or even to or from his home, is serving a public as well as a private purpose. If, for example, a state employee is regularly on call at home or other places, frequently required to do state work at home or to depart from his home on state business at odd hours, there is no reason why the vehicle cannot be taken home. Of necessity, and within these guidelines, the factual determination of whether a motor vehicle is being used or operated for private purpose, or properly for a dual purpose, public as well as private, must ordinarily be left to the head of the employee's department.

December 3, 1975

COUNTIES: County Seat. §§340.18, 602.7, Code of Iowa, 1975. (1) Lee county is a dual seat county and its deputy officers are limited by the salary restriction set forth in §340.18. (2) The county must bear the expense of providing court room facilities in the city of Keokuk. (Nolan to Anderson, Lee County Attorney, 12-3-75) #75-12-3

Mr. Barry M. Anderson, Lee County Attorney: This is written in response to your request for an Attorney General's opinion on the following questions:

1. Does Lee County have dual county seats, one at Fort Madison, one at Keokuk?

2. If we are a dual county seat county, is the Board of Supervisors bound by §340.18 to pay first deputies only a maximum of 75% of the principal salary when first deputies of single county seat counties are able to receive up to 80% of the salary?

In answer to your first question, this office, by an opinion dated June 26, 1939, advised that Lee County is the only county in the state having dual county seats. There has been no change in either fact nor legal conclusions since that date. Accordingly, we concur in your view that Lee County is a dual seat county.

Your second question must be answered affirmatively. The language of §340.18 is clear and unequivocal:

"In any county having two county seats and where the district court is held in two places, the first deputy county auditor, county treasurer, county clerk and county recorder shall receive not more than seventy-five percent of the amount of the salary of his principal. Other deputies shall receive between fifty percent and seventy-five percent of the amount of the salaries of their principals as determined by the board of supervisors."

By a subsequent letter dated August 28, 1975, you have submitted a third question as to whether or not the city of Keokuk is responsible to provide expenses for the court room facilities in Keokuk. You have stated that the Lee County Board of Supervisors have now taken some action toward requiring the city of Keokuk to provide and furnish court-room facilities pursuant to Iowa Code Chapter 602.7. Section 602.7 provides:

"Where court is held in any city not the county seat, such city shall provide and furnish the necessary rooms and places therefor free of charge to the county."

As indicated in answer to your first question, it is our opinion that there are two county seats in Lee County. These two county seats have been continuously recognized since February 1, 1848, when the legislative provision for the first judicial district provided that the district court in Lee County shall be held in Fort Madison and Keokuk.

Recognition of the dual county seat situation in Lee County has been accorded by the Iowa Supreme Court. *State v. Turner and Macey*, 114 Iowa 426, 429 (1901). Accordingly, the city of Keokuk would not be liable for the cost of providing courtroom facilities under §602.7, Code of Iowa, 1975.

December 11, 1975

CITIES AND TOWNS: Low-Rent Housing — §§4.7, 4.8, 403A.10 and 403A.27, Code of Iowa, 1975; §§403A.25 and 403A.26, Code of Iowa, 1971; §2, Ch. 1092, Acts of the 64th G.A. (1972); §§3, 4, Ch. 239, Acts of the 63rd G.A. (1969). Section 403A.27, providing for tax payments of at least ten percent of the rents controls and supercedes §403A.10 which provides for no tax liability for low-rent property. (Blumberg to Howe, Adair County Attorney, 12-11-75) #75-12-4

Jay E. Howe, Adair County Attorney: We have received your opinion request regarding Chapter 403A, 1975 Code. You ask for a construction of §403A.27 in light of §403A.10.

Section 403A.10 provides:

"The property acquired or held pursuant to this chapter is declared to be public property used exclusively for essential city, or municipal public and governmental purposes and *such property is hereby declared to be exempt from all taxes and special assessments of the state or of any state public body.* In lieu of taxes on such property a municipality may agree to make payments to the state or a state public body (including itself) as it finds consistent with the maintenance of the low-rent character of housing projects and the achievement of the purpose of this chapter." [Emphasis added]

Section 403A.27 provides:

"Any provision of chapter 403A notwithstanding, no housing project shall be approved unless as a condition at least ten percent of all rents and supplemental rental aid shall be paid annually as taxes to the office of the treasurer in the respective county in which said project is located, except as to the use of dwelling units in existing structures leased from private owners."

As can be seen, the above sections appear to be in conflict.

Section 403A.25 of the 1962 through 1971 Codes mandated that an election be held before any low-rent housing project could proceed. Section 3 of Chapter 239, Acts of the 63rd G.A. added §403A.26 of the Chapter:

"As an optional procedure, a municipality or low-rent housing agency may proceed to exercise the powers granted by this chapter on its own motion without an election, in the manner and subject to the limitations prescribed by this section. Before adoption of the resolution to proceed, the governing body of the municipality shall cause a notice of the proposed resolution to be published at least once in a newspaper of general circulation within the municipality, at least fifteen days prior to the meeting at which it is proposed to take action on the resolution to proceed. The scope of property acquisition for the low-rent housing project or projects shall be specifically limited, by the resolution to proceed, to:

1. The use of dwelling units in existing structures to be leased from private owners.

2. The construction or acquisition of dwelling units which are specifically designed for, and the occupancy of which is to be limited to, persons who are sixty-two years of age or older, or who are physically handicapped, together with their spouses, if married, during the period of being physically handicapped and said project shall not be used for other rental or occupancy except for such limited part or parcel used by the superintendent or manager of such dwelling unit."

Section 4 of Chapter 239 added §403A.27. In a prior opinion, 1970 O.A.G. 351, we held that §4 of Chapter 239 (403A.27) applied only to §3 (403A.26). Thus, at that time there was no conflict. Where an election was held pursuant to §403A.25, §403A.10 applied. Where the alternative method was used (§403A.26), §403A.27 applied.

Section 2 of Chapter 1092, Acts of the 64th G.A. (1972), repealed §§403A.25 and 403A.26. Thus we are left with §403A.27 standing alone since it applied only to §403A.26. The issue here is one of statutory construction.

We are cognizant of the general rules of statutory construction that conflicts between general and special provisions shall be construed so that effect is given to both, but if not possible the special provision prevails, §4.7 of the Code; and, that if statutes are irreconcilable the statute latest in date of enactment by the Legislature prevails, §4.8 of the Code. While §§403A.25 and 403A.26 were in effect, it could be stated that §403A.10 was a general provision while §403A.27 was special in that it was an exception to the general rule of no tax liability. However, with the repeal of §§403A.25 and 403A.26, the general/special argument is not applicable.

If possible, we would give effect to both statutes. However, since one

provides for no tax liability while the other mandates an annual tax payment, we are not able to do so. Section 403A.10 was enacted in 1961 by the 59th G.A., whereas §§403A.27 was enacted in 1969 by the 63rd G.A. Our office has issued a lengthy and persuasive opinion on the interpretation of §§4.7 and 4.8 of the Code. 1974 O.A.G. 119. Suffice it to say that the above opinion held that the statute last enacted (meaning last signed by the Governor) controls. It should also be noted that §4.8 also provides that if provisions of the same Act are irreconcilable, the one listed last in the Act prevails. Accordingly, it appears that §403A.27 should control and supercede §403A.10.

We are faced, however, with the fact that §403A.27 was placed in the Chapter to supplement only §403A.26, while §403A.10 was controlling for the remainder of the Chapter. And, we are faced with the fact that if the Legislature intended to have §403A.27 control for the entire chapter, it merely had to repeal or amend §403A.10 when §§403A.25 and 403A.26 were repealed. But, it did not do so. Section 403A.10 prescribes the property held under the chapter to be public property for a governmental purpose, and so it is and should be. Section 403A.27 appears to be contrary to the purpose of the chapter, which is to provide suitable housing at as low a cost as possible.

We are not faced with a repeal by implication. As pointed out in our prior opinion, repeals by implication are not favored. 1974 O.A.G. 119 at 125. In addition, when §403A.27 was enacted there was not even the slightest intent to have it repeal in any way §403A.10, since it applied only to §403A.26. To say that at the time §403A.27 was enacted the Legislature intended it to repeal §403A.10 sometime in the future is an argument of futility. It was held in *Haulbrich v. Johnson*, 1951 242 Iowa 1236, 50 N.W.2d 19, that an intent to repeal by implication must appear clearly, manifestly and with cogent force. It must be necessary or necessarily follow from the language used. If two constructions are possible, the one that supports the earlier act will be adopted rather than repeal it by implication. The court cited to *McGraw v. Seigal*, 1936, 221 Iowa 127, 132, 263 N.W. 553, which held, citing to *Oliphant v. Hawkinson*, 1922, 192 Iowa 1259, 1263, 183 N.W. 805, 807:

" 'The intention of the lawmakers is the law. This intention is to be gathered from the necessity or reason of the enactment and the meaning of the words, enlarged or restricted according to their real intent. In construing a statute the courts are not confined to the literal meaning of the words. A thing within the intention is regarded within the statute, though not within the letter. A thing within the letter is not within the statute, if not also within the intention. When the intention can be collected from the statute, words may be modified or altered, so as to obviate all inconsistency with such intention. (Hoyne v. Danisch, 264 Ill. 467, 106 N.E. 341.) When great inconvenience or absurd consequences will result from a particular construction, that construction should be avoided, unless the meaning of the legislature be so plain and manifest that avoidance is impossible. (People v. Wren, 4 Scam. (Ill) 269.) The courts are bound to presume that absurd consequences leading to great injustice were not contemplated by the legislature, and a construction should be adopted that it may be reasonable to presume was contemplated.' "

As stated above, we are unable to reconcile these sections since the wording of them are indirect conflict. We cannot place a construction or meaning on either one that would allow both to be effective.

It can be said that the two sections mean that the property is not taxable except as to ten percent of the rents. However, that interpretation can be gleaned just from §403A.27. In addition, §403A.27 provides for the tax payment, "[a]ny provision of Chapter 403A notwithstanding . . ." This phrase certainly includes §403A.10. The argument made earlier that §403A.10 could have been repealed if it was not intended to be operative clearly applies to §403A.27. The Legislature could have repealed or amended §403A.27 at the time it repealed §§403A.25 and 403A.26. The fact that §403A.27 was not repealed does not necessarily lead to the conclusion of an oversight on the part of the Legislature. Thus, there must have been some intent to leave it in.

Although §403A.27 appears to be contrary to the overall purpose of Chapter 403A, and §403A.10 is consistent with such purpose, we must adhere to the general principals set forth above, and to our prior opinion. Accordingly, in light of §4.8 of the Code and the cases and opinions thereunder, we are of the opinion that §403A.27 is controlling.

December 11, 1975

JOINT EXERCISE OF GOVERNMENTAL POWERS; TORT LIABILITY OF GOVERNMENTAL SUBDIVISIONS — Chapters 28E and 613A, Code of Iowa (1975): The members of the board of directors of the Woodbury County Area Solid Waste Agency are protected under the provisions of Chapter 613A. (Kelly to Scheelhaase, State Representative, 12-11-75) #75-12-5

Honorable Lyle Scheelhaase, State Representative: This opinion is in response to your request dated December 8, 1975, regarding the legal liability of the board members of the Woodbury County Area Solid Waste Agency. You specifically asked if such board members are covered for their errors and omissions under Chapter 613A, commonly known as the Municipal Tort Claims Act of the Code of Iowa.

This office determined that the Woodbury County Area Solid Waste Agency, (hereinafter referred to as the "Agency"), was established pursuant to Chapter 28E of the Code, "Joint Exercise of Government Powers". The stated purpose of this Agency ". . . is to provide sanitary disposal projects for the final disposition of solid wastes by the residents of the Governments and thereby protect the citizens of Woodbury County, Iowa, from such hazards to their health, safety, and welfare, that result from the uncontrolled disposal of solid waste." (*See* the Intergovernment Agreement creating the Woodbury County Area Solid Waste Agency.) Additionally, the towns of Anthon, Bronson, Correctionville, Cushing, Danbury, Lawton, Moville, Oto, Pierson, Salix and Sergeant Bluff along with Woodbury County entered into this agreement sometime in 1973. Obviously, the Agency is serving Woodbury County and the various towns included in the Chapter 28E agreement.

The Municipal Tort Claims Act, Chapter 613A, was enacted in 1971 to subject municipalities, (which are defined in the Act as including cities, county, townships, school districts and any other units of local government, see §613A.1(1)), to liability for its torts and those of its employees and agents acting within the scope of their employment or

duties, whether arising out of a governmental or proprietary function, see §613A.2. This Act further provides that the governing body will defend, save harmless and indemnify the employee when sued as a result of his duties of employment. Naturally, there are limitations on this coverage, such as instances of malfeasance in office or willful and unauthorized injury, see §613A.4 and §613A.8. You should further note, that §613A.8 also provides " . . . Any independent or autonomous board or commission of a municipality having authority to disburse funds for a particular municipal function without approval of the governing body shall similarly defend, save harmless and indemnify. . . ." It is our understanding that the funds sustaining this Agency are provided by the participating towns and Woodbury County. Whether this Agency is an autonomous or independent board or commission, and whether the Agency has the authority to disburse funds without prior approval, is not clear from the Chapter 28E agreement.

The thrust of this opinion request is whether this Agency fits into the definition of a "municipality" under Chapter 613A or whether, even though the Agency in itself might not be included within the "municipality" definition, will the board members and other employees be protected under the Act through the participation of the various cities and Woodbury County.

Unfortunately, there has never been a definitive court ruling on this subject but, the Iowa Supreme Court stopped short of stating that autonomous or independent boards in municipalities are suable entities in their own right under Chapter 613A in *City of Spencer v. Hawkeye Security Insurance Co.*, 216 N.W.2d 406 (Iowa 1974). However, this decision does not affect Chapter 613A coverage to county and city employees performing county and city functions. Also, the Supreme Court did not foreclose Chapter 613A coverage to autonomous or independent boards, it merely refused to rule on that issue because it was not required to do so for the disposition of the appeal.

The Woodbury Solid Waste Agency could come within the "municipality" definition under Chapter 613A because of the phrase, ". . . any other unit of local government" language found in §613A.1(1). The Agency is serving the general public in these participating towns and Woodbury County by controlling the disposal of solid waste and could thusly qualify as a unit of local government. Coverage may also be afforded simply under the principle the Agency employees and board members are providing direct services to the participating towns individually and Woodbury County; making the Agency a quasi-city or quasi-county entity.

We have pointed out some procedural problems inherent in Chapter 613A, but it is this Office's opinion that there is definitely coverage for the Agency board members. The confusion arises when a determination has to be made which entity in the §613A.1(1) "municipality" definition this Agency fits under. This opinion should not be construed to mean that all quasi-public agencies performing services for a community or county will come within the protective language of Chapter 613A. In the situation at hand, we have a public agency founded under our State's intergovernmental cooperation statute, Chapter 28E, comprised of a

county and a number of towns within the boundaries of that county. When Chapter 28E was drafted the Legislature intended that any powers, privileges and authority that a political subdivision may exercise alone may also be exercised jointly, §28E.3. It seems inconceivable that the Legislature would require a political subdivision to waive the protections in Chapter 613A merely because one subdivision entered into a cooperative agreement with another subdivision to provide services to the general public.

December 11, 1975

STATE OFFICERS AND DEPARTMENTS: City Development Board — Annexations — §368.7, Code of Iowa, 1975; §15, S.F. 526, Acts of the 66th G.A. (1975). The City Development Board need not approve voluntary annexations for areas outside of urbanized areas. Board approval is required for areas within certain urbanized areas. (Blumberg to Dunn, Chairman, City Development Board, 12-11-75) #75-12-6

Michael V. Dunn, Chairman, City Development Board: We are in receipt of your opinion request of November 6, 1975, regarding §368.7 of the Code. You specifically asked:

"The Board must specifically ascertain whether action on their part is required for:

"A. A voluntary annexation if the territory is within the urbanized area of a city other than the city to which the request for annexation is directed.

"B. All voluntary annexations which have been approved by resolution of a city council and filed with the Board."

Section 368.7, 1975 Code, as amended by §15, S.F. 526, Acts of the 66th G.A. (1975) reads:

"Annexation by petition. All of the owners of land in a territory adjoining a city may apply in writing to the council of the adjoining city requesting annexation of the territory. Territory comprising railway right of way may be included in the application without the consent of the railway if a copy of the application is mailed by certified mail to the owner of the right of way, at least ten days prior to the filing of the application with the city council. The application must contain a map of the territory showing its location in relationship to the city.

"An application for annexation under this section must be approved by resolution of the council which receives the application. If the territory is within the urbanized area of a city other than the city to which the request for annexation is directed, the application must *also* be approved by the board. Upon receiving the required approval, the council shall file a copy of the map and resolution with the board. The annexation is completed when the board has filed copies of the applicable portions of the proceedings as required in section three hundred sixty-eight point twenty (368.20), subsection two (2) of the Code." [Emphasis added]

The first paragraph is clear, and provides that voluntary annexations (those sought by all the property owners in the affected area) must be sought from the applicable city council. Generally, council approval is all that is required. However, pursuant to the second paragraph, if the area to be annexed is within the urbanized area of a city other than

the city to which annexation is sought, the Board must also approve the annexation. Thus, the answer to your questions are as follows:

1. If the area to be annexed is within the urbanized area of a city other than the city to which annexation is sought, the Board must approve the annexation in addition to the city council.

2. If the area to be annexed is not within such an urbanized area, Board approval is not necessary.

Although your request does not seek an interpretation of all parts of the statute, we should point out that the second paragraph is not clear. It is unclear whose approval is referred to in the third sentence of that paragraph. Also, it is not clear whether the Board must make filings pursuant to §368.20 on all voluntary annexations, or only on those which it acts upon. We are not going to interpret these since you did not so request. We only mention this for your information in considering legislative action.

December 11, 1975

CITIES AND TOWNS: Change in Terms of Council — §§4.7, 4.8, 362.4, 372.13, 376.2, Code of Iowa, 1975; §§2, 44, Ch. 81, Acts of the 66th G.A. (1975). There is no time limit for filing a petition under §376.2. Such a petition may be filed with the clerk, mayor or council. After the initial election changing the terms, all terms shall be four years. The special election under §376.2 may be held at the same time as a general or regular city election. The thirty day time period may not be extended, but the special election can be held in less than thirty days. The majority approval required is a simple majority. If the measure is defeated it may not be resubmitted for four years. A mayor's term need not be changed along with the rest of the council. (Blumberg to Griffee, State Representative, 12-11-75) #75-12-7

Honorable William F. Griffee, State Representative: We have received your opinion request of November 7, 1975, regarding a special election under §376.2, Code of Iowa, 1975. The city in question has a six member council consisting of two councilmen at large and four from wards. The terms of all and the mayor are two years. A move is under way to change the terms to four years and be staggered. Based upon this you ask the following questions:

"1. Certain people in the community have already circulated and obtained the petitions as contemplated by Iowa Code Section 376.2 and they have in their possession this signed petition with far more than the necessary number of signatures, but the petition is not yet filed. Is there anything in Iowa law that limits the length of time such petitions are effective? In other words, how long can these proponents under Iowa Code Section 376.2 hold the petition without filing them as contemplated by Code Section 376.2?

"2. If such petitions are held for a period of a few months before filing, and some of the people who have signed the petitions have died or moved out of the jurisdiction but the petitions still contain far more signatures of valid voters than are necessary, is the validity of the petition or petitions affected by the death or moving away of a few of the signers?

"3. Code Section 376.2 states: 'Upon receipt of a valid petition . . . '. By whom is this receipt contemplated in the Code Section in question? Has such petition been validly received by the city upon filing with the

City Clerk, or must it be received by the City Council in official session, or can it be received by the mayor outside of official session, or must it be received by the mayor in official session? My question is which of the above ways constitutes proper receipt as contemplated by Code Section 376.2?

"4. Clearly, under the terms of the statute, if the special election is held and the voters do approve the changed term, under the situation of the city in question, the council members seeking an at large seat receiving the most votes would receive the four year term and the council member running at large receiving the second most votes would receive the two year term. The winners in Wards I and III would receive four year terms and the council election winners in Wards II and IV would receive two year terms. Does the law provide with sufficient specificity that after the passage of two years and after the next city election, the at large winner, who previously had a two year term, and the council winners in Wards II and IV would also then receive four year terms, so that the terms clearly are staggered?

"5. Code Section 376.2 speaks in numerous places of a 'special city election.' Must the election under Code Section 376.2 to change the term of council members be a special city election or can it be part of a regular city election, if the proper time requirements are met? Secondly, could it be part of a regular county or State-wide election, such as the elections held in even-numbered years in Iowa to elect various State officers, Congressmen, and local candidates?

"6. Section 376.2 states that the council shall submit the question at a special city election to be held within thirty days of receipt of the petition. Does the County Commissioner of Elections have the authority, under Iowa law, to waive the thirty day requirement and allow the elections to be held a period of time longer than thirty days after the filing of the receipt of the petition? If the County Commissioner of Elections has no such authority, does the council or the mayor have any authority to extend the period of time for the elections? Can the County Commissioner of Elections or the city officials shorten the thirty day period in view of the use of the word 'within' thirty days?

"7. Section 376.2 states: 'If the majority of the persons voting at the special election . . . '. Does the use of the phrase 'majority of the persons voting' mean a simple majority?

"8. At one place in Section 376.2, the law says: 'Upon receipt of a valid petition requesting that the term of an elective office be changed, the *council* shall submit the question . . . ', and at another place, the same statute said: 'If the majority does not approve the changed term, the *mayor* shall not submit the same proposal to the voters within the next four years.' (Emphasis added) Assume that the election is held and a majority of the voters do not approve the changed term. Suppose two years later, another petition containing the requisite number of signatures is filed with the city, in view of the fact that the affirmative act of submitting the question to the voters is placed upon the council under Section 376.2, and the negative act of not submitting same for four years if it loses is placed upon the mayor, can the council submit the question to the voters during a period of time shorter than the four year period during which the mayor is barred from submitting the proposal?

"9. Sub-section 1 of Section 376.2 says: 'Elected for four year *terms*,' and 'Elected for two year *terms*'. Does the use of the word 'terms' in its plural form contradict the indication that those receiving a two year term in the first election subsequently run for a four year term in the next succeeding election or is the use of the plural 'terms' only because several persons could be elected the first time to various council seats each to a respective two year term seat, as opposed to those who receive four year term seats?

"10. In the city in question, the mayor also currently receives a two year term. Must the length of the term for the mayor also be submitted for change to a four year term under the requirements of Code Section 376.2? If such need not be submitted, may such be submitted to the voters in conjunction with the special election contemplated by Section 376.2?"

The answers to your questions may not be in the same order that they are asked.

Section 376.2 provides in pertinent part:

"Except as other wise provided by state law or the city charter, terms for elective offices are two years. However, the term of an elective office may be changed to two or four years by petition and election. Upon receipt of a valid petition as defined in section 362.4, requesting that the term of an elective office be changed, the council shall submit the question at a special city election to be held within thirty days. If a majority of the persons voting at the special election approves the changed term, it becomes effective at the beginning of the term following the next regular city election. If a majority does not approve the changed term, the mayor shall not submit the same proposal to the voters within the next four years.

"At the first regular city election after the terms of councilmen are changed to four years, terms shall be staggered as follows:

1. If an even number of councilmen are elected at large, the half of the elected councilmen who receive the highest number of votes are elected for four-year terms. The remainder are elected for two-year terms.

2. If an odd number of councilmen are elected at large, the majority of the elected councilmen who receive the highest number of votes are elected for four-year terms. The remainder are elected for two-year terms.

3. In case of a tie the mayor and clerk shall determine by lot which councilmen are elected for four-year terms.

4. If the councilmen are elected from wards, the councilmen elected from the odd-numbered wards are elected for four-year terms and the councilmen elected from even-numbered wards are elected for two-year terms."

This section sets forth the manner in which changes in terms for elected officials are made. There is no indication in this section, nor in any other section, of a time limit on such a petition. Other statutes have time limits on the submission of petitions, mainly those for nominations of persons for office. Since time limits are specifically set forth in some statutes, but not in §376.2, it can be said that the Legislature did not intend that a time limit be imposed. A question may exist if a petition is signed during one term of office for council members, and submitted at a later time when there is a new council. However, your facts do not show such a situation, nor do you ask such a question. In the absence of any specific limitation, we cannot say that a petition must be filed within a specified time.

There is no statute which specifically addresses itself to your second question. However, since you stated that there are sufficient signatures without those of people who may have died or moved, we need not answer this question. Since there are sufficient signatures anyway, the petition would still be valid.

Section 376.2 does not specify upon whom the petition is filed. Nor does §362.4 of the Code. Section 372.13 of the Code indicates that the main duty of the Clerk is to maintain city records. Accepting petitions can fall within this duty. In addition, that section allows the council to prescribe other duties pursuant to state or city law. Thus, the council can require the clerk to accept petitions. This does not mean, however, that the clerk is the only official upon whom a petition may be served. In the absence of any statement that such a petition may only be served on the clerk, we cannot say that service on the council or mayor is not valid. This is especially true since the council must call the election. Therefore, service of the petition on the clerk, council or mayor should constitute valid receipt. Although there is no indication that such service must be made during normal business hours or while the council is in session, we feel that such is the proper way of serving. The clerk has regular business hours and the petition should be filed during those times. In the same vein, if service is made on the council or mayor, it should be during official session.

Section 376.2 provides for a special election to be held within thirty days of receipt of the petition. There is nothing in this section or any other section which states that this period can be extended. See, however, §44, Ch. 81, Acts of the 66th G.A. (1975), which amends Chapter 47 of the Code. That amendment provides that the governing body of a political subdivision authorizing a special election, where §39.2 of the Code is applicable, shall give written notice of the proposed date of the special election to the commissioner of elections at least thirty days prior to the election. Section 39.2, as amended by §2, Ch. 81, Acts of the 66th G.A. (1975) provides that all special elections authorized or required by law shall be held on Tuesday, but not on the first or second Tuesday preceding and following primary and general elections. It is possible, pursuant to the above two sections, that the thirty day requirement of §376.2 may not be met. Accordingly, §376.2 is in conflict with §§44, Ch. 81, 66th G.A. and 39.2.

Section 4.7 of the Code provides that if a general provision conflicts with a special provision, effect should be given to both. If the conflict is irreconcilable, the special provision prevails. Section 4.8 provides that if statutes are irreconcilable, the statute latest in date of enactment prevails. Section 44, Ch. 81, 66th G.A., is general in that it refers to the general category of special elections. Section 376.2 is special because it refers only to a special election for terms of councilmen. Thus, §376.2 prevails as an exception to §44, Ch. 81, 66th G.A. This does not mean that notice need not be given to a commissioner of elections, but rather that said notice need not be thirty days prior to the proposed date. A similar result is reached when §376.2 is compared to §39.2, as amended by §2, Ch. 81, 66th G.A. The fact that a special election must be held on Tuesday does not necessarily constitute a conflict. Although if that requirement does so constitute a conflict, the phrase "unless the applicable law otherwise requires" within the amendment can be employed to require that the special election in question be held on another day. The real conflict may come from the fact that no special election may be held two weeks before or after a general or primary election. In the

event the thirty day requirement results in the election falling during this time period, §376.2 should prevail, allowing the election to be held within that two week period.

Special elections may be held on the same day as a general election. There is nothing in the Code that prohibits this. The fact that a proposition is submitted at a general election does not change the election on that question from a special to a general one. 29 C.J.S. *Elections* §1(3) p. 17. It is a special election because it does not fall within the definitions of the general or regular elections. Thus, a special election to change the terms of councilmen may be held at the same time as a general or regular city election if the time limit is met.

Section 376.2 provides for the first election on the new terms and sets forth the requirement that some terms shall be four years and the rest two years. The reasoning behind this is obvious, since this ensures staggered terms. This section, however, does not speak of any subsequent elections. However, it need not do so. The election to change the terms to four years means that nothing need be done to keep the terms at four years. All §376.2 does is to begin the staggering of the terms. Four year terms after the initial election will automatically be staggered. If, for example, those with two year terms continued to have two year terms, eventually all councilmen would be up for election at the same time. Such would defeat the purpose of §376.2 and the mandate of the people. Thus, after the initial election, all terms must be four years.

With reference to the prior discussion of special versus general provisions, the county commissioner may not extend the thirty day period. Nor may the mayor or council. However, since §376.2 requires the special election *within* thirty days, the election may be held at a time less than thirty days.

The section also refers to a majority of persons approving the measure. The word "majority" means the greater number, more than half of the whole number. *Mills v. Hallgren*, 1910, 146 Iowa 215, 124 N.W. 1077. See also, Black's Law Dictionary 1107 (4th ed. 1951). Thus, in the absence of anything to the contrary, "majority" in §376.2 means a simple majority.

In one part of §376.2 it is provided that the council shall submit the question at an election. Later on it is stated that if the measure is defeated the mayor shall not resubmit it for four years. You ask whether the council may resubmit the question within four years. It is unfortunate that the Legislature did not use the same word (either "mayor" or "council") throughout. However, this does not matter. The legislative intent is clear and unambiguous: If the measure is defeated, it shall not be resubmitted within four years. The use of the words "council" or "mayor" do not alter this intent.

Section 376.2 speaks of four year and two year "terms." The plural, "terms", is used to be grammatically correct since more than one person may have a four year or two year term. It is presumed that the Legislature knows rules of grammar. *Kizer v. Livingston County Board of Commissioners*, 1972, 38 Mich. App. 239, 195 N.W.2d 884.

Finally, you ask whether the mayor's term must be submitted for change along with the council's. Section 376.2 provides that "the term of *an* elective office may be changed . . . " [Emphasis added] Reference is made to the singular (an elective office), rather than the plural. Thus, the elective office of mayor may, but need not, be changed. This is true even though the terms for the council members are changed.

In summary, we are of the following opinions in response to your questions:

1. There is no statutory time limit for submission of a petition within §376.2.

2. If there are more than a sufficient number of signatures on such a petition, the fact that someone who signed it may die or move before the petition is filed will not necessarily invalidate the petition.

3. Such a petition may be received by the clerk, mayor or council.

4. After the initial election where some terms are for two years, all terms at subsequent elections shall be four years.

5. The special election may be held at the same time as a general or regular city election.

6. The county commissioner of elections, mayor or council may not extend the thirty day period for the election. The election may be held in less than thirty days.

7. The majority approval required at the election is a simple majority.

8. If the measure is defeated, it may not be resubmitted to the voters within four years.

9. The word "terms" within §376.2 is plural for grammatical reasons.

10. A mayor's term need not be changed along with the change of terms for the council.

December 11, 1975

COUNTY OFFICERS: Deputies — §§340.4, 602.34, Code of Iowa, 1975. Supervisors have no discretionary authority to approve a salary increase for deputies where such increase exceeds the limitation imposed by §340.4, Code of Iowa, 1975. (Nolan to Smith, Assistant Clinton County Attorney, 12-11-75) #75-12-8

Mr. Lauren Ashley Smith, Assistant Clinton County Attorney: We have your letter requesting an opinion on the matter of the legality of a proposed raise for the deputy clerk of court. The essence of the problem is stated in your letter as follows:

". . . we have a worthy former clerk of the former Clinton Municipal Court, then an elected official, who became a deputy of the District Court clerk here under the Uniform Court System.

"When he thus became a deputy of the District Clerk July 1, 1973, he was receiving more salary than permitted by Section 340.4 of the Code.

"However, Section 602.34 of the Code, *at that time*, covered this and even provided that the District Court Clerk could receive a raise, if necessary to put him $200.00 a year ahead of his new deputy.

"Two things have since happened. One is that June 30, 1975, under Section 602.34 the period ended when new deputies thus acquired were required to be assigned their former duties (in substance).

"That has no Clinton application except showing legislative intent for the end of the transition period.

"The other is that the Code editor considered the special salary provision of Section 602.34 so much a part of the transition that he editorially omitted it from the 1975 Code version of that section.

"This fine deputy clerk of ours now receives salary in excess of the limits under Section 340.4, but not in excess of the limits provided transitionally in Section 602.34.

"The question now is, can he as of July 1, 1975, receive a further raise, which would also be in excess of the Section 340.4 limits, or must he sit back and wait for inflation and salary increases of the District Court Clerk to increase until being without a raise he finds Section 602.34 has caught up with his situation whereupon thereafter he can get a raise?

"In other words, can he continue to get raises while he continues after June 30, 1975, to already be in excess of the Section 340.4 total?

"It seems to this writer the answer is negative. As a matter of fact it is not clear to me that after June 30, 1975, he can continue to exceed Section 340.4 at all, although that is not presently the question. * * *"

It is the opinion of this office that under §340.4 of the Code, the supervisors have no discretionary authority to approve the salary increase for the deputy where such amount would exceed 80% of the annual salary of the deputy's principal. 1974 O.A.G. 510.

In a 1951 opinion at 1952 O.A.G. 37, 38, this office advised:

"In exercising its power of fixing compensation, the Board should bear in mind that in so far as deputies are concerned, the compensation attaches to the office and not to the person who occupies the office."

Under House File 802, enacted by the 66th General Assembly, 1975 Session, a compensation board is created (§6). This board is to submit its recommended compensation schedule to the board of supervisors in December of 1975 and each year thereafter. Under the new legislation, the board may not exceed the recommended compensation schedule. Section 12 of the same act provided for a salary increase of $1,500 for the clerk of the district court, effective July 1, 1975, over and above the salary existing on June 30, 1975. This provision is an interim provision to remain in effect "until modified by the county compensation board as provided". It is my understanding from a telephone conversation with you that this $1,500 increase does not provide sufficient margin for the deputies salary limitations imposed by §340.4. However, in view of the language of §340.4, a deputy's salary is limited to the statutory 80% of his principal's salary until July 1, 1976, at which time the salary recommendations submitted by the county compensation board become the upper limit.

December 17, 1975

CITIES AND TOWNS: Conflict of Interest — Park Board — §362.5, Code of Iowa, 1975. A member of a city park board may enter into contracts with the city if §362.5(7), (10) are applicable. (Blumberg to Locher, Jones County Attorney, 12-17-75) #75-12-9

Stephen E. Locher, Jones County Attorney: We have received your opinion request of November 25, 1975, regarding a possible conflict of interest. You indicate that a newly elected member of the park board, who will take office on January 1, 1976, is a contractor in the city and has done work for the city in the past. You ask whether it would be a conflict for him to continue such work after he takes office, indicating that the population of the city is 3600.

Section 362.5, 1975 Code, provides as follows:

" 'Contract' defined. When used in this section, 'contract' means any claim, acccount, or demand against or agreement with a city, express or implied.

"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 his city. A contract entered into in violation of this section is void. The provisions of this section do not apply to:

"1. The payment of lawful compensation of a city officer or employee holding more than one city office or position, the holding of which is not incompatible with another public office or is not prohibited by law.

"2. The designation of a bank or trust company as a depository, paying agent, or for investment of funds.

"3. An employee of a bank or trust company, who serves as treasurer of a city.

"4. Contracts made by a city of less than three thousand population, upon competitive bid in writing, publicly invited and opened.

"5. Contracts in which a city officer or employee has an interest solely by reason of employment, or a stock interest of the kind described in subsection 9, or both, if the contracts are made by competitive bid, publicly invited and opened, and if the remuneration of employment will not be directly affected as a result of the contract and the duties of employment do not directly involve the procurement or preparation of any part of the contract. The competitive bid requirement of this subsection shall not be required for any contract for professional services not customarily awarded by competitive bid.

"6. The designation of an official newspaper.

"7. A contract in which a city officer or employee has an interest if the contract was made before the time he was elected or appointed, but the contract may not be renewed.

"8. Contracts with volunteer firemen or civil defense volunteers.

"9. A contract with a corporation in which a city officer or employee has an interest by reason of stockholdings when less than five percent of the outstanding stock of the corporation is owned or controlled directly or indirectly by the officer or employee or the spouse or immediate family of such officer or employee.

"10. A contract made by competitive bid, publicly invited and opened, in which a member of a city board of trustees, commission, or administrative agency has an interest if he is not authorized by law to participate in the awarding of the contract. The competitive bid requirement of this subsection does not apply to any contract for professional services not customarily awarded by competitive bid."

As can be seen, the general rule is that no city officer or employee may have any interest in a contract, job, material or the like and the profits

thereof with the city. There are ten specific exceptions. Subsections 1, 2, 3, 4, 5, 6, 8 and 9 are not applicable to this fact situation. Subsection 7 would apply if the person in question is currently engaged in work for the city and such work will continue beyond the time he takes office. However, your facts do not indicate this.

It is axiomatic that a member of a park board would be an "officer" within §362.5. See, e.g. 1966 O.A.G. 6. Thus, the prohibition of that section applies unless one of the listed exceptions is applicable. The purpose of this section is to protect the public from public officers who would profit personally from their place of advantage in government. *Leffingwell v. City of Lake City*, 1965, 257 Iowa 1022, 135 N.W.2d 536. The Legislature obviously feels that the public trust is not violated pursuant to facts that fall within the various subsections, specifically subsection 10. We are not unaware of some of the hardships placed upon some individuals and smaller cities by this statute. See, 1966 O.A.G. 6, 7. If the person in question is able to enter into contracts with the city, it could only be through subsection 10. Therefore, if this person enters into contracts with the city upon competitive bidding, publicly invited and open, and is not authorized to participate in the awarding of the contract, he would not be in violation of this section.

December 5, 1975

STATE OFFICERS AND DEPARTMENTS: GENERAL ASSEMBLY: Police Communications Review Committee. §§1, 21 and 22 of Article III, Constitution of Iowa; §750.8, Code of Iowa, 1975. Members of the General Assembly may constitutionally serve as members of the Police Communications Review Committee. (Haesemeyer to Gallagher and Winkelman, State Senators, 12-5-75) #75-12-10

The Honorable James V. Gallagher and the Honorable William P. Winkelman, State Senators: Reference is made to your request for an opinion of the Attorney General in which you state:

"This letter is in regard to your request that I ask for an Attorney General's opinion as to whether the Police Communications Review Committee remains exempt from the recent opinion by the Attorney General about service by legislators on commissions.

"I have informed the other members of the committee that we may remain as members until we have had an Attorney General's opinion to the contrary, as per your instructions."

The opinion of the Attorney General about service by legislators on commissions to which you refer is an opinion by Attorney General Richard C. Turner to Senator William Plymat dated January 16, 1975. In that opinion, the Attorney General concluded that because of the provisions of §§1, 21 and 22 of Article III of the Constitution of Iowa, a member of the general assembly could not constitutionally serve on a state board or commission where membership on such commission constituted another public office and there was a per diem attached to such office. Article III, §1 is, of course, the constitutional provision on the separation of powers. Article III, §§21 and 22 provide respectively:

"No senator or representative shall, during the time for which he shall have had been elected, be appointed to any civil office of profit under this State, which shall have been created, or the emoluments of which

shall have been increased during such term, except such offices as may be filled by elections by the people.

"No person holding any lucrative office under the United States, or this State, or any other power, shall be eligible to hold a seat in the General Assembly: but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative."

The Police Communications Review Commission was established by §5 of Chapter 104, 65th G.A., First Session (1973) and is now found in §750.8, Code of Iowa, 1975. Such §750.8 provides:

"There is established a police communications review committee which shall consist of three members of the senate appointed by the president of the senate and three members of the house of representatives appointed by the speaker of the house. The committee shall select a chairman and shall meet at the call of the chairman.

"Members shall be appointed prior to the adjournment of the first regular session of each general assembly and shall serve for terms ending upon the convening of the following general assembly or when their successors are appointed. Vacancies shall be filled in the same manner as original appointments and shall be for the remainder of the unexpired term of the vacancy. The members of the committee shall be reimbursed for actual and necessary expenses incurred in the performance of their duties and shall receive forty dollars for each day in which engaged in the performance of such duties. However, such per diem compensation and expenses shall not be paid when the general assembly is actually in session at the seat of government. Expenses and per diem shall be paid from funds appropriated pursuant to section 2.12.

"The police communications review committee shall meet periodically with representatives of the department of public safety and shall review proposed changes of the communications operating procedures of the department which affect operating procedures of local law enforcement agencies."

In his January 16, 1975, opinion, the Attorney General pointed out that it is only the holding of dual *offices* which is prohibited and that under the applicable case law, all of the following five elements must be present to make a public employment a public office:

"(1) the position must be created by the constitution or legislature; (2) a portion of the sovereign power of government must be delegated to that position; (3) the duties and powers must be defined directly or impliedly by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law; and (5) the position must have some permanency and continuity and not be only temporary and occasional."

See also, O.A.G. Turner to Peterson, 9-12-75.

As is clear from the language of §750.8, the only function of the police communications review committee is to meet periodically with representatives of the Department of Public Safety to review proposed changes of communications operating procedures of the department which affect operating procedures of local law enforcement agencies. O.A.G., Turner to Plymat, 1-16-75, says on page 8 that if a commissions only duty is to make recommendations, or to ascertain facts ancillary to legislation and within the law making power, service by legislators on

commissions for that purpose alone may not violate separation of powers (citing *Parker v. Riley*, 1941, 18 Cal.2d 83, 115 P.2d 873).

Here, this committee has no authority to veto or override proposed changes and is not even given the authority to make recommendations with respect to the same. Under these circumstances, we do not think that the committee has "a portion of the sovereign power of government delegated to it" and therefore, it is not a public office. This being so, the prohibitions of Article III, §§21 and 22 do not apply and members of the general assembly may remain as members of the police communications review committee.

December 5, 1975

CORPORATIONS: Corporation as incorporator. §§4.1(13), 491.1, Code of Iowa, 1975. A corporation may be an incorporator of a chapter 491 corporation. (Haesemeyer to Galvin, Director, Corporations Division, Secretary of State, 12-5-75) #75-12-11

Mr. John D. Galvin, Director, Corporation Division, Secretary of State:
Reference is made to your letter of December 4, 1975, in which you state:

"Attorney General's opinion 7.1 on page 68 of the 1958 report of Attorney General, issued January 22, 1958, determined that a corporation was not a person within the meaning of Section 491.1 of the Code and therefore could not be an incorporator of an Iowa corporation under Ch. 491.

"This opinion came to the attention of the undersigned by reason of a pending attempt on the part of a Delaware corporation to be the incorporator of a Chapter 491 corporation, drafted to be set up as a life insurance company under Chapter 508 of the Code. I have read the above opinion thoroughly and I am not certain that I agree with the conclusion reached, even under the status of the law at that time. However, I do feel that this opinion should be reviewed and updated by reason of the passage of time and changes which have occurred in Iowa law during the period from 1958 to date.

"As a matter of background, you should be aware that since the advent of the Iowa Business Corporation Act, Chapter 496A, old Chapter 491 can be used only by those corporations that existed under it at the time the Iowa Business Corporation Act came into being in the year 1959. With certain noted exceptions, Chapter 491 can no longer be used for the formation of any Iowa Business Corporation. Section 496A.142, Subsection 1 and the second sentence of Section 491.1 provide respectively as follows:

'Except for this subsection, this chapter shall not apply to or affect corporations subject to the provisions of chapters 174, 196, 482, 497, 498, 499, 499A, 504, 506, 508, 510, 512, 514, 515, 518A, 519, 533, 534 of the Code and state banks organized under Chapter 524. Such corporations shall continue to be governed by all laws of this state heretofore applicable thereto and as the same may hereafter be amended. This chapter shall not be construed as in derogation of or as a limitation on the powers to which such corporations may be entitled. * * *

'All domestic corporations shall be organized* under Chapter 496A only, except for corporations which are to become subject to the provisions of one or more of the following chapters: 174, 176, 482, 499, 499A, 504A, 506, 508, 510, 512, 514, 515, 515A, 518, 518A, 519, 524, 533, and 34. (C51, S673; R60, S1150; C73, S1058, C24, 27, 31, 35, 39, S8339; C46, 50, 54, 58, 62, 66, 71, 73, S491) *After July 1, 1971.'

"From the above, one can perceive that domestic corporations which are formed for insurance purposes are among those exceptions

which must use the vehicle of Chapter 491 as their mode of incorporation to bring them into existence under the various insurance chapters. The scope and extent of Chapter 491 has been greatly limited by those provisions referred to.

"The conclusion reached in the 1958 Attorney General's opinion appears to a great degree to have been predicated on the then wording of Section 4.1(13) of the Iowa Code. That section then provided:

'Person. The word "person" may be extended to bodies corporate.'

"One, I suppose, could have concluded as did the office of the Attorney General in 1958, that since the word 'may' was used, the word 'person' did not necessarily have to include bodies corporate and the opinion so held. That same Section (4.1 13) now reads:

' "Person." Unless otherwise provided by law "person" means individual, *corporation,* government or governmental subdivision or agency, business trusts, estate, trusts, partnership or association or any other legal entity.'

"Consequently, when we now proceed to Section 491.1 of the present Code, it appears to be very *patent* that a corporation may be an incorporator of a corporation under these circumstances where Chapter 491 can still be utilized, such as for insurance purposes per the matter now pending.

"Further evidence of present day thinking and legislative intent in a similar situation under another statute, Chapter 496A can be gleaned from perusing sections 48 of that chapter, viewed in the light of Section 496A.2. Those sections are worded respectively as follows:

'One or more persons as defined in this chapter having capacity to contract, may act as incorporators of a corporation by signing, acknowledging and delivering to the secretary of state articles of incorporation for such corporation. (C62, 66, 71, 73 S496A.48).

' "Person" means an individual, a corporation (domestic or foreign) a partnership, an association, a trust or a fiduciary. (C62, 66, 71, 73 S496A.2)'

"Based on these sections, it is an everyday practice for other corporations to be the incorpoators of new domestic entities under Chapter 496A. I do not, for one moment, infer that the definitions in Chapter 496A are controlling on a question arising under Chapter 491, but I cite the above merely as a parallel of legislative and legal thinking in the field.

"Section 521A.2, another example of similar legislative bent contains the following provision:

'Any domestic insurer, either by itself or in cooperation with one or more persons, subject to the limitations set forth herein or elsewhere in this chapter may organize or acquire one or more subsidiaries engaged or registered to engage in one or more of the following business or activities.'

"One can only conclude from the above that the legislature must have intended that a corporate parent could and would be the incorporator of its own subsidiary corporations, which must of necessity, be subsidiaries formed under Chapter 491.

"We are holding the matter at issue in this office pending your opinion and while not wishing to impinge on your office time table we have been made acutely aware of the fact that by reason of some contractural matters, time is of the essence to the question we herewith place before you:

"CAN A CORPORATION BE AN INCORPORATOR OF A CHAPTER 491 CORPORATION UNDER THE PRESENT STATUTES AND LAWS OF THE STATE OF IOWA?"

We concur in your careful and thoughtful analysis of the present day state of the law relative to whether or not a corporation may be an incorporator of a Chapter 491 corporation and it is our opinion that in view of the amendment to §4.1(13), Code of Iowa, 1975, and for the other reasons stated by you, a corporation is no longer prohibited from being an incorporator of a Chapter 491 corporation.

December 17, 1975

CORPORATIONS: Articles of Incorporation; Amendment to Change Chapter Under Which Incorporated. Chapters 491 and 499, Code of Iowa, 1975. A corporation incorporated under Chapter 491 may not by amendment to its articles of incorporation place itself under Chapter 499. (Haesemeyer to Galvin, Director, Corporations Division, Secretary of State, 12-17-75) #75-12-12

Mr. John D. Galvin, Director, Corporations Division, Office of the Secretary of State: You have requested an opinion of the Attorney General on the question of whether or not a corporation which exists under Chapter 491, Code of Iowa, 1975, as a business corporation, may, by amendment of its articles of incorporation, come out from under the purview of that chapter and become a cooperative association under Chapter 499 of the Code.

I understand that everything in the Chapter 491 capital structure is such that it would meet the requirements of Chapter 499. Nevertheless, it is our opinion that in the absence of some specific statutory authorization for a corporation to change the chapter under which it is incorporated by amendment of its articles, such a procedure may not be approved. While we have been unable to find any cases or other authorities on the precise question you raise, there does seem to be some authority for the proposition that the power of a corporation to amend its articles or certificates of incorporation does not include the power to change the nature, purpose, and character of the corporation and that after the amending process has been completed, the corporation must still be of the same kind as it was before the amendment. See e.g., *Sherman v. Pepin Pickling Corp.*, 230 Minn. 87, 41 N.W.2d 571. A corporation organized for pecuniary profit under Chapter 491 certainly is not of the same kind as a cooperative association organized under Chapter 499.

December 30, 1975

CITIES AND TOWNS: Municipal Building Codes — §103A.20(2), Code of Iowa, 1975. A municipality's building code is applicable to county buildings within its city limit, except as to §103A.20, and a county must pay the building permit fees. (Blumberg to Wood, Hamilton County Attorney, 12-30-75) #75-12-13

Carroll Wood, Hamilton County Attorney: We have received your opinion request of September 16, 1975. The Board of Supervisors has let contracts to construct a new County Court House within the city limits of Webster City. The city has adopted a Building Code, part of which you attached to your request. You specifically asked:

"1. Are buildings or structures to be constructed and owned by a county under the control of the County Board of Supervisors located

within the confines of a city subject to a building code adopted by that City?

"2. Does Hamilton County or the Hamilton County Board of Supervisors come within the scope of the building code, including the provisions for the payment of building permit fees, adopted by the City of Webster City, when constructing a county court house within the physical boundaries of said City?

"3. In the event your answer to either question 1 or question 2 herein is in the negative, is a building contractor or an architect under contract with the Hamilton County Board of Supervisors for the construction of a new Hamilton County Court House within the physical boundaries of the City of Webster City required to pay a building permit fee for the purpose of constructing said County court house in accordance with the building code adopted by the city of Webster City?"

Section 505.6(A) of the Webster City Building Code provides in pertinent part:

"1. No wall, structure, building or part thereof, shall hereafter be built, enlarged or altered, until a plan of the proposed work, together with a statement of the materials to be used, shall have been submitted to the City Manager, who shall, if in accordance with the provisions herein contained, issue a permit for the proposed construction."

The issue here is one of sovereignty. Generally, a statute or ordinance of general application is not applicable to the government if it is restricting or limiting, unless the government is named expressly or by necessary implication. See, 1968 OAG 522, citing to *State v. City of Des Moines*, 1936, 221 Iowa 642, 647, 266 N.W. 41, where it was held that " 'the general words of a statute ought not to include the government or affect its rights, unless that construction be clear and indisputable upon the text of the act.' " In addition, we have held that municipalities may not enforce their building codes or state laws concerning construction against the state except as expressly allowed by statute, 1970 OAG 353. In that opinion, however, a distinction was made between the State and governmental subdivisions, citing to *Cedar Rapids Community School District of Linn County v. City of Cedar Rapids*, 1960, 252 Iowa 205, 106 N.W.2d 655.

In the *Cedar Rapids* case, the issue was whether the building code of a city was applicable to school buildings within the city limits. The Court cited to §368.9, 1958 Code, which gave cities the power to adopt building codes and regulate and inspect *all* construction. Based upon that section, the fact that nothing in the Chapters on schools concerned building regulations, and the fact that building codes are police measures to protect health and safety, it was held that municipal building codes are applicable to schools.

Although §368.9 is no longer in effect, having been replaced by the new city code on July 1, 1975, the concept of Home Rule keeps it alive if a city adopts such a code and makes it applicable on all structures. It appears that this is what Webster City has done. We cannot find any indication in Title XIV of the Code (County Government) that plans and specifications must be approved by any county agency, pursuant to any building code. See also *Cook County v. City of Chicago*, 1924, 311 Ill. 234, 142 N.E. 512, where the County had to comply with the city's build-

ing code for the construction of a jail within the city. Accordingly, a city's building code is applicable to county structures within its city limits with one exception. Section 103A.20(2) of the Code provides that any building or structure constructed in conformance with the State Building Code shall be deemed to comply with all state, county and municipal building regulations, and the owner, architect and the like shall be entitled to a permit upon proper payment.

This leads into your next question whether the county must pay the permit fee. There can be no doubt as expressed above, that local building codes are not applicable to the State. This also means that the State need not pay permit fees to a city. See, *Paulus v. City of St. Louis*, 446 S.W.2d 144 (Mo. 1969) where the same was held, and required that the contractor for the State need not pay such fees. However, there appears to be a different result where a political subdivision is involved. In *City of Fort Lauderdale v. School Board of Broward Co.*, 300 So. 2d 297 (Fla. 1974), a county school board was subject to a city's building code and was required to pay permit fees. An independent school district, subject to a city's building code, was required to pay the permit fees in *City of Groves v. Port Arthur Independent School District*, 366 S.W.2d 849 (Ct. Civ. App., Tex. 1963). Also, a parking authority (a political subdivision) was required to pay a permit fee to a city. *Parking Authority of Trenton v. City of Trenton*, 1963, 40 N.J. 251, 191 A.2d 289. See, also, *County of Union v. Benesch*, 98 N.J. Super. 167, 236 A.2d 409, and 103 N.J. Super. 119, 246 A.2d 728, where it was held that a county was required to follow a city's building code but not pay the permit fees. However, a statute existed that prevented a county in excess of a certain population from paying such fees. Therefore, a county must pay building permit fees to a city. Because of this answer an answer to your third question is not needed.

Accordingly, we are of the opinion that a county must comply with a city's building code, except as to §103A.20(2) of the Code, and must pay the building permit fees.

December 30, 1975

STATE OFFICERS AND DEPARTMENTS: State Building Code — §§103A.10, 103A.19 and 103A.20, Code of Iowa, 1975. Local inspectors have no duty to inspect state owned buildings. The state is not required to acquire or pay for a local building permit. (Blumberg to Richards, Legal Counsel, Legislative Service Bureau, 12-30-75) #75-12-14

Ms. Mary Richards, Legal Counsel, Legislative Service Bureau: We have received your opinion request of December 8, 1975, regarding Chapter 103A of the Code. You specifically asked:

"1. Do local inspectors have the authority and the duty to inspect state buildings located within their jurisdictions?

"2. Do local agencies have the authority to require the state to obtain building permits for construction within the local jurisdiction?

"3. Do local agencies have the authority to require fee payment by the state as a part of the process of applying for such building permits?"

We will answer your last two questions first.

Chapter 103A, 1975 Code, provides for a state building code. Section 103A.10 provides that the state building code shall apply to all state buildings. Section 103A.19 includes the administration and enforcement of the building code. Section 103A.20 provides:

"1. If the plans and specifications accompanying an application for permission to construct a building or structure fail to comply with the provisions of building regulations applicable to the governmental subdivision where the construction is planned, the state or governmental subdivision official charged with the duty shall nevertheless issue a permit, certificate, authorization, or other required document, as the case may be, for the construction, if the plans and specifications comply with the applicable provisions set forth in the state building code, whenever such code is operative in such governmental subdivision.

"2. Any building or structure constructed in conformance with the provisions of the state building code, shall be deemed to comply with all state, county, and municipal building regulations, and the owner, builder, architect, lessee, tenant, or their agents, or other interested person shall be entitled, upon a showing of compliance with the code, to demand and obtain, upon proper payment being made *in appropriate cases*, any permit, certificate, authorization, or other required document, the issuance of which is authorized pursuant to any state or local buildings or structure regulation, and it shall be the duty of the appropriate state or local officer having jurisdiction over the issuance to issue the permit, certificate, authorization, or other required document, as provided herein, whenever the code is operative in the governmental subdivision." [Emphasis added]

Generally, a statute of general application is not applicable to the state if it is restricting or limiting, unless the state is named expressly or by necessary implication. See, 1968 O.A.G. 522, and *State v. City of Des Moines*, 1936, 221 Iowa 642, 266 N.W. 41. It was held in that case (221 Iowa at 647) that " 'the general words of a statute ought not to include the government or affect its rights, unless that construction be clear and indisputable upon the text of the act.' " Our office has further held that municipalities may not enforce their building codes or state laws concerning construction against the state except as except as expressly allowed by statute. 1970 O.A.G. 353.

In *Paulus v. City of St. Louis*, 446 S.W.2d 144 (Mo. 1969), the city required a contractor for the state to pay a building permit fee for the construction of a state hospital. The Court held that an ordinance does not apply to a state with reference to its own property unless the city charter (granted by the Legislature) expressly gives the city authority to bind the state, or the state waives its right to regulate its property, and cited, with approval, to the following cases: *City of Milwaukee v. McGregor*, 140 Wis. 35, 121 N.W. 642; *New Jersey Interstate Bridge and Tunnel Comm. v. Jersey City*, 93 N.J. Eq. 550, 118 A. 264, 266-267 (a city may not compel the state or its contractor to take out a permit); *City of Medford v. Marinucci Bros. & Co., Inc.*, 344 Mass. 50, 181 N.E.2d 584; *Township of Springfield v. New Jersey State Highway Dept.*, 91 N.J. Super. 567, 221 A.2d 766; *Davidson County v. Harmon*, 200 Tenn. 575, 292 S.W.2d 777; *Kentucky Institute, etc. v. City of Louisville*, 123 Ky. Law. Rep. 767, 97 S.W. 402; *City of Atlanta v. State*, 181 Ga. 346, 182 S.E. 184; *Exparte Means*, 14 Cal.2d 254, 93 P.2d 105; *Board of Regents, etc. v. City of Tempe*, 88 Ariz. 299, 356 P.2d 399, *Watson Const. Co. v. City of St. Paul*, 260 Minn. 166, 109 N.W.2d 332. The Court went on to

hold that the state and its agencies are not within the purview of a statute unless an intention to include them is clearly manifested, especially where prerogatives, rights, titles, or interests of the state would be divested or diminished or liabilities imposed on it.

The city charter in *Paulus* contained language giving the city power to regulate the construction of all buildings; to do all things necessary for the health, safety and welfare of its inhabitants; and to exercise all powers granted or not prohibited to it. The Court held that such language did not expressly or by necessary inference empower the city to regulate construction of state buildings. In other words, the language was merely general. See also, *County of Union v. Benesch*, 1968, 103 N.J. Super 119, 246 A.2d 728, 729; *Parking Auth. of Trenton v. Trenton*, 1963, 40 N.J. 251, 191 A.2d 289, 291.

The language of Chapter 103A is as general as the language of the city charter in *Paulus*. We can find no express inclusion of the state or its agencies for payment of fees, nor is there any hint of such a necessary implication. In addition, it was held in both *Paulus* and *Watson Const. Co. v. City of St. Paul*, supra, that the state inherently has complete police power and the authority to command or direct the construction of a building, making a city permit unnecessary.

A similar result is reached on your first question. While §103A.19 authorizes the local building departments to enforce the state building code, that section is general in nature and has no application to the state, as discussed above. In addition, that section makes reference to applications to state agencies, while §103A.20 refers to the state official charged with the duty to issue permits and the like. These two references to state agencies and officials serve some purpose, and further lead to the conclusion that the legislature did not intend for the local officials to have sole jurisdiction of state buildings and the state building code.

Accordingly, we are of the opinion that local inspectors do not have the duty to inspect state buildings for compliance with the state building code. Similarly, the state is under no duty to pay, let alone apply, for a local building permit.

December 31, 1975

CITIES AND TOWNS: Incompatibility — §29C.7, Code of Iowa, 1975. A mayor may not also be a county civil defense director. (Blumberg to Bauercamper, Allamakee County Attorney, 12-31-75) #75-12-15

John J. Bauercamper, Allamakee County Attorney: We have received your opinion request of December 16, 1975, regarding a possible conflict of interest or incompatibility of positions. You ask whether the mayor of a city may also be the county director of civil defense within the same county. You indicate that your county does not have a joint county-muncipal civil defense administration.

Section 29C.7, 1975 Code, mandates that boards of supervisors, city councils and school boards *shall* form a joint county-municipal civil defense and emergency planning administration. The mayors of the various

municipalities or their representatives shall be on this administration. The administration shall then appoint a director. In addition, the board of supervisors and each city council shall appoint a director of civil defense for the county or city, who shall also serve as an operations officer for the joint administration. Said county director may also be the director of the joint administration. Funds for payment of these directors, especially the joint administration director are derived from the cities and county.

The case of *State ex rel. Crawford v. Anderson*, 1912, 155 Iowa 271, 136 N.W. 128, referred to in *State ex rel. LeBuhn v. White*, 1965, 257 Iowa 606, 133 N.W.2d 903, sets forth the criteria for incompatibility of offices. It is stated therein (155 Iowa at 273):

"The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' State v. Bus, 135 Mo. 338, 36 S.W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra [112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211]; State v. Goff, 15 R.I. 505, 9A. 226, 2 Am.St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both'."

The criteria set forth above are apparent here. As a county director, the mayor would work with an administration of which he was a member, or of which his representative was a member. Thus, there is some degree of revisory power.

Accordingly, we are of the opinion that a mayor may not also be a county civil defense director. By accepting one position the other is *ipso facto* vacated. *State ex rel. Crawford v. Anderson*, supra. The fact that there is no joint administration does not alter this result.

January 2, 1976

COURTS: Inheritance Tax Appraisers Hearings. §450.28, Code of Iowa, 1975. When inheritance tax appraisers perform official duties they are serving as fact finders for the probate court and a hearing held pursuant to §450.28 is exempted from the open meeting requirements of Chapter 28A of the Code. (Nolan to Brown, Administrator, Department of Revenue, Inheritance Tax Division, 1-2-76) #76-1-1

Mr. Ben W. Brown, Administrator, Department of Revenue, Inheritance Tax Division: Your letter of November 17, 1975, asks for an Attorney General's opinion whether the Iowa inheritance tax appraisal hearing provided for in §450.28 of the Code is subject to the Iowa open meetings statute, Chapter 28A of the Code.

As pointed out in your letter, each county in the State of Iowa has three appraisers appointed by the district court in January of each

year. The appraisers determine the market value of assets of a decedent's estate upon a commission issued by the clerk of the district court and they are paid fees which are taxed as costs in the probate proceedings of an estate.

In an Attorney General's opinion of January 14, 1972, 1972 O.A.G. 334, it was stated that a retired judge may legally serve in the capacity of an inheritance tax appraiser and continue to receive an annuity under the judicial retirement system because an inheritance tax appraiser is a county officer rather than a state officer or employee. That opinion, quoting from 20 C.J.S., *Counties*, §100, p. 888, set forth the following:

"While it has been said that whether or not a person is to be classified as a county officer may depend somewhat on the particular question involved and it might be impossible to lay down any general rule, the term 'county officers,' in its most general sense, applies to officers whose territorial jurisdiction is coextensive with the county for which they are elected or appointed . . . ."

Whether an inheritance tax appraiser is or is not a county officer has some relevance in connection with §28A.1, Code of Iowa, 1975, which prohibits closed meetings of "any board, council, commission, trustees or governing body of any county . . . in this state" unless such meetings are expressly permitted by law. However, under §28A.6, the following appears:

"This chapter does not apply to any court, jury, or military organization."

The provisions of §450.28 of the Code to which you have made reference are as follows:

"It shall be the duty of all appraisers appointed under the provisions of this chapter, upon receiving a commission as herein provided, to forthwith give notice to the director of revenue and other persons known to be interested in the property to be appraised, of the time and place at which they will appraise such property, which time shall be not less than ten days from the date of such notice. The notice *shall be served in the same manner as prescribed for the commencement of civil actions, or in such other manner as the court in its discretion, may prescribe upon application of any appraiser or interested party.*" (Emphasis added)

Accordingly, when inheritance tax appraisers perform the official duties of that office they are serving as fact finders for the probate court pursuant to statutory authority prescribing a specific manner of procedure, which is comparable to procedure under the rules of court. Accordingly, it is our view that the hearing prescribed by §450.28 is a judicial proceeding and as such, is covered by the exemption to the open meetings law stated in §28A.9, because the courts are exempt thereform.

January 5, 1976

HIGHWAYS: Functional: Classification of Highways. §313.2, Code of Iowa, 1975. The requirements set forth in the 6th unnumbered paragraph of §313.2 of the Code of Iowa, for implementation of functional classification of the roads and streets of Iowa, (§306.1 through 8 of the Code) have not been met through enactment of House Files 368, 901, 903 and 904 by the 66th General Assembly, First Session. (Schroeder to Krause, State Representative, 1-5-76) #76-1-2

The Honorable Robert A. Krause, State Representative: Your letter of December 2, 1975, requested an opinion with reference to recent legislative action and the effect of such action upon jurisdictional shifts of roads and streets, as mandated under functional classification of highways in Iowa, as described in Sections 306.1 through 8, Code of Iowa, 1975.

Your letter asks if certain legislation, that is House Files 368, 901, 903, and 904, enacted during the First Session of the 66th General Assembly could be construed as satisfying the requirements of that part of Section 313.2, Code of Iowa, 1975, which is set forth as follows:

" * * *

"No transfer of jurisdiction and control of any road or street as required by this Act (65th G.A., Ch. 1177) shall be effective until the enactment of legislation which allocates the road use tax fund in a manner different from the law existing on January 1, 1974, and in a manner which compensates state, county and municipal jurisdictions for additional highway, road or street needs acquired by such transfer as determined by the department.

" * * * "

H.F. 368 now identified as Chapter 36, Acts of the 66th General Assembly, First Session, provides an appropriation to the Department of Transportation for its own use and that of the Counties of the State for the stated purpose of providing matching funds so as to be eligible to receive federal funds for road and bridge projects.

H.F. 903, now Chapter 46, Acts of the 66th General Assembly, First Session, is the most recent appropriation to the Municipal Assistance Fund. It provides only that its use be in accordance with Section 405.1, Code of Iowa, 1975.

H.F. 901, now Chapter 61, Acts of the 66th General Assembly, First Session, is an additional appropriation to the Muncipal Assistance Fund to be used in accordance with said Section 405.1 of the Code. The Chapter further provides for an appropriation to be used to provide financial assistance to counties for fiscal year 1976. The Act provides generally that the fund be used on projects and programs developed and maintained for rural citizens of each county.

H.F. 904, now Chapter 232, Acts of the 66th General Assembly, First Session, does make specific reference to Section 312.2 subsection (5). An amendment is made in the form of increased appropriation to the already established grade crossing safety fund.

Chapter 36, 46, and 61, Acts of the 66th General Assembly, First Session, all deal with appropriations from the General Fund and do not change the allocation of the road use tax fund. Chapter 232, increases the deduction to be made by the State Treasurer, from total R.U.T. Funds before allocation of the balance to the four identified road system funds. It does not change the percentage of the allotments for any of the identified systems. It is a minor change in the appropriation to a specific fund, and cannot be viewed as a recognition of the needs of various highway systems of this State brought about by functional classification.

In the absence of an affirmative legislative statement of the intent of such limited changes it would be my opinion that the actions of the 66th General Assembly which you have referred to in your letter, would not in and of themselves be sufficient to find the previously announced legislative intent first quoted above (Section 313.2) to have been fulfilled.

January 2, 1976

STATE OFFICERS AND DEPARTMENTS: Agriculture Department; Bartenders, hair restraints. §170.19(6), Code of Iowa, 1975, as amended by §2, Chapter 129, 66th G.A., First Session (1975). Bartenders must use hair restraints of some kind. However, hair spray is an acceptable hair restraint. (Haesemeyer to Kinley, State Senator, 1-2-76) #76-1-3

The Honorable George Kinley, State Senator: Reference is made to your letter of January 2, 1976, in which you state:

"There appears to be some question among Health Officials in the State of Iowa as concerns the use of hair nets by bartenders. My question is, does Senate File 167 as passed by the 1st Session of the 66th General Assembly do away with the requirements of such hair nets. In your opinion does the section require the use of hair restraints at all times by bartenders?"

Senate File 167, to which you make reference, is now found in Chapter 129, Laws of the 66th G.A., 1975 Session. Section 2 of such Chapter 129 amends §170.19(6), Code of Iowa, 1975, to read as follows:

"While preparing food, employees shall use effective hair restraints to prevent the contamination of food."

Such subsection 6 formerly read as follows:

"While preparing food, employees whose hair does not extend below their ears shall wear suitable head coverings, and employees whose hair extends below their ears shall wear hair nets."

It is clear from the foregoing that whereas formerly the law required employees to wear suitable head coverings and in some cases hair nets, the statute as now amended only requires effective hair restraints. In accordance with this change in the law, the Department of Agriculture has recently made and promulgated new rules which will take effect January 5, 1976. Rule 30-37.2(3) provides:

"All employees who contribute in any way to the assembling, dressing, cooking, manufacturing, compounding, or serving of food are required to effectively cover and restrain their hair to prevent contamination of food. Caps, bandanas, head scarves, hairnets or hair spray are acceptable hair restraints. Wigs must be covered with an acceptable hair restraint. Employers, as well as employees, shall be held responsible if this rule is violated."

Thus, not only head coverings and hair nets but also hair spray are considered suitable hair restraints. Accordingly, a bartender will be in compliance if he uses any one of the foregoing.

In answer to your second question, it is our opinion that a hair restraint of some kind would have to be used by bartenders. It is clear that a tavern or cocktail lounge is a "restaurant" within the meaning of Chapter 170, §170.1(4) and that alcoholic beverages are "food" within the meaning of §170.1(5).

January 5, 1976

GAMBLING: Section 726.8, Code of Iowa, 1975; §§9, 21, 22, Senate File 496, Acts, 66th G.A., First Session (1975). A promotional scheme whereby a grocery store draws cash register receipts from a barrel and pays the amount registered thereon to the person who has signed the receipt constitutes an illegal lottery under Iowa law. (Coleman to Reiter, Marion County Attorney, 1-5-76) #76-1-4

Mr. Warren A. Reiter, Marion County Attorney: You have requested an opinion of the Attorney General with respect to the following:

"Retail grocery stores have been inviting customers to sign his or her cash register receipt and deposit it in an enclosed container as they depart from the store. At the end of each week the manager at random draws five signed receipts from the container and the customer shown thereon receives as a prize the amount shown on that receipt. Each winner has one week to claim his or her prize.

"The question is, 'Does this arrangement violate Section 726.8?' "

Section 726.8, Code of Iowa, 1975, provides:

"When used in this section, lottery shall mean any scheme, arrangement, or plan whereby a prize is awarded by chance or any process involving a substantial element of chance to a participant who has paid or furnished a consideration for such chance.

"For the purpose of determining the existence of a lottery under this section, a consideration shall be deemed to have been paid or furnished only in such cases where as a direct or indirect requirement or condition of obtaining a chance to win a prize, the participants are required to make an expenditure of money or something of monetary value through a purchase, payment of an entry or admission fee, or other payment . . ."

This legislative definition echoes the definition that the Iowa Supreme Court has consistently employed. In *Brenard Manufacturing Co. v. Jessup and Barrett Co.*, 186 Iowa 872, 173 N.W. 101, 102 (1919), it was stated:

"The term 'lottery' has been variously defined by the courts as a scheme for the division or distribution of property or money by chance, or any game of hazard, or a species of game among persons who have paid or agreed to pay a valuable consideration for the chance to obtain a prize. *Chancy Park Land Co. v. Hart*, 104 Iowa 592, 73 N.W. 1059; *Burks v. Harris*, 91 Ark. 205, 120 S.W. 979, 23 LRA (N.S.) 626; 134 Am. St. Rep. 67, 18 Ann. Cas. 566; *Commonwealth v. Jenkins*, 159 Ky. 80, 166 S.W. 795, Ann. Cas. 1915 B, 170; *Eastman v. Armstrong-Byrd Music Co.*, 212 Fed. 662, 129 C.C.A. 198, 52 LRA (N.S.) 108.

"Authorities uniformly agree that the three elements necessary to constitute a lottery are: (a) a consideration; (b) the element of chance; and (c) a prize. *State v. Perry*, 154 N.C. 616, 70 S.E. 387; *Hull v. Ruggles*, 56 N.Y. 424; *Cross v. People*, 18 Colo. 321, 32 Pac. 821, 36 Am. St. Rep. 292; *Eastman v. Armstrong-Byrd Music Co.*, supra."

Examining the factual situation as you have presented it, we find the following: (a) the consideration; it appears that as a condition precedent to having one's name placed in the drawing barrel that one must have their name on a cash register receipt. This receipt is received when one pays for the groceries that have been purchased. No doubt, the total on the receipt may vary from the price paid for a package of gum to the price of a week's worth of groceries for a large family or even an organizational purchase. The important aspect of this is that the purchase price paid for the groceries is the consideration or thing of value

which constitutes eligibility for entry into the drawing barrel. This is further borne out by the fact that, (c) the prize, corresponds to the registered amount on the receipt drawn. Lastly, (b) the element of chance, is the drawing itself. Thus the definition of a lottery is met by the factual situation. See: *Retail Section of Chamber of Commerce v. Kieck*, 128 Neb. 13, 257 N.W. 493 (1934).

Section 726.8, unnumbered paragraph (1), Code of Iowa, 1975, as amended by Section 21, Senate File 496, Acts of the 66th General Assembly, 1975 Session, provides further that:

"If any person make or aid in making or establishing, or advertise or make public any scheme for any lottery; or advertise, offer for sale, sell, negotiate, dispose of, purchase, or receive any ticket or part of a ticket in any lottery or number thereof; or have in his possession any ticket, part of a ticket, or paper purporting to be the number of any ticket of any lottery, with intent to sell or dispose of the same on his own account or as the agent of another, the person commits a misdemeanor." See also Section 23, S.F. 496, supra, which defines the penalty for the misdemeanor.

The preceding does not make all lotteries illegal in Iowa. Under very limited circumstances, certain lotteries (raffles) may be lawful when properly conducted. Section 726.8, Code of Iowa, 1975, as amended by Section 22, Senate File 496, Acts of the 66th General Assembly, 1975 Session provides:

". . . section 726.8 shall not apply to any game or activity or device when lawfully possessed, used, conducted or participated in pursuant to chapter ninety-nine B (99B) of the Code."

Your question or factual situation must therefore be viewed against the backdrop of Chapter 99B, Code of Iowa, 1975, as amended by S.F. 496, supra. Those categories of individuals or organizations that are allowed to conduct lotteries (raffles) under Chapter 99B, Code of Iowa, 1975, as amended by S.F. 496, supra, are: fairs (§7, S.F. 496); games conducted by qualified organizations (§9, S.F. 496); persons or organizations conducting annual game nights (§10, S.F. 496), and company games (§15, S.F. 496, New Section, sixth unnumbered paragraph). From your description of the promotion, the categories of fairs, annual game nights and company games may be ruled out as not being applicable.

It appears that the grocery store promotion could only come within the category of a lottery conducted by a "qualified organization." Thus, it would be necessary for the promotion to be within the guidelines governing that category. Briefly those are: (a) the grocery store has been properly licensed; (b) the grocery store cannot profit from the lottery; (c) cash prizes cannot be awarded; (d) only merchandise prizes may be awarded and their value cannot exceed twenty-five dollars, excepting one time per year when the prize value may inflate to five thousand dollars; (e) the cost to participate cannot exceed one dollar, excepting during a one-a-year "grand" raffle when the cost to play may go to five dollars; (f) all profits taken in as a result of the promotion must be distributed to the participants or be given to educational, civic, public, charitable, patriotic or religious uses within this state; (g) the prize must be distributed on the day that it is won. (See Section 99B.7, Code of Iowa, 1975, as amended by Section 9 of S.F. 496, supra).

From the foregoing, it readily appears that the grocery store of your description would fail to qualify under the licensing and cost to play criteria, not to mention that in all likelihood it would put itself out of business in a short time.

It is our opinion that the promotional scheme which you have described is a lottery within Section 726.8, Code of Iowa, 1975, and Section 21, S.F. 496, supra, and further that it does not comport with existing laws which provide for limited lotteries.

January 5, 1976

GAMBLING: Section 726.8, Code of Iowa, 1975, §§9, 20, 22, Senate File 496, Acts, 66th G.A., First Session (1975). A discount wheel, bearing thereon numbers from 0 to 50, which when spun and stopped corresponds to percentages of discounts allowed by a retail establishment, constitutes an illegal gambling device under Iowa law. (Coleman to Barrick, Clay County Attorney, 1-5-76) #76-1-5

Mr. Ronald R. Barrick, Clay County Attorney: You have requested an Opinion of the Attorney General with respect to the following:

"The device is known as a discount wheel and contains numbers from 0 to 50. After purchasing an item at a retail store, the purchaser spins the discount wheel. Whatever number the marker on the wheel lands on is the amount of discount the individual receives for the item just purchased. This discount could be anything up to 50% of the total purchase price, or it could be nothing, if the marker landed on 0. The wheel has been analyzed by a mathematician and according to his calculations, the wheel would average a 22.3% discount on all items purchased. The device would be used only after an individual had purchased an item.

"In rendering your opinion, I would be interested in knowing if it would make any difference whether an individual bought an item, spun the wheel and then paid whatever the amount was, or whether he first paid the money, then spun the wheel and had the money paid back to him as a discount, if any discount was received."

Section 726.8, Code of Iowa, 1975, assists in arriving at an answer to your question. It provides in pertinent part:

"When used in this section, lottery shall mean any scheme, arrangement, or plan whereby a prize is awarded by chance or any process involving a substantial element of chance to a participant who has paid or furnished a consideration for such chance.

"For the purpose of determining the existence of a lottery under this section, a consideration shall be deemed to have been paid or furnished only in such cases where as a direct or indirect requirement or condition of obtaining a chance to win a prize, the participants are required to make an expenditure of money or something of monetary value through a purchase, payment of an entry or admission fee, or other payment..."

This definition of a lottery (raffle) is one that has been consistently employed by the Iowa Supreme Court for many years. See: *Guenther v. Dewien*, 11 Iowa 133 (1860); *Chancy Park Land Co. v. Hart*, 104 Iowa 592, 73 N.W. 1059 (1898); *Brenard Manufacturing Co. v. Jessup and Barrett Co.*, 186 Iowa 872, 173 N.W. 101 (1919); *State v. Hundling*, 220 Iowa 1369, 264 N.W. 608, 103 A.L.R. 861 (1936); *St. Peter v. Pioneer Theatre Corporation*, 227 Iowa 1391, 291 N.W. 164 (1940).

Observing that in order for a scheme or promotion to constitute a lottery (raffle), three elements must be present, it must be determined

whether your instant factual situation involves (a) a consideration; (b) an element of chance, and, (c) a prize.

The Consideration

You note in your letter that the discount wheel "would be used only after an individual had purchased an item." Therefore as a condition of eligibility for spinning the wheel and winning a discount, one must have paid over something of value. This appears to be exactly what was envisioned by Section 726.8, Code of Iowa, 1975: "a consideration shall be deemed to have been paid or furnished only in such cases where as a direct or indirect requirement or condition of obtaining a chance to win a prize, the participants are required to make an expenditure of money . . . ."

An Element of Chance

You state that after the purchase, the discount wheel is spun and whatever number between 0 and 50 at which the wheel stops will determine the percentage of discount received. Assuming that the wheel is not "gaffed," its stopage at a particular number is left purely to chance, or "a result is reached by some action or means taken, in which result man's choice or will has no part, nor can human reason, sagacity, foresight, or design enable him to know or determine such result until the same has been accomplished." See: *Lee v. City of Miami*, 121 Fla. 93, 163 So. 486, 492, 101 ALR 1115 (1935).

The Prize

The winning or benefit or prize to be achieved herein is the discount received. Undoubtedly, this prize will vary not only as to the numerical percentage acquired, but also as to the total value of the purchase made.

What you have described constitutes a lottery, and the term "gambling" includes a lottery. See: *Westerhaus Co. v. City of Cincinnati*, 165 Ohio St. 327, 135 N.E.2d 318, 327 (1956).

You seek to know also whether the "discount wheel" would be "considered a gambling device under the laws of Iowa." In this regard, Section 726.5, Code of Iowa, 1975, as amended by Section 20, Senate File 496, Acts of the 66th General Assembly, 1975 Session states:

"No one shall, in any manner or for any purpose whatever, except under proceeding to destroy the same, have, keep, or hold in possession or control any *gambling device. The term 'gambling device' means and includes every device used or adapted or designed to be used for gambling* . . . ." (emphasis added).

It should be noted, however, that Section 20, S.F. 496, supra, will not apply to any "game, activity or device when lawfully possessed, used, conducted or participated in pursuant to chapter ninety-nine B (99B) of the Code." (§22, S.F. 496). The question then becomes one of whether the activity you describe can be legally conducted under Chapter 99B, Code of Iowa, 1975.

Chapter 99B, Code of Iowa, 1975, as amended by S.F. 496, supra, allows categories of individuals or organizations to conduct lotteries (raffles): fairs (§7, S.F. 496); games conducted by qualified organizations (§9, S.F. 496); persons or organizations conducting annual game nights (§10, S.F. 496), and company games (§15, S.F. 496, New Section, sixth unnumbered paragraph). From your description of the promotion,

the categories of fairs, annual game nights and company games may be ruled out as not being applicable.

It appears therefore that the "discount wheel" promotion could only come within the category of a lottery conducted by a "qualified organization." Thus, it would be necessary for the promotion to be within the guidelines governing that category. Briefly those are: (a) the store is properly licensed; (b) the store proprietor cannot profit from the lottery; (c) cash prizes cannot be awarded; (d) only merchandise prizes may be awarded and their value cannot exceed twenty-five dollars, excepting one time per year when the prize value may inflate to five thousand dollars; (e) the cost to participate cannot exceed one dollar, excepting during the one-a-year "grand" raffle when the cost to play may go to five dollars; (f) all profits taken in as a result of the promotion must be distributed to the participants or be given to educational, civic, public, charitable, patriotic or religious uses within this state; (g) the prize must be distributed on the day that it is won. (See, Section 99B.7, Code of Iowa, 1975, as amended by Section 9 of S.F. 496, supra).

It readily appears that the "discount wheel" promotion which you have described fails to meet many, if not all, of the enumerated criteria set out. Moreover, the requirement of the divestiture of profits by the store owner certainly militates against its practicality from an economic point of view. It is our opinion that failing to meet these criteria, such promotion would be illegal and therefore the "discount wheel" would be an illegal gambling device. The "discount wheel" is "used or adapted or designed to be used for gambling" in a promotional scheme which does not comport with Chapter 99B, Code of Iowa, 1975.

Lastly, we do not believe that the sequence of either the payment of money or the spin of the wheel would serve to change the nature of the activity nor to legitimize it.

January 5, 1976

TAXATION: Property Tax Exemption: Use of Real Property by Nonprofit Historical Institution: §§427.1(9), 427.1(23), 427.1(24), 441.21, Code of Iowa, 1975. A historical building owned by a nonprofit corporation and used for the purpose of educating people as to its historical architecture could qualify for property tax exemption under §427.1(9). Such exemption would not be lost merely because the buidling would be rented to the YMCA, YWCA, Red Cross, and Campfire Girls for cash rent which would be used to maintain the building. But, if the building is leased to a commercial business, there can be no exemption as to the portion of the building used by such business. Whether the assessor may consider, in arriving at the market value of the property, the fact that the City which conveyed the property to the historical institution retained a possibility of reverter is a question for the assessor to determine. (Griger to Bordwell, Washington County Attorney, 1-5-76) #76-1-6

Mr. Richard S. Bordwell, Washington County Attorney: You have requested an opinion of the Attorney General as to whether certain real property owned by a nonprofit corporation would be entitled to a property tax exemption pursuant to §427.1(9), Code of Iowa, 1975, and as background information you state:

"By way of background information, the property in question is a small lot located on a major intersection in the City of Washington, Iowa, upon which there was constructed prior to the turn of the century a Victorian brick home known as "Blair House." Several years ago, the building was placed on the National Register of Historic Places because of its exterior architecture. The nonprofit corporation was formed to "educate citizens of the community on the history of the building and the preservation of the historical building and other historical architecture in the county." The primary purpose of the corporation is to repair and maintain the exterior of the building, and the corporation has secured a $5000 grant through the Iowa American Revolution Bicentennial Commission. The corporation has taken a limited title from the City of Washington, a copy of the Quit Claim Deed being enclosed".

Section 427.1(9) of the Code provides for the following property tax exemption in relevant part:

"All grounds and buildings used or under construction by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used or under construction with a view to pecuniary profit. All deeds or leases by which such property is held shall be omitted from the assessment".

Claims for property tax exemptions pursuant to §427.1(9) must be filed annually within the time prescribed by law. See §427.1(23) and (24), Code of Iowa, 1975.

Your first question is whether the real property, as used in the manner in which you described it above, is exempt from property tax in accordance with §427.1(9) of the Code. In this regard, the Iowa Supreme Court has held that the question of taxation or exemption under this statute must be determined by the use made of the property, and not from the declaration made in the articles of incorporation. *South Iowa Methodist Homes, Inc. v. Board of Review*, 1970, Iowa, 173 N.W.2d 526; *Readlyn Hospital v. Hoth*, 1937, 223 Iowa 341, 27 2 N.W. 90. This becomes generally a question to be initially determined by the local assessor. 1972 O.A.G. 77.

Assuming that the property is solely used as described above, it is the opinion of this office that such nonprofit corporation would qualify as a charitable institution under the statute. *In Re Los Angeles County Pioneer Society*, 1953, 40 Cal. 2d 852, 257 P.2d 1.

Your second question involves the rental of rooms by the nonprofit corporation to the other nonprofit groups such as YMCA, YWCA, Red Cross, and Campfire Girls. You state that the rents collected from such groups would be used in maintaining this historical building and your question is whether the collection of such rents would render the property taxable if it otherwise qualifies as exempt.

At this point, you should be aware that not every nonprofit group would be entitled to a property tax exemption. *Theta Xi Bldg Assn v. Board of Review*, 1934, 217 Iowa 1181, 251 N.W. 67. Therefore, without knowing which groups would "use" the property in question, it would not be possible to speculate in this opinion as to whether such use by a particular group disqualifies the property for exemption. Moreover, in the event only a portion of the property is used for nonexempt purposes, only the portion so used, and not the remainder of the property, is tax-

able. See §427.1(23) of the Code. Also, as previously stated, it is the use made of the property, and not the character of the nonprofit organization, which determines whether the property is exempt or taxable. Nonprofit organizations such as YMCA, YWCA, Red Cross, and Campfire Girls are considered to be charitable and benevolent institutions. *Department of Employment v. United States*, 1966, 385 U.S. 355, 87 S.Ct. 464, 17 L.Ed.2d 414; *Young v. Boy Scouts of America*, 1935, 9 Cal. App. 2d 760, 51 P.2d 191; 1930 O.A.G. 373. Consequently, the mere collection of rent from such nonprofit groups, which rent would be used in maintaining the property in question, would not, per se, render the property taxable if it otherwise qualifies for exemption.

Your third question is whether the property would be exempt if it is leased to a commercial profit making business which will pay the expenses of maintaining the property and liability insurance, but no cash rent would be paid to the nonprofit corporation. This question is completely answered by the Iowa Supreme Court's decision in *Readlyn Hospital v. Hoth*, supra. In that case, a doctor conveyed property to a nonprofit corporate hospital, but he continued to use a portion of the property in his private practice of medicine and for his private personal gain. The Court looked at the use of the property by the doctor and determined such use was not solely for charitable purposes and the property was, therefore, taxable. A commercial business for profit, likewise, would not be using the property for the appropriate objects listed in §427.1(9). However, the local assessor would have to determine whether all or only a portion of the property was used by the commercial business in accordance with the provisions of §427.1(23), since such determination would bear on whether all or only a portion of the property would be taxable.

Your fourth question concerns the nature of the conveyance of the property in question by the City of Washington, Iowa, to the nonprofit corporation. The "Quit Claim Deed" which you submitted denotes that the City conveyed all its interest in the property to the nonprofit corporation so long as the property is used for "educational and historical purposes", and the property is not conveyed or mortgaged by the corporation. In short, it appears that the City has retained a reversionary interest, called a possibility of reverter, and the nonprofit corporation has a fee-simple determinable. *Reichard v. Chicago, Burlington & Quincy Railroad Co.*, 1942, 231 Iowa 563, 1 N.W.2d 721. Specifically, your question is whether the assessor, in arriving at the market value of the property under §441.21, Code of Iowa, 1975, may consider this possibility of reverter on behalf of the City. Pursuant to §427.1(9) of the Code, even if the property be exempt from taxation, the assessor must still ascribe to that property its actual market value as contemplated by §441.21 of the Code. Of course, if any or all of the property were taxable, the assessor would have to value such property pursuant to §441.21, of the Code. *In Tiffany v. County Board of Review of Greene County*, 1971, Iowa, 188 N.W.2d 343, and *Juhl v. Greene County Board of Review*, 1971, Iowa, 188 N.W.2d 351, the Iowa Supreme Court, in construing §441.21, stated that the willing buyer-willing seller formula for ascertaining market value of the property must be used first, but if market value cannot be ascertained by such standard, the assessor is free to use

various factors (but not one alone) which would aid him or her in determining the fair and reasonable market value of the property. Further, in the event the assessor cannot determine market value of the property by use of the willing buyer-willing seller standard, one of the factors he or she may not use is special value or use value of the property to its present owner. *Maytag Company v. Partridge,* 1973, Iowa, 210 N.W. 1d 584. With the above principles in mind, whether the assessor may be able to determine the market value of this property by the willing buyer-willing seller approach is a question for the assessor, not for this office. Whether this possibility of reverter will influence the market value of this particular property is a question for the assessor to evaluate.

Your final question was whether the restrictions in the "Quit Claim Deed" on the use of the property by the nonprofit corporation constitute a lease from the city rather than a conveyance of the property to the corporation. We have, heretofore, in this opinion determined that a conveyance of a fee simple determinable was made with a possibility of reverter to the City. In our opinion, there is no lease arrangement.

January 5, 1976

DEPARTMENT OF SOCIAL SERVICES: Division of Correctional Institutions. Sections 28E.1, 28E.3, 28E.4, 356.1, 789.16, Code of Iowa, 1975. The Department of Social Services does have the authority to transfer a prisoner to a county jail through the utilization of Chapter 28E. (Robinson to Burns, Commissioner of Iowa Department of Social Services, 1-5-76) #76-1-7

Mr. Kevin J. Burns, Commissioner, Department of Social Services: In your recent letter, you raise the following question:

"A situation has arisen in which a person was sentenced by a judge for confinement to a State institution, however, the Department has been asked that that person be confined to a County jail for the serving of that sentence. Does the Department have the authority to make such a transfer? If so, would complete and total legal custody also be transferred to the County? Finally, if this is true, what would be the most appropriate means to do this — Code of Iowa 28E?"

We believe the Department does have the authority to transfer a prisoner through the utilization of Chapter 28E, the Code. For fuller analysis of the question that you have proposed, several statutes should be considered. §789.16 (pertaining to the place of confinement when a prisoner is sentenced), Code of Iowa, 1975, provides:

"789.16 Place of commitment. Any male person who shall be committed to the penitentiary, except those convicted of murder, treason, sodomy, or incest, and who at the time of commitment is between the ages of sixteen and thirty years, and who has never before been convicted of a felony, shall be confined in the men's reformatory; provided, however, that persons between the ages of sixteen and thirty years convicted of rape, robbery, or of breaking and entering a dwelling house in the nighttime with intent to commit a public offense therein, may, as the particular circumstances may warrant, in the discretion of the court, be committed to either the men's reformatory at Anamosa, or the penitentiary at Fort Madison."

Section 356.1 (pertaining to the use of county jails), Code of Iowa, 1975, provides:

"356.1 How used. The jails in the several counties in the state shall be in charge of the respective sheriffs *and used as prisons*: * * *

"3. For the confinement of persons under sentence, *upon conviction for any offense, and of all other persons committed for any cause authorized by law.* * * * " [Emphasis added.]

Sections 28E.1, 3 and 4 (pertaining to the joint exercise of governmental powers), Code of Iowa, 1975, provides:

"28E.1 Purpose. The purpose of this chapter is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to co-operate in other ways of mutual advantage. This chapter shall be liberally construed to that end."

"28E.3 Joint exercise of powers. Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privilege or authority, . . . Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency."

"28E.4 Agreement with other agencies. Any public agency of this state may enter into an agreement with one or more public or private agencies for joint or co-operative action pursuant to the provisions of this chapter, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force."

A careful examination of these sections indicates that a person who was sentenced by a judge for confinement in a State institution may be confined in a county jail for the serving of that sentence provided that a proper due process hearing is held. If the prisoner consents in writing, this would meet requirements of the necessity for a hearing. The proper agreement should also be executed with the approval of the statutory officers involved.

There are no Iowa cases interpreting these sections of the Code that are on point. We, therefore, draw your attention to 72 C.J.S., Prisons, §19b, regarding transfer of prisoners which provides:

"Under some statutory provisions, authority, express or implied, is given to an official or a board to transfer or remove prisoners from one place of incarceration to another; but a transfer or removal of prisoners should be made only by the authorities designated by statute for that purpose, and only in the cases provided for."

We recognize that in the instant case, this transfer is not specifically provided for by the Iowa Code. Nevertheless, the restrictions upon transfer which were noted above are for the protection of the prisoner. Thus if we have his consent, this prohibition will not stand in the way.

We will be available to assist you in drawing such an agreement.

January 5, 1976

BANKING DEPARTMENT: Credit Unions. §§533.1 and 533.19, Code of Iowa, 1975. I. A credit union chartered in another state is not a "credit union" within the meaning of §533.1 unless its articles and by-

laws are submitted to the State Superintendent of Banking of this state and his certificate of approval filed with such articles in the office of county recorder. II. Credit union members may make withdrawals against their share investments in a credit union on a slip designated "share draft". A credit union utilizing such forms waives the 60 day notice provided in §533.19. (Nolan to Huston, Superintendent of Banking, 1-5-76) #76-1-8

Mr. Thomas H. Huston, Superintendent of Banking: By letter dated November 18, 1975, and subsequent correspondence, you have requested an opinion as to whether out of state credit unions are eligible for membership in the proposed new Iowa corporate central credit union, now being organized by the Iowa Credit Union League.

Chapter 241 of the laws of the 66th General Assembly, 1975 Session (S.F. 39) authorizes the formation of a corporate central credit union in Iowa with the following language:

" * * *

"SEC. 16. Chapter five hundred thirty-three (533), Code 1975, is amended by adding the following new section:

"NEW SECTION. Corporate central credit union. A credit union, in which all credit unions, the credit union league, and its affiliates in the state of Iowa are eligible for membership, may be established in this state and shall be known as a corporate central credit union. A corporate central credit union shall have all the powers, rights, restrictions and obligations imposed upon or granted credit unions established under the provisions of this chapter, except:

"1. It shall not be required to transfer to the legal reserve of the corporation more than five percent of the corporation's net income for the year.

"2. It may buy or sell investment securities and corporate bonds which are evidenes of indebtedness. However, the buying and selling of such investment securities and corporate bonds shall be limited to buying and selling without recourse to marketable obligations evidencing indebtedness of any corporation or state or federal agency under further definitions of the term 'investment securities' as prescribed by the superintendent. The total amount of the investment securities of any one obligor or maker held by the credit union shall at no time exceed five percent of the shares, undivided earnings and reserves of the credit union except that this limit shall not apply to obligations of the federal government. The aggregate total of the investment securities held by the credit union shall not exceed fifteen percent of the shares, undivided earnings and reserves of said credit union."

By definition in §533.1, Code of Iowa, 1975, a credit union is:

" * * *

". . . a co-operative, nonprofit association, incorporated in accordance with the provisions of this chapter for the purpose of creating a source of credit at a fair and reasonable rate of interest, of encouraging habits of thrift among its members and of providing the opportunity for people to use and control their savings for their mutual benefit."

It is the opinion of this office that an out of state credit union authorized by Chapter 240 unless such credit union satisfies the provisions of §533.1, as set out above.

The out of state credit union now seeking membership in the proposed corporate central credit union is the U.S. Central Credit Union which is

chartered by the State of Kansas (under laws similar to the Iowa credit union laws) with its principal place of business, as we understand it, in the State of Wisconsin.

To be incorporated in accordance with the provisions of Chapter 533 of the Iowa Code, it is necessary for a credit union to execute in duplicate articles of incorporation and by-laws and forward them to the State Superintendent of Banking for his approval. Upon receiving the certificate of approval from the Banking Department, the articles of incorporation with the certificate of approval attached are to be filed with the county recorder of the county within which the credit union is to do business. When the designated procedures have been followed, the applicants become a credit union "incorporated in accordance with the provisions of this chapter". From the materials submitted to this office, it appears that the U.S. Central Credit Union as of this date has not complied with the required procedures for being incorporated as a credit union in the State of Iowa. Further, we have noted that the purpose of the U.S. Central Credit Union differs from the required stated purpose of a credit union in the State of Iowa in that in lieu of being organized for the purpose of "creating a source of credit at a fair and reasonable rate of interest, of encouraging habits of thrift among its members and of providing the opportunity for people to use and control their savings for their mutual benefit", the stated purpose of the U.S. Central Credit Union is:

"(1) To operate as a central credit union, without profit, for the mutual benefit of its members.

"(2) In cooperation with the state credit union leagues, to foster and promote economic security, by viability, and growth through the various member central credit unions and other member organizations for the ultimate benefit of the credit union members."

In other words, as we see it, its purposes are directed more to the accumulation of new sources of funds and to assist members in administrative solutions and to perform financial services as required by the state credit union leagues.

Accordingly, it is our view that for the reasons set out above, the U.S. Central Credit Union does not qualify for membership in the corporate central credit union to be established pursuant to Chapter 241, laws of the 66th General Assembly, 1975 Session.

II

In your letter of November 20, 1975, you requested a further advisory opinion with respect to the issuance of withdrawal slips in the form of share drafts by credit unions. In your letter you state:

" * * *

". . . Obviously, a significant question is what definition should be given to certain of the words in [section 533.4] that subsection (11).

Key among those words which in my judgment need definition are 'incidental', 'necessary or requisite', 'effectively' and 'the business for which it is incorporated'. From a non-lawyer's standpoint, I have great difficulty imagining that the authorization of a procedure which allows credit unions to distribute among their members, directly or indirectly, 'pieces of paper' which are essentially like checks with the exception of the fact that they are non-negotiable, so that their members can draw upon their funds in the credit union in direct dealings with third parties, is 'incidental' to some other power. For that matter, I have difficulty of thinking of such a significant power as being 'incidental' at all. * * *

"It is very difficult for me to imagine that a legislature that specifically precluded the payment of interest on demand deposits in banks intended or intends that credit unions be able to pay interest on demand deposits. Clearly, if share drafts are authorized, the nature of the deposit in the credit union would be a demand deposit subject only to the credit union member signing a check-like instrument.

"I would most respectfully request that a thorough review of your opinion of October 22, 1975, be engaged in. It is my belief that if basic changes in structure and powers of financial institutions in Iowa are to be effected, then those basic changes should result from legislative determination and action."

Code Section 533.4 provides that a credit union shall have power to receive the savings of its members either as payment on shares or as deposits. Assuming that each member in the credit union subscribes to at least one share having a par value of not exceeding $25.00, such member is entitled to withdraw his share in accordance with the provisions of the by-laws and Code Section 533.19 upon giving the proper notice to the credit union. The credit union may require sixty days' notice of the intention to withdraw shares or it may provide withdrawal slips in the form of share drafts and thereby waive the notice requirement.

A "share draft" as its name clearly implies, cannot be used by a member to make a demand withdrawal from his savings in the credit union account which are classified as deposits rather than shares. However, the statute does not prohibit a member from purchasing more than one share in the credit union and consequently, it would appear that a member could convert savings deposits to shares and utilize a share draft for the withdrawal of such shares from the credit union.

Under §533.19, any credit union member may withdraw his deposits from the credit union by notifying the credit union of his intention to do so and the credit union may require thirty days' notice of the intention to withdraw deposits. Accordingly, such deposits are not payable "on demand" and further are not subject to withdrawal by assignment or "share draft".

Accordingly, it is the view of this office that the authorization of share drafts does not automatically convert deposits to share purchases or share purchases to demand deposits. To be a member in a credit union, a person must be elected to membership and qualify by subscribing for a participating share. Not all persons (including corporate organizations) will meet the requirements for membership in a given credit union, and a member desiring to transfer his investment in such credit union cannot do it with a negotiable instrument but can make such withdrawals as are

authorized by law under §533.19, which also provides that all amounts paid on shares withdrawn shall be paid to the withdrawing member after deducting all amounts due from the member to the credit unoin. The credit union's lien on such shares and deposits for any sum due from a member is as spelled out in §533.12.

January 6, 1976

SCHOOLS: Area Education Agency. §273.3(7)(8), Code of Iowa, 1975. County supervisors are not required to furnish space in the courthouse for Area Education Agencies. (Nolan to Tieden, State Senator, 1-6-76) #76-1-9

The Honorable Dale L. Tieden, State Senator: On September 23, 1975, you submitted to this office a copy of a letter from Mr. Richard L. Hansen, Administrator of the Keystone Area Education Agency, which raised the question of the responsibility for rent payment by an Area Education Agency where it continues to occupy space formerly used by the County Board of Education. The same question has been presented by several county attorneys and involves the interpretation of §9, Chapter 1172, Acts of the 65th G.A., which provided as follows:

". . . During the interim between October 7, 1975, and July 1, 1975, the county and joint county boards and their personnel shall furnish full cooperation to the area education agency board in assisting it with the preparation of a budget, the recruitment of personnel and other necessary preliminary matters. Office space and other space furnished by the counties to the several county and joint county boards shall remain available for use by the area education agency board for such period of time as the area education agency board deems continued use of the space to be necessary and convenient."

When the county boards and joint county boards went out of existence on July 1, 1975, the duty of county supervisors to furnish space to them came to an end.

There is adequate authority in §273.3(7) and (8) for Area Education Agency board to obtain sufficient space to carry on their program without the assistance of the county board of supervisors. Under §273.3(7), the board is authorized "subject to the approval of the department of public instruction, to lease, receive by gift and operate and maintain such facilities and buildings as deemed necessary to provide authorized programs and services." As indicated by §273.3(8), agreements for the joint use of school buildings are contemplated.

Where a county board of supervisors has refused to continue furnishing facilities to the Area Education Agency, the Area Education Agency Board must take on the responsibility of acquiring and maintaining the needed facilities. Where a county entered into a lease for the benefit of the Area Education Agency Board prior to July 1, 1975, and where the term of the lease extends beyond that date, the county may be bound under the contract. However, in the absence of a joint agreement between the Area Education Agency Board and the county for the mutual benefit of the parties, the supervisors may re-allocate such space to other county agencies as needed, insuch case the Area Education Agency Board should be notified to vacate the premises. Accordingly, the boards of supervisors are no longer required to furnish space in the courthouse for Area Education Agencies.

January 6, 1976

CITIES AND TOWNS: Civil Service — §4.7, 400.1, 400.3, 400.6 and 400.13, Code of Iowa, 1975. In cities operating under civil service, chiefs of police must be appointed pursuant to §400.13. (Blumberg to Krause, State Representative, 1-6-76) #76-1-10

Mr. Robert A. Krause, State Representative: We have received your opinion request of December 24, 1975, regarding the civil service status of chiefs of police. You wish to know whether §400.6 or §400.13, 1975 Code, governs the hiring of chiefs of police in cities under 15,000 population.

Section 400.1, 1975 Code, mandates that cities over 8,000 population with paid police or fire departments have civil service commissions, whereas §400.3 provides that cities under 8,000 population may adopt the provisoions of Chapter 400. Section 400.6(1) provides that in cities over 15,000 population the chapter shall apply to all appointive officers and employees with certain listed exceptions. Section 400.6(2) states that in all other cities the chapter shall only apply to members of police and fire departments. Reading the above four provisions together, the meaning and intent is that in those cities over 15,000 population with paid police or fire departments, civil service extends to most officers and employees. In those cities between 8,000 and 15,000 population, having paid police or fire departments, or in those cities under 8,000 population adopting the provisions of the chapter, civil service only applies to members of the police and fire departments. In both parts of §400.6, chiefs of police are exempted from the provisions of the chapter.

Section 400.13 provides for the manner of appointment of chiefs of police. It is special in nature whereas §400.6 is general. Section 400.6 states, as a general rule, that chiefs of police are not governed by the provisions of the chapter (civil service). This would appear to mean that no provisions of that chapter, including any regarding the appointments of chiefs, are applicable. However, the Legislature passed, along with §400.6, §400.13. Where a general provision conflicts with a special one, effect should be given to both; but if irreconcilable, the special one prevails. §4.7 of the Code. Thus, reading §§400.6 and 400.13 together, they mean that chiefs of police in departments under civil service do not have civil service status, however, they must be appointed pursuant to §400.13.

Accordingly, we are of the opinion that in those cities under civil service, the chiefs of police must be appointed pursuant to §400.13.

January 6, 1976

COUNTIES: Officers Expense. Chapters 176A, 441 and §332.3, Code of Iowa, 1975. Claims for reimbursement for meals charged by county officers may be allowed where justified as a benefit to the county rather than to the individual involved. (Nolan to Yenter, Deputy Auditor, 1-6-76) #76-1-11

Mr. Ray Yenter, Deputy Auditor, Office of Auditor of State: This is written in reply to the request which you submitted for an opinion concerning the filing and payment of claims for meals under circumstances which you set forth as follows:

"May members of Boards of Supervisors charge and be reimbursed for meals obtained in connection with regular or special meetings of the board; or, if the Board meets for lunch with an individual or group of people for a business meeting at the county seat, or, in the event such meeting is held at a location within the county other than at the county seat?

"Are agricultural extension officers and county assessors eligible for reimbursement for meals obtained during their field work within the county?"

With respect to the meals of members of the boards of supervisors, the authority of the supervisors to allow claims for meals obtained must be derived from statutory authority contained in §332.3 of the 1975 Code of Iowa. Subsection 5 of §332.3 authorizes the supervisors:

"To examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle, and allow all claims against the county, unless otherwise provided by law."

Any allowance of claims for reimbursement of expenses for attending meetings must be justified as a county expense, regardless of where the meeting is held. It is unlikely that such justification can be given for meals obtained in connection with the regular or special meetings of the board where the members of the board meet daily, weekly or even several times a month. Further, the justification of "business meeting lunches" also is contingent upon whether or not the incurring of such expense is for the convenience and benefit of the county rather than the individuals involved. In this connection, it may be noted that §332.3(27) specifically authorizes the board of supervisors to appropriate from the county general fund necessary funds for membership fees and attendance expenses at schools of instruction held by the Iowa State Association of Counties and also for attendance at the annual meeting of that association. In an attorney general's opinion issued by this office on July 13, 1955, 1956 O.A.G. 70, the following advice was given:

". . . so that the Board of Supervisors may justify the allowance of the necessary and actual expenses in attending the same, every case is a factual situation to be determined by the Board of Supervisors. The said Board of Supervisors should determine the factual situation upon the following set of standards:

"(1) Does the meeting have instructional value?

"(2) Does the instruction to be given relate directly to the duties of the office requesting approval?

"(3) Is the value of the instruction likely to be such as to justify the absence of the officer from his duties for the period involved?

"If the Board can, in good conscience, answer all said questions in the affirmative, it may properly conclude that the meeting in question is a legitimate study conference for attendance at county expense."

With respect to agricultural extension officers, there appears to be no statutory provision in §176A of the Code of Iowa, or elsewhere that we have located authorizing the reimbursement to such officers for meals obtained during their field work within the county. It is our opinion, however, that the same standards as have been outlined above for the determination of the benefit to the county would also apply in the case of county agricultural extension officers.

With respect to the reimbursement for meals obtained for field work within the county by county assessors, there appears to be no authorization in Chapter 441 of the 1975 Code of Iowa for the allowance of such claims.

January 7, 1976

SCHOOLS: Open Meetings. Chapter 28A, Code of Iowa, 1975. Annual review and renewal of three year employment contract of superintendent is not, in absence of other factors, a personnel matter justifying the school board's executive session instead of considering the matter in an open meeting. (Nolan to Tieden, State Senator, 1-7-76) #76-1-12

The Honorable Dale L. Tieden, State Senator: We have your request for an opinion on the following:

"Special meeting

"A special meeting of the board will be held Wednesday, July 16, at 6:30 p.m. at the school to discuss personnel matters. The board will open in regular session and then go into executive session. * * *

"The attached notification for a special meeting of our school board appears in our local newspaper. At this meeting the Superintendent's contract, which would not have expired until June, 1976, was renewed for a term of three years. Is this particular matter covered by the statement as 'personnel matters'.

"Executive sessions are becoming more and more frequent and seem to cover many subjects. The individual who asked for this opinion is concerned about what really designates the need for executive sessions."

The Iowa law requiring official meetings to be open to the public is found in Chapter 28A of the Code of Iowa, 1975. Section 28A.3 provides:

"Any public agency may hold a closed session by affirmative vote of two-thirds of its members present, when necessary to prevent irreparable and needless injury to the reputation of an individual whose employment or discharge is under consideration, or to prevent premature disclosure of information on real estate proposed to be purchased, or for some other exceptional reason so compelling as to override the general public policy in favor of public meetings. The vote of each member on the question of holding the closed session and the reason for the closed session shall be entered in the minutes, but the statement of such reason need not state the name of any individual or the details of the matter discussed in the closed session. Any final action on any matter shall be taken in a public meeting and not in closed session, unless some other provision of the Code expressly permits such action to be taken in a closed session. No regular or general practice or pattern of holding closed sessions shall be permitted."

The Iowa law is quite clear. Without the presence of other factors pertaining to the protection of personal rights of individuals or the premature disclosure of proposed action by such board which would give rise to speculation and financial advantage or for some other reason whereby the agency would be unduly hindered in carrying out some lawful duty, the meeting should be an open meeting.

From the information supplied by your letter and the notice attached thereto, it would appear that none of these factors was involved at the school board special meeting you referred to. Further, it would appear

that the provisions of the Iowa Code requiring the public agency to obtain the affirmative vote of two-thirds of the members present prior to holding a closed session was ignored. Code §28A.7 and §28A.8 provide for the enforcement of the rights of citizens under the open meetings law and for the penalties to be imposed "upon any person knowingly violating or attempting to violate any provision of this chapter".

January 7, 1976

STATE OFFICERS AND DEPARTMENTS: Board of Accountancy; Registration of Certified Public Accountants. §§1905-C7(2), 1905-C11, 1905-C9, Chapter 91-C1, Code of Iowa, 1931; §§116.6, 116.18, 496C.2, Code of Iowa, 1975, Rules 10-8.3(116), 11.3(1) Iowa Board of Accountancy Rules. A firm consisting of certified public accountants and not public accountants as of June 30, 1975, should be registered with the Iowa Board of Accountancy pursuant to §116.18, Code of Iowa, 1975. Corporations desiring registration under the provisions of Chapter 116, Code of Iowa, 1975, shall be incorporated under the provisions of Chapter 496C (Iowa Professional Corporation Act). (Cook to Burger, Secretary, Iowa Board of Accountancy, 1-7-76) #76-1-13

Mr. Leo E. Burger, Secretary, Iowa Board of Accountancy: I am in receipt of your request for an Attorney General's Opinion concerning an application for registration submitted to the Iowa Board of Accountancy by the Farmers Grain Dealers Association of Iowa. Farmers Grain seeks a current permit to practice as a firm of "public accountants."

Your letter relates the following circumstances regarding this request for a permit:

"Under the Public Accountancy Act of 1974, which went into effect on July 1, 1975, and the related rules adopted by the Board, firms of CPAs, PAs, and APs must request permits to practice in Iowa on an annual basis, i.e., July 1 to June 30. * * *

"Prior to the enactment of the new law the Farmers Grain Dealers Association of Iowa was registered annually by the Board as a firm of public accountants in Iowa. The initial registration took place in 1929 when the legislature passed a Regulatory Accountancy Law which apparently 'grandfathered' in as public accountants those who were 'engaged in the practice of accountancy at the time of enactment' and were not CPAs.

"Annually since 1929 the Iowa Board of Accountancy continued to register the Farmers Grain Dealers Association of Iowa as a firm of public accountants.

"It is our understanding that the Farmers Grain Dealers Association of Iowa is a Cooperative whose members are individual grain dealer cooperatives. It has a 'Public Accountant Division' that presently employs certified public accountants to manage the department which performs audits of member cooperatives. This request for a permit, dated August 6, 1975, indicated the Association had in its employ four certified public accountants each of whom was registered with the Board as a holder of a valid Iowa CPA certificate."

The following questions are posed for consideration:

"1. Does Section 116.6 grant this corporation the right to registration since it was registered as a firm of public accountants on June 30, 1975? Under the prior law registration was granted on a calendar year basis.

"2. All management employees are certified public accountants and not public accountants. Should the Board consider the association to

be a firm of CPAs rather than PAs, thus bringing Section 116.18 into play?

"3. Rule 8.3 requires any corporation desiring registration to be incorporated under the provisions of Chapter 496C. Does the current or prior law grant an exemption for this association?

"4. Rule 11.3(1) requires a firm of PAs or CPAs to be independent. Would the association be considered independent when examining and reporting on the financial statements of its own members? The Board realizes this question probably does not affect the request for registration, but would have to be considered if registration was granted."

The first two questions which you pose are answered conjunctively. Resolution of these questions turns upon the effect of the grandfather clause contained in the regulatory accountancy law of 1929 to which you refer in your letter. See, Session Laws 43 G.A., Ch. 59 (1929, codified in Ch. 91-C1, Iowa Code, 1931). This Act first imposed a registration requirement for persons engaged in the practice of accountancy, as defined in that Act, but who did not hold a certificate issued by the Board as a certified public accountant. Although able to perform identical services under the law, a distinction was drawn between "certified public accountants" and "public accountants," the latter being defined in Chapter 91-C1, §1905-c7(2) of the 1931 Code of Iowa as follows:

"A public accountant is a *person* who is engaged in the practice of accountancy at the time of enactment of this act and who is not a certified public accountant, but who can qualify as a practitioner under the provisions of section 1905-c6." (emphasis added).

Chapter 91-C1, §1905-c11 provided for registration of public accountants as follows:

"Registration of practitioners. All practitioners engaged in the practice of accountancy in this state at the time of the passage of this act who desire to continue in such practice, shall upon application to the board of accountancy on or before September 30, 1929, be registered as follows: * * *

"2. All other practitioners shall be registered as public accountants and shall be issued certificates before December 31, 1929, to practice as such for the ensuing year.

"3. All practitioners who, in connection with the practice of accountancy, make use of a firm, association, assumed or corporate name, shall register the same at the time of making application for registration as herein provided, *and certificates to practice shall be issued only in the names of individuals* . . . ." (emphasis added).

The 1929 Act also provided that individuals who had "three years continuous practical accounting experience as a public accountant" were exempted from certain examination and experience prerequisites to acquire valid registration with the Board. Chapter 91-C1, §1905-c9, Code of Iowa, 1931.

Generally, a grandfather clause within a regulatory law extends certain prerogatives to individuals established in a profession prior to

enactment of the law. As stated in *State ex rel. Krausmann v. Streeter*, 1948, 226 Minn. 458, 33 N.W.2d 56:

"The purpose of an exception or grandfather clause is to exempt from the statutory regulations imposed for the first time on a trade or profession those members thereof who are tehn engaged i nthe newly regulate dfield on the theory that they who have acceptably followed such profession or trade for a period o fyears, or who are engaged therein on a certain date, may be presumed to have the qualifications which subsequent entrants to the field must demonstrate by examination."

See also, *In re Berman*, 1957, 245 N.C. 612, 97 S.E.2d 232; *State Board of Dispensing Opticians v. Schwab*, 1963, 93 Ariz. 328, 380 P.2d 784; and, Annot., 4 A.L.R.2d 667.

It is apparent that the above provisions of the Iowa regulatory law were intended to provide a right of registration to those individuals, not certified public accountants, who qualified as public accountants at the time of enactment without imposing upon such qualified individuals the examination and experience requirements of the law. Though Section 1905c-11 required the public accountant to register with the Board the name of a firm, association, or corporation under which he is practicing public accounting, it seems clear, as the emphasized portions of the statute illustrate, that the legislature intended to make the right of registration available to individuals as opposed to the business entity with which the public accountant was associated.

The original members of Farmers Grain Dealers Association of Iowa presumably fell within the definition of public accountants at the time the 1929 law was enacted. As a result, the members were initially registered as public accountants pursuant to the above provisions. Also, as prescribed by statute, the firm name was registered with the Board. Farmers Grain has continued to register since that time, however, the individuals who were granted registration rights under the grandfather provisions as public accountants no longer are members of the firm. The members of the firm currently consist entirely of registered certified public accountants. Reference to the definition of "public accountant" in the original act illustrates that certified public accountants were specifically excluded therefrom. Thus, it is my opinion that the grandfather clause contained in the original act has no application to this firm of certified public accountants. Since all management employees of the "Public Accountant Division" of Farmers Grain Dealers Association of Iowa are presently certified public accountants and not public accountants, the Iowa Board of Accountancy should consider them to be a firm of certified public accountants. The firm should make current registration with the Board pursuant to the provisions of Section 116.18, Iowa Code, 1975.

Implicit in the above conclusion is my opinion that if the association consisted of certified public accountants and not public accountants on June 30, 1975, the firm could not have been legally registered as a firm of public accountants on that date. Thus, Section 116.6, Iowa Code, 1975, does not grant the firm a right to register as a firm of public accountants.

In light of the above disposition of questions (1) and (2), the response to question (3) appears clearly controlled by the current accountancy laws and related Board rules. Should the certified public accountants elect to adopt a corporate form, Rule 10-8.3(116) of the Board of Accountancy Rules provides:

"Any corporation desiring registration under the Act shall be incorporated under the provisions of Chapter 496C (Iowa Professional Corporation Act)."

This rule is consistent with the Iowa Professional Corporation Act which specifically includes within its provisions the profession of certified public accountancy. See, Section 496C.2, Iowa Code, 1975.

Proper current registration of Farmers Grain in the manner suggested by the above discussion appears to resolve any possible "independence" problems which may or may not exist in the present circumstances. Of course, as a firm of certified public accountants, Farmers Grain would have to comply with the independence requirement of Rule 11.3(1), Iowa Board of Accountancy Rules.

January 8, 1976

ALCOHOLISM; STATE OFFICERS AND DEPARTMENTS: §§4.1(13), 125.2(2), 125.12(4), 125.13(1), 125.13(5), 125.14, 125.26, 125.27, 1975 Code of Iowa. Neither the Commission on Alcoholism nor the Director of the Division on Alcoholism presently has the power to require private, non-profit, corporations with which the Commission contracts for the providing of alcoholism treatment to have boards of directors representative of the areas they serve. An alcoholism program at an institution run by the Department of Social Services must be approved by the Commission on Alcoholism. (Haskins to Voskans, Director, Division on Alcoholism, 1-8-76) #76-1-14

Jeff Voskans, Director, Division on Alcoholism: You ask an opinion of our office on two questions. The first is whether the Commission on Alcoholism or the Director of the Division on Alcoholism has the power to require private, non-profit corporations with which the Commission contracts for the providing of alcoholism treatment to have boards of directors representative of the areas they serve. The second is whether alcoholism programs at mental health institutes run by the Department of Social Services must be approved by the Commission on Alcoholism.

Pertinent to both questions is §125.13(1), 1975 Code of Iowa, which states:

"The commission shall establish standards for treatment programs and facilities. The standards may concern only the health standards to be met and minimum standards of treatment to be afforded patients. A person shall not operate a public or private alcoholism treatment facility or program until it is approved by the commission, except as provided in section 125.14."

With regard to the first question, §125.13(1) is the sole authority for the Commission to regulate facilities. Under that section, as can be seen, the Commission is empowered to establish standards for facilities, but the standards may only concern health standards and minimum standards of treatment to be afforded patients. The composition of boards of directors of facilities is clearly outside the allowable scope of the Commission's standards and the Commission cannot therefore

regulate it. The same is true of the Director. Under §125.13(5), 1975 Code of Iowa, the Director can approve or disapprove a facility only for failure to meet the lawful standards of the Commission and therefore could not deny approval to a facility merely because of the composition of the board of directors. And the Director's power in §125.12(4), 1975 Code of Iowa, to "maintain, supervise, and control all facilities operated by him" does not extend to the type of private facilities involved here, because they are not "operated" by the Director. It may well be that, as a matter of policy, the Commission or the Director should have the power to regulate the make-up of the boards. But due to the present specific restrictive language of §125.13(1), the power does not now exist on the part of either the Commission or the Director.

As to the second question, §125.13(1), as seen, provides that a person shall not operate a public or private alcoholism program unless it is approved by the Commission, subject to certain exceptions. The exceptions are set forth in §125.14, 1975 Code of Iowa, which states:

"Approval of the director[1] is not required for the operation of the following:

conclude that the word "director" in §125.14 is probably an error in legislative drafting and that the legislature actually meant the word "Commission".

"1. A hospital or alcoholic treatment facility under the control of the veterans administration or other federal agency.

"2. The private practice of medicine and surgery or osteopathic medicine and surgery. However, no program shall be exempt from approval by the director by virtue of its utilization of the services of a medical practitioner or a practitioner of osteopathic medicine or surgery.

"3. A private institution conducted by and for persons who adhere to a religious faith or belief for the purpose of providing non-medical services to alcoholics, and who rely primarily on prayer or other spiritual means for healing in the practice of their religion.

"4. An agency, institution or program which, in the judgment of the director, provides services which are only informational or educational in nature."

Alcoholism programs at mental health institutes run by the Department of Social Services fall into none of the above excepted categories. Moreover, the Department of Social Services would constitute a "person" under §125.13(1). *See* §4.1(13), 1975 Code of Iowa. And an alcoholism program at a mental health institute run by the Department of Social Services clearly is a "public" program and therefore must be approved by the Commission. This interpretation is consistent with the fact that, under §125.26, 1975 Code of Iowa, alcoholism programs at mental health institutes run by the Department of Social Services are funded outside of Ch. 125 and not through the Division on Alcoholism. The Commission's approval, unlike the Director's, does not entitle an alcoholism program to funding. It is the Director's approval which is both necessary and sufficient for funding. Once a program is approved by the Director, it becomes a "facility" within the meaning of §125.2(2), 1975 Code of Iowa, and thus, under §125.27, 1975 Code of Iowa, is entitled to funding.

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[1] An analysis of the overall statutory scheme of Ch. 125 leads us to

But approval by the Commission has no such effect and is perfectly consistent with funding outside Ch. 125. Commission approval is for broad regulatory purposes and is required regardless of whether a program receives funding from the Division.

In sum, neither the Commission on Alcoholism nor the Director of the Division on Alcoholism presently has the power to require private, nonprofit, corporations with which the Commission contracts for the providing of alcoholism treatment to have boards of directors representative of the areas they serve. Alcoholism programs at mental health institutions run by the Department of Social Services must be approved by the Commission on Alcoholism.

January 5, 1976

INSURANCE. Health Maintenance Organizations. §§4.1(13), 514B.1, 514B.2, 514B.4, 514B.5, Code of Iowa, 1975. A person may not offer to provide a §514B.1(2) health care service on a fixed prepayment basis unless he first offers to provide §514B.1(6) basic health care services and has been certified as a Chapter 514B Health Maintenance Organization. (Hager to Kelly, State Senator, 1-8-76) #76-1-15

The Honorable E. Kevin Kelly, State Senator, Twenty-fifth Senatorial District: Reference is made to your letter of October 15, 1975, in which you state:

"In an effort to improve collection of obstetric (OB) accounts, . . . (a local) . . . hospital offers to enter into an agreement with OB patients to furnish all necessary hospital services for the mother and the baby for a period up to seven days for a total charge of $400, if prepaid fifteen days prior to delivery. If the patient is discharged for any reason prior to incurring $400 in services per schedule of charges, the difference between the incurred charges and the $400 is returned to the patient."

"The issue at question is whether the availability, at the option of the patient, of the opportunity to pay a fixed sum for hospital services up to a maximum of seven days constitutes a pricing mechanism or arrangement prohibited by Chapter 514B of the Iowa Code.

In our opinion, the plan offers "health care service" to enrollees on a fixed prepaid basis and is therefore subject to Chapter 514B, The Code, regulating health maintenance organizations. A careful reading of the Insurance Code, and specifically Chapter 514B, will disclose the reason for this conclusion.

Your inquiry asks whether 514B is applicable to the proposed plan. Before making that determination we engaged in an examination of the Insurance Code generally and found no other sections specifically applicable.

Chapter 514B relating to Health Maintenance Organizations (HMO) was enacted by the 65th General Assembly, 1973. Committee drafts of the bill show that the law is substantially based upon the model HMO Act of the National Association of Insurance Commissioners (NAIC). Applicable sections of our Act are set out below:

"Health maintenance organization" means any person which:

a. Provides either directly or through arrangements with others, health care services to enrollees on a fixed prepayment basis;

b. Provides either directly or through arrangements with other persons for basic health care services; and,

c. Is responsible for the availability, accessibility and quality of the health care services provided or arranged. Section 514B.1(3).

Elements of that definition are set out in the chapter:

"Health care services" means services included in the furnishing to any individual of medical or dental care, or hospitalization, or incident to the furnishing of such care or hospitalization, as well as the furnishing to any person of all other services for the purposes of preventing, alleviating, curing, or healing human illness, injury, or physical disability. Section 514B.1(2).

"Basic health care services" means services which an enrollee might reasonably require in order to be maintained in good health, including as a minimum, emergency care, in-patient hospital and physician care, and out-patient medical services rendered within or outside of a hospital. Section 514B.1(6).

Prior to establishing an HMO, a *person* must be certified:

"A person shall not establish or operate a health maintenance organization in this state, nor sell, offer to sell, or solicit offers to purchase or receive advance or periodic consideration in conjunction with a health maintenance organization without obtaining a certificate under this chapter." Section 514B.4.

The critical language of Chapter 514B as it relates to the proposed plan then may be summarized as follows: to be certified as an HMO and thus eligible to provide "health care service" on a fixed prepayment basis, a person must first provide a minimum package of "basic health care services".

The language of the Act provides that ". . . any person . . ." who provides a level of benefits and meets other requirements may be certified as an HMO. "Person" is not defined in the chapter and, as such, section 4.1(13), The Code, is controlling:

"unless otherwise provided by law 'person' means individual, corporation, government . . . or association, or any other legal entity."

A hosiptal then can be a "person" as contemplated by Chapter 514B. However, before operating an HMO, a "person" must be granted a certificate of authority. Section 514B.2, The Code. To qualify for certification as an HMO, a minimum package of "basic health care benefits" on a prepaid basis must be offered. Section 514B.5(3), The Code. That package of "basic health care benefits" is defined at section 514B.1(6), The Code:

". . . (at) a minimum, emergency care, in-patient hospital and physician care, and out-patient medical services rendered within or outside a hospital."

"Health care services" is defined in the chapter to be ". . . services included in the furnishing to any individual of . . . hospitalization, or incident to the furnishing of . . . such hospitalization".

The proposed plan offers to provide "all necessary hospital services for the mother and baby for a period of up to seven days . . . for a total charge of $400, if prepaid fifteen days prior to delivery . . ." and thus

offers to provide health care service without an offering of a minimum package of "basic health care benefits" and, as such, is prohibited by Chapter 514B.

Comments to the NAIC Model Act's definition of an HMO are instructive and in accord with our opinion:

". . . (the language) . . . prevents the avoidance of the applicability of the Act by the mere expediency of failing to meet the minimum package requirement." *Proceedings of the National Association of Insurance Commissioners*, Vol. 1, p. 206 (1973).

It is our opinion that the plan is an offer by a "person" to provide "health care services" to "enrollees" on a fixed prepayment basis without offering to provide the required minimum package of "basic health care services" and, as such, is prohibited by Chapter 514B, The Code.

January 12, 1976

TAXATION: Property Tax Exemption for Church, Sections 427.1(9), (23) and (24). In order to qualify for property tax exemption for property used for religious purposes, Church must file for exemption no later than July 1 of the year for which the exemption is claimed. (Maggio to Boerner, Assistant Ida County Attorney, 1-13-76) #76-1-16

Mr. Laurel L. Boerner, Assistant Ida County Attorney: This is in response to your request for an Opinion of the Attorney General in which you state:

"A Church in our county owns a home which is provided to the acting minister of the Church without charge.

"From January 1, 1973, to September 1, 1973, a minister was not employed by the Church and a commercial rental agreement was entered into by the Church and an individual for rental of this home. The Church received rental payments during this period of time and admitted they were not using the property for religious purposes.

"Starting on September 1, 1973, a minister again occupied the home and has continued to occupy the home rent free up to the present time.

"Tax assessments were made in January of 1973 for the eighteen month period and the Church has been assessed for taxes on this home for each of the three six month periods of the assessment.

"It is the Church's position that they reverted to a religious purpose on September 1, 1973, and that they are not liable to pay tax on assessments for the period of September 1, 1973, to July 1, 1974.

"An Opinion is requested from your office on the question of whether the Church is liable for such taxes under the exemption provisions of Section 427.1(9) of the 1973 Code."

In order to qualify for property tax exemption under Section 427.1(9), Code of Iowa, 1975, the claimant must file a "statement of objects and uses" with the county assessor before February 1 of the year for which the exemption is claimed, Section 427.1(23), Code of Iowa, 1975, although a delayed claim may be filed as late as July 1 of the year for which the exemption is claimed, Section 427.1(24), Code of Iowa, 1975. According to your statement of the problem, the Church was not using the property in question for its "appropriate objects", Sections 427.1(9), (23), Code of Iowa, 1975, until September 1, 1973. Thus, since the

Church was not qualified to file for a 1973 exemption before July 1, 1973, it is not entitled to an exemption for that year or any portion thereof. *Churchill v. Millersburg Savings Bank*, 1931, 211 Iowa 1168, 235 N.W. 480.

You also state, "Starting on September 1, 1973, a minister again occupied the home and has continued to occupy the home rent free up to the present time." Thus, the Church used its property as prescribed in Section 427.1(9), Code of Iowa, 1975, for the 1974 tax year, and, if it timely applied for the exemption by July 1, 1974, it would be entitled to the same. Likewise, for the year 1975, if the Church timely applied for the exemption by July 1, 1975, the exemption would be applicable to 1975 property taxes. These conclusions assume that in 1974 and 1975 the property in question was used for appropriate religious objects which include the Church's use of a house as a parsonage. *Trinity Lutheran Church of Des Moines v. Browner*, 1963, 255 Iowa 197, 121 N.W.2d 131.

January 13, 1976

CITIES AND TOWNS: Conflict of Interest—§403.16, Code of Iowa, 1975. A City Attorney should not have an interest in property included in the city's urban renewal project, except as to the exceptions listed in §403.16. (Blumberg to Rabedeaux, State Senator, 1-13-76) #76-1-17

Honorable W. R. Rabedeaux, State Senator: We have received your opinion request of October 20, 1975, regarding a conflict of interest in an urban renewal project. Under your facts, the law firm of the city attorney has a tentative agreement with a potential bidder on urban renewal property to lease or purchase a building constructed by the bidder. The city attorney has no connection with the urban renewal project in that private counsel has been retained by the city or urban renewal agency. You ask whether a conflict of interest, pursuant to §403.16, 1975 Code, exists.

Section 403.16 provides in pertinent part:

"No public official or employee of a municipality, or board or commission thereof . . . shall voluntarily acquire any personal interest, as hereinafter defined, whether direct or indirect, in any urban renewal project, or in any property included or planned to be included in any urban renewal project of such municipality, or in any contract or proposed contract in connection with such urban renewal project . . . For the purposes of this section the following definitions and standards of construction shall apply:

1. 'Action affecting such property' shall include only that action directly and specifically affecting such property as a separate property but shall not include any action, any benefits of which accrue to the public generally, or which affects all or a substantial portion of the properties included or planned to be included in such a project.

2. Employment by a public body, its agencies, or institutions or by any other person having such an interest shall not be deemed an interest by such employee or of any ownership or control by such employee of interests of his employer. Such an employee may participate in an urban-renewal project so long as any benefits of such participation accrue to the public generally, such participation affects all or a substantial portion of the properties included or planned to be included in such a

project, or such participation promotes the public purposes of such project, and shall limit only that participation by an employee which directly or specifically affects property in which an employer of an employee has an interest.

3. The word 'participation' shall be deemed not to include discussion or debate preliminary to a vote of a local governing body or agency upon proposed ordinances or resolutions relating to such a project or any abstention from such a vote.

4. The designation of a bank or trust company as depository, paying agent, or agent for investment of funds shall not be deemed a matter of interest or personal interest.

5. Stock ownership in a corporation having such an interest shall not be deemed an indicia of an interest or of ownership or control by the person owning such stocks when less than five percent of the outstanding stock of the corporation is owned or controlled directly or indirectly by such person.

6. The word 'action' shall not be deemed to include resolutions advisory to the local governing body or agency by any citizens group, board, body, or commission designated to serve a purely advisory approving or recommending function under this chapter.

7. The limitations of this section shall be construed to permit action by a public official, commissioner, or employee where any benefits of such action accrue to the public generally, such action affects all or a substantial portion of the properties included or planned to be included in such a project, or such action promotes the public purposes of such project, and shall be construed to limit only that action by a public official, commissioner, or employee which directly or specifically affects property in which such official, commissioner, or employee has an interest or in which an employer of such official, commissioner, or employee has an interest. Any disclosure required to be made by this section to the local governing body shall concurrently be made to an urban renewal agency which has been vested with urban renewal project powers by the municipality pursuant to the provisions of section 403.14. No commissioner or other officer of any urban renewal agency, board or commission exercising powers pursuant to this chapter shall hold any other public office under the municipality, other than his commissionership or office with respect to such urban renewal agency, board or commission. Any violation of the provisions of this section shall constitute misconduct in office, but no ordinance or resolution of a municipality or agency shall be invalid by reason of a vote or votes cast in violation of the standards of this section unless such vote or votes were decisive in the passage of such ordinance or resolution."

There is no case with your specific fact situation. *Wilson v. Iowa City*, 165 N.W.2d 813 (Iowa 1969), dealt with §403.16 before paragraphs one through seven were added. There, several councilmen had interests in property within an urban renewal area. It was held that their interests created a conflict of interest which voided the measures of the city voted upon by those councilmen. Although your fact situation is not similar in that the city attorney does not vote, the case is still analogous.

Section 403.16 prohibits any person under any employment situation with a city from having any interest, direct or indirect, in any property in an urban renewal area. It also prohibits any such person from taking any action connected with the project. It was held in *Wilson*, concerning

the rules on conflicts of interest, that no such rule of law has more longevity than that which condemns conflict between the public and private interests of government officials and employees nor any which has been more consistently and rigidly applied. The court stated (165 N.W.2d at 822):

"These rules, whether common law or statutory, are based on moral principles and public policy. They demand complete loyalty to the public and seek to avoid subjecting a public servant to the difficult, and often insoluble, task of deciding between public duty and private advantage.

"It is not necessary that this advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the *potential* for conflict of interest which the law desires to avoid."

See also, *Goreham v. Des Moines Met. Area Solid Waste Agency*, 179 N.W. 2d 449, 462 (Iowa 1970).

As city attorney, a person is a public servant, and the laws of conflict of interest should be rigidly applied. We do not believe that the city attorney has done anything wrong, or even so intended. On the contrary, his concern over this matter shows his desire to comply with the applicable laws. However, as stated above, it is the *potential* for a conflict of interest that the law wishes to avoid. Such a potential exists here.

Accordingly, we are of the opinion that a city attorney should not have an interest in property included in the city's urban renewal project, except as to the exceptions listed in §403.16.

January 14, 1976

HEALTH: Health Services Agencies — P.L. 93-641; 42 C.F.R. Part 122. A spouse of a superintendent of a community college where health care is taught may not be a consumer member of a Health Services Agency, subject to caveat. (Blumberg to Hargrave, State Representative, 1-14-76) #76-1-18

Honorable William Hargrave, State Representative: We have received your opinion request of January 12, 1976, regarding Health Systems Agencies, pursuant to the National Health Planning and Resources Development Act of 1974 (P.L. 93-641). You ask whether the spouse of a superintendent of a community college which offers courses in health care can serve as a consumer on a governing body for such an agency.

At present, 42 C.F.R. Part 122 contains proposed rules, issued October 17, 1975, regarding Health Systems Agencies. Section 122.109(b)(1) provides that a majority, not exceeding 60 percent, of the members of the governing body shall be residents of the health service area served by the agency who are consumers, and are not, and have not been during the preceding year, providers of health care. "Providers of health care" is defined in §122.1(o)(1) and (2) as a direct provider (physician, dentist, nurse, and the like) and an indirect provider. "Indirect provider" is defined, in part, as one who receives, either directly or through his or her spouse, more than one-tenth of his or her gross annual income from one or more of the following: "(A) Fees or other compensation for . . .

instruction in the provision of health care; (B) Entities . . . engaged in the provision of health care . . . or instruction." "Provider" also includes a member of the immediate family of a direct or indirect provider.

Assuming that the superintendent earns more than one-tenth of his annual gross income as superintendent, a literal reading of these rules leads to the conclusion that the spouse in question would not qualify as a consumer. This conclusion, however, is subject to possible change. These rules are only proposed and may be amended or changed before they are finalized. To date, the federal agency has not taken any steps to interpret these rules and the law in a strict fashion, for to do so may result in determinations contrary to the intention of Congress. We have strictly construed these rules, but the federal agency may take a different approach.

Accordingly, we are of the opinion that the spouse of a superintendent of a community college, where health care is taught, may not be a consumer on the governing body of a Health Services Agency, subject to the above caveat.

January 16, 1976

STATE OFFICERS AND DEPARTMENTS. Department of Transportation; Rule Making Power; Effective Date of Rules. §§4.12 and 307.10 (5), Code of Iowa, 1975. The Transportation Commission, in adopting a proposed rule extending the maximum length of double bottom trucks to 65 feet, may not by resolution establish an effective date for such rule conditional on the General Assembly passing and sending to the Governor bills banning studded snow tires and implementing the functional classification of highways where the statute authorizing the making of the rule itself provides when such rule is to be effective, i.e., May 1. The invalidity of this portion of the resolution does not make the rule itself invalid. The rule is severable and if the General Assembly approves the rule or takes no action with respect to the same within 60 days of the submission of such rule to it, the rule will become effective on May 1. (Turner to Rabedeaux, State Senator, 1-16-76) #76-1-19

The Honorable W. R. Rabedeaux, State Senator: Reference is made to your letter of January 14, 1976, in which you state:

"I am requesting an opinion on the Tuesday, January 13, 1976, decision of the Commission of the Iowa Department of Transportation regarding the length of trucks operated on the highways of the State of Iowa.

"I believe that the section of the Code dealing with this matter, 307.10 subsection 5, specifically instructs the Commission to act in the length of vehicles and combination vehicles, and in no other matter.

"Subsection 5 specifically exempts the rules, if adopted, to be exempt from provisions of chapter 17A. It does not grant this exemption to the subject of banning studded snow tires and reclassifying highways."

Section 307.10, Code of Iowa, 1975, provides in relevant part:

"The commission shall: * * *

"5. Adopt rules in accordance with the provisions of chapter 17A as it may deem necessary to transact its business and for the administration and exercise of its powers and duties. The transportation commission

shall also adopt rules, which rules shall be exempt from the provisions of chapter 17A, governing the length of vehicles and combinations of vehicles which are subject to the limitations imposed under section 321.457. The commission may adopt such rules which permit vehicles and combinations of vehicles in excess of the length limitations imposed under section 321.457, but not exceeding sixty-five feet in length, which may be moved on the highways of this state. Any such proposed rules shall be submitted to the general assembly within five days following the convening of a regular session of the general assembly. *The general assembly may approve or disapprove the rules submitted by the commission not later than sixty days from the date such rules are submitted and, if approved or not action is taken by the general assembly on the proposed rules, such rules shall become effective May 1 and thereafter all laws in conflict therewith shall be of no further force and effect.* * * *" (emphasis added)

In an earlier opinion of the Attorney General, 1974 O.A.G. page 576, we had occasion to consider the constitutionality of §307.10(5) and concluded that it was a constitutionally valid delegation of legislative authority to the commission with respect to the establishment of maximum truck lengths.

The January 13, 1976, action of the Transportation Commission to which you make reference is found in a Report of the Department of Transportation to the 1976 Regular Session of the Sixty-sixth General Assembly. Such report consists of two sections and copies were filed with the Clerk of the House of Representatives at 2:08 PM, and the Secretary of the Senate at 2:17 PM, today (January 16, 1976). Section 1 is a resolution adopted by the Commission relative to truck lengths. Section 2 is a proposed rule with respect to such truck lengths. Such §§1 and 2 provide:

"Section 1. Pursuant to the authority of section 307.10 of the Code and in accordance with the special rulemaking provisions of that section, the Iowa Transportation Commission in public session January 13, 1976, adopted the following motion:

"That the Iowa DOT, pursuant to the authority granted to it under SF 1141, establish the legal length limit of a combination of three vehicles coupled together, one of which is a motor vehicle, inclusive of front and rear bumpers, to be sixty-five feet. No single semitrailer or trailer included in such combination shall have an overall length, inclusive of rear bumper, in excess of thirty feet. Said combination of three vehicles in excess of sixty feet but not in excess of sixty-five feet may be operated on 4 lane highways or on highways other than 4 lane when the points of origin and destination are within five miles of a 4 lane highway. Said 4 lane highway restriction shall not effect those Iowa border cities which shall have by ordinance allowed internal movement of said sixty-five foot combination vehicles.

"In addition to these exceptions said sixty-five foot three vehicle combinations shall be allowed on all Iowa 24′ highway segments as now exist or may exist in the future and such other segments less than 24′ which may provide continuity to the transportation system or provide reasonable route continuity and/or access to communities of 5,000 or greater population. Said exception to 24′ highways shall be subject to Iowa DOT Commission approval and shall not exceed 125 miles in total.

"Said motion shall also include an appropriate fee schedule which shall be adopted by the Iowa DOT Commission prior to the effective date of usage as established by SF 1141.

"The legalization of 65 ft. double bottom shall be effective the day the General Assembly sends the enrolled bills outlawing studded tires and implementing functional classification to the Governor.

"Section 2. PROPOSED RULES:

TRANSPORTATION DEPARTMENT (820)

07 MOTOR VEHICLE DIVISION

ARTICLE F
OPERATING AUTHORITY

CHAPTER 6
LENGTH OF THREE VEHICLE COMBINATIONS

"820—(07,F)6.1(307) *Length.* Sixty-five feet is established as the maximum legal length of a combination of three vehicles coupled together, one of which is a motor vehicle, inclusive of front and rear bumpers which may operate on Iowa highways. No single semitrailer or trailer included in such combination operated on Iowa highways shall have an overall length, inclusive of rear bumper, in excess of thirty feet.

"820—(07,F) 6.2 *Operations restricted.* A combination of three vehicles in excess of sixty feet but not in excess of sixty-five feet may be operated only on four lane highways with the following exceptions:

"6.2(1) When traveling to or from points of origin and destination which are within five miles of a four lane highway, highways other than those with four lane may be used;

"6.2(2) When operated in Iowa border cities pursuant to subsection 321.457(7) of the Code;

"6.2(3) When operated on Iowa highways with pavement widths of twenty-four feet or more;

"6.2(4) When operated on Iowa highways with pavement widths less than twenty-four feet which may provide continuity to the highway transportation system or which provide reasonable route continuity or access to communities of five thousand or greater population. The granting of an exception to a section of highway under this subrule shall be by order of the transportation commission and the total of all such exceptions shall not exceed one hundred and twenty five miles."

It is clear from the plain language of §307.10(5) that the Transportation Commission is granted no authority thereunder to prohibit directly the use of studded tires on the highways of Iowa or to implement functional classification of highways. However, as is evident from the resolution which it has adopted, it does not purport to do this. Rather the Commission's resolution attempts to make the effective date of the rule authorizing 65 foot trucks contingent on the general assembly passing and sending to the Governor enrolled bills prohibiting the use of studded tires and implementing functional classification of highways.

In my opinion, this strongly suggests coercion and in any case is in excess of the statutory authority granted by §307.10(5), the last sentence of which in clear, plain and in unambiguous terms provides that a rule relating to truck lengths submitted to the general assembly, if approved or no action is taken by the general assembly, shall become effective May 1.

Of course, if the general assembly disapproves the rule within the sixty day time limit established by the statute, the rule does not become effective at all. But if it is approved or no action is taken, such a rule becomes effective May 1, 1976, and the Commission has no authority to alter or postpone that effective date to some other time contingent on one

or more other events: in this case, the adoption of bills prohibiting the use of studded tires and implementing functional classification.[1]

As stated in 2 Am.Jur.2d, page 126, *Administrative Law*, §300:

"Administrative rules and regulations, to be valid, must be within the authority conferred upon the administrative agency. A rule or regulation which is broader than the statute empowering the making of rules, or which oversteps the boundaries of interpretation of a statute by extending or restricting the statute contrary to its meaning, cannot be sustained. To the extent that a regulation is not in conformity with the statute and with controlling judicial interpretations of the statute it conflicts with the meaning of such statute and so is unauthorized; and regulations must conform, not only with the statute under which they are issued, but also with the constitution and other laws.

"Administrative agencies must strictly adhere to the standards, policies, and limitations provided in the statutes vesting power in them. * * *

* * *

"It is a wholesome and necessary principle then that an administrative agency must pursue the procedure and rules enjoined upon it by the statute creating it, and show a substantial compliance therewith, to give validity to its action. * * *"

Beyond this, it is to be observed that the proposed rule itself (§2 of the report) makes no mention of the effective date of such rule. It is only the resolution (§1 of the report) which attempts to establish an effective date at variance with that provided by the statute.

Accordingly, it is our opinion that so much of the resolution adopted by the Transportation Commission, which purports to make the effective date of the legalization of sixty-five foot double bottoms contingent on the specified actions of the general assembly, is invalid and of no force and effect.

The question remains, however, as to whether or not the invalidity of this portion of the resolution is severable from the remainder of such resolution and from the proposed rule itself. We think that it is, and, in our opinion, if the general assembly approves the rule or takes no action with respect to the same within the sixty day time period provided by law, that portion of the report which legalizes sixty-five foot double bottom trucks will become effective May 1, 1976.

As stated in 2 Am.Jur.2d, page 125, *Administrative Law*, §298:

"An act of an administrative agency which is legislative in character and has the force of a statute is subject to the same tests as to its validity as an act of the legislature intended to accomplish the same

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[1] If such conditions could be attached to rule making authority, the agencies of the executive department would be forever at war with the legislative department, insisting upon passage of countless programs. Delegation of rule making power is a useful but sensitive function and saves the legislature much time which might otherwise be wasted in fact finding and needless detail. This tool ought not be destroyed by the ingenious tactics of imaginative administrators. See *Goodlove v. Logan*, 1933, 217 Iowa 98, 251 N.W. 39, *Danner v. Hass*, 1965, 257 Iowa 654, 134 N.W.2d 534 and cases cited in 1974 O.A.G. 576.

purpose, whether such acts are rules or regulations, or general orders. * * * Thus there are applicable the rules in regard to . . . partial or entire invalidity; . . ."

In Iowa, the rule with respect to partial or entire invalidity is set forth in the code. §4.12, Code of Iowa, 1975, provides:

"Acts or statutes are severable. If any provision of an Act or statute or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act or statute which can be given effect without the invalid provision or application, and to this end the provisions of the Act or statute are severable."

Certainly, the proposed rule of the transportation commission can be given effect without the invalid part of the resolution. We cannot see how banning studded snow tires or implementing functional classification of highways is germane to the length of trucks and nothing in the resolution or rule suggests these matters affected the transportation commission's decision to allow longer trucks. The commission's attempt to set an effective date for such rule in conflict with a statute authorizing the rule and which, itself, specifies the effective date of the rule as May 1, is part of the invalid part of the resolution.

It may be that the transportation commission will want to reconsider its rule and resolution in the light of this opinion. If so, it has until midnight Saturday, January 17, 1976, (the fifth day following the convening of the present regular session) to correct, vacate or modify said rule. §4.1(22). The General Assembly intended to leave the decision as to the length of trucks to the transportation commission, and certainly not to the attorney general.

January 20, 1976

COUNTIES: Legal Residence. Mental Retardation. §§222.60, 222.77 and 252.16, Code of Iowa, 1975. The county of legal residency as originally determined does not change when an individual is placed as a habilitation measure from a hospital-school in an institution in another county. (Boecker to Ladegaard, Dickinson County Attorney, 1-20-76) #76-1-20

Mr. James C. Ladegaard, Dickinson County Attorney: This is written in response to your request for an Attorney General's Opinion with respect to the following question concerning the legal settlement of an individual placed out of the Woodward State Hospital-School:

"Whether a person's legal settlement changes after discharge from a state institution and placement in a county other than the one of his legal settlement at time of commitment."

The pertinent facts that you have set out for us are as follows:

The individual involved was a patient at the Woodward State Hospital-School from 1959, until he was placed at the Black Hawk Goodwill Sheltered Workshop in 1969. In December of 1970, he was discharged as capable of partial self-support. The individual remained in Black Hawk County from the time of discharge under the auspices of Goodwill Industries until his readmission to Woodward in the autumn of 1975. Goodwill Industries employed and supervised this individual during his entire stay in Black Hawk County.

Section 222.60, Code of Iowa 1975, states:

"All necessary and legal expenses for the cost of admission or commitment or for the treatment, training, instruction, care, habilitation, support and transportation of patients in a state hospital-school for the mentally retarded, or in a special unit, or any public or private facility within or without the state, approved by the commissioner of the department of social services, shall be paid by either:

"1. The county in which such person has legal settlement as defined in section 252.16.

"2. The state when such person has no legal settlement or when such settlement is unknown."

Section 222.60, Code of Iowa 1975, places the financial cost of maintaining an individual under Chapter 222 on the county of legal settlement. There is no dispute from the facts presented to us that the individual concerned in the question presented to us originally had legal settlement in Dickinson County. Thus Dickinson County is liable for the expenses incurred under Chapter 222 unless there has been a change of legal settlement. This then leads us to your question has this individual's legal settlement changed from Dickinson County to Black Hawk County.

We feel that there are two pertinent Code sections to be addressed in determining this issue. Section 222.77, Code of Iowa, 1975, and Section 252.16, Code of Iowa, 1975, to which we are referred by Section 222.60, as a basis for defining legal settlement. Section 222.77, Code of Iowa, 1975, states:

"The cost of support of patients placed on convalescent leave or removed as a habilitation measure from a hospital-school, or a special unit, except when living in the home of a person legally bound for the support of such patient, shall be paid from the state institution fund or the county mental health fund of the county of legal settlement. If the patient has no county of legal settlement, the cost shall be paid from the support fund of the hospital-school or special unit and charged on abstract in the same manner as other state inpatients until such time as the patient becomes self-supporting or qualifies for support under other existing statutes."

Iti s our understanding of the facts presented to us that the individual involved herein never became self-supporting and had to rely on Goodwill for funding and supervision. This is a case where an individual has been removed from the State Hospital-School as a "habilitation measure" and therefore the original county of legal settlement remains responsible for that individual.

This is further reinforced when we turn to Section 252.16(3) for a determination of legal settlement as directed by Section 222.60. Section 252.16(3) reads in pertinent part:

"A person who is an inmate of or is supported by an institution whether organized for pecuniary profit or not or an institution supported by charitable or public funds in a county in this state shall not acquire a settlement in the county unless the person before becoming an inmate in the institution or being supported by an institution has a settlement in the county. A minor child residing in an institution assumes the settlement of his parent as prescribed in subsections 5 and 6. Settlement

of the minor child changes with the settlement of his parent, except that the child retains the settlement that his parent has on the child's eighteenth birthday until he is discharged from the institution, at which time he acquires his own settlement, as provided in this section."

There are two requirements for legal settlement under Section 252.16 (1), Code of Iowa, 1975; (1) residency, and (2) for a period of one year. Section 252.16(3) specifically excludes certain individuals from acquiring a new legal settlement even if they had lived in another county for over a year; namely those supported by an institution. Institution as defined in Section 252.16(3) clearly includes Goodwill and thus this individual we feel could not acquire a new legal settlement in Black Hawk County. AGO 1964 p. 457.

Our answer to your question then is as long as the individual remained in Black Hawk County under the auspice of Goodwill Industries he did not obtain a legal settlement in Black Hawk County and therefore Dickinson County has never been relieved of financial responsibility for this patient.

January 20, 1976

HIGHWAYS: Temporary Closing for Construction. Chapter 306.41, Code of Iowa, 1975. Any number road is limited in interpretation to any *posted* number road. (Hogan to Bauercamper, Allamakee County Attorney, 1-20-76) #76-1-21

Mr. John J. Bauercamper, Allamakee County Attorney: Reference is made to your letter of July 21, 1975, in which you state:

"Section 1 of House File 99 amends the first unnumbered paragraph of Section 306.41 of the 1975 Code of Iowa. It adds the following sentence to that section:

" 'Any *numbered road* closed for over 48 hours shall have a designated detour route." (emphasis added).' "

"The question is, then, did the legislature mean that all roads closed for over 48 hours must have a designated detour route, or did it intend that only some ("numbered") roads be provided with detour routes? And finally, what roads are "numbered roads?"

Numbered road is neither defined in the Iowa Code (1975) nor in the case law. The legislature meant some and not all numbered roads are to be provided with a detour route; and second, numbered roads are those kinds of roads that are identifiable by a *posted sign.* The posted sign indicates by a letter or number or symbol the route. The purpose of such being for travel identification purposes along this route.

A "road" is a . . . line of travel or communication extending from one town or place to another. Black's Law Dictionary 1491 (4th ed. 1968). A "route" is a . . . line of travel . . . . Black's Law Dictionary 1495 (4th ed. 1968). A detour is a temporary turning aside from the usual or regular route . . . . Black's Law Dictionary 537 (4th ed. 1968). The statute's purpose in designating a detour route is to guide travelers along points in a line of travel; points of travel not well known to the traveler; such as, a route from town A to town B.

Posted means a process whereby a pole or stake (or whatever) is set up to mark or indicate a route. Number means a numeral or combination of numerals or other symbols used to identify or designate. Webster's Seventh New Collegiate Dictionary 578 (1971). The decision of whether or not a road is significant enough for posting of symbols or numbers is within the governmental agency's discretion. The agency might consider such factors as (1) type of traffic (2) number of vehicles (3) road surface (4) availability of alternate roads to and from a point, town, or market center (5) volume of unfamiliar traffic in the area (6) continual lines of travel, and so forth. Therefore, not all roads are posted if the agency feels the road is not a significant route requiring a posted sign.

The word "any" is a general word and may have a diversity of meanings: its meaning in particular case depending largely upon context and subject matter of statute . . . . *Catholic Order of Foresters vs. State*,. 1937, 67 N.D. 228, 271 N.W. 670, 676, 109 ALR 979; 3A Words and Phrases, "Any", p. 56 (1953).

"Numbered road" is not defined in the Code or in case law. There are numbers (letters, numbers, or symbols) for all roads. However, a *posted*, numbered road guides the traveler along unfamiliar points in a route.

In conclusion, the legislature did not intend to burden the government with unnecessary detour routes. If a statute is ambiguous, the court, in determining the intention of the legislature, may consider . . . (1) the object sought to be attained . . . (2) the consequences of a particular construction . . . . Iowa Code Chapter 4.6 (1975). The legislature selected the words "any numbered roads" for the purpose of guiding unfamiliar travelers along a significant route. This statute should not be read to administratively penalize government for non-posted numbered roads that are of minor significance to travelers in the area. Therefore, any *posted* numbered road is the proper interpretation of this statute.

January 20, 1976

COUNTIES: Collection of Claims. Mental Retardation. §§222.78, 222.81, 222.82, 614.1(4), 633.410, Code of Iowa, 1975; Chapter 1158; §1, 65th G.A. (1974). The statute of limitation imposed by Section 222.82 does not run against the sixth class claim in the estate of an individual or his parents created by Section 222.81. (Boecker to Murphy, Clarke County Attorney, 1-20-76) #76-1-22

Richard J. Murphy, Clarke County Attorney: This is in response to your request for an opinion with respect to the following question concerning a claim in an estate for the cost of maintaining an individual in a Hospital-School for the Mentally Retarded:

"Can any amounts be collected, even those prior to the child's 21st birthday, in light of Section 222.82 of the 1973 Code of Iowa, which limits collections under Chapter 222 by Section 614.1 subsection 4 of the 1973 Code of Iowa?"

Section 222.78, Code of Iowa, 1975, mandates that the father and mother of a mentally retarded child are liable for the individual's support until he reaches the age of majority. AGO 1974 p. 67. It should be noted here that the age of majority in Section 222.78 was lowered to eighteen by Chapter 1158 Section 1, Acts of the 65th G.A. Second Session. Section 222.81, Code of Iowa, 1975, then creates a claim of the sixth class in the estate of the parents for their obligation while the child was a minor. Section 222.81 states:

"The total amount of liability provided in section 222.78 shall be allowed as a claim of the sixth class against the estate of the person or against the estate of the father or mother of such person."

Section 222.82, Code of Iowa, 1975, also addresses itself to the collection of claims arising out of the obligations created under Section 222.78. Section 222.82 states:

"The board of supervisors of each county may direct the county attorney to proceed with the collection of said claims as a part of the duties of his office when the board of supervisors deems such action advisable. The board of supervisors may and is hereby empowered to compromise any and all liabilities to the county arising under this chapter when such compromise is deemed to be in the best interests of the county. Any collections and liens shall be limited in conformance to section 614.1 subsection 4."

Section 222.82 applies Section 614.1, subsection 4, the five year statute of limitation, to these claims. Your question presents the issue of whether or not there is a conflict between Sections 222.81 and 222.82 or in other words, does Section 222.82, limiting the collections authorized under Section 222.82 to conformance to Section 614.1, subsection 4, also apply to the claim created in the estate of an individual or his parents by Section 222.81?

We think not. In determining the meaning of a statute all the sections thereof must be considered and every part must be presumed to have been enacted for a purpose and was meant to have effect. *Georgen v. State Tax Commission*, 165 N.W.2d 782 (1969). Further, a statute must be given a "sensible, practical, workable and logical construction". *Junson v. Fulton*, 162 N.W.2d 438, 443 (1968).

In this light we conclude that Section 222.81 must be given its rightful due and the limitation placed on filing a claim in a decedent's estate would be governed by the pertinent sections of Chapter 633, Code of Iowa, 1975, and Section 633.410 in particular. Section 222.81 does not abrogate the limitation state as it applies to Section 222.82 to suits on an open account, but merely gives rise to a separate cause of action in the estate of an individual or his parents for the liability incurred.

It is further noted that in your request you state that the will of the decedent leaves the entire estate in trust for the maintenance of a surviving child. In the facts presented by your request the surviving child is mentally retarded and at the Glenwood State Hospital-School. Section 222.78 provides in part that:

"* * *

"Nothing in this section shall be construed to prevent a relative or

other person from voluntarily paying the full actual cost as established by the state director for caring for such mentally retarded person."

Thus under the terms of the will it appears this money in any event could be used to help support the surviving child at Glenwood.

January 20, 1976

GENERAL ASSEMBLY; STATUTES; TITLES; SUBJECT MATTER. Art. III, §29, Const. of Iowa. §357.10(5), Code of Iowa, 1975. Ch. 1180, 65th GA, 2nd, 1974. §307.10(5) delegating to the transportation commission power to adopt rules governing the length of trucks is not unconstitutional under Art. III, §29, Const. of Iowa, but is within the ambit of transportation, the one subject of the Act, and the power is adequately expressed in the title. (Turner to Rigler, Chairman DOT). #76-1-23

Mr. Robert R. Rigler, Chairman, Department of Transportation: You have requested an opinion as to the constitutionality of §307.10(5), Code of Iowa, 1975, in which the General Assembly delegated to the Transportation Commission power to adopt rules "which permit vehicles and combinations of vehicles in excess of the length limitations imposed under section 321.457, but not exceeding sixty-five (65) feet in length, which may be moved on the highways of this state" and which provision was adopted as a part of Chapter 1180, Acts of the 65th General Assembly, 2nd Session, 1974 (page 624) which created the department of transportation.

Your question does not go to the constitutionality of the delegation of power to the department of transportation to promulgate rules and regulations setting length limits on trucks. That question was laid to rest in an opinion to Representative Harold O. Fischer on July 11, 1974. 1974 OAG 576.

Nor do you challenge the act in its entirety as an unconstitutional delegation of legislative powers. In that regard, we said the act was constitutional in an opinion to Representative Richard W. Welden dated April 2, 1974. 1974 OAG 469.

Rather you question whether that portion of the act which gave this rule-making authority to the commission was a violation of the one subject matter limitation of Article III, §29, Constitution of Iowa, which provides:

"Every Act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The title to Chapter 1180, creating the department of transportation provided:

"AN ACT to create a state department of transportation by transferring certain duties of the state highway commission, Iowa aeronautics commission, Iowa reciprocity board, Iowa state commerce commission, and the department of public safety to a state department of transportation, *relating to the dimensions of vehicles*, and making coordinating amendments to the Code, including penalty provisions." (Emphasis added.)

It is apparent that this act was intended to be a comprehensive law embracing nearly every area of transportation from airports and air lanes to railroads. Indeed, this monstrous bill comprises 50 pages and doubtless covers foot and bicycle paths as well as mass transportation. I wouldn't be surprised someday to see transportation commission rules thereunder regulating roller skates, skate boards and pogo sticks, which I would suppose are authorized under the broad scope of this bill.

To supplement the title, the General Assembly took the unusual precaution of detailing the public policy of the state in five very broad "whereas" clauses indicating the purpose of the bill and which are quoted as follows:

"WHEREAS, it is the public policy of this state that the general welfare, economic growth, job mobility, convenience, stability, and well-being of the citizens of the state can best be served by a coordinated transportation policy to assure adequate, safe, and efficient transportation facilities and services, and

WHEREAS, in order to accomplish this goal, the general assembly finds that it is necessary to recognize the executive branch of government and to combine and transfer the duties and functions of certain existing state agencies into a state department of transportation created by this Act, and

WHEREAS, that in the reorganization of the executive branch of government relative to the reorganization and regulation of the railroad industry, it shall be the policy of the state that a complete study and survey of the problems of coordination with the federal law, rules and regulations be made, including equalization of taxation, preemption and conflict of authority, authorization and justification for use and application of state and local funds, the improvement of rail facilities through modernizing, regulation and competition, continuation and improvement of service to the shipping public, and

WHEREAS, it is the policy of the state to encourage, foster, and assist in the general development and promotion of highway transportation to promote uniformity in highway design and highway transportation consistent with the economic needs of the state and nation, and

WHEREAS, the duties and responsibilities of the state highway commission should be transferred to the state department of transportation. The duties and responsibilities of the Iowa aeronautics commission should be transferred to the state department of transportation. The duties and responsibilitiles of the Iowa reciprocity board should be transferred to the state department of transportation. The duties and responsibilities of the department of public safety relating to motor vehicle registration, motor vehicle dealer licensing, motor vehicle inspection, and operators and chauffeurs licensing should be transferred to the state department of transportation. The duties and responsibilities of the Iowa state commerce commission relating to the regulation of railroads and motor transportation should be transferred to the state department of transportation, NOW THEREFORE," * * *

The act encompasses not only the department of transportation and the transportation commission but a transportation regulation board; an administrative division; a planning division; a general counsel division; a highway division; a public transportation division; a transportation regulation and safety division; and a railroad transportation division. Dozens of chapters and sections of the Code were amended or repealed and the former Iowa aeronautics commission, Iowa reciprocity board and the regulatory division of the Iowa state commerce commission with

reference to transportation, were abolished or their duties transferred to this one giant agency.

When the legislative purpose was to promote the "general welfare, economic growth, job mobility, convenience, stability and well-being of the citizens of the state" and to provide for such things as "improvement of rail facilities" and to "encourage, foster and assist in the general development and promotion of highway transportation" and "*efficient* transportation * * * services" who can say that the length of trucks is not embodied in the scope of the act? To so hold would jeopardize all code revision projects.

Of course, it is a matter of common knowledge that Governor Ray is strongly opposed to long trucks and on March 2, 1974, earlier in the same year in which this act passed, wrote a five page veto message to House Speaker Varley returning House File 671, a 26 line act which would have authorized 65 foot double bottom trucks, as disproved. Therein the Governor noted that the issue was "controversial and charged with emotion" and said he "set the emotional arguments aside." He said that it was "unfortunate that Iowa does not have a Department of Transportation which could have been so helpful in ascertaining the desirability of any change of the size of trucks that are allowed in our state." "A DOT would be charged with the responsibility of determining our overall transportation needs *and tolerances*," the Governor noted and said "in any event that kind of counseling was not available to either the legislature or me as Governor."

It would thus appear that the legislature, in delegating the long truck issue to the transportation commission, merely followed the recommendation of the Governor in his veto message. But that may not have been the case since Governor Ray now says that state legislators "got what they deserved" when the commission voted to approve 65 foot double bottom trucks on condition the legislature passed bills banning studded snow tires and reclassifying highways. *Des Moines Tribune*, 1-14-76. The Governor is *now* quoted as saying the transportation commission "apparently decided if the legislature is going to toss the ball in their court they could add those two issues and toss it back to the Legislature *where it properly belongs anyway*." One wonders from the foregoing dichotomy who is setting aside whose emotions. Or perhaps the Governor simply doesn't remember his veto message.

In any case, the more than one subject matter rule has been repeatedly construed by our Supreme Court. One of the leading cases, *Long v. Board of Supervisors of Benton County*, 1966, 258 Iowa 1278, 142 NW2d 378, involved an amendment by Senator Jack Schroeder tacked onto an act relating to the compensation of county officers, deputies and clerks, which required the county courthouses of the state to stay open for the transaction of business on Saturday mornings. In a carefully written opinion by Justice Larson, it is pointed out:

"Controversy has often arisen as to the proper application of this provision. In Volume 8, No. 1, Drake Law Review, the author of an article on constitutional form of a bill, states that there have been about 90 such cases involving this point before our court and, in all but 9, statutes have been held valid. As a result of these opinions, we have

some rather definite and specific guides to aid in determining our questions."

The Court noted that the purpose of the constitutional proscription against more than one subject matter "was to prevent so-called 'log-rolling' legislation, and was not intended to embarrass legislation or hamper the legislature." It is difficult for me to see how this act was logrolling when, in fact, the Governor had tacitly urged that the Department of Transportation be given authority to determine the "desirability of any change of the size of trucks" and "tolerances." He had said "that kind of counseling was not available to the Legislature or [the] Governor."

In any case, logrolling is something that can never be entirely eradicated as long as there are legislators and governors with differing legislative objectives, priorities and constituencies.

Another purpose, according to the court, is to limit each bill to a single subject so that the issues presented can be better grasped and more intelligently discussed by legislators. This, too, it would seem is a Utopian objective and would virtually eliminate the code revision process.

Thus the Iowa Supreme Court has "uniformly held" (according to *Long*) that §29 of Article III should be liberally construed so one act may embrace *all* matters reasonably connected with the subject expressed in the title and not utterly incongruous thereto. "To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other. All that is necessary is that the act should embrace some one general subject, and by that is meant, merely, that all matters treated therein should fall under some one general idea and be so connected with or related to each other, either logically or in popular understanding, as to be part of or germane to one general subject." Thus in *Long*, keeping the courthouses open for the transaction of public business on Saturday mornings was held related and germane to the subject of compensation of county officers.

More recent cases have been equally or more liberal and have of course usually cited *Long* on one subject matter considerations. *Graham v. Worthington*, 259 Iowa 845, 146 NW2d 626 (decided later in 1966); *Lee Enterprises, Inc. v. Iowa State Highway Commission*, 162 NW2d 730 (Iowa 1968); *Frost v. State*, 172 NW2d 575 (Iowa 1969); *Webster Realty Company v. City of Fort Dodge*, 174 NW2d 413 (Iowa 1970); *State ex rel. Turner v. Iowa State Highway Commission*, 186 NW2d 141 (Iowa 1971).

In the latter case, the attorney general sought to enjoin the highway commission from moving resident engineers' offices because the moves were prohibited by a section of an appropriation act which the Governor had item vetoed. The highway commission argued that regardless of the validity of the governor's item veto, the prohibition against removal of the offices was a separate subject matter and violated Article III, §29 of the Constitution. While the Court upheld the Governor's item veto of the prohibition, it said it was not disposed to find the prohibition unconstitutional on the ground that the act embraced multiple subject matter.

In the *Lee Enterprises* case, involivng a sales tax on services, including advertising, the Court quoted *State v. Talerico*, 227 Iowa 1315, 290 NW 660 (1940) stating:

"It is sufficient if all the provisions relate to the one subject indicated in the title and are parts of it *or incidental to it* or *reasonably connected* with it or in *some reasonable sense auxiliary* to the subject of the statute." (Emphasis added.)

I have in the past nevertheless said that an entire act was unconstitutional and void because the act embraced more than one subject matter and matters properly connected therewith and that the fact that both subjects were expressed in the title prevented a choice between them and a severance of the void part as §29 permits. OAG to Senator Coleman, 6-18-75. In that instance, the title to the act provided for the "making of an appropriation to the campaign finance disclosure commission, amending, laws relating to the administration of the campaign finance laws and providing penalties, and making appropriations to state regulatory agencies for the regulation of banking, beer and liquor control, insurance, real estate, and those subjects regulated by the secretary of state." Despite *Long* and *Lee Enterprises, supra,* and after careful study of all of the approximately 90 Iowa cases referred to in 8 Drake Law Review 66, *supra,* and those arising after *Long,* I was unable to find any way in which the sections of the act pertaining to election and campaign finance laws were related to appropriations to the departments of banking, beer and liquor control, insurance, real estate and the office of the secretary of state. I there said that those provisions simply were not "matters properly connected therewith" (with each other) as permitted in §29. There was no common denominator.

Because both subjects were there expressed in the title, I said under authorities cited that the entire act must fall. But no one has paid any attention to that opinion or to two others like it which followed on July 8th, 1975, regarding approximately 13 separate acts all apparently containing more than one subject matter. See OAG Turner to Governor Ray, 7-8-75 (two opinions) and OAG Turner to Representative Lipsky, 10-16-75. In the latter instances, the separate subject matter was not expressed in the title and could have been severed out of the bill, leaving the remainder validly intact. But notwithstanding my opinion of July 8th, 1975, urging the Governor to exercise his item veto powers on those unconstitutional provisions, he permitted them to stand. Of course, as he has frequently (and recently) noted, mine is only one man's opinion. And as the Supreme Court has noted, an opinion of the attorney general is entitled to weight, particularly when the court agrees with it.

Of course, dimensions of vehicles is specifically expressed in the title as required by Article III, §29. Thus, if it were to be held to be totally unrelated to the creation of the department of transportation, the whole act would fall, and the Department of Transportation with it, because of the manifest impossibility of the court's choosing between two subject matters expressed in the title. See OAG Turner to Coleman, 6-18-75 and citations therein including *Power v. Huntley*, 1952 Wash., 235 P.2d 173.

But it can hardly be gainsaid that under the aforesaid Iowa Supreme

Court decision the dimensions of trucks are within the ambit of transportation, the one subject of the act.

The only authority I know which is contra to the Iowa Supreme Court cases is a ruling by Lt. Gov. Neu, while presiding over the Iowa Senate, that the salaries of the elected state officers were not germane to a bill which fixed the salaries of state officials. Senate Journal page 2234, 66th G.A., 1st Session, June 19, 1975. I have always believed elected state officers to be state officials, but Lt. Gov. Neu ruled otherwise without explanation. (It does seem ironic that the opening of courthouses on Saturday mornings was held germane to compensation of county officers by our Supreme Court in *Long*, but that compensation of elected state officers was ruled not germane to that of state officials by our Lt. Gov.) Of course, he was shooting from the hip in an attempt to wind down that lengthy session on its 158th and last day. Besides, as you know, consistency has never been the hobgoblin of the presiding officers of the Senate. In any case, such parliamentary rulings are not legally determinative of constitutional questions any more than is the opinion of your humble servant.

January 21, 1976

RULES AND REGULATIONS; STATE OFFICERS AND DEPARTMENTS: §§4.1(1), 17A.4, 17A.4(4)(a), 17A.5(2), 1975 Code of Iowa. Old merit rule 4.5(2)(b) was never actually repealed by amended merit rule 4.5(2(b), because the latter was rescinded before its effective date, and therefore old merit rule 4.5(2)(b) always remained in effect. (Haskins to Keating, Director, Merit Employment Department, 1-21-76) #76-1-24

Wallace L. Keating, Director, Iowa Merit Employment Department: You ask our opinion with respect to the following situation. The Merit Employment Department followed the procedure set forth in §17A.4, 1975 Code of Iowa, to amend Merit Employment Department Rule 4.5(2)(b), I.A.C. 7/1/75, 570 — Ch. 4, p. 4, also appearing in 1973 I.D.R. at p. 634 [hereinafter referred to as "old merit rule 4.5(2)(b)"]. The old merit rule sets the lengths of time which various merit employees must take to advance from one pay step to another. The amendment changes these lengths of time. The amended rule was filed with the Secretary of State on September 4, 1975, with a stated effective date of October 27, 1975. (I.A.C. Supp. 9/22/75, 570 — Filed). The amended rule was published on September 22, 1975, in the Iowa Administrative Code. (I.A.C. 9/22/75, 570 — Ch. 14, p. 4). On October 20, 1975, the amended merit rule was rescinded with the recission to be effective immediately. (I.A.C. Supp. 11/3/75). Nevertheless, on November 3, 1975, the Code Editor deleted the old merit rule from the Iowa Administrative Code. (I.A.C. 11/3/75, 570 — Ch. 4, p. 4). The reason was that he felt the old merit rule had been repealed and would have to be refiled as a new rule. This was done by your department on November 4, 1975, in accordance with the procedures of §17A.4, 1975 Code of Iowa. (I.A.C. 12/29/75, 570 — Ch. 4, p. 4). However, the refiled "old merit rule" drew an objection from the Administrative Rules Review Committee. (I.A.C. Supp. 11/29/75, 12/29/75, 570 — Filed Emergency). Because the filing of an objection shifts the burden of proof to the promul-

gating agency as to the validity of a rule, *see* §17A.4(4)(a), 1975 Code of Iowa, the question arises as to whether the old merit rule remained in effect throughout or whether it exists only as repromulgated and hence subject to the objection filed against it.

The Code Editor believes that old merit rule was repealed by the publishing of new amended rule 4.5(2)(b) and that therefore, by analogy to §4.1(1), 1975 Code of Iowa, the rescinding of the amended rule could not serve to revive the old merit rule. §4.1(1) provides:

"In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute:

"1. Repeal—effect of. *The repeal of a statute does not revive a statute previously repealed,* nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed. [emphasis added]

By way of background, under the common law, the repeal of a repealing statute operated to revive the original statute. *See* 1A Sutherland, *Statutory Construction,* §23.31, at 276. However, §4.1(1) changes the common law, so that now the repeal of a statute does not revive a statute previously repealed. Since the same rules of construction and interpretation govern the construction and interpretation of rules and regulations of administrative agencies as apply to statutes, *see* 2 Am. Jur. 2d *Administrative Law* §307, at 135, §4.1(1) is assumed here to be applicable to administrative rules.

Your department takes the position that until amended merit rule 4.5(2)(b) became effective October 27, 1975, the old merit rule 4.5(2)(b) was still in effect and continued to be in effect after the rescinding of the amended rule on October 20, 1975. You argue that §4.1(1) really only applies when the repealing action has already taken effect and would not apply when a repealing statute with a future effective date is itself repealed before that date.

The essential question boils down to whether amended merit rule 4.5(2)(b) ever became effective. If it did become effective, then its recission on October 20, 1975, would not, of course, serve to revive old merit rule 4.5(2)(b), because of §4.1(1), 1975 Code of Iowa, which, as indicated, provides that the repeal of a statute does not revive a statute previously repealed. But if it never became effective, then the old merit rule 4.5(2)(b) remained in effect because it was never actually repealed. The latter is the case here. Under §17A.5(2), 1975 Code of Iowa, a (non-emergency) rule becomes effective thirty-five days after both filing and publishing or at such later date as specified in the rule. Here, thirty-five days after both filing and publishing coincides with the specified effective date of the amended merit rule on October 27, 1975, and hence the amended merit rule was not effective until that date. But prior to that date it was rescinded. Therefore, the old merit rule was never actually repealed and §4.1(1) does not come into play. In the language of §4.1(1), there is no statute (rule) "previously repealed". Old merit rule 4.5(2)(b) remained in effect throughout.

In accord with this view is a Georgia case, *Clark v. Reynolds*, 72 S.E. 254 (Ga. 1911), which held that where an act of the legislature provided for the repeal of an earlier act, to take effect at a certain time, and before the arrival of that time, the repealing act was itself repealed, the original act stood as if no repealing legislation had been passed. The Court stated:

"Was the act of 1873 repealed by the act of 1879? The act of 1879 provided for its repeal, but not to take effect until the end of the term of the then incumbent in office. Before that time arrived, the act of 1880 repealed the act of 1879. It was therefore held by this court that the act of 1873 was not repealed by the act of 1879, but remained of force. Adam v. Wright, 84 Ga. 720, 11 S.E. 893. These acts and counteracts do not present a case of legal execution and resuscitation, but of intercepted death."

The Code Editor's position is that a repealing rule becomes law when the rule is first published and not on its effective date, which, under §17A.5(2), is normally at least thirty-five days after the rule is published. The Code Editor analogizes to a statute, which he argues becomes law when it is signed by the Governor. However, for purposes of determining when there has been a repeal, the key occurrence is not when a repealing rule is published or a repealing statute signed by the Governor, but rather the effective date of the rule or statute. Prior to that date, there is no actual repeal. As a general proposition, until the time arrives when a statute is to take effect and be in force, such statute, notwithstanding the fact that it has been passed by both houses of the legislature and approved by the executive, has no force whatever for any purpose. *See Butters v. City of Des Moines*, 202 Iowa 30, 209 N.W. 401, 402 (1926); 1923-1924 O.A.G. p. 351. Certainly, this is true for repealing statutes. Until their effective date arrives, they can be themselves repealed without effect on any statutes they might have amended, revised, or repealed.

In sum, old merit rule 4.5(2)(b) was never actually repealed by amended merit rule 4.5(2)(b), because the latter was rescinded before its effective date, and therefore old merit rule 4.5(2)(b) always remained in effect.

January 21, 1976

STATE OFFICERS AND DEPARTMENTS; DENTISTRY; RULES AND REGULATIONS; §§4.1(1), 4.13, 4.13(1), 4.13(4), 17A.2(7), 147.13, 147.14(4), 147.19, 1975 Code of Iowa; §§147.13, 153.1, 153.2, 1973 Code of Iowa; Ch. 166 §37, Acts of the 66th G.A.; Ch. 1086, §198, Acts of the 65th G.A. The rules of the old board of dental examiners are still in force but cannot be amended or repealed. (Haskins to Stapleton, Legal Counsel, State Board of Dental Examiners, 1-21-76) #76-1-25

Keith Stapleton, Legal Counsel, State Board of Dental Examiners: You request our opinion as to whether rules promulgated by the former licensing board of the dental profession are presently in force. The former board was created in 1967, see Ch. 166, §37, Acts of the 66th G.A., and was known as the "state board of dentistry", *see* §§153.1, 1973 Code of Iowa, as well as the "board of dental examiners", *see* §147.13,

1973 Code of Iowa. The present board is known only by the latter name. *See* §147.13, 1975 Code of Iowa. The former board was empowered to adopt rules and regulations. §153.2, 1973 Code of Iowa, states in relevant part:

"The board shall adopt rules and regulations for its own organization and for the practice of dentistry in the state, and for carrying out the provisions of this chapter, and may amend, modify and repeal said rules and regulations from time to time. . . ."

But effective July 1, 1975, the legislature repealed the whole of the above quoted section along with the other eleven of the first twelve sections of Ch. 153 of the 1973 Code. *See* Ch. 1086, §198, Acts of the 65th G.A.

The effect of the repeal was to leave the board without power to promulgate rules and regulations. Moreover, the board was changed from a five member board composed only of licensed dentists to a nine member board composed of five licensed dentists, two licensed dental hygienists, and two persons who represent the general public. *See* §153.1, 1973 Code of Iowa; §147.14(4), 1975 Code of Iowa. The terms of the board members were shortened from five years to three years, *see* §153.1, 1973 Code of Iowa, §147.19, 1975 Code of Iowa, and appointment of the members of the new board was made subject to senate conformation, *see* §147.19, 1975 Code of Iowa. Whether it can be said that an entirely new board has arisen and the old one ceased its existence completely or whether the new board is merely a continuation of the old one, the issue remains whether the regulations of the old board are still in force.

Under the common law, the repeal of a statute voids all proceedings and actions (except those already closed) taken pursuant thereto. *See City of Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56, 96 (1874); 82 C.J.S. *Statutes* §434, at 1809; 1A Sands, *Sutherland: Statutory Construction* §23.33, at 279. For this reason, the legislature has enacted general saving statutes. *Cf. Grant v. Norris*, 249 Iowa 236, 85 N.W.2d 261, 267 (1957). The only one pertinent here is §4.13, 1975 Code of Iowa,[1] which states:

"*The* re-enactment, revision, amendment, or *repeal of a statute does not affect*:

1. The prior operation of the statute or *any prior action taken thereunder;*

2. Any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;

3. Any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal; or

4. Any investigation, proceeding, or remedy in respect of any privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

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[1] The other general saving statute is §4.1(1), 1975 Code of Iowa.

"If the penalty, forfeiture, or punishment for any offense is reduced by a re-enactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment if not already imposed shall be imposed according to the statute as amended." [Emphasis added]

The question in the instant case is whether the rules of the former dentistry board fall within the meaning of the words "any prior action" in subsection 1 so as to not be affected by the repeal of the authorization in §153.2, 1973 Code of Iowa, for the promulgation of the rules. The words "any prior action" literally cover the rules of the old board. Accordingly, they must be interpreted to cover the rules, because legislative intent in Iowa is determined by the literal scope and meaning of words rather than by some surmise as to that intent or speculation as to what the legislature "really meant". *See State v. Brustkern*, 170 N.W.2d 389, 392 (Iowa 1969); *cf.* R.C.P. 344(f) (13). For this reason, the words "any prior action" cannot be limited in meaning to quasi-judicial, or adjudicative, type actions as opposed to quasi-legislative, or rule making, type actions. The former type actions are covered in subsection 4 of §4.13 and to limit the words "any prior action" to mean only adjudicative actions and not rule making actions would make the words redundant. Moreover, had the legislature intended to restrict the words "any prior action" to action of an adjudicative nature, it could have so stated. Hence, the rules of the old board constitute "any prior action" in §4.13(1) and thus are still in force. However, they cannot be amended or (ironically) repealed, because, under the now applicable Iowa Administrative Procedure Act, amendment or repeal of a rule constitutes the promulgation of a new rule, *see* §17A.2(7), 1975 Code of Iowa, which the new board has no authority to do.

In sum, the rules of the old board of dental examiners are still in force but cannot be amended or repealed.

January 21, 1976

BEER, LIQUOR AND CIGARETTES. §§123.32(2), 123.30, 123.31, Code of Iowa, 1976. City Council has power to approve or disapprove renewal applications for Class C Liquor License. §§123.32, 123.37, Referendum of local voters on approval is prohibited. (Shimanek to Matheny, Howard County Judicial Magistrate, 1-21-76) #76-1-26

Judge Gerald L. Matheny, Judicial Magistrate, Howard County Courthouse: Reference is made to your letter of November 26, 1975, wherein you ask for an opinion from this office on the following questions:

"1. Can the City Council refuse to renew a Class C Liquor License when it comes up for renewal?

"2. In the event that a petition is submitted to the City Council by a requisite number of petitioners of the city asking that the matter of the renewal of the Class C Liquor License be placed on the ballot as to whether the Class C Liquor License should be renewed, can this be done?"

In response to your first inquiry, §123.32(2), Code of Iowa, 1975, gives power to the local authority to either approve or disapprove the issuance of a liquor control license or beer permit. This applies to both initial applications [§123.32(1), The Code], and renewal applications (§123.35, The Code). Note that "local authority" is defined to include

a city council when the establishment to be licensed is located within the corporate limits of the city [§123.3(4), The Code].

Provisions of §§123.30 and 123.31, The Code, set forth the conditions which must be satisfied before an initial or a renewal application for a liquor license can be granted. I refer you specifically to the requirement of §123.30(1), The Code, stating that a licensee must be a person of "good moral character," this phrase defined by §123.3(11), The Code, to include one who can show by good reputation his or her ability and willingness to comply with all the liquor laws, Ch. 123, The Code, and all laws, regulations, and ordinances applicable to his or her operations. While a City Council cannot arbitrarily or capriciously or without reasonable cause deny a renewal application for a Class C Liquor License, §123.32(4), The Code, the local authority can legally proceed under the above-cited provisions to deny a license application as the case warrants.

Review of your second inquiry brings to mind the now-repealed provisions of §123.27(7)(a), The Code, 1971, which allowed a local referendum on whether liquor control licenses shall be approved for the locality, or the much earlier provisions of the Code, designated the mulct law, Acts 1894 (25 G.A.) Ch. 62, which allow a locality to suspend penalties prescribed for the sale of intoxicating liquors on a written statement of consent signed by a majority of the residents of the locality. There is no similar law in effect at present time. Presently, the local authority, being the elected governing body of the city or county, has sole authority, subject to §123.32, The Code, 1975, to act upon license applications and renewals pursuant to the conditions established for the aspiring licensee or permittee by Ch. 123, The Code. Any other prerequisites for approval, including the consent of the majority of local voters for the issuance or renewal of a Class "C" Liquor License, are contrary to law. §123.37, The Code.

While not the specific subject of inquiry, the above discussion applies to issuance or renewal of a liquor license in general. **Be aware that a local option, although not a local referendum, is permitted with respect to grant of a Sunday permit. §§123.36(7); 123.134(5), The Code.**

January 21, 1976

STATE OFFICERS AND DEPARTMENTS: Board of Parole. Chapter 28A and 247. The board of parole is subject to the open meeting provisions of Chapter 28A but whether or not a conversation held within an auto while traveling is a meeting can only be resolved on a case by case analysis. (Robinson to Redmond, Senator, 1-21-76) #76-1-27

The Honorable James M. Redmond, State Senator: Reference is made to your recent letter asking for an Opinion of the Attorney General pertaining to the applicability of Chapter 28A of the 1975 Code of Iowa to the proceedings of the Board of Parole. You raised four questions which we shall answer separately.

QUESTION 1: "Is the Board of Parole generally subject to the open meeting provisions of Chapter 28A?"

The pertinent provisions of §28A.1 provide:

"28A.1 Closed meetings prohibited. All meetings of the following public agencies shall be public meetings open to the public at all times, and meetings of any public agency which are not open to the public are prohibited, unless closed meetings are expressly permitted by law:

"1. Any board, council, or commission created or authorized by the laws of this state. * * *

"Wherever used in this chapter, 'public agency' or 'public agencies' includes all of the foregoing, and 'meeting' or 'meetings' includes all meetings of every kind, regardless of where the meeting is held, and whether formal or informal."

The phrase "any board, council or commission created . . . by the laws of this state" applies to the Board of Parole. Thus, the Board is subject to the open meeting provisions of Chapter 28A.

The Iowa Supreme Court has determined in *Anti-Administration Ass'n v. No. Fayette City, C.S.D.*, 206 N.W.2d 723 (Iowa 1973), that even if the open meetings' law has been violated, contracts approved during such a meeting were neither void nor voidable.

QUESTION 2: "Which of the Board's activities, as set forth in Chapter 247 may be carried out in a meeting closed under the auspices of Section 28A.3?"

Section 28A.3 provides:

"28A.3 Closed session by vote of members. Any public agency may hold a closed session by affirmative vote of two-thirds of its members present, when necessary to prevent irreparable and needless injury to the reputation of an individual whose employment or discharge is under consideration, or to prevent premature disclosure of information on real estate proposed to be purchased, or for some other exceptional reason so compelling as to override the general public policy in favor of public meetings. The vote of each member on the question of holding the closed session and the reason for the closed session shall be entered in the minutes, but the statement of such reason need not state the name of any individual or the details of the matter discussed in the closed session. Any final action on any matter shall be taken in a public meeting and not in closed session, unless some other provision of the Code expressly permits such action to be taken in a closed session. No regular or general practice or pattern of holding closed sessions shall be permitted."

Chapter 247, Code of Iowa, 1975, does not expressly permit closed meetings of the Board of Parole. Therefore, the exception provided in §28A.1 above does not apply. This is not to say, however, that there would never be an occasion wherein the Board of Parole could hold a closed session in accordance with §28A.3 "for some other exceptional reason so compelling as to override the general public policy in favor of public meetings." As a counter balance to this broad open-ended exception is §28A.8 which provides the penalty, to-wit:

"28A.8 Penalty. Any person knowingly violating or attempting to violate any provision of this chapter shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one hundred dollars."

QUESTION 3: "Does Chapter 28A require the Board of Parole to begin its meetings in open session before adjourning to a closed session?"

Section 28A.3 permits a public agency to hold a closed session by an affirmative vote of two-thirds (2/3) of the members present. This

indicates to us that the motion of the Board to resolve itself into closed session should occur while the Board is in open session. Thus, we would answer your third question in the affirmative.

QUESTION 4: "Does Chapter 28A prevent the Board of Parole from discussing Board matters in an informal setting such as an automobile while traveling to or from a State Institution?"

The last paragraph of §82A.1, quoted above, defines meeting to include "all meetings of every kind, regardless of where the meeting is held, and either formal or informal." This does not mean, however, that everytime the individual members of the Board of Parole happen to be together that there is also a meeting of the Board of Parole. Thus, it may be possible for the members to discuss Board business while traveling in an automobile without being in violation of Chapter 28A of the 1975 Code of Iowa. We draw your attention, however, to a previous opinion of this office (Turner to Johnston, Dept. of Public Instruction, June 16, 1971) [72 OAG 158, 163], where we find:

"Nor can the requirement of this Iowa public meeting statute be evaded by such devices as 'just getting together to talk things over,' or the like. The term 'meeting' comprehends 'informal sessions or conferences of county board members designed for discussion of public business' and includes 'deliberative gatherings however confined to investigation and discussion.' *Sacramento Newspaper Guild v. Sacramento County Bd. of Sup'rs,* 1968, App., 69 Cal. Rptr. 480, 485."

Thus, whether or not a conversation held within an automobile while traveling to or from a State institution is a meeting within the purview of Chapter 28A can only be resolved upon consideration of the facts in a case by case analysis. The above opinion of the Attorney General also provides a comprehensive review of the law on this subject.

January 22, 1976

STATE OFFICERS AND DEPARTMENTS. Council on Social Services §§217.2 and 217.3(2), Code of Iowa, 1975. The duty given to the Council on Social Services by §217.3(2) to "(a)dopt and establish policy for the operation and conduct of the department of social services and the implementation of all services and programs thereunder" is not an unconstitutional delegation of legislative authority. (Robinson to Welden, State Representative, 1-22-76) #76-1-28

The Honorable Richard Welden, State Representative: You recently requested an opinion of the Attorney General wherein you raise the following question:

"The second duty mandated on the Council of Social Services in §217.3 [Code of Iowa, 1975] is to 'Adopt and establish policy for the operation and conduct of the department of social services . . .'

"Since there are no guidelines given nor any provision for approval of this policy by the legislature, is this an unconstitutional delegation of power by the legislature?"

Our answer to your question is in the negative for the reasons we shall develop.

When considering questions of constitutionality of statutes the rule is well settled that a statute will not be declared unconstitutional unless it

clearly, palpably and without doubt infringes the constitution. *Lee Enterprises, Inc. v. Iowa State Tax Commission,* 162 N.W.2d 730 (1968). The challenger of the statute has the burden of demonstrating that the statute is unconstitutional. *Miller v. Schuster,* 227 Iowa 1005, 289 N.W. 702 (1940). Also, if any reasonable state of facts can be conceived to support the constitutionality of the statute, then the statute must be sustained. *Lewis Consolidated School District v. Johnston,* 256 Iowa 236, 127 N.W.2d 118 (1964).

The Iowa Supreme Court has been confronted with the problem of delegation of powers by the legislature to the administrative agencies and whether or not proper standards were established on many occasions. *Grant v. Fritz,* 201 N.W.2d 188, 192 (Iowa 1972), quotes from an earlier case:

"In Elk Run Telephone Co. v. General Telephone Co., *supra,* 160 N.W.2d 311, at 315, this court said:

'It is generally recognized that some legislative power may be delegated to administrative bodies. The practice of doing so has increased as the range and complexity of governmental functions continue to expand. It has been said that government could not be efficiently carried out if something were not left to the judgment and discretion of administration officers to accomplish in detail what is authorized or required by law in general terms. Butler v. Commonwealth, 189 Va. 411, 53 S.E.2d 152. The test—not always easy to apply—is whether such delegation is a reasonable one permitting the administrative body only to "fill in the details" to accomplish a general purpose or policy announced by the legislature itself or whether it abdicates to the administrative body the right to legislate.' "

Section 217.2, Code of Iowa, 1975, states:

"217.2 Council on social services. There is hereby created within the department of social services a council on social services which shall act in a *policy-making and advisory capacity on matters within the jurisdiction of the department.* The council shall consist of five members appointed by the governor with the consent of two-thirds of the senate. . . ." [Emphasis added.]

Section 217.3(2), Code of Iowa, 1975, provides:

"217.3 Duties of council. The council of social services shall: * * *

"2. Adopt and establish policy for the operation and conduct of the department of social services and the implementation of all services and programs thereunder. * * * "

The crucial point is not whether the legislature granted to a State department the power to make or establish "policy" but whether in doing so the legislature provided adequate standards within which the policy is to be established or made. In other words, in our opinion, the legislature may in fact grant the power to State agencies to determine policy within certain well-defined limits. The resolution to your question then revolves upon a determination of whether or not adequate standards were defined by the legislature. In this regard, we note that the council, in addition to being a policy-making council, acts in an advisory capacity upon matters within the jurisdiction of the department (§217.2, supra). The establishment of the policy for the operation of the department as defined in §217.3(2) is primarily an internal matter. In this regard,

the courts allow greater latitude in the delegation of the policy-making power as opposed to matters which would affect the general public directly.

It is significant that in the implementation of the services and programs of the department of social services, the legislature has been extremely careful to set forth guidelines by the way of specific statutes that set the standard for virtually every operation within the department of social services. In part, this is a response to federal legislation and funding regarding the same subject matter. In fact, some have been critical of the department of social services and the legislation relating thereto for being too voluminous. We shall not attempt at this time to review all of the statutes but do call your attention to the fact that Title XI of the 1975 Code of Iowa relates to the subject of social welfare and rehabilitation which constitute the services and programs of the department of social services. To illustrate this point, we note that there are approximately 180 pages of the Code devoted to this subject matter.

It is, therefore, within this context that we must view the role to make "policy" of the council. The council must act within the purview of these applicable statutes. It has no power to act outside their mandate, and, thus, there is no unconstitutional delegation of legislative authority.

January 29, 1976

STATE OFFICERS AND DEPARTMENTS: Department of Social Services; Division of Community Services. §§238.33 through 238.41, Code of Iowa, 1962; §1, Chapter 206, Acts, 62nd G.A., 1967; §4.6, Code of Iowa, 1975; Chapter 232, Code of Iowa, 1975; Chapter 238 (especially §§238.25, 238.26, 238.33); §§ 600.1, 600.2, 600.3, Code of Iowa, 1975. The present method of approval utilized by the Iowa Department of Social Services regarding placement of children into Iowa from states not members of the Interstate Compact on the Placement of Children or from foreign countries, is appropriate and consistent with Iowa law. (O'Meara to Burns, Commissioner, Department of Social Services, 1-29-76) #76-1-29

Mr. Kevin J. Burns, Commissioner, Iowa Department of Social Services: You have requested an Attorney General's Opinion concerning whether or not the current method of approval utilized by the Iowa Department of Social Services regarding the placement of children into Iowa from states not members of the Interstate Compact on the Placement of Children or from foreign countries is appropriate and consistent with requirements of the Code of Iowa or other legal requirements.

Adoption is a creature of statute, being unknown to common law. *Stotler v. Lutheran Social Service of Iowa,* 209 N.W.2d 121 (Iowa 1973). See also, *In Re Adoption of a Baby Girl,* 248 Iowa 619, 80 N.W.2d 500 (1957); 2 Am.Jur.2d, Adoption, §§2-3; 2 C.J.S., Adoption of Persons, §2. Thus the policy established by the legislature in this state is that permanent rights and obligations regarding the children mentioned can only be transferred by court decree, by compliance with the statute on child-placing agencies, or by adoption. *Sampson v. Holton,* 185 N.W.2d 216 (Iowa 1971); *In Re Estate of Williamson,* 205 Iowa 772, 218 N.W. 469 (1928); *In Re Adoption of a Baby Girl,* supra.

The pertinent statutory references are §§600.1, 600.3, 238.25 and 238.26, 1975 Code of Iowa. In general these sections of the Code establish that no person other than the parents or relatives of the child within the fourth degree may assume the permanent care and custody of a child under fourteen years of age except in accordance with these chapters of the Code, and no person may assign, relinquish, or otherwise transfer to another his rights or duties with respect to the permanent care or custody of such child except in accordance with these chapters of the Code.

Chapter 238, Code, deals with the placement of such children by child placing agencies. §238.26 prohibits any person from, in any manner, transferring his rights or duties concerning such a child, unless specifically authorized by an order or decree of court, or through the proper procedure of transfer to any agency licensed by the state director (Division of Family and Adult Services).

You have made reference to an Attorney General's Opinion of August 6, 1960, "Licensed Child Placing: Importation of Children—Adoption". It does not appear that this Attorney General's Opinion has continuing applicability, in that this opinion rests in great measure upon §238.33, Code, as it read before its repeal in 1967 (Chapter 206, §1, Acts of the 62nd General Assembly). (It would also appear that the interpretation given the term "license" in §238.26, Code, by this Attorney General's Opinion is inconsistent with the express description of the term "license" in §§238.3 through 238.10. The term "license" should be accorded a consistent meaning throughout Chapter 238.)

This 1960 Attorney General's Opinion, referring to 1925-26 OAG 213, does correctly state the proposition that the transfer of permanent care and custody of such a child must be "within the framework of this law to be legal in Iowa".

Determination of the nature of the "framework of this law" depends upon statutory construction. Chapter 238 appears to be ambiguous in two senses. There appears to be internal ambiguity between the requirement of licensure by the state director in §238.26, and the Interstate Compact on the Placement of Children, §238.33. There appears to be "external" ambiguity between the Interstate Compact on the Placement of Children and what is otherwise determined to be legislative intent.

§4.6, 1975 Code of Iowa, states that if a statute is ambiguous, intention of the legislature is to be determined by considering, among other matters: the object to be attained; the circumstances under which the act was passed; legislative history; former statutory provisions, including laws upon the same or similar subject; the consequences of a particular construction; administrative construction; the preamble or statement of policy.

The Iowa Supreme Court has established that in construing a statute, the object to be accomplished, the evils and mischief sought to be remedied, the purpose to be subserved, must all be examined. A reasonable or liberal construction which will best effect the purpose of the statute

must be placed on such statute. *Monroe Community School District v. Marion County Board of Education,* 251 Iowa 992, 102 N.W.2d 746 (1960).

Examining the internal ambiguity apparent within Chapter 238, a logical division of the statute resolves this ambiguity. This chapter is entitled "Child-Placing Agencies". The entire chapter treats child-placing agencies. However, the chapter is susceptible of a logical division between §§238.1 through 238.32 (*intra*state placement), and §§238.33 through 238.41 (*inter*state placement). §§238.25, and 238.42 through 238.45, by their express language, deal with the entire chapter. The object to be accomplished by each "division" of the chapter is consistent with this analysis. A licensure requirement is logically only applicable to child-placing agencies within the licensing jurisdiction of the state; whereas placement of children within Iowa from other jurisdictions is logically subject to the type of restrictions imposed by the Interstate Compact.

Reference to the scant legislative history regarding the 1967 amendment of §§238.33 through 238.41 gives credence to this position. (Chapter 206, §1, Acts of the 62nd General Assembly; Senate File 454) An amendment to Senate File 454 was proposed in the House (1967 House Journal, p. 1352):

"Nothing herein shall be deemed to prohibit the placement of children, *interstate or intrastate,* by persons other than licensed child-placing agencies." [Emphasis supplied.]

As adopted by the House, the amendment read:

"Nothing herein shall be deemed to prohibit the *intrastate* placement of children, by persons other than licensed child-placing agencies." [Emphasis supplied.]

This amendment was in direct contradiction of §238.5, unrepealed by Senate File 454, unless it was read to mean that nothing within the interstate sections of the chapter would prohibit intrastate placements of a given nature.

Further legislative history (1967 Senate Journal, p. 1739) shows that this House amendment was rejected by the Senate, went to conference committee, and was ultimately adopted by the joint legislature as (1967 House Journal, p. 2049; 1967 Senate Journal, p. 2072):

"Nothing contained herein shall be deemed to affect or modify the provisions of Chapters 232 and 600 of the Code."

This is presently §238.41: "*Statutes not affected.* Nothing contained in sections 238.33 through 238.40 shall be deemed to affect or modify the provisions of Chapters 232 and 600." (Chapters 232 and 600 govern essentially intrastate activities: termination of parent-child relationship by court with subsequent "judicial placement" of child, and adoption of "any child not his own" upon petition in the county where child or adoptive parent reside and after the minimum residence requirement of §600.2, the Code, is fulfilled.)

By contrast, reading §238.26, the Code, consistently, with this logical division, it is apparent that §238.26, the Code, is concerned with *intra-*

state placement, only, (". . . or unless the parent sign a written release . . . to an agency licensed by the state director.") and chapters 232 and 600, the Code, (". . . an order or decree of court . . .").

It is therefore concluded that the licensure requirement of Chapter 238 has application to intrastate placement of children, only.

The second ambiguity referred to above is ambiguity of practical application. The Iowa Supreme Court has repeatedly taken the position that the general assembly does not intend to enact a law which is futile or leads to illogical consequences, and will strive to achieve the intention of the legislature through liberal construction of the statute. *Stotler v. Lutheran Social Service of Iowa*, supra.

The apparent intent of the Child Importation Law, for which the Interstate Compact was substituted, was to allow children to be placed in Iowa, from any state or foreign nation, subject, so far as Iowa was concerned, only to the requisites of that law (§§238.33 through 238.41, 1962 Code of Iowa).

The expressed ends to be achieved by the Interstate Compact appear to be the placement of such children which need placement, in a suitable environment (§238.33, 1975 Code of Iowa, Article I of Interstate Compact on Placement of Children).

The primary intentions of the "old" law and the present law appear equivalent if not identical. There is no statement within the present law that only children from compact states fit the description of need intended to be dealt with by the present law. Nor is there a statement in the present law that such law is intended to limit the availability of such placements to compact states, and to deny the availability of such placements to noncompact states and all foreign nations. (Such an intent would appear inimical to the express ends to be achieved by the present law, and certainly to the history of legislative intent and state public policy in this area of concern.)

There is a statement in the present law that this compact is to engender and assist in cooperation between member states in achieving the expressed ends. (This is not a statement of purpose that these ends are not to be sought with other jurisdictions.) Further consideration of this statement of cooperation, and the general intent of entering a compact, leads to the reasonable conclusion that, concerning placement of children between the 50 United States, the Iowa legislature assumed that all fifty states would soon be members of the Compact.

An analogous situation was before the legislature, for its consideration, when the Interstate Compact on Placement of Children was passed. The Interstate Juvenile Compact was adopted by the Iowa legislature in 1961. Either prior to Iowa adopting this compact, or within five years thereafter, 41 states were compact members. By approximately 1973, all 50 states, the District of Columbia, Guam and Puerto Rico were compact members.

It is therefore concluded that the legislature in adopting Chapter 206, §1, Acts of the 62nd General Assembly, did not intend that interstate

placements from compact states, only, would be allowed. Nor did the legislature intend that placements from foreign nations be prohibited.

It does appear that the legislature did intend that an optimum effort be expended by the proper authorities in Iowa to certify that the placement of each of such children in Iowa would be in the best interest of the child and of this state.

§238.33, wherein it is relevant to the method of approval for placement of children, states:

"a. Each child requiring placement shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care.

"b. The appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement thereby promoting full compliance with applicable requirements for the protection of the child." [Article I (a) and (b)]

These policy statements are expanded in §238.33 as follows:

"b. Prior to sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state. The notice shall contain:

"1. The name, date and place of birth of the child.

"2. The identity and address or addresses of the parents or legal guardian.

"3. The name and address of the person, agency or institution to or with which the sending agency proposes to send, bring or place the child.

"4. A full statement of the reasons for such proposed action and evidence of the authority pursuant to which the placement is proposed to be made." [Article III(b) (1), (2), (3) and (4)]

In your request for an opinion, you have described the current method of approval of placement of children within Iowa from a noncompact state or foreign country as: "(1) an approved home study of the family; (2) social history and legal documents for the child; (3) interstate placement forms signed by the agency having guardianship of the child; (4) a verification through the state Department of Social Services where the agency is located to determine if the agency is licensed."

A comparison of the provisions set forth in the Compact to monitor such placements and the procedures described by the Department of Social Services as presently being employed in noncompact, "other state" placements demonstrates that these procedures are substantially equivalent and tend to insure the certification intended. The method used by the Department of Social Services to approve such placements comports with the particulars of the safeguards given in the Interstate Compact on the Placement of Children.

Therefore, it is the opinion of this office that the method of placement of children from noncompact states and foreign countries, described as employed presently by the Department of Social Services, is within the

intent of the legislature, and, therefore, appropriate and consistent with the Code of Iowa and other legal requirements.

However, it is further the opinion of this office that it would be appropriate for the state legislature to take specific action to expressly clarify its intention regarding such placements of children, lest the situation, as described by a unanimous Iowa Supreme Court, be continued, that ". . . the participants in such cases are playing with fire." *Sampson v. Holton*, supra.

January 5, 1976

GENERAL ASSEMBLY: LEGISLATIVE COUNCIL, JOINT LEGISLATIVE INTERN COMMITTEE. Sec. 2.42, Code of Iowa, 1975; HCR 148, 65th G.A. HCR 148 is the sources of authority for the Joint Legislative Intern Program. There is no statutory authorization for the Legislative Council to set an upper limit on the number of interns accepted by the committee. There is no authority for the Legislative Council to direct the Legislative Intern Committee not to offer expense reimbursements to interns. This is not to say, however, that in the absence of such a power in the Legislative Council the intern committee does not have the authority to offer expense reimbursement. HCR 148 contains no authorization for expense reimbursement to interns but only for the payment of expenses and per diem of members of the Committee. (Haesemeyer to Millen, State Representative, 1-5-76) #76-1-30

The Honorable Floyd H. Millen, State Representative: Reference is made to your letter of November 26, 1975, in which you request an opinion of the Attorney General and state:

"On May 3, 1974, the 65th General Assembly adopted House Concurrent Resolution 148 (copy enclosed) which established a Joint Legislative Intern Committee. This committee was authorized '. . . to provide procedures for coordinating the recruitment, selection, assignment and supervision of interns in each house; . . .'.

"House Concurrent Resolution 148 was, in substance, incorporated into the proposed Joint Rules for the 66th General Assembly as Rule 17; these rules, however, were not adopted by the 1975 Session of the General Assembly. As a result, Senate Concurrent Resolution 57 authorizing a Joint Legislative Intern Program was introduced on June 13, 1975. As with the case of the Joint Rules, this resolution was not adopted during the 1975 Session.

"The Assistant Chief Clerk of the House, Mr. Robert Davies, addressed the Legislative Council at its July 7, 1975, meeting and requested authorization for the Joint Legislative Intern Committee. Enclosed is a copy of the Council's minutes which set forth the discussion of this subject.

"I have four questions concerning the present status of the Joint Legislative Intern Committee and the program in general, they are as follows:

"1. What is the effect of House Concurrent Resolution 148 of the 65th General Assembly on the 66th General Assembly?

"2. Under what source of authority is the program operating at the present time? Is it HRC 148 adopted by the 65th General Assembly or the Legislative Council action of July 7, 1975?

"3. Is it within the prerogative of the Legislative Council, at this time, to set an upper limit on the number of interns accepted by the Committee?

"4. May the Legislative Council direct the Committee not to offer expense reimbursement to the interns? This provision is set out in the enclosed progress report of the committee as presented to the Legislative Council on Novmber 21, 1975.

"I am particularly concerned with the latter two questions as there is apparently some ambiguity concerning the boundaries of authority delegated to the Joint Legislative Intern Committee. Therefore, it is critical that we determine the source of that authority as well as the extent to which the Legislative Council can exercise some independent controls."

In a prior opinion of the Attorney General, 1970 O.A.G. p. 66, we had occasion to consider the force and effect of joint and concurrent resolutions. In that opinion at page 74 we concluded that joint and concurrent resolutions where they relate to the internal functioning of the General Assembly have the force and effect of law. Thus, in answer to your first two questions, it is our opinion that HCR 148 continues in effect and is the source of authority for the Joint Legislative Intern Program.

Turning to your third question, we note that the powers and duties of the Legislative Council are set forth in detail in §2.42, Code of Iowa, 1975. An examination of these powers and duties does not disclose any statutory authorization for the Legislative Council to set an upper limit on the number of interns accepted by the committee. Its duties relate primarily to preparation of reports, appointment of study committees and the making of recommendations. Under §2.42(7), the Council arguably could *recommend* an upper limit on the number of interns accepted by the Joint Legislative Intern Committee.

In answer to your fourth question, we can find nothing in §2.42 or elsewhere which would authorize the Legislative Council to direct the Legislative Intern Committee not to offer expense reimbursements to interns. This is not to say, however, that in the absence of such a power in the Legislative Council the intern committee does have the authority to offer expense reimbursement. As pointed out earlier herein, the latter committee derives its powers from HCR 148. Such HCR 148 contains no authorization for expense reimbursement to interns but only for the payment of expenses and per diem of members of the committee.

February 4, 1976

STATE OFFICERS AND DEPARTMENTS: Secretary of State; Rights of Aliens; "Nonresident Alien" defined. Chapter 567, Code of Iowa, 1975, as amended by House File 215, Acts, 66th G.A., First Session (1975). A "nonresident alien" for the purposes of the reporting requirement found in §7, H.F. 215, is a person who is not a citizen of the United States or its territories and who is not a resident of the State of Iowa. (Haesemeyer to Synhorst, Secretary of State, 2-4-76) #76-2-1

Honorable Melvin D. Synhorst, Secretary of State: This letter is in response to your request for an Attorney General's opinion defining the term "nonresident alien" as found in House File 215, Acts, 66th G.A., 1975 Session. Your inquiry reads in part:

"The Act, among other things, requires that certain corporations, limited partnerships and 'nonresident' aliens file a report as respects their agricultural activities.

"The term 'nonresident alien' is not defined in the statute and based on the number of inquiries received by this office, that said term is causing much confusion in the legal reporting community. * * *

". . . this office must have some definitive guide lines to utilize in determining who must report under the Act. To this end we have done some little research in our own office. Based on certain definitions of the words 'nonresident' and 'alien' in Black's Law Dicitionary, we have arrived at the consensus that 'nonresident alien' as the term is used in House File 215, means a person who is not a citizen of the United States and who is not a resident inhabitant of the State of Iowa. * * * "

It is our opinion that the definition you have arrived at by consensus is the correct one. House File 215 is an amendment to Chapter 507, Code of Iowa, 1975, which deals with the rights of aliens, generally. The statutory language contained in the various subsections of Chapter 567 makes it clear that the chapter applies to persons who are not citizens of the United States or its territories. The addition of nonresident as a modifier to alien in §7, House File 215, amending Chapter 567, indicates that the aliens referred to in the bill are those who are nonresidents of the State of Iowa.

Restated, a "nonresident alien" for the purposes of the reporting requirement found in §7, House File 215, is a person who is not a citizen of the United States or its territories and who is not a resident of the State of Iowa.

February 4, 1976

CITIES AND TOWNS: Appointment of Officers—§§80B.11, 372.4, and 372.13(4), Code of Iowa, 1975; §§19, 23, Chap. 203, Acts of the 66th G.A. (1975). A city council may require a background investigation prior to the appointment of a police chief or police officer. Officers *de facto* are entitled to compensation. (Blumberg to Irvin, Page County Attorney, 2-4-76) #76-2-2

J. C. Irvin, Page County Attorney: We have received your opinion request of January 23, 1976, regarding the powers of a mayor and council. According to your facts, the mayor entered office the first of the year, and appointed a police chief and another policeman. Thereafter, the city council set the salaries for both, but mandated that they not be paid until a complete background investigation has been completed. The police chief and policeman are currently working at their positions and have been since their appointment. You specifically asked:

"1. May the City Council establish requirements or guidelines for the employment of police officers or a Chief of Police, said officers to be appointed by the Mayor pursuant to authority granted by city ordinance or state statute?

"2. May the City Council set a salary for a police officer or Chief of Police appointed by the Mayor and then withhold the payment of the same pending compliance with requirements established by motion or resolution by the City Council; e.g., completion of a background investigation and submission of an application for appointment?"

We assume that you are referring to a mayor-council form of government.

Section 372.4, 1975 Code, as amended by §19, Chap. 203, Acts of the 66th G.A. (1975) provides in pertinent part:

"The mayor . . . shall appoint the marshal or chief of police except where an intergovernmental agreement makes other provisions for police protection. Other officers must be selected as directed by the council."

Section 372.13(4) as amended by §23, Chap. 203, Acts of the 66th G.A. (1975), provides that the council, except as otherwise provided by state or city law, may appoint city officers and employees, and prescribe their powers, duties, compensation, and terms. A look at the pertinent city ordinances reveals that the mayor appoints all police officers, and that they "shall qualify by subscribing to the oath of office." The mayor is given the responsibility to establish police rules and regulations. The council is given the authority to fix the compensation of the police officers.

Under the concept of Home Rule, there is no doubt that the council can set forth guidelines for employment with the city (assuming civil service is not applicable). Although the council may not appoint the police chief it may set forth a requirement for a background investigation before such a person is appointed. Such an action by the council is unnecessary, however, since the Law Enforcement Academy rules makes a background investigation mandatory prior to the appointment of a law enforcement officer. Rule 1.1(6), Chap. 550, I.A.C. Pursuant to that rule, the authority for which is found in §80B.11 of the Code, no law enforcement officer may be appointed unless the requirements of that rule are met. In addition, pursuant to rule 1.2, additional requirements must be met unless the appointment is in a city of less than 2,000 population. *See e.g.* 1974 OAG 193. Therefore, a background investigation is mandatory prior to appointment.

Here, however, the appointment was made prior to such an investigation. The issue, therefore, is whether an individual's pay may be withheld pending the required background investigation after the appointment. There is a question whether these individuals were properly appointed to their positions. That is an issue, however, we need not speak to. There can be no doubt that if the officers were officers *de jure*, they would be entitled to their compensation. If they are not officers *de jure*, in order for them to be entitled to compensation they must be *de facto* officers. In *Herkimer v. Keeler*, 1899, 109 Iowa 680, 683, 81 N.W. 178, 179, it was held:

"A *de facto* officer is one who, *colore officii*, claims and assumes to exercise official authority, is reputed to have it, and in whose acts the community acquiesces. *Hussey v. Smith*, 90 U.S. 20-25 (25 L.Ed. 314). He has been said to be one who exercises the duties of an office, claiming the right to do so under some commission or appointment. *Smith v. Cansler*, 83, Ky. 367; *Brown v. Lunt*, 37 Me. 425; *Attorney General v. Crocker*, 138 Mass. 218. As said in *Ex parte Strahl*, 16 Iowa, 369: 'An officer *de facto* is one who comes in by the forms of an election or appointment, and who thus acts under claim and color of right, but who, in consequence of some informality, omission, or want of qualification, could not hold his office if his right was tried in a direct proceeding by information in the nature of *quo warranto*.'"

In *Buck v. Hawley & Hoops*, 1906, 129 Iowa 406, 408, 409, 105 N.W. 688, 689, the Court held, regarding a deputy sheriff:

"Can it be said that he was a deputy sheriff *de facto*? In some cases,

color of office—that is, an appointment or an election of some kind—has been thought indispensable to the finding that a person is an officer *de facto*, and without which he is to be regarded as an intruder or usurper. . . . But the current of authority is to the effect that an intruder or usurper may exercise official functions under such circumstances and for so long a time without interference as to justify belief that he has been elected or appointed. . . . The theory of the doctrine of officers *de facto* and the principles sustaining the validity of their acts are that, though wrongfully in office, justice and necessity require that their acts, done within the scope of official authority and duty, be sustained, to the end that the rights and interests of third persons be protected and preserved. If Shapley can be said to have been an officer *de facto*, this must be owing to the exercise of official functions alone, for the only information contained in the record that he was acting as deputy, even, is the signature to the return and the fact that the court based its judgment thereon. But the circumstance of his signing the return alone seems hardly sufficient to induce any one, without inquiry, to act upon the understanding that he was an officer. In the absence of any color of appointment or election the party to be treated as a *de facto* officer must have acted as such under such circumstances of reputation or acquiescence as are calculated to induce people, without inquiry, to submit to or invoke his action in the supposition that he is in fact the officer he assumes to be. Manifestly proof of the very act concerning which the controversy has arisen cannot be regarded as sufficient to indicate his authority to perform it. . . . The court said in the first of the above cases: 'If it could, the authority of third persons to do official acts, when it came in question, would be proved by the acts themselves, which would be absurd.' And in the last case: 'It has, we think, always been required, in order to prove a person to be an officer *de facto*, to show that he has acted as such on other occasions than those which are the subject of the controversy.'" [Citations Omitted]

See also, *Board of Directors v. County Board (Education)*, 1964, 257 Iowa 106, 131 N.W.2d 802; and, *State v. Central States Elec. Co.*, 1947, 238 Iowa 801, 28 N.W.2d 457.

It is apparent from the facts you supplied and the above case law that the individuals in question are at least acting in a *de facto* capacity. Although their pay is being withheld, they are not being prevented from performing their duties. Are they, then, entitled to compensation? In *Petrone v. City of Newark*, 1941, 19 N.J. Misc. 318, 19 A.2d 450, 451, it was held:

"If the plaintiff was a de facto officer, and as such, if he was entitled to his salary for the time during which he rendered service, it becomes unnecessary to pass upon the question of the legality of his appointment. Ordinarily the doctrine of de facto officers applies to the validity of the acts of such officers in respect to the public and to innocent parties. Von Nieda v. Bennett, 117 N.J.L. 231, 187 A. 629; Erwin v. Jersey City, 60 N.J.L. 141, at page 144, 37 A. 732, 64 Am.St.Rep. 584.

"However, the doctrine of de facto officers has not been confined to the validity of the acts of officers as they affect innocent parties, but has also been applied to the rights of such de facto officers, to compensation for their services; thus, in the Erwin case, supra, at page 149 of 60 N.J.L., at page 735 of 37 A., 64 Am.St.Rep. 584, Chief Justice Magie says: 'That doctrine applied to the case before us requires us to hold that one who becomes a public officer de facto without dishonesty or fraud, and who has performed the duties of the office, may recover such compensation for those services as is fixed by law from the municipality which is by law to pay such compensation.'"

A similar holding can be found in *Gershon v. Kansas City*, 215 S.W.2d 771, 773-774 (Ct. App. Mo. 1948) where the Court stated:

"In 1916, the Supreme Court decided the case of State ex rel. Kansas City v. Coon, 316 Mo. 524, 296 S.W. 90, 102. The court recognized the general rule that 'The legal right to the office carried with it the right to the salary'. In a supplemental opinion on a motion for rehearing the further question was considered as to whether payment to a de facto officer of the salary incident to the office, during the time he is in possession of the office and discharging all the duties thereof is a defense to a suit by the de jure officer, upon his restoration to office to recover the same salary from the muncipality, county or state. The court therein reviewed the cases and other authorities on the question and cited authorities holding that such payment to a de facto officer is such a defense, and stating the reasons therefor. In effect the reason approved was quoted from Dolan v. Mayor, etc., of City of New York, 68 N.Y. 274, 23 Am.Rep. 168, as follows: 'It is well settled that the acts of an officer de facto are valid so far as they concern the public or the rights of third persons who are interested in the things done. (citations). "Society", says Bronson, C.J., in that case, "could hardly exist without such a rule." The principle is, that those dealing with officers clothed with an apparent title should be protected, and that they should not be compelled to go beyond that and trace the title to its source. The case of the government paying a salary to an officer de facto is, we think, within the same protection, and that such payment is a defense to an action by the officer de jure against the officer or body charged with the duty of paying salaries to recover it. This does not deprive the person who has been wrongfully deprived of his office of a remedy. He may recover his damages for the wrong against the usurper; and the amount of salary, if not the fixed measure, may be considered by the jury in assessing the damages'.

"The Supreme Court in the Coon case thereupon held: *'In this state a de facto officer, that is, one in possession of the office and discharging all the duties pertaining thereto, under color of right, can compel by mandamus the payment of the salary incident to the office . . . .'*"

. . .

"This, the court said, was plainly supported by the overwhelming weight of authority, quoting from 16 L.R.A., N.S., page 794, as follows: 'There is, however, an argument which is, of itself, sufficient to support the rule recognized by the weight of authority, and which seems logically unassailable. This is that, since it is for the interest of the community that public offices should be filled and the duties of the offices discharged by either an officer de jure or an officer de facto, and, in order to secure such service, the officer performing them must ordinarily be paid, payment in good faith to the officer discharging the duties of the office should be deemed justified, the de jure officer being remitted to an action against the de facto incumbent for the fees or salary received by him'.

"In City of Miller v. Sherman, Mo.App. 1940, 139 S.W.2d 1114, the Springfield Court of Appeals cited and followed the opinion in State ex rel. Kansas City v. Coon, supra; 139 S.W.2d 1114, 1115. Our court in Stratton v. City of Warrensburg, 237 Mo. App. 280, 167 S.W.2d 392, 396, wherein the controlling question was the right or title to the office involved, cited with approval a part of the rule stated in the Cunio case, supra, and did so in the following words: 'The true rule is that the right to the compensation attached to an office is an incident to the legal right to the office and not to the exercise of the functions of the office'." [Emphasis added]

Finally, *Davenport v. Teeters*, 315 S.W.2d 641 (Ct. App. Mo. 1958), dealt with a marshal of a city and his *de jure* or *de facto* status. The defendant had been declared the winner in an election and took office. The loser contested the election and won nearly two years later. He then sued the incumbent for wages paid to the incumbent during the period of the

election contest. The Court held that the plaintiff was not entitled to the compensation paid to the *de facto* officer, citing to *Gershon, supra*, and other authorities for the proposition that the right to an office carries with it the right to a salary, and other public policy considerations.

Accordingly, we are of the opinion that the council may prescribe background investigation prior to the appointment of a police chief or police officer, but need not do so because of the Law Enforcement Academy Rules. If the individuals in question are officers *de jure*, they are entitled to their salaries. If they are officers *de facto*, they also have a right to compensation.

February 4, 1976

STATE OFFICERS AND DEPARTMENTS: Board of Engineering Examiners; Disclosure of Confidential Information. §114.32, Code of Iowa, 1975. The Board of Engineering Examiners may release to responsible persons information with regard to the final score of an applicant for registration as a professional engineer or land surveyor pursuant to Code §114.32(3). The Board may also release statistical information (which does not include individual applicant's names) as to the numbers from educational institutions who passed and failed and as to the total number of applicants taking the examination and the number of those who received passing scores. (Haesemeyer to Livingston, Chairman, Iowa State Board of Engineering Examiners, 2-4-76) #76-2-3

Mr. B. R. Livingston, Chairman, Iowa State Board of Engineering Examiners: You have requested an opinion of the Attorney General concerning the interpretation of the provisions of §114.32, Code of Iowa, 1975, Disclosure of Confidential Information. Your specific inquiry reads in part:

"Specifically, in the past, we have supplied to certain department heads in the Engineering College at Iowa State University information regarding their particular students who took the examination as to how many had passed and how many who had failed.

"We have also supplied them with information regarding the total numbers who took the examination and the number of those who received passing scores.

"Will the Board be in violation of the Iowa Code if we continue to supply information of this kind concerning the results of examinations to those who have requested it and, more specifically, what information, if any are we permitted to disclose, and to whom?"

Section 114.32 provides that a member of the Board shall not disclose information relating to the following:

1) Criminal history or prior misconduct of the applicant.

2) Information relating to the contents of the examination.

3) Information relating to the examination results other than the final score except for information about the results of an examination which is given to the person who took the examination.

This section was added to Chapter 114 by §16, Chapter 1086, Acts of the 65th General Assembly, and became effective on July 1, 1975. This

particular section has not been interpreted in the courts, but §147.21 pertaining to the release of scores by the Iowa Board of Nursing is identical in form and was the subject of an Attorney General's opinion on September 5, 1975 (Blumberg to Illes, Executive Director, Iowa Board of Nursing). That opinion concerned, primarily, the question of release of information to other state boards of nursing and specifically allowed that information as to final scores may be released.

Subsections 1 and 2 of §114.32 are straight forward in their prohibitions against disclosure of past criminal history or prior misconduct of the applicant and information relating to the contents of examinations and should provide no interpretation problems.

Subsection 3 as to which you have specifically requested our opinion, prohibits disclosure of examination results other than final scores. Quite clearly, this subsection allows release of an applicant's final score to responsible parties.

We see nothing in the statutory language which would prohibit the disclosure of statistical information of the nature outlined in your request for opinion to department heads in the Engineering College at Iowa State provided that individual applicant's names are not included in such a report. Any further information about the results of the examination may not be released to anyone other than the person who took the examination in accordance with subsection 3 of §114.32.

February 4, 1976

COUNTIES AND COUNTY OFFICERS: County Supervisors; Vacation of Road. §§306.10 through 306.17, §332.3(13), Code of Iowa, 1975. When the Board of Supervisors determines that an unsafe bridge on its secondary road system is to be neither repaired or replaced, vacation proceedings are required. The board may determine disposition of the bridge as will be in the best interests of the county. (Schroeder to Lee, Humboldt County Attorney, 2-4-76) #76-2-4

Mr. Robert E. Lee, Humboldt County Attorney: This is in response to your recent letter in which you have posed questions related to the proper disposition of an unsafe bridge (now closed to traffic) which is presently a part of the secondary road system of Humboldt County.

Your questions may be summarized as follows:

1. What is the County required to do, if it wishes to dispose of the bridge?

2. May the bridge be sold to an individual and the buyer allowed to leave it in place?

I understand the Board does not intend to repair or replace the bridge in question. Were this to occur, I also understand, persons with agricultural operations which include both sides of the stream have expressed interest in acquiring the bridge in place. Because it is presently barricaded against traffic, certain portions of the road on either side of the stream have also been barricaded as well. That portion of the secondary road (including the bridge) which the Board ultimately decides to remove from its road system, will require that it undertake formal vaca-

tion proceedings in conformance with Sections 306.10 through 306.17, 1975 Code of Iowa. Your attention is also directed to *Braden v. Board of Supervisors of Pottawattamie Co.*, 1968, 261 Iowa 973, 157 NW2d 123, for a discussion of rights and duties under this procedure.

The powers of the Board of Supervisors are found in Section 332.3, 1975 Code of Iowa. Specifically said section provides:

"The board of supervisors at any regular meeting shall have power:

* * *

"13. When any real estate, building, *or other property* are no longer needed for the purposes for which the same were acquired by the County, to convert the same to other county purposes or *to sell* or lease the same. . . ." (emphasis added)

While this paragraph describes procedures to be followed if real estate is sold, it is silent with reference to "other property." Therefore the Board, in the exercise of its sound discretion, is free to make disposition of the bridge to other public bodies or individuals as would be in the best interests of Humboldt County.

On the assumption the Board will not repair or replace the bridge it will have to weigh the merits of (1) scrapping the bridge, (2) selling it for removal, or (3) making a sale which allows the bridge to remain in place. Were they to choose the third alternative, prospective buyers should be fully and carefully advised of the condition of the bridge, as well as of access limitations brought about as a result of vacation proceedings.

In summary, if an unsafe bridge (which is not going to be replaced) is to be dismantled, removed or permanently abandoned, the Board of Supervisors is required to institute vacation proceedings, for the highway affected, as described in Sections 306.10 through 306.17, 1975 Code of Iowa. Once this is accomplished, the Board may determine the best method of disposition of the County's interest in the bridge, including a sale of the bridge which allows the buyer to keep it in place.

February 4, 1976

STATE OFFICERS AND DEPARTMENTS: Multi-year contracts. The Board of Nursing may enter into a multi-year contract for tests as long as the period of the contract is not unreasonable. (Blumberg to Wellman, Secretary, Executive Council, 2-4-76) #76-2-5

Mr. W. C. Wellman, Secretary, Executive Council: We have received your opinion request of December 3, 1975. You asked whether the Board of Nursing may legally negotiate contracts for more than one year. The contract in question is with the committee on the Administration of the State Board Test Pool Examination, Council of State Boards of Nursing for Iowa's use of their National test. Currently, the Board of Nursing has entered into one-year contracts for the test but wishes to sign multi-year contracts to save paperwork and expense.

The issue is whether a board or agency can, by entering into multi-year contracts, bind future boards or officers. Administrative agencies are continuing in nature and are unaffected by changes in personnel. Final actions of such bodies within the scope of their authority are

binding on their successors. 81 C.J.S., *States* §9, page 897 (1953). It has been held that a contract extending beyond the term of the officer making it and tying the hands of the successor is void as against public policy. 81 C.J.S., *States* §113, page 1086; *MacDougall v. Board of Land Com'rs. of Wyoming*, 1935, 48 Wyo. 493, 49 P.2d 663. But, see *Contra., Butler v. Hatfield*, 152 N.W.2d 484 (Minn. 1967). In *MacDougall*, the contract in question with auditors and attorneys for professional services was not limited and the time period of the contract was left indefinite. It was held as being void and against public policy. The court noted the general rule set forth above, but indicated such contracts are not always void. In *Butler*, it was held that a public official cannot anticipate his or her contracting powers for the purpose of unreasonably limiting the authority of a successor. "But, contracts by public officials are not made invalid merely because the official's term expires before the contemplated performance of the contracts." (152 N.W.2d at 493)

Accordingly, we are of the opinion that the Board of Nursing may enter into the contemplated multi-year contract, but advise that the period of the contracts be reasonable.

February 5, 1976

CITIES AND TOWNS: Partition Fences — §113.1, Code of Iowa, 1975. Cities are not exempt from Chapter 113 of the Code. (Blumberg to Jones, Taylor County Attorney, 2-5-76) #76-2-6

Mr. Richard R. Jones, Taylor County Attorney: We have received your opinion request of January 15, 1976, regarding partition fences. Owners of farm land adjacent to a city's property wish to have a partition fence erected between the tracts of land. You ask whether there is any legal provision exempting a town from the provisions of Chapter 113 of the Code; and, if so, who then would be responsible for erecting the fence.

Section 113.1, 1975 Code of Iowa, provides:

"The respective owners of adjoining tracts of land shall upon written request be compelled to erect and maintain partition fences, or contribute thereto, and keep the same in good repair throughout the year."

In a prior opinion, 1970 O.A.G. 649, citing to *Hansen v. Kemmish*, 1926, 201 Iowa 1008, 208 N.W. 277, we held that the tracts of land to be partitioned need not be farm land. Our office has also held in the past that school districts could fall within this Chapter, 1898 O.A.G. 326; and, townships were not excluded from this Chapter, February 23, 1965, #65-2-22, McCarthy to McKinnley.

There is nothing in Chapter 113 that specifically exempts cities. Nor can anything so exempting be found in any other chapter. Accordingly, we are of the opinion that cities are not exempt from the requirements of Chapter 113 of the Code. This means that requests may not only be made of them for partition fences, but also that they may request such fences from adjoining land owners. Your second question need not be answered.

February 5, 1976

STATUTES: Abortion Defined. Senate File 387, 66th G.A., Second Session (1976) and Amendment S-3635 thereto. The words of the Sovern Amendment (S-3635) to S.F. 387 "An Act relating to liability for the performance or refusal to perform abortions" which provide: "Abortion does not include medical care which has as its primary purpose the treatment of a serious pathological condition requiring immediate medical attention and which may indirectly cause the termination of a pregnancy," provide protection to a person seeking medical care for a condition which has been medically determined to be serious and to require immediate medical attention whether it results from disease, injury or disorder. (Haesemeyer to Brunow, State Representative, 2-5-76) #76-2-7

The Honorable John B. Brunow, State Representative: You have requested an opinion of the Attorney General regarding what you designate as the Sovern Amendment to Senate File 387, 66th G.A., "An Act relating to liability for the performance of or refusal to perform abortions."

Senate File 387, a bill for an act relating to liability for the performance of or refusal to perform abortions, according to the explanation attached to it, in part provides "that a person cannot be required to participate in medical procedures which will result in an abortion if the participation is against his religious beliefs or moral convictions." The Sovern Amendment, S-3635, provides as follows:

"Abortion does not include medical care which has as its primary purpose the treatment of a serious pathological condition requiring immediate medical attention and which may indirectly cause the termination of a pregnancy."

You have specifically asked:

Does the Sovern Amendment (S-3635) provide protection to a person seeking medical care for a serious pathological condition in an emergency situation . . .

"a. due to trauma,

"b. due to ectopic pregnancy,

"c. or any other medical emergency where the life of the mother is in danger either as a result of the pregnancy or because of another disease or trauma."

The resolution of this matter, of course, turns upon the construction of the term "serious pathological condition". It would not profit us to embark upon an extended discussion of the meaning of the word "serious" in the context of the Sovern Amendment. In a situation which requires "immediate medical attention", a determination of that which is "serious" would necessarily be purely a matter of medical judgment. The application of rigid rules to a situation involving the necessity of "immediate medical attention" would be impractical. Doctors and nurses can best determine those conditions which are "serious" and need "immediate medical attention". We shall not attempt to do so here.

We turn next to an examination of the term "pathological". In its narrowest sense, the term refers to diseases and their effects.[1] How-

[1] See Webster's 3rd International Dictionary Unabridged, G. & C. Merriam Company, 1967, where pathology is defined as 1: the study of abnormality; esp: the study of diseases . . ."

ever, it is a well settled rule of statutory construction that statutes are not to be narrowly construed. Rather, they are to be liberally construed to effect their purpose.[2] Another "well established cannon" is that the "construction given a statute should be sensible, practical, workable, and such as will avoid absurd results."[3] These rules have a great bearing on the questions before us here.

The purpose of the Sovern Amendment is obviously to allow medical treatment for serious physical conditions despite the fact that the treatment results in the termination of a pregnancy. The term "pathological", therefore, must be construed in a sense broad enough to effect this purpose. Serious conditions may arise from circumstances other than disease. It would seem absurd indeed to say that the Sovern Amendment provides protection to one seeking treatment necessitated by a serious condition resulting from disease but does not provide protection to one seeking treatment for a serious condition resulting from injury or severe disorder. If construed in such a fashion, the statute would not be sensible, practical, or workable.

We therefore cannot define "pathological" in its aforementioned narrow sense. It must be construed in its more broad sense, i.e., that which relates to medical abnormality, whether the abnormality results from disease, trauma[4] or other disorder. *This construction is necessary both to effect the purpose of the Sovern Amendment and to avoid an otherwise absurd construction.*

We arrive at this conclusion then: The Sovern Amendment provides protection to a person seeking medical care for a condition which has been medically determined to be serious and to require immediate medical attention whether it results from disease, injury or disorder. This would, of course, include trauma, ectopic pregnancy, or any other medical emergency where the life of the mother is in danger either as a result of the pregnancy or because of disease or trauma.

February 6, 1976

STATE OFFICERS AND DEPARTMENTS: Motor Vehicle Reciprocity — §§326.2(9) and 326.15, Code of Iowa, 1975. Iowa need not grant a refund for payment over 100% if the overpayment is caused by an error of another jurisdiction. Miles generated by an Iowa based fleet in a jurisdiction granting reciprocity can be included as in-state miles. Miles generated in a jurisdiction which charges a prorate fee may not be included within in-state miles. (Blumberg to Bellis, Director, Office of Operating Authority, Department of Transportation, Feb. 6, 1976) #76-2-8

Ms. Karen Bellis, Director, Office of Operating Authority, Department of Transportation: We have received your opinion request of December

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[2] §4.2, Code of Iowa, 1975.

[3] *State v. Monroe*, 236 N.W.2d 24, 36 (Iowa 1975) and citations.

[4] "1. An injury caused by mechanical violence, as a blow, twist, etc. 2. A wound caused by a physical agent, including heat, radiation, acids, etc. 3. A mental or emotional injury; phychological shock. 4. A neurosis resulting from an emotional strain." 2 Schmidt's Attorney's Dictionary of Medicine, p. T-88.

22, 1975, regarding Chapter 326, 1975 Code of Iowa. Your questions and explanations are as follows:

"QUESTION: When the composite percentage apportioned by an owner on a fleet of vehicles based in Iowa to each of the states with which Iowa has an apportionment agreement is more than one hundred percent percentage wise, does the State of Iowa recognize the actual percent paid to another jurisdiction regardless of the method used to determine that percentage, for the purpose of determining overpayment according to 326.15?

"EXPLANATION: Some states that are a party to the Uniform Compact determine a percent differently than Iowa does. For example, the State of Illinois determines a prorate percent by the miles of vehicles that generate Illinois miles divided by the total of such vehicles. Also the state of Illinois restricts carriers to filing only one fleet application. The Uniform Compact defined a 'fleet' only as 'three (3) or more vehicles, at least two (2) of which are motor vehicles. These two factors combine to produce a fleet with a percentage different from the percentages of the individual fleets filed separately with other states as a consequence. Other states including Iowa determine percentage by considering mileage generated by all vehicles in the fleet. Therefore, if Iowa granted a refund according to 326.15, some carriers would be paying a percent less than the $\frac{\text{in-state miles}}{\text{total fleet miles}}$.

"QUESTION: For refund purposes according to 326.15, does Iowa recognize the percentage payment to a jurisdiction that is not a member of the Uniform Compact or a state with which Iowa has no bilateral proportional registration agreement.

"EXPLANATION: Some jurisdictions enter into bilateral proportional registration agreements which require that all of the carriers' vehicles are prorated. Certain carriers base vehicles in Iowa, Illinois and Wisconsin and pay a percent fee to each state. Since Iowa and Wisconsin have a Reciprocity Agreement, the miles generated by the Iowa Fleet in Wisconsin are considered in the in-state miles. Conversely, these miles determine the fees charged by Wisconsin on the Iowa based fleet. Therefore, the carrier pays fees to Wisconsin and Iowa for the miles generated by the Iowa fleet in Wisconsin."

Your first question involves §326.15. That section provides:

"If the composite percentage apportioned by an owner on a fleet of vehicles based in Iowa to each of the states with which Iowa has an apportionment agreement is more than one hundred percent percentage wise, the fleet owner may file a claim with the department for a refund of registration fees paid in excess of one hundred percent percentage wise. The claim for such refund shall be filed on or after December 1 of the year for which refund is requested, and the fleet owner shall furnish satisfactory evidence of the alleged overpayment. The department shall prescribe and provide suitable forms requisite or deemed necessary to process such claims and insure that claims are paid to fleet owners who have complied with proportional registration requirements. The fleet owner may elect to apply any such refund to proportional registration fees payable the next registration year in lieu of any refund payable under this section. The State of Iowa shall not be liable for claims filed after December 1 of the following year."

Nowhere in that section is there any indication on the reasons why the percentage is over 100%. Not all states determine fees the same as Iowa, as evidenced by the Appendices to the Uniform Compact. For example, Illinois, in its Appendix, reserves the right to define a fleet as only containing vehicles which actually drive in that state. Iowa defines

fleet in such a way that it may include vehicles not actually operating in Iowa. When Illinois redetermines its fees after the beginning of the license year by deleting vehicles without any miles in that state, it increases the percentage paid, which often results in a total percentage exceeding 100%. Illinois' Appendix, in regard to this point, does not appear to be contrary to the Compact. See §16 of the Compact. Thus, refunds based upon Illinois' or another jurisdiction's action which is not violative of the Compact, any other apportionment agreement with Iowa, or with that jurisdiction's statutes, are recoverable. This is not to say, however, that you need not investigate to determine the reason for the overpayment. If, for example, a jurisdiction charged too high a percentage on an erroneous basis, the claimant should seek a refund from that jurisdiction and not from Iowa. We do not believe that the Legislature intended refunds from Iowa for any reason, when a refund could be claimed from the jurisdiction committing the error. In other words, if the excess percentage is caused by an error of another jurisdiction, the claimant should pursue the appropriate remedy with that jurisdiction, and Iowa need not grant a refund. To hold otherwise would permit a jurisdiction to commit errors at the expense of Iowa.

Your final question concerns the inclusion of reciprocity miles with Iowa's instate miles pursuant to the Iowa-Wisconsin Agreement. That agreement defines "resident" to include an individual who is a resident of either state; a corporation having its principal place of business in either state; or a corporation doing business in either state and maintaining a place of business in either state, but not necessarily its principal place of business. It provides that vehicles operated by a resident of either state and lawfully registered therein or entitled to operate therein pursuant to another reciprocity agreement, shall be entitled to reciprocity in the other state. Thus, fleets based in Iowa and maintaining a place of business here are entitled to reciprocity in Wisconsin.

Section 326.2(9) defines "in-state miles" to include miles driven in another state pursuant to reciprocity. Thus, if the Iowa based fleet is granted reciprocity in Wisconsin, those Wisconsin miles are added to Iowa's in-state miles for determining the fees due Iowa. Conversely, if Wisconsin requires the Iowa based fleet to pay prorate fees to Wisconsin, then Iowa may not add those Wisconsin miles to its in-state miles. There appears to be some indication from your letter that Wisconsin is requiring some Iowa based fleets to prorate fees rather than granting reciprocity. We do not understand how Wisconsin can do this unless those fleets fall within the stated exceptions to the Agreement. Our opinion, however, is not affected by Wisconsin's action, therefore, we will refrain from a determination of Wisconsin's legal authority for its actions.

Accordingly, we are of the opinion that the Office of Operating Authority may investigate into another jurisdiction's methods of computing percentages in order to determine a claim for refund for over 100%. If it is found that the other jurisdiction has erroneously charged too high a percentage, Iowa need not grant the refund since the claimant's remedy is with that other jurisdiction. Miles generated in a state, by an Iowa based fleet, with which Iowa has reciprocity may be included within the in-state miles. However, miles generated in a state which is charging a prorate fee may not be so included.

February 9, 1976

TAXATION: Public Bidders Sale: Assessment of fee for each property sold for delinquent taxes: §§569.5, 569.6, and 569.8, Code of Iowa, 1975, and §49 of Chapter 138, Acts of 66th G.A., first session (1975). Section 49 of Chapter 138, Acts of 66th G.A., first session (1975), which amended §569.8, Code of Iowa, 1975, abrogated the authority of the board of supervisors to recover costs incurred at public bidders sale. (Griger to Dickson, Ass't. Black Hawk County Attorney, 2-9-76) #76-2-9

Mr. David K. Dickson, Assistant Black Hawk County Attorney: You have requested an opinion of the Attorney General on the question of whether the Black Hawk County Board of Supervisors has the authority to assess a fee of fifty dollars ($50.00) as costs in the sale of each property at public bidders sale authorized by §569.8, Code of Iowa, 1975, as amended by §49 of Chapter 138, Acts of 66th G.A., first session.

In the event that real property cannot be sold for delinquent property taxes at the annual tax sale pursuant to §446.7, Code of Iowa, 1975, or at the scavenger tax sale pursuant to §446.18, Code of Iowa, 1975, the county in which the real estate is located, through its board of supervisors is required to bid for that property in accordance with the provisions of §446.19, Code of Iowa, 1975. In the absence of redemption by the delinquent taxpayer, a tax deed is issued to the county. Thereafter, the county must dispose of the property pursuant to Chapter 569, Code of Iowa, in particular, by public auction in accordance with the procedures listed in §569.8, Code of Iowa, 1975, as amended by §49 of Chapter 138, Acts of 66th G.A., first session (1975).

Section 569.5, Code of Iowa, 1975, provides:

"When the title to real estate becomes vested in the state, or in a county or municipality under this chapter, *or by conveyance under the statutes relating to taxation*, the executive council, board of supervisors, or other governing body, as the case may be, shall manage, control, protect by insurance, lease, or sell said real estate on such terms, conditions, or security as said governing body may deem best." (emphasis supplied).

Section 569.6, Code of Iowa, 1975, provides:

"The cost and expense relating from the exercise of said powers shall be paid from the fund to which said real estate belongs and the proceeds of a lease or sale shall be credited to said fund."

These statutes do not, by themselves, authorize the board of supervisors to recover the costs incurred at a public bidders sale.

Section 569.8, Code of Iowa, 1975, provided in relevant part:

"When the county acquires title to real estate by virtue of a tax deed such real estate shall be controlled, managed and sold by the board of supervisors as provided in this chapter, *except that any sale thereof shall be for a sum not less than the total amount stated in the tax certificate including all endorsements of subsequent general taxes, interests, and costs, without the written approval of the tax-levying and tax-certifying bodies having a majority interest in said general taxes. However, where the total amount stated in the tax sale certificate including all endorsements of subsequent general taxes, interests, and costs does not exceed two hundred fifty dollars, such real estate may be sold by the board of supervisors without the written approval of any of the tax-levying and*

tax-certifying bodies having any interest in said general taxes. All money received from said real estate either as rent or as proceeds from the sale thereof shall, after payment of any general taxes which have accrued against said real estate since said tax sale and after payment of insurance premiums on any buildings located on said real estate and after expenditures made for the actual and necessary repairs and upkeep of said real estate, be apportioned to the tax-levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold." (emphasis supplied).

The above underlined portions of §569.8 of the Code were deleted by the legislature in 1975 when it enacted §49 of Chapter 138, Acts of 66th G.A., first session. This language clearly covered costs associated with tax sales. 1940 O.A.G. 206. When the legislature deleted such language, it abrogated the authority of the board of supervisors to recover the costs incurred in the sale of each property at public bidders sale. Therefore, it is the opinion of this office that no fee can be assessed by the board of supervisors to recover the costs incurred at public bidders sale held pursuant to Code §569.8, as amended.

February 9, 1976

PENAL INSTITUTIONS: Juvenile Home and Training Schools for Girls and Boys. §§242.2 and 281.1, Code of Iowa, 1975. The term "penal institution" does not include the Juvenile Home and the Training Schools for Girls and Boys. (Robinson to Doderer, State Senator, 2-9-76) #76-2-10

The Honorable Minnette Doderer, State Senator: You recently asked this office for:

a precise definition of what constitutes a penal institution and whether or not this term covers the Juvenile Home and the Training Schools for Girls and Boys.

We are of the opinion that the term "penal institution" does not include the Juvenile Home or Training Schools. *Appeal of Bailey*, 262 A.2d 177, 179, 158 Conn. 439 (1969); *Marks v. State*, 102 P.2d 955, 956, 69 Okl.Cr. 330 (1940); *Newman v. Wright*, 29 S.E.2d 155, 157, 126 W.Va. 502 (1944).

Penal pertains to punishment whereas §242.2, Code of Iowa, 1975,

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empowers the superintendent at the training schools to "use his best endeavors to reform the pupils in his care." 60 Am.Jur.2d, Penal and Correctional Institutions, §1, provides the following definitions:

"The words 'penal institution' and 'prison' are generic terms comprising places maintained by public authority for the detention of those confined under legal process, whether criminal or civil, and whether the imprisonment is for the purpose of insuring the production of the prisoner to answer in future legal proceedings, or whether it is for the purpose of punishment for an offense of which the prisoner has been duly convicted and for which he has been duly sentenced. The term 'correctional institution' refers to industrial schools, reform schools, and similar institutions whose purpose is generally educational and reformative rather than penal, although their inmates are restrained of liberty. A 'penitentiary' is a prison or place of imprisonment in which convicts sentenced to hard labor are confined by authority of law. . . ."

We certainly agree with the conclusion reached in your letter, to-wit:

"While the State Penitentiary, Women's Reformatory and Men's Reformatory are clearly penal institutions, I question the extension of this term to cover the other institutions set forth in Section 218.1 of the Code. Indeed, these first three facilities are listed under the heading 'Penal' in the index to the Code and are controlled by the Director of the Division of Corrections. I would note that the other institutions are controlled by other divisions of the Department and are accorded generally different treatment in the Code.

"It is clear that all of the institutions are not of the same character. The distinctions among the facilities have long been recognized by the Legislature, the Department and the citizens of Iowa. To group the Juvenile Home and Training Schools along with the Penitentiary, Women's Reformatory and Men's Reformatory as penal institutions at this time would require a significant step backward."

February 9, 1976

TOWNSHIPS: Fire Protection — §§332.3(20), 332.11, and Chapter 613A, Code of Iowa, 1975; §368.11, Code of Iowa, 1973; §368.11, Code of Iowa, 1954; §§368.23, 368.25, 368.26, 368.27, 368.28, 368.29 and 368.30, Code of Iowa, 1950; §§6 and 9, Chapter 194, Acts of the 66th G.A. (1975). Sections 6 and 9, Chapter 194 of the 66th G.A., are not void for vagueness. A township may be divided into areas when contracting for fire protection. The township trustees may purchase liability insurance to cover their fire protection. (Blumberg to Hullinger, State Representative, 2-9-76) #76-2-11

Honorable Arlo Hullinger, State Representative: We have received your opinion request of January 26, 1976, regarding Chapter 194, Acts of the 66th G.A. (1975). You specifically asked:

"I would request an attorney general's opinion as to the constitutionality of Section 6 and Section 9 of this Act. Section 6 mandates the trustees to provide 'fire protection for the township'. The term 'fire protection' is not defined nor is a department or agency of State Government given authority to promulgate rules to establish standards for fire protection.

"How are the trustees to know when they have fulfilled their obligation as mandated by this section of the Act? Is this section unconstitutionally vague? I have the same questions concerning Section 9.

"Question II. If the Act is constitutional, Section 3 permits trustees to contract with other agencies under Chapter 28E of the Code. Section 7 of the Act appears to require a uniform tax levy on old property outside of any benefitted fire district and any incorporated city. Can the township be further divided to provide for two or more contracts to be entered into to provide for this service?

"Question III. If the Act is constitutional, are the trustees personally liable if they have not adequately provided for this service? If there is a fire loss, could the trustees be sued because the individual felt the service provided was inadequate? If they are liable, does the County Liability Insurance cover their acts or are they required to secure further insurance?"

Chapter 194, Acts of the 66th G.A. (1975) was passed to insure that all areas are afforded fire protection. Another purpose was to limit benefitted fire districts. Section 6 of the Act amends §359.42 to read as follows:

"359.42 TOWNSHIP FIRE PROTECTION. The trustees of each township in this state shall provide fire protection for the township, exclusive of any part of the township within a benefitted fire district.

The trustees may purchase, own, rent or maintain fire protection apparatus or equipment and provide housing for such equipment. The trustees may contract with any public or private agency under chapter twenty-eight E (28E) of the Code for the purpose of providing fire protection under this section."

Section 9 of this Act adds the following to Chapter 364 of the Code:

"*NEW SECTION.* MUNICIPAL FIRE PROTECTION. Each city shall provide for the protection of life and property against fire and may establish, house, equip, staff, uniform and maintain a fire department. A city may establish fire limits and may, consistent with code standards promulgated by nationally recognized fire prevention agencies regulate the storage, handling, use, and transportation of all inflammables, combustibles, and explosives within the corporate limits and inspect for and abate fire hazards. A city may provide conditions upon which the fire department will answer calls outside the corporate limits or the territorial jurisdiction and boundary limits of this state. A city shall have the same governmental immunity outside its corporate limits when providing fire protection as when operating within the corporate limits. Firemen operating equipment on calls outside the corporate limits shall be entitled to the benefits of chapter four hundred ten (410) or four hundred eleven (411) of the Code when otherwise qualified."

You question whether the term "fire protection", as used in these sections, is unconstitutionally vague.

Legislative enactments are presumed to be valid and constitutional. The party attacking a statute must prove its unconstitutionality beyond a reasonable doubt. *Brown Enterprises, Inc. v. Fulton*, 192 N.W.2d 773 (Iowa 1971); *Lewis Consolidated School District v. Johnston*, 1964, 256 Iowa 236, 127 N.W.2d 118. If the constitutionality is merely doubtful or fairly debatable, courts will not interfere. *Burlington and Summit Apartments v. Manolato*, 1943, 233 Iowa 15, 7 N.W.2d 26. It must be shown that the statute clearly, palpably, and without doubt infringes upon the Constitution, and in so doing, every reasonable doubt must be resolved in favor of constitutionality. Every reasonable basis upon which constitutionality could be sustained must be negated. *Green v. Shama*, 217 N.W.2d 547 Iowa (1974); *Lee Enterprises, Inc. v. Iowa State Tax Comm'n*, 162 N.W.2d 730 (Iowa 1968); *Lewis Consolidated School District*, supra.

When dealing with a statute alleged to be void for vagueness, one claiming that invalidity must make a clear showing to that effect and must show that courts are unable to determine the legislative intent with a reasonable degree of certainty by accepted rules of construction. *Webster Realty Company v. City of Fort Dodge*, 174 N.W.2d 413 (Iowa 1970). A statute is not necessarily void for vagueness simply because it may be ambiguous or open to two constructions. *Williams v. Brewer*, 442 F.2d 657 (8th Cir. 1971). Language in a statute meets the constitutional test if its meaning is fairly ascertainable by reference to similar statutes, judicial determinations and reference to the dictionary, or if the words themselves have a common and generally accepted meaning. *Iron Workers Local No. 67 v. Hart*, 191 N.W.2d 758 (Iowa 1971); *Powers v. McCullough*, 1966, 258 Iowa 738, 140 N.W.2d 378; *Diamond Auto Sales, Inc. v. Erbe*, 1960, 251 Iowa 1330, 105 N.W.2d 650. A court should not reach for or create statutory obscurity and if men of ordinary intelligence can understand a statute, despite some possible areas of disagree-

ment, it is not wanting in certainty. Nor is a statute unconstitutionally vague because clearer or more precise language could have been used. *State ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W.2d 624 (Iowa 1971). Finally, a law should not be held invalid as unworkable because of uncertainty of meaning, unless there is no other reasonable alternative. *Stanley v. Southwestern Com. Col. Merged Area*, 184 N.W. 2d 29 (Iowa 1971). These rules apply here.

We have not been shown that the sections are unconstitutional or vague. "Fire protection" is a commonly used term, and has been used for some time by the Legislature. See, e.g., §368.11, 1973 Code, and previous codes dating back to 1954. Prior to that time, provisions for fire protection were found in §§368.23, and 368.25 through 368.30, 1950 Code. As an example, §368.25, 1950 Code, which was entitled "Fire protection" contained a list of powers a city had to regulate combustible materials and the like. Section 368.29, 1950 Code, provided that a city had the power to organize and maintain a fire department. These sections were recodified into §368.11, 1954 Code. Fire protection at that time encompassed many things in addition to providing for fire departments to fight or prevent fires. We cannot state with any certainty that all the enumerated powers in the applicable sections of the 1950 Code are now made mandatory by the new Act. We are prepared, however, to state that at a minimum the ability to fight fires is now required. This can be accomplished by organizing and maintaining a fire department or contracting with another public agency, such as a benefitted fire district or a city, to provide fire protection. We do not feel that the term "fire protection" is vague, nor that the requirements for declaring it to be unconstitutional have been met.

In answer to your second question, there is nothing in the Act which limits a township's ability to contract with more than one agency for fire protection. The trustees may divide the township into areas in order to contract with more than one agency for fire protection. This could be done to insure that the distances from the fire companies with which there are contracts are uniform.

Your final question concerns the liability of township trustees for failure to provide adequate fire protection, and whether liability insurance of the county would cover the township. Chapter 613A of the Code provides for tort liability of governmental subdivisions. "Municipality" is defined in §613A.1(1) to include a township. Section 613A.2 provides that every municipality is subject to liability for its torts and those of its officers, employees and agents. Section 613A.8 mandates that the governing body of a municipality shall defend its officers, employees, and agents, whether elected or appointed, and shall indemnify them except in cases of malfeasance in office or willful or wanton acts. There is no doubt that the township, or its trustees could be held liable for failing to provide any fire protection. The question of liability for failure to provide adequate fire protection would, of course, depend upon each set of facts. Governmental units with fire departments have been held liable for the negligence of their firemen in operating the equipment. See, e.g., *Smith v. Ginther*, 1967, 379 Mich. 208, 150 N.W.2d 798. Similarly, governmental units have been held liable for negligence in fighting a fire. In *City of Fairbanks v. Schaible*, 375 P.2d 201 (Alas. 1962), the

city was held negligent based upon its firemen's neglect in saving a woman in a burning building. The court stated: "The City was guilty not only of failure to use common sense methods to rescue decedent. It was also guilty of affirmatively preventing rescue by others." In addition the Court found (375 P.2d at 210):

"The evidence is sufficient to sustain the trial court's finding of negligence. This is not merely a case where the court in retrospect and using hindsight has determined that the City might have done things differently in its overall method of fighting the fire. This is a case where the City specifically induced reliance on the skill and authority of its fire department to rescue decedent, and then failed to use due care to carry out its mission. It affirmatively took over the rescue mission, and excluded others from taking action which in all probability would have been successful. It thus placed decedent in a worse position than when it took complete charge of rescuing her, and became responsible for negligently bringing about her death."

The failure to provide water to fight fires has been the basis for liability. *Hall v. Youngstown*, 1967, 11 Ohio App.2d 195, 229 N.E.2d 660. These cases did not contain any statement regarding the adequacy of fire protection.

In *Steinhardt v. Town of North Bay Village*, 132 So.2d 764 (Dist. Ct. App. Fla. 1961), a property owner brought an action for damages to buildings caused by fire. It was alleged that the firemen were not properly trained and that they did not keep the equipment in proper condition. In holding for the city, the Court stated (132 So.2d at 766, 767):

"The gravamen of the complaint is the failure of the city to properly carry out a function it has undertaken and for collected taxes from the plaintiffs. It is not alleged that the city has failed to provide a fire department; rather it is urged that it provided an ineffective one insofar as the needs of the plaintiffs were to be met. It is argued that this is another way of saying that the plaintiffs have suffered a direct personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment, and therefore the facts come within the statement of the law contained in the Hargrove case at page 133, paragraph [3].

"In a consideration of the problem, we are not greatly aided by the many cases from other jurisdictions, which almost uniformly hold that a city is not liable. The greatest number of the cases cited base the holding upon the conclusion that the maintenance and operation of a municipal fire department are a governmental function, and in the exercise of such function, the municipality is immune to liability. The distinction between proprietary and governmental functions is no longer valid as a method of allocating municipal liability in this state. It is sometimes said that failure to provide adequate fire protection involves the denial of a benefit owing to the community as a whole, but that it does not constitute a wrong or injury to a member thereof so as to give rise to a right of individual redress. Notwithstanding such reasoning, our Supreme Court in Mugge v. Tampa Waterworks Co., 52 Fla. 371, 42 So. 81, 6 L.R.A.,-N.S., 1171, held that where a private water company fails to furnish an adequate water supply pursuant to its contract with the city, and an individual suffers fire damage because of this failure, the individual has a right of action against the company even though the benefit of the contract runs to the community as a whole.

"As mentioned previously, the option in Hargrove v. Town of Cocoa Beach, supra, has been recognized as rejecting the rule of municipal

immunity from some torts arising out of governmental functions. There are as pointed out in the cases cited, limitations expressed in the Hargrove opinion which restrict municipal liability.

"One of these is the rule of immunity set forth in Elrod v. City of Daytona Beach, 132 Fla. 24, 180 So. 378, 118 A.L.R. 1049, where it was held that a municipality was not liable for the enforcement of an unconstitutional ordinance. It was reasoned that the ordinance in question was an exercise of the legislative power, and its passage and enforcement could not become the basis of legal liability because the commission was performing discretionary duties. In the instant case the plaintiffs do not complain of the negligence of a municipal employee but of the failure to properly provide a city service. Their allegations are in essence that the city, through its governing body did not (1) restrict the firemen from using the water tank for purposes unconnected with fire fighting and (2) provide for trained firemen. The argument for immunity of the city from liability for its failure to act as the plaintiffs allege it should have acted would seem to be as strong as the basis recognized for immunity for the enforcement of an improper legislative act. In each case the elected officials of the city were undertaking to perform functions which required an exercise of legislative or quasi legislative powers, and the consequences of their acts, even if improperly performed, cannot be made subject to civil liability.

"The application of these principles is not without its difficulty. As appellants point out, our Supreme Court has several times refused to apply the doctrine of immunity to protect a city from liability for the negligent operation of its fire equipment. These cases declare that 'a city may be liable when it conducts its fire-fighting equipment upon the public streets in such a manner as to endanger the lives and property of innocent persons. They cannot be made the basis for a holding of municipal liability upon the facts of the instant case because one could hardly say that a city's failure to establish an efficient fire department to extinguish fires is a nuisance upon the public streets."

It appears that the Court based its opinion upon a trend of law that the functions of a fire department are to the general public, not to specific individuals, and therefore, a governmental body cannot be held liable in the absence of specified negligence directed toward that individual. See also, *Duran v. City of Tucson*, 1973, 20 Ariz. App. 22, 509 P.2d 1059. We cannot state whether the Iowa courts will adhere to such a position. Nor can we state, based upon case law, that the failure to provide adequate fire protection will lead to liability since each case is dependent upon its set of facts.

Section 332.3(20) of the Code permits a County Board of Supervisors to purchase insurance for liability and property damage covering county employees in the operation of county vehicles. It also appears that there can be insurance of county buildings, and other operations. §§332.11, 613A.7 of the Code. There is nothing, however, to indicate that the county may purchase insurance to cover the townships. Section 613A.7 provides that the governing body of a municipality (which includes a township) may purchase liability insurance to cover actions under that chapter.

Accordingly, we are of the opinion that §§6 and 9, Chap. 194, Acts of the 66th G.A., are not void for vagueness. A township may be divided into areas in order to contract for fire protection services. The possibility of liability for the failure to provide or the negligence in providing fire protection exists. Finally, although a county's liability

insurance does not cover a township, the township may purchase such insurance on its own.

February 9, 1976

CITIES AND TOWNS: Contribution of Funds Pursuant to Chapter 28E — §§28E.4, 28E.5, 28E.6, 28E.11, 384.24 and 384.26, Code of Iowa, 1975. Where a city enters into a 28E Agreement with another public agency for the construction and administration of a theater, auditorium and the like, it may contribute funds for the facility. (Blumberg to Wornson, Cerro Gordo County Attorney, 2-9-76) #76-2-12

Clayton L. Wornson, Cerro Gordo County Attorney: We have received your opinion request regarding the donation of funds by a municipality. Pursuant to your facts, an area community college is contemplating constructing a theater and/or auditorium on its campus. This facility will be open for use by the students and the residents of the city and county. The city has revenue sharing funds which it desires to give to the college for the construction of the facility. The appropriate federal agency has indicated that any prohibition of this use of revenue sharing funds would have to be pursuant to state law. You initially asked whether the city could make such a donation. In later discussions and correspondence with you, more facts were submitted and the question was changed. It now appears that a Chapter 28E Agreement is being contemplated whereby the city would contribute money and be part of an advisory council or directorship overseeing the operation of the facility. The actual maintenance and operating costs would still be borne by the college. You now ask whether this is a sufficient interest on the part of the city, or whether more control must be exercised by the city in order to have a valid 28E Agreement.

Initially we were concerned about a mere contribution or donation by the city with no rights or powers. Previous opinions of this office would cast a doubt upon that type of transaction. See, 1972 O.A.G. 395 and 403. However, since the introduction of the new facts regarding a 28E Agreement, such a doubt no longer exists. Sections 384.24 and 384.26, et seq., 1975 Code, provide for and permit a city to own, operate or maintain a civic center, which includes auditoriums, theaters, music halls and the like. Section 28E.4 permits any public agency of the state (cities, counties, school districts and the like) to enter into an agreement with one or more public or private agencies for joint co-operation. In addition a separate entity may be created to administer the agreement. The requirements of an agreement are set forth in §§28E.5 and 28E.6, and include the organization and composition of the separate or administrative entity and its powers, if any, is created; the purpose of the joint co-operation; its financing; a provision for an administrator or joint board (which shall include representation of each public agency if no separate entity is established); and, the manner of acquiring, holding, and disposing of property. Section 28E.11 provides that any public agency entering into such an agreement may appropriate funds to the board or entity for the project. We can find no other requirements in that chapter relative to your situation.

The fact that there is going to be a joint board composed of representatives of all public agencies a party to the agreement for the joint

administration of the facility shows compliance with Chapter 28E. Accordingly, pursuant to the facts you supplied, the city may contribute funds for the project pursuant to a 28E agreement.

February 9, 1976

STATE DEPARTMENTS: Department of Health. Bureau of Vital Statistics. §§4.1(36)(a), 144.13(4), 144.39, 675.35, 675.36, Code of Iowa, 1975. The Bureau of Vital Statistics must enter the name of the person found to be the legal and actual father of a child on a birth certificate when directed to do so by a court order pursuant to Section 144.13(4), Code of Iowa, 1975. This includes entering the name of one father as determined by the court and also if so ordered changing the child's name to conform with that to the name of the person found to be the legal and actual father. The presumption of legitimacy can be overcome by a determination by the court of the legal and actual father of a child. The Bureau of Vital Statistics must conform the Birth Certificate to reflect this determination by the Court, Section 144.13(4), Code of Iowa, 1975. (Boecker to Crook, Assistant Polk County Attorney, 2-9-76) #76-2-13

Mr. Charles S. Crook, III, Assistant Polk County Attorney: You have requested an opinion from the Attorney General's Office on the following questions:

"If the Court establishes actual and legal paternity of a child, must the Iowa Bureau of Vital Statistics, pursuant to Section 144.13(4) of the Code of Iowa (1975), enter the name of the person found by the Court to be the legal and actual father on the birth certificate, and if so Ordered by the Court, change the child's last name to conform with such paternity?"

"Does the Order of the Court, finding that a particular person is the actual and legal father of the child, operate to illegitimatize the child if the mother was married to another person at the time the child was conceived or born? If so, should the Bureau of Vital Statistics conform the birth certificate to the Court's orders?"

The answer to the first part of your first question, in which you inquired whether or not the Iowa Bureau of Vital Statistics must enter the name of the person found by the Court to be the legal and actual father on the birth certificate, is yes. Section 144.13(4), Code of Iowa, 1975, reads:

"In the case of a child born out of wedlock, the certificate shall be filed directly with the state registrar.

"If the mother was married either at the time of conception or birth, the name of the husband shall be entered on the certificate as the father of the child unless paternity has been determined otherwise by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered.

"If the mother was not married either at the time of conception or birth, the name of the father shall not be entered on the certificate of birth without the written consent of the mother and the person to be named as the father, unless a determination of paternity has been made by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered."

Both unnumbered paragraphs two and three of Section 144.13(4) contain the requirement that the name of the father as determined by the court shall be entered when the court has been requested to determine

paternity. The use by the legislature of the word "shall" imposes a duty (Section 4.1(36)(a), Code of Iowa, 1975) on the Department of Vital Statistics to enter the name of the individual determined by the court to be the father. (AGO 1946, p. 77). The word shall is "ordinarily mandatory, excluding the idea of permissiveness or discretion". *Schmidt v. Abbott*, 261 Iowa 886, 890, 156 N.W.2d 649 (1968).

The second part of your first question is also answered in the affirmative. The Bureau of Vital Statistics must, if so ordered by a court of competent jurisdiction, change the name of the child to conform with the order of the court. Section 144.39, Code of Iowa, 1975, provides two ways for changing a name on a birth certificate and the first of those is by order of the court. Section 144.39 reads:

"Upon receipt of a certified copy of a court order from a court of competent jurisdiction or certificate of the clerk of court pursuant to chapter 674 changing the name of a person born in this state and upon request of such person or his parent, guardian, or legal representative, the state registrar shall amend the certificate of birth to reflect the new name."

Again the use of the word shall in the language of the statute places a mandatory directive upon the Bureau of Vital Statistics to comply with the order of the court.

Your second question is also in two parts. The first issue presented to us concerns the presumption of legitimacy that is accorded to a child born in lawful wedlock. The fact situation you present is a court of competent jurisdiction finds that the actual and legal father of a child is a different individual than the husband of the mother of the child at the time the child was conceived or born. Your question being is this child illegitimate? If a court of competent jurisdiction has determined that the father of the child is not the husband of the mother of the child our answer must necessarily be, yes, the child has been determined by the court to be illegitimate.

When a child is born in wedlock the law presumes said child to be legitimate. This theory is based upon a multitude of reasons some of those being decency, morality, and public policy. However, this presumption may be rebutted. *Wallace v. Wallace*, 137 Iowa 37, 114 N.W. 527 (1908), *Craven v. Selway*, 216 Iowa 505, 246 N.W. 821 (1933), *Nelson v. Nelson*, 249 Iowa 638, 87 N.W.2d 767 (1958).

The standard of evidence needed in this type of action is clear and convincing, *Kuhns v. Olson*, 258 Iowa 1274, 141 N.W.2d 925 (1966), and for the purposes of this opinion, since in your question the set of facts presented to us state that the court has issued an order determining paternity, we assume the presumption of legitimacy has been rebutted.

A child born to a married woman begotten by one who is not the husband of the mother is illegitimate. *State v. Coliton*, 17 N.W.2d 546 (North Dakota 1945), *People v. Gleason*, 211 Ill.App. 380 (1918), 10 C.J.S. Bastards §1 p. 7. In *State v. Lavin*, 80 Iowa 555, 561, 46 N.W. 553 (1890) the Iowa court stated:

"Bastards are persons born out of wedlock, lawful or unlawful, or not within competent time after termination of coverture; or if born out of wedlock, whose parents do not afterwards intermarry, and the father

acknowledges them, or who are born in wedlock when procreation by the husband is impossible."

Again we feel we must stress that our conclusion is based on the ground that the presumption of legitimacy has been rebutted by court action.

The second part of this last question again refers to the duty of the Bureau of Vital Statistics to conform the birth certificate to the Court's order and we feel we have already answered that question in the first part of our opinion and that a complete discussion is unwarranted. That answer is yes. Section 144.13(4), Code of Iowa, 1975, reads:

"In the case of a child born out of wedlock, the certificate shall be filed directly with the state registrar.

"If the mother was married either at the time of conception or birth, the name of the husband shall be entered on the certificate as the father of the child unless paternity has been determined otherwise by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered. * * *"

We further feel obligated to point out two other pertinent sections of the Code. Section 675.35, Code of Iowa, 1975, addresses itself to references concerning illegitimacy and reads:

In all records, certificates, or other papers hereafter made or executed, other than birth records and certificate or records of judicial proceedings in which the question of birth out of wedlock is at issue, requiring a declaration by or notice to the mother of a child born out of wedlock, it shall be sufficient for all purposes to refer to the mother as the parent having the sole custody of the child or to the child as being in the sole custody of the mother and no explicit reference shall be made to illegitimacy, and the term natural shall be deemed equivalent to the term illegitimate when referring to parentage or birth out of wedlock."

Section 675.36, Code of Iowa, 1975, provides for the Clerk of the district court to notify the registrar of Vital Statistics when a judgment determining paternity has been entered. Section 675.36 reads:

"Upon the entry of a judgment determining the paternity of an illegitimate child the clerk of the district court shall notify in writing the state registrar of vital statistics of the name of the person against whom such judgment has been entered, together with such other facts disclosed by his records as may assist in identifying the record of the birth of the child as the same may appear in the office of said registrar. If such judgment shall thereafter be vacated that fact shall be reported by the clerk in the same manner."

In conclusion when a court enters a judgment in a paternity action the Bureau of Vital Statistics must comply with that order to conform with Section 144.13(4).

February 10, 1976

STATE OFFICERS AND DEPARTMENTS: Alcoholism; Public Records. §§68A.1, 68A.2, 68A.3, 68A.7, 68A.7(11), 125.20(1), 1975 Code of Iowa. The public has the right to examine and copy a written agency evalution of an independent Ch. 125 alcoholism facility compiled by the State Division on Alcoholism when the contents of patient records would not be revealed. (Haskins to Voskans, Director, Division on Alcoholism, 2-10-76) #76-2-14

Jeff Voskans, Director, Division on Alcoholism: You request our opinion as to whether the public has the right to examine a written agency evaluation of an alcoholism facility compiled by the state Division on Alcoholism and intended for the personal use of members of the state Commission on Alcoholism. The facility is funded and regulated by the Division under Ch. 125, 1975 Code of Iowa. The contents of patient records are not disclosed by the evaluation.

Any attempt to resolve the question you pose must begin with Ch. 68A, 1975 Code of Iowa, the Public Records Act, and specifically §68A.2, 1975 Code of Iowa. That section states:

"Citizen's right to examine. *Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential.* The right to copy records shall include the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records. All rights under this section are in addition to the right to obtain certified copies of records under section 622.46. [Emphasis added]

§68A.2, when read together with the definition in §68A.1, 1975 Code of Iowa, of "public records", grants a general right to any member of the public to examine and copy all records of a state department.[1] Nevertheless, as seen, the general right is subject to an exception where "some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential." It should be noted that confidentiality is permitted only when a provision of the Code requires it. The mere intent of the creator of a record to have it remain confidential is not sufficient to confer upon it that legal effect. No statutory exception covers the record under consideration here. While none of the exceptions in §68A.7, 1975 Code of Iowa, are here applicable, one in that section should be mentioned. §68A.7(11), 1975 Code of Iowa, states:

"Confidential records. The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information: * * *

"11. *Personal* information in confidential *personnel* records of public bodies including but not limited to cities, boards of supervisors and school districts." [Emphasis added]

This subsection does not apply, because not only is the information in the written agency evaluation not "personal", but it does not pertain to "personnel" of the state Division. The evaluation covers only a facility which is an independent contractor with the Division. Nor is the exception of §125.20(1), 1975 Code of Iowa, relevant in the instant situation, since patient records are not involved. §125.20(1) states:

"Records of alcoholics and intoxicated persons.

1. The registration and other records of facilities shall remain confidential and are privileged to the patient."

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[1] Under section 68A.3, 1975 Code of Iowa, the examination and copying of the records is to be under the supervision of the lawful custodian of the record.

This section appears to be limited to patient records. This is because there would be no reason for the legislature to make other, non-patient, records "privileged to the patient."

Accordingly, by reason of the general provisions of §68A.2, the public has the right to examine and copy the written agency evaluation here involved.

February 10, 1976

SCHOOLS: Area Community Colleges. §§280A.17, 280A.18, 280A.19, 280A.22, 280A.34, Code of Iowa, 1975. Area school boards are prohibited from using funds derived from tuition, state funds, local taxation on bonded indebtedness for the construction or maintenance of buildings and grounds which are used exclusively for athletic purposes. (Nolan to Nystrom, State Senator, 2-10-76) #76-2-15

The Honorable John N. Nystrom, State Senator: This is written in response to your request of January 15, 1976, for an opinion on the following:

"Section 280A.34 of the Code provides that 'Funds . . . shall not be used for the construction or maintenance of athletic buildings or grounds'. In short, this provision prohibits construction or maintenance of athletic facilities by area schools. What I would like from you is a definition of the word 'athletic' within the context of this prohibition.

"I particularly would like to know whether athletic buildings and grounds include facilities for physical education classes. In other words, can area school construct such facilities with funds provided by Section 280A.17, 280A.18 (3) (4) (5), 280A.19 and 280A.22 and then use those same facilities for interscholastic athletics? It occurs to me that if they can then no real function is served by Section 280A.34."

In the absence of statutory definition, the ordinary meaning of the word "athletic" is to be used in connection with §280A.34 of the Iowa Code. With respect to a definition for the word "athletic", we have looked to *Webster's Seventh New Collegiate Dictionary* where the word "athletic" is defined, "of or relating to athletes or athletics . . . used by athletes". The word "athletics" is defined therein as follows: "(1) exercises, sports, or games engaged in by athletes; (2) the practice or principles of athletic activities".

The board of directors of an area school are subject to the restrictions imposed by this statute. Thus, an area community college would be prohibited from using funds derived from local property tax (§280A.17), tuition, state aid, or state site funds (§280A.18(3)(4)(5)), bonded indebtedness (§280A.19), or additional property tax voted for site and construction (§280A.22). Inasmuch as the statute does not prohibit the use of §280A.18(1)(2)(6)(7) funds for the construction and maintenance of an athletic building, the board is not prohibited from using federal funds administered by the state board, other federal funds, donations and gifts and student fees for this purpose.

Accordingly, it is the opinion of this office that the prohibitions in §280A.34 do not extend to all funds in the hands of an area school and further, that the term "buildings or grounds" should be interpreted to mean those sites and buildings which are used exclusively for athletic purposes.

February 10, 1976

CONSTITUTIONAL LAW: Nuisance Actions; Limitations Regarding the Operation of Feedlots; Constitution of the United States; Constitution of the State of Iowa; S.F. 367, 66th G.A., Second Session (1976). A proposed bill placing limitations on maintaining of nuisance actions against the operation of certain feedlots is of questionable constitutionality. (Adams to Gallagher, State Senator, 2-10-76) #76-2-16

Honorable James V. Gallagher, State Senator: Reference is made to your letter of May 8, 1975, concerning the constitutionality of Senate File 367, 66th G.A.

Portions of Senate File 367 are quoted as follows:

Sec. 2. *New Section. "Nuisance actions Limited.* No person whose date of ownership of realty is subsequent to the established date of operation of a feedlot shall maintain a nuisance action or proceeding except upon the pleading and proof of a specific violation either of section three (3) or section four (4) of this act.

Sec. 3. *New Section. Compliance with Rules of the Department.*

1. Requirement. A person who operates a feedlot shall comply with applicable rules of the department. The applicability of a rule of the department shall be as provided in subsection two (2) of this section. A person complies with this section as a matter of law where no rule of the department exists.

2. Applicability.

a. A rule of the department shall apply to a feedlot with an established date of operation subsequent to the effective date of the rule.

b. A rule of the department shall not apply to a feedlot with an established date of operation prior to the effective date of the rule, for a period of ten years from the effective date of that rule.

c. A rule of the department in effect on the effective date of this act shall apply to a feedlot with an established date of operation prior to effective date of this act.

Sec. 4. *New Section.* Compliance with Zoning Requirements.

1. Requirement. A person who operates a feedlot shall comply with applicable zoning requirements. The applicability of a zoning requirement shall be as provided in subsection two (2) of this section. A person complies with this section as a matter of law where no zoning requirement exists.

2. Applicability.

a. A zoning requirement shall apply to a feedlot with an established date of operation subsequent to the effective date of the zoning requirement.

b. A zoning requirement, other than one adopted by a city respecting real property located within the corporate limits of the city, shall not apply to a feedlot with an established date of operation prior to the effective date of the zoning requirement for a period of ten years from the effective date of that zoning requirement.

c. A zoning requirement, other than one adopted by a city respecting real property located within the corporate limits of the city, which is in effect on the effective date of this act shall apply to a feedlot with an established date of operation prior to the effective date of this act.

d. A zoning requirement adopted by a city shall apply to a feedlot which is located within the corporate limits of that city as those corporate

limits exist on the effective date of this act. Regardless of the established date of operation of the feedlot.

e. A zoning requirement adopted by a city shall not apply to a feedlot which is located outside the corporate limits of that city for a period of ten years from the effective date of the zoning requirement.

f. A zoning requirement adopted by a city shall not apply to a feedlot located within the corporate limits of that city by virtue of an annexation or incorporation which takes effect after the effective date of this act for a period of ten years from the effective date of annexation or incorporation.

Section 1. *New Section.* Definitions.

As used in this act, unless the context otherwise requires? * * *

10. 'Nuisance action or proceeding' means and includes every action. claim or proceeding, whether brought at law, in equity, or as an administrative proceeding, which is based on nuisance. * * *

9. 'Nuisance' means and includes public or private nuisance as defined either by statute or common law.

It would appear that the above cited provisions are discriminatory in that it would deny to individuals whose date of ownership of real estate is subsequent to the established date of operation of a feedlot the right to maintain a nuisance action for a period of ten years unless said individuals could plead and prove a specific violation of a departmental rule or a zoning ordinance; therefor where a rule or zoning ordinance is non-existent, there would be no specific violation on which to base a nuisance action.

It could in effect remove from a portion of the public the availability of an impartial tribunal to protect their rights to the free use and enjoyment of their property for a period of ten years, while conditions surrounding the operation of said feedlot could deteriorate considerably in that time.

The right of an individual to the free use and enjoyment of his property, and the right to protect said property is a basic inviolable right guaranteed by both the Federal and State Constitutions.

The pertinent parts of the 5th and 14th Amendments to the Constitution of the United States provide as follows:

"Amendment 5 No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Amendment 14 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The term "nuisance" has been defined many times. Literally nuisance means annoyance. In legal phraseology, the term "nuisance" is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal or from his own improper, indecent or unlawful personal conduct working

an obstruction or injury to a right of another, or of the public, and producing material annoyance, inconvenience, discomfort.

Also the term "nuisance" is used to designate the wrongful invasion of a legal right or interest and it comprehends not only the wrongful invasion of the use and enjoyment of property, but also the wrongful invasion of personal legal rights and privileges generally. 66 C.J.S. Nuisances §1 pp. 726 and 729.

Section 657.1, Code of Iowa 1975, provides as follows:

"Whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property so as to essentially interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof."

This section serves to define a "nuisance" as contemplated by the common law, and to prescribe a remedy for the wrong.

The above definitions are cited to illustrate that common law nuisances are by definition an infringement upon personal rights which are protected by both Federal and State Constitutions.

These rights are protected by affording individuals the right to due process of law, and equal protection of the laws. The term "due process of law" is not susceptible, or does not admit, of exact, precise, or comprehensive definition, its meaning necessarily varying with the dissimilarity in the proceedings in which it is required and any definition must depend upon the relation which the particular law bears to the fundamental law which limits the legislative power.

"A widely accepted definition is that of Judge Cooley, to the effect that due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one question belongs." 16A C.J.S. Constitutional Law §567 p. 538.

Of similar import are Sections 1, 6 and 9, respectively, of Article I of the Constitution of Iowa. The pertinent parts provide as follows:

Sec. 1. All men are, by nature, free and independent, and have certain unalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

Sec. 6. All 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.

Sec. 9 . . . but no person shall be deprived of life, liberty, or property, without due process of law.

The legislative power of the state is not plenary but is limited by the Constitution of the United States and by the Constitution of the State.

The Supreme Court of Iowa, in the case of *Al Pierce v. Incorporated Town of Laporte City*, 1966, 259 Iowa 1120, 146 N.W.2d 907, which was an appeal from a declaratory judgment action to determine the constitutional validity of ordinance giving council complete discretion to

approve a trailer park site, held the ordinance unconstitutional. The court at page 1123, quoting from a previous opinion in *Central Theatre Corporation v. Sar*, 245 Iowa 1254, 66 N.W.2d 450, stated:

"Arbitrary and unreasonable restrictions upon the use, and enjoyment of property, . . . or deprivation of property without due process of law cannot be sustained . . . .

"A statute empowering a municipal corporation to prohibit or unreasonably restrict the operation of a legitimate business would transgress the Constitutional requirements of due process . . . . Power to violate the due process clauses is lacking in the legislative body no matter how it attempts to exercise it . . . ."

We believe these cases to be analogous to, and an indication of the Supreme Court's position when considering the Constitutionality of a statute which would restrict the right of individuals to resort to a tribunal of some form to adjudicate the complaint of said individuals who feel they have been or are being denied the right to the free use and enjoyment of their property.

The Iowa Supreme Court has stated as recently as January of 1974 in *Helmkamp v. Clark Ready Mix Company*, 214 N.W.2d 126, Iowa 1974.

Although our statute does not abrogate the common law on nuisance, the starting point is this portion of §657.1, Code of Iowa, 1973: "Whatever is . . . offensive to the senses . . . so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance . . . ."

Section 657.2(1) is pertinent in declaring as a nuisance: "The erecting, continuing or using any building or other place for the exercise of any trade, employment or manufacture, which, by occasioning noxious exhalations, offensive smells, or other annoyances, becomes injurious and dangerous to health, comfort, or property of individuals or the public." The court stated in Bates v. Quality Ready-Mix Co., 1967, 261 Iowa at 703-704, 154 N.W.2d at 857: "The above statutory enumerations do not modify the common-law application to nuisances. The term 'private nuisance' refers to an *actionable* interference with a persons interest in the private use and enjoyment of his land . . . . One must use his own property so that his neighbors comfortable and reasonable use and enjoyment of his estate will not be unreasonably interfered with or disturbed . . . ."

The Court cited additional decisions supporting this position: *Riter v. Keokuk Electro-Metals Co.*, 1957, 248 Iowa 710, 82 N.W.2d 151; *Kellerhals v. Kallenberger*, 1960, 251 Iowa 974, 103 N.W.2d 691; *Schlotfeldt v. Vinton Farmer's Supply Co.*, 1961, 252 Iowa 1102, 109 N.W.2d 695; *Claude v. Weaver Construction Co.*, 1968, 261 Iowa 1225, 158 N.W.2d 139; *Patz v. Farmegg Products Inc.*, 196 N.W.2d 557 (Iowa 1972); *Kriener v. Turkey Valley Community School Dist.*, 212 N.W.2d 526 (Iowa 1973); *Larsen v. McDonald*, 212 N.W.2d 505 (Iowa 1973).

Black's Law Dictionary, p. 51 (4th Ed. 1951), defines "actionable" as follows: "That for which an action will lie, furnishing legal ground for action." Also this reference work defines the term "actionable nuisances" as follows: "Anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights." While we are not unmindful that the legislature may enact any law desired, provided it is not clearly prohibited by some provision of the Federal or State Constitutions, and may enumerate or delete that which it considers to

be or not to be a nuisance, and may also define the powers and duties of administrative agencies which are of their own creation, we feel the provisions of Senate File 367 could be construed as an attempt to abrogate the common law on nuisance and deprive certain portions of society of their constitutional rights of due process of law.

The reading of Senate File 367 indicates a vulnerability to Constitutional challenge, should it be enacted into law.

February 12, 1976

LIQUOR, BEER AND CIGARETTES; SHERIFFS; GIFTS; POLITICAL CONTRIBUTIONS; CONSTITUTIONAL LAW. First and 14th Amendments to Const. of U.S. §§123.18, 123.3(10) and 688.1, Code of Iowa, 1975. §123.18 is a criminal statute which must be strictly construed against the state and in favor of any person charged with an offense thereunder. Accordingly, a sheriff does not violate this section if his campaign committee accepts donations, gratuities, political ads, gifts or other favors unless he participates in the acceptance or solicitation thereof. A sheriff's campaign committee is not a person, as defined in §123.3(10) and is charged with no responsibilities under §123.18. A candidate for sheriff or other office charged with such enforcement responsibilities, who is not an incumbent, and his committee, may directly accept and solicit such favors. The donor liquor control licensee or beer permittee who makes such gifts to a campaign committee does not violate §123.18 unless he knows the sheriff is encouraging his committee to solicit and accept the favor, in which case he might be guilty as a principal under §688.1, for aiding and abetting the sheriff. §123.18 does not unconstitutionally discriminate against an incumbent sheriff and in favor of another candidate for the sheriff's office nor violate First Amendment rights to freedom of speech, assembly or to petition for redress of grievances. (Turner to Wehr, Scott County Attorney, 2-12-76) #76-2-17

Mr. Edward N. Wehr, Scott County Attorney: You have requested an opinion of the attorney general on what we must necessarily presume are hypothetical questions and do not ask us to determine the guilt or innocence of anyone (which latter of course we are powerless to do by legal opinion).

Paraphrasing your first questions, you inquire as to whether a sheriff responsible for the administration or enforcement of Chapter 123, Code of Iowa, 1975, the Iowa Beer and Liquor Control Act, violates §123.18 of said chapter if his campaign committee accepts donations, gratuities, political ads, gifts or other favors with his knowledge and consent. You also ask whether a candidate for sheriff, who is not an incumbent, or a person otherwise charged with responsibility for enforcing the liquor laws, violates the law if his campaign committee does the same. Ch. 56, relating to campaign finance disclosure, is not involved in your question nor considered in this opinion.

§123.18 provides:

"Favors from licensee or permittee. No person responsible for the administration or enforcement of this chapter shall accept or solicit donations, gratuities, political advertising, gifts, or other favors, directly or indirectly, from any liquor control licensee or beer permittee. A violation of this section shall subject the violator to the general penalties provided by this chapter."

This is a criminal statute and must be strictly construed against the state and in favor of any person charged with an offense thereunder. *State v. Nelson*, 78 N.W.2d 434 (Iowa 1970).

Accordingly, it is my opinion that there is no violation in your first hypothetical question unless the incumbent sheriff, himself, participates in the acceptance or solicitations of the proscribed favors, e.g. by encouraging his committee to solicit or accept them.

Of course, if the sheriff actively participates in accepting or soliciting the gift, directly or indirectly, or aids and abets his committee in doing so, he would violate the law. But if his committee solicits or accepts such on his behalf and without his participation or encouragement, and he thereafter learns of it, he cannot, after the fact, be found to have committed any violation.

A candidate for an office charged with such enforcement responsibilities, who is not an incumbent, may directly accept and solicit such favors because before taking office he is not charged with liquor enforcement responsibilities as the statute contemplates.

A sheriff's campaign committee is not a person as defined in §123.3 (10) and is charged with no responsibilities under §123.18. Accordingly, it is not prohibited by that section from accepting a contribution from a beer permittee or liquor license holder.

You also inquire as to whether a person who contributes to the campaign committee of an incumbent sheriff violates this law. Here again the answer is no. The statute proscribes acceptance or solicitation of such gifts or favors by a "person responsible for the administration or enforcement" of Chapter 123. It does not forbid a gift to the campaign committee of that person. But again this is subject to the caveat that if the sheriff himself knowingly encourages his committee to solicit and accept the favor, and the donor knows the sheriff is doing so, then the donor might be guilty, as a principal, for aiding and abetting the sheriff. See §688.1, Code of Iowa, 1975.

Additionally, you question the constitutionality of §123.18 under the "Equal Protection and/or Due Process provisions of the Federal or State constitutions, or [whether] otherwise [it] violates the First Amendment."

In my opinion, the section is entirely constitutional under each of these considerations, in part, because the Twenty-first Amendment to the Constitution of the United States, which repealed prohibition, delegated to the state of Iowa absolute power over the "delivery or use therein of intoxicating liquors," and the state can make virtually any law it deems desirable in controlling such.

State ex rel. Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624 (Iowa 1971) at page 629 holds that the legislature is free to enact any law provided it is clearly not prohibited by some provision of the federal or state constitution and that it is not for the judicial branch of government to determine whether any legislative enactment is wise or unwise. Every reasonable presumption must be indulged in support of a controverted act and any doubts resolved against the challenging party. "We must also look to the object to be accomplished, evil sought to be reme-

died, or purpose to be subserved in the interpretation of a statute, according to that reasonable and liberal construction which will best serve to attain such object rather than one which will defeat it."

In my opinion, the legislature may properly distinguish between an incumbent sheriff or other party charged with the responsibility of enforcing the liquor laws and one who is merely running for election to that office. It is not every discrimination which is invidious. All that is required is that the classification adopted by the legislature be reasonable and that the law operates equally upon all within the class. *Brown Enterprises v. Fulton*, 192 N.W.2d 773 (Iowa 1971).

Lastly, I fail to see how §123.18 could be said to violate First Amendment rights to freedom of speech, assembly or to petition for redress of grievances. No right is absolute—and certainly not the right of a beer or liquor control licensee to make gifts to those who enforce the liquor laws. *Buckley v. Valeo*, decided by the U.S. Supreme Court January 30, 1976, 44 L.Week 4127.

February 17, 1976

CONSTITUTIONAL LAW: Legislative Officers and Employees. Article III, §31, Constitution of Iowa; S.C.R. 102, 66th G.A., Second Session (1976). It takes a two-thirds vote of the members of each House to provide compensation to the chief administrative officers of the Senate and House, under S.C.R. 102, retroactive to January 11, 1976. (Turner to Junkins, State Senator, 2-17-76) #76-2-18

Honorable Lowell L. Junkins, State Senator: You have requested an opinion of the attorney general as to whether it takes a two-thirds vote of the members of each House to provide compensation to the chief administrative officers of the Senate and House, under S.C.R. 102, retroactive to January 11, 1976, the date on which H.C.R. 5 adopted by the 1975 Session of the 66th G.A. terminated. Since that date, you say these officers have continued to work without pay in expectation that their pay will be set pursuant to §2.11, Code of Iowa, 1975.

Article III, §31, Constitution of Iowa, provides as follows:

"*No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered,* or the contract entered into; nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by preexisting laws, and no public money or property shall be appropriated for local, or private purposes, *unless such* appropriation, *compensation,* or claim, *be allowed by two-thirds of the members elected to each branch of the General Assembly.*" (Emphasis added)

Of course, if these gentlemen are to be paid back to the date the General Assembly commenced on January 12, S.C.R. 102 will take a two-thirds vote in each House. See OAG Turner to Selden, July 3, 1975. It makes no difference that the Chief Clerk, Secretary and Assistant Secretary are not now being paid anything. A public officer is presumed to serve without compensation unless provision is made therefore. 63 Am.Jur.2d p. 850, *Public Officers and Employees*, §367. Thus, any compensation back to January 12, 1976, would in my opinion, "be extra compensation."

See also *Carmella Brown, et al. v. Selden,* Equity No. CE4-1991 in the District Court of Iowa, in and for Polk County.

February 23, 1976

TAXATION: Chain Store Tax: Doing business by a system of chain stores in Iowa; §§424.2(8), 424.4, Code of Iowa, 1975. (1) Assuming that the requisite constitutional nexus exists, a corporation authorizing franchises by two or more stores in Iowa exercises "common ownership, control, supervision or management" within the definition of "conducting a business by a system of chain stores" if the franchisor receives a percentage of the profits from the franchisee's operations. Whether two or more stores are "indirectly controlled" within the meaning of §424.2(8) is essentially a factual matter although it is clear that strict control in the legal sense or a relationship of principal-agent is not required. (2) Payment of the Chain Store Tax is the responsibility of the person who exercises "common ownership, control, supervision or management." (Thompson to Hines, State Representative, 2-23-76) #76-2-19

The Honorable Neal Hines, State Representative: You have requested the opinion of the Attorney General regarding the Iowa Chain Store Tax imposed by Chapter 424, Code of Iowa, 1975. Specifically, you have inquired by letter first, whether the tax is applicable to franchise arrangements in which the franchise operator (franchisee) of the business is required to pay to the authorizing corporation (franchisor) a percentage of the profits of such business. Second, you have asked upon whom the responsibility rests for payment of the tax.

With reference to your first question, §424.4, Code of Iowa, 1975, imposes the Iowa Chain Store Tax, in relevant part as follows:

"There is hereby imposed upon every person within the state of Iowa engaged in *conducting a business by a system of chain stores* from any of which stores are sold or otherwise disposed of at retail, tangible personal property such as goods, wares, and merchandise an anual occupation tax for each taxable year during which year or any part thereof, such person is so engaged. . . ." (emphasis supplied)

Section 424.2, Code of Iowa, 1975, contains a number of definitions of words, terms, and phrases used in Chapter 424 of the Code. The legislature is its own lexicographer and it is axiomatic that legislative definitions are controlling in construing statutory language. *S & M Finance Co., Fort Dodge v. Iowa State Tax Commission,* 1969, Iowa, 162 N.W.2d 505.

Section 424.2(3) of the Code defines "person" to include, among others, "corporations, joint adventures, estate, trust, receiver, and any group or combination acting as a unit.

Section 424.2(8) of the Code defines the phrase "conducting a business by a system of chain stores" in relevant part as follows:

" 'Conducting a business by a system of chain stores', when used in this chapter shall be construed to mean and include every person, as defined in this chapter, in the business of owning, operating, or maintaining, directly or indirectly, under the same general management, supervision, control, or ownership in this state, or in this state and any other state, two or more stores, where goods, wares, articles, commodities, or merchandise of any kind whatsoever are sold or offered for sale at

retail and where the person operating such store or stores receives the retail profit from the commodities sold therein."

Then, this statute goes on to further provide in relevant part when two or more stores are treated as being "under a single or common ownership, control, supervision, or management" as follows:

"Two or more stores shall . . . be treated as being under a single or common ownership, control, supervision, or management, . . . if any part of the gross revenues, net revenues, or profits from such store shall, directly or indirectly, be required to be immediately or ultimately made available for the beneficial uses, or shall directly or indirectly inure to the immediate or ultimate benefit, of any single person or group of persons having a common interest therein."

In the situation which you have posed in your letter you have asked this office to determine whether the mere fact that two or more franchisees in Iowa must distribute to the franchisor a percentage of the profits of the retail businesses actually owned and operated by the franchisees is sufficient, per se, to require imposition of the Iowa Chain Store Tax.

As a preliminary matter, it should be noted that the franchisor must have a sufficient nexus with Iowa in order to be subject to taxation by the state. *Wisconsin v. J. C. Penney Co.*, 1940, 311 U.S. 434, 444, 61 S.Ct. 246, 85 L.Ed. 267. The nexus requirement has been formulated as "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Brothers Co. v. Maryland*, 1954, 347 U.S. 340, 344-345, 74 S.Ct. 535, 98 L.Ed. 744. Although there is no Supreme Court cases dealing precisely with the issue of a profit sharing franchise agreement, analogous authority indicates that a profit sharing agreement, per se, would not constitute a sufficient constitutional nexus. *American Oil Co. v. Neill*, 1965, 380 U.S. 451, 85 S.Ct. 1130, 14 L.Ed.2d 1; *Connecticut General Life Insurance Co. v. Johnson*, 1937, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673.

In a telephone conversation subsequent to your written request, you indicated a special interest in the requirements necessary to establish when, within the meaning of §424.2(8), two or more stores would be "indirectly controlled." It is not possible to speculate, with any reasonable degree of credibility, as to the requisite requirements since the facts of each case would be a determinative factor. However, it has been held that full control in a strict legal sense or a relationship of principal-agent is not required. *Gulf Refining Co. v. Fox*, 1935, 11 F.Supp. 425, aff'd., 297 U.S. 381, 56 S.Ct. 510, 80 L.Ed. 731, *Maxwell v. Shell Eastern Petroleum Products, Inc.*, 1937, 90 F.2d 39, *cert. denied*, 302 U.S. 715, 58 S.Ct. 34, 82 L.Ed. 552; *Ashland Refining Co. v. Fox*, 1935, 11 F. Supp. 431, aff'd. in *Gulf Refining*, supra; *S. B. McMaster, Inc. v. Chevrolet Motor Co.*, 1925, 3 F.2d 469.

The Alabama Chain Store Tax, Title 51, Chapter 20, Article 3, §620-629, Alabama Code, 1960, uses, in relevant part, language that is very similar to §424.2(8). In an Opinion of the Attorney General, April 4, 1969, it was indicated that a partner in a retail store exercised "common ownership, supervision or management" simply because he received a precentage of the profits. This opinion of the Alabama Attorney Gen-

eral would also support imposition of the chain store tax in the franchisor-franchisee situation.

Franchise agreements, typically, involve contractual relationships in which the franchisee is granted the right to market products under the franchisor's name in accordance with uniform procedures and methods prescribed by the franchisor. Additionally, the franchisee often receives continuing assistance from the franchisor by "operational guidance, coordinated advertising, research and development, quality [sic] purchasing, training and education and other specialized management resources." *Mobil Oil Corp. v. Rubenfield*, 1972, 72 Misc. 2d 392, 330 N.Y. S.2d 623, 631. See also *H. & R. Block v. Lovelace*, 1972, 208 Kan. 538, 493 P.2d 205.

Assuming that the franchisor has a nexus with the State of Iowa, he is subject to the chain store tax. The statute, in relevant part, imposes the tax upon any person or group with a common interest who receives the beneficial use of any part of the profits. §424.2(8), Code of Iowa, 1975. The clear implication of this statutory language is that a franchisor who receives a percentage of the profits from two or more Iowa stores exercises "common ownership, control, supervision or management" and, thus, is subject to the tax.

Regarding the second inquiry in your letter, viz., upon whom the responsibility for payment rests, §424.4 provides that the tax is ". . . imposed upon every person within the state of Iowa engaged in conducting a business by a system of chain stores . . ." The Iowa Supreme Court has found that the purpose of the act is to impose an "occupation tax upon persons engaged in operating a system of chain stores in this state . . ." *Tolerton and Warfield Co. v. Iowa State Board of Assessment and Review*, 1936, 22 Iowa 908, 916, 270 N.W. 427. In other words, it is the franchisor who is responsible for the tax payment since it is he who owns, controls, supervises or manages more than one store.

February 23, 1976

CITIES AND TOWNS: Utility Boards. §388.3, Code of Iowa, 1975. A county officer is a "public officer" precluded by statute from serving on a city utility board. (Nolan to Poncy, State Representative, 2-23-76) #76-2-20

The Honorable Charles Poncy, State Representative: You have forwarded a letter to you from City Attorney Dew with a request for an opinion on the question of whether a county attorney may serve on a utility board.

Under §388.3, Code of Iowa, 1975, the following language appears:

"A public officer or a salaried employee of the city may not serve on a utility board."

In *State v. Hardin County Cooperative*, 226 Iowa 896, 916, 285 N.W. 219 (1939), the Iowa Supreme Court stated:

"It is a well known rule of statutory construction that the courts will construe disjunctive words as conjunctive, and vice versa, and will disregard technical rules of grammar and punctuation, when necessary to arrive at the intent of the legislative body. Such rule has been uniformly followed by this and other courts. (citing cases)"

In attempting to determine legislative intent, it is the view of this office that the term "public officer" does not relate solely to an officer of the city. Clearly, if the legislature had intended that both officers and salaried employees of the city be prohibited from serving on a utility board, it easily could have said so. There is an equally established rule of statutory construction which provides that the courts will look to what the legislature has said and not to what it might have said. Accordingly, it is our view that all public officers are effectively prevented from serving on utility boards by the language of §388.3 of the Iowa Code, which under "Home Rule" is part of the City Code.

Chapter 362, Code of Iowa, 1975, contains definitions as used in the City Code of Iowa, including a definition of the term "officer", which means a natural person elected or appointed to a fixed term and exercising some portion of the power of the city. If §388.3 could be read without the modifying word "public" preceding the word officer, then clearly, the limitation imposed therein would apply only to city officials. However, the language clearly states that a "public officer" may not serve on the utility board. In *VanderLinden v. Crews*, 205 N.W.2d 686, 688 (Iowa, 1973), the Iowa Supreme Court stated:

"This court considered fully the question of status of one holding a public position in our early case of State v. Spaulding, 102 Iowa 639, 72 N.W. 288, 289. Also, in State v. Taylor, 260 Iowa 634, 144 N.W.2d 289, 292, we said five essential elements are required by most courts to make a public employment a public office, namely: (1) the position must be created by the constitution or legislature, or through authority conferred by the legislature; (2) a portion of the sovereign power of government must be delegated to that position; (3) the duties and powers must be defined directly or impliedly by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law; and (5) the position must have some permanency and continuity and not be only temporary and occasional."

Clearly, the county attorney is a public officer under all of the aforementioned criteria. Accordingly, the county attorney is precluded by statute from serving as a member of the board of trustees of the Ottumwa Water Works.

February 23, 1976

COUNTIES: Civil Service Commission. §§314A.12, 314A.20, Code of Iowa,, 1975. The costs of a hearing before the Civil Service Commission are to be paid as provided under §314A.20 and the attorney fees for the sheriff are allowable from the county fund where the county attorney does not represent the sheriff. The board of supervisors does not have authority to pay the attorney fees of the deputy sheriff who appeals his dismissal to the Civil Service Commission. (Nolan to Greenfield, Guthrie County Attorney, 2-23-76) #76-2-21

Mr. C. F. Greenfield, Guthrie County Attorney: We have received your request of November 1, 1975, for an opinion on the following:

"Pursuant to Chapter 341A of the 1975 Code of Iowa, a deputy sheriff of Guthrie County was discharged by the sheriff of Guthrie County. Under Section 341A.12 a hearing was held before the Civil Service Commission. The matter was fully heard by the Commission. The discharged deputy appeared by his attorney, and the sheriff of Guthrie County appeared represented by three attorneys. This matter was heard by the Commission for the greater part of two days. After the hearing the Civil Service Commission suspended the deputy sheriff for 90 days without pay. This decision is subject to appeal.

"The question has now arisen whether Guthrie County should pay the attorney fees of the sheriff at said hearing and the attorney fees for the appealing deputy sheriff. I would like an opinion from your office interpreting Chapter 341A as to the following:

"1. Does the Board of Supervisors have the authority to allow and pay the attorney fees and other costs incurred in this hearing out of the General Fund of the County for the sheriff?

"2. Does the Board of Supervisors have the authority to allow and pay the attorney fees and other costs incurred in this hearing out of County funds for the appealing deputy sheriff?"

In answer to your first question, it is the opinion of this office that the board of supervisors has the authority to allow and pay the fees and costs incurred at the hearing on behalf of the sheriff from available monies in the general fund. The proceedings under §341A.12, Code of Iowa, 1975, contemplate that any notice of disciplinary action shall be based on the written accusation of the county sheriff. Any county officer acting in official capacity is entitled to be represented at all "actions and proceedings" by the county attorney. §336.2(6). Accordingly, fees and costs incurred by the sheriff in such proceedings are payable from the county funds budgeted to the office of the sheriff, since there is no clear statutory authority to tax such costs to the unsuccessful appellant.

With respect to your second question, Code §341A.12 provides:

". . . The appellant shall be entitled to appeal personally, produce evidence and to have counsel. . . ."

In administrative proceedings, the right to counsel means the counsel of one's choice. *Backer v. Commissioner of Internal Revenue,* C.A. Georgia, 1960, 275 F.2d 141. In the absence of a showing of indigency, the expense of obtaining counsel of one's choice must be borne by the individual exercising such statutory right. Accordingly, the board of supervisors do not have authority to pay the fees and costs incurred by the appealing deputy sheriff. This is not to say, however, that the general costs of the Commission are not to be paid, as provided in §341A.20.

February 25, 1976

TAXATION: Tax Sheltered Annuities. Purchase of Annuities. Purchase of Annuity Contracts on behalf of school district employees. Section 294.16, Code of Iowa, 1975. There is no valid statutory authority whereby a school district could purchase mutual funds on behalf of its employees and such purchase could be considered in the nature

of an annuity for the tax benefit provided in 26 U.S.C. §403(b). There is no statutory authority providing for the purchase of bonds on behalf of such employees. (Griger to Raduenz, Assistant Winneshiek County Attorney, 2-25-76) #76-2-22

Ms. Sherry J. Raduenz, Assistant Winneshiek County Attorney: You have requested an opinion of the Attorney General on the question of whether annuity contracts provided for in §294.16, Code of Iowa, 1975, could include purchase of mutual funds or bonds.

Section 294.16 of the Iowa Code provides as follows:

"At the request of an employee through contractual agreement a school district may purchase group or individual annuity contracts for an employee, from such insurance organization authorized to do business in this state and through an Iowa - licensed insurance agent as the employee may select, for retirement or other purposes and may make payroll deductions in accordance with such arrangements for the purpose of paying the entire premium due and to become due under such contract. The deductions shall be made in the manner which will qualify the annuity premiums for the benefit afforded under section 403b [26 USC §403b] of the federal internal revenue code and *amendments thereto.* The employee's rights under such annuity contract shall be nonforfeitable except for the failure to pay premiums. Whenever an existing tax-sheltered annuity contract is to be replaced by a new contract the agent or representative of the company shall submit a letter of intent to the company being replaced, to the insurance commissioner of the state of Iowa, and to his own company at least thirty days prior to any action by registered mail. This letter of intent shall contain the policy number and description of the contract being replaced and a description of the replacement contract." (emphasis supplied).

In 1965, the legislature adopted, for the first time in Iowa, statutory provisions allowing school districts to purchase annuity contracts on behalf of their employees. See Chapter 252, Acts of 61st G.A. That statute, codified as §294.16, Code of Iowa, 1966, provided that the payroll deductions of the school district employee had to be made in a manner to qualify the annuity premiums for the income tax benefit afforded "under section four hundred three 'b' (403b) of the federal internal revenue code and amendments thereto."

A description of this 1965 legislation and operation of §403(b) of the Internal Revenue Code of 1954 (26 U.S.C. §403b) appears in 1966 O.A.G. 211.

In 1974, the legislature amended §294.16, Code of Iowa, 1973, to read in its present form. This legislation became effective on July 1, 1974. See §4 of Chapter 1167, Acts of 65th G.A., second session.

In 1974, the United States Congress passed the Employee Retirement Income Security Act of 1974 (P.L. 93-406) and the President signed it on September 2, 1974. 1974 U.S. Code Congressional and Administrative News, 93rd Congress, pp. 1187, 4639. This federal act added a new sub-paragraph to 26 U.S.C. §403(b), namely, §403(b)(7) which permits public schools and organizations exempt from federal income tax under 26 U.S.C. §501(c)(3) to purchase mutual funds on behalf of their employees and such purchase is to be considered in the nature of an annuity. Such mutual fund shares must be held in a custodial account. Therefore, if the conditions of this act and 26 U.S.C. §403(b) are met, amounts paid by employees to such custodial accounts are treated as being paid for annuity contracts and qualify for the tax benefit afforded

in §403(b). There is no provision in §403(b) or in any of the Internal Revenue Service regulations which provide for the purchase of bonds. Moreover, this office requested and received from the Internal Revenue Service confirmation that mutual funds may be purchased and considered in the nature of an annuity in accordance with §403(b) as amended by the Employee Retirement Income Security Act of 1974, but not bonds.

Prior to the enactment of the Employee Retirement Income Security Act of 1974, there was no congressional authority to qualify school district employee contributions used to purchase mutual funds for the tax benefit afforded by §403(b). Now that there is, the question becomes whether such school district employee payroll deductions for purchase of mutual funds are allowable. If such deductions are allowable, the statutory authority must be found in that portion of §294.16 of the Code referring to the future enactment of amendments to §403(b). The reason is that when §294.16 was first enacted in 1965, and assuming arguendo, completely re-enacted, as amended, in 1974, the Employee Retirement Income Security Act of 1974 was not law and did not exist, and it was this Act which provides for the purchase of mutual funds as a qualifying tax-sheltered annuity.

In 1970 O.A.G. 147, 148, the Attorney General opined:

"Of course, it is fundamental that the General Assembly cannot delegate its power to make the law to anyone. Article III, §1, Constitution of Iowa, vests the legislative authority of this state in its own General Assembly; not in the federal government. But ordinarily our legislature can incorporate by reference and thereby adopt, as its own, such valid federal laws and regulations as are in existence when the bill is passed in the first house of the General Assembly, *as long as subsequent amendments to the federal law or regulations are clearly not incorporated for automatic adoption by Iowa as they later became effective under federal law.* See OAG Turner to State Representative Holden, June 22, 1967, and 16 Am.Jur.2d 495, Constitutional Law §245, which says:

'The principle is firmly established that a state legislature has no power to delegate any of its legislative powers to any outside agency such as the Congress of the United States. Thus, it is generally held that the adoption, by or under authority of a state statute, of prospective Federal legislation, or Federal administrative rules thereafter to be passed, constitutes an unconstitutional delegation of legislative power'." (emphasis supplied).

See also 1967 O.A.G. 166.

Therefore, it is clear that the Iowa legislature, in enacting §294.16 in 1965, and amending it in 1974, had no constitutional authority to provide that school districts could purchase, on behalf of their employees, annuity contracts and make employee payroll deductions to pay the annuity premiums in a manner to qualify such premiums for the tax benefit afforded by future amendments to §403(b). The only authority for a school district to make payroll deductions for annuity contracts appears in §294.16. 1972 O.A.G. 632.

Consequently, there is no valid statutory authority whereby a school district could purchase mutual funds on behalf of its employees and such purchase could be considered in the nature of an annuity for the tax benefit provided in 26 U.S.C. §403(b). Further, there is no statutory authority providing for the purchase of bonds on behalf of such employees.

February 25, 1976

CITIES AND TOWNS: Compatibility; Voting Rights — §403A.5, Code of Iowa, 1975. A city attorney's position is not per se incompatible with that of a school board attorney. A chairman of a low-rent housing commission has a vote as a member of the commission. (Blumberg to Nealson, State Representative, 2-25-76) #76-2-23

Honorable Otto Nealson, State Representative: We have received your opinion request of January 27, 1976. You asked the following questions:

1. Can a city attorney also be the attorney for a school board?

2. Does the chairman of a low-rent housing commission have a vote?

We assume in your first question that you are referring to a compatibility of office rather than a conflict of interest.

The case of *State ex rel. Crawford v. Anderson*, 1912, 155 Iowa 271, 136 N.W. 128, sets forth the criteria for incompatibility of offices. It is stated therein (155 Iowa at 273):

"The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant. State v. Bus, 135 Mo. 338, 36 S.W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra [112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211]; State v. Goff, 15 R.I. 505, 9 A. 226, 2 Am.St.Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both'."

See also, *State ex rel. LeBuhn v. White*, 1965, 257 Iowa 606, 133 N.W.2d 903. Based upon the above, we see no incompatibility of the two positions. Neither the school board, nor the city has revisory power over the other. Nor do we feel that the two are repugnant to one another. Our office has held that the position of county attorney and school board members are incompatible, 1972 O.A.G. 35, but we do not feel that this opinion is applicable. We have previously held that a city treasurer may be a school board member, 1972 O.A.G. 445; and, that an attorney for a community college could also be a police judge, 1974 O.A.G. 388. A check of prior opinions dating back to 1933 revealed no opinions on this issue. Although there may be some instances where a conflict might arise, and therefore be governed under the common law rules of conflict of interest or by the Iowa Code of Professional Responsibility (specifically Ethical Considerations 5-15 and 5-16), we feel that the two positions may be held by the same person.

With regard to your second question, we can find no Iowa authority. Most of the Iowa cases concern the presiding officer's right to cast a vote breaking a tie, or such officer being counted when determining a majority

vote, irrespective of that officer's right to vote. In *Reed v. Trotter*, 1919, 142 Tenn. 37, 215 S.W. 400, it was held that where the presiding officer is a member of the body, and as such member is entitled to vote with the other members, the fact he or she was chosen as presiding officer does not take away that privilege. The court in *Maskham v. Simpson*, 1918, 175 N.C. 135, 95 S.E. 106, held that the prevailing rule in this country is that in the case of municipal boards, a presiding officer who is also a member has the legal right as a member to vote on questions before the board. See also, *People v. Teller*, 1938, 169 Misc. 342, 7 N.Y.S.2d 168, where the court cited to 2 E. McQuillan on Municipal Corporations §620 (2nd Ed.) for the proposition that where the presiding officer is a member of the body, he or she may vote on all matters before that body, unless specifically forbidden by law. There are some cases to the contrary. See, *State v. Highway Patrol Board*, 1962, 140 Mont. 383, 372 P.2d 930; *Hill v. Taylor*, 264 Ky. 708, 95 S.W.2d 566. However, as in the *Highway Patrol Board* case, the presiding officer in question was one that was not normally a member of the body, such as a lieutenant governor.

Section 403A.5, 1975 Code, details the establishment and duties of a low-rent housing commission. The mayor shall appoint five commissioners, and shall designate a chairman and vice-chairman from among the commissioners. We can find no indication in that Chapter which limits the voting of any commission member.

Accordingly, we are of the opinion that a city attorney's position is not per se incompatible with that of a school board attorney. The chairman of a low-rent housing commission has a vote as a member of the commission.

February 25, 1976

CRIMINAL LAW: County Attorneys; Public Records; Indictments and Informations. §§68A.1, 68A.2, 769.13, 772.4, Code of Iowa, 1975. Minutes of Testimony attached to and filed with county attorneys' informations are not public records available for public inspection. (Coleman to Correll, Black Hawk County Attorney, 2-25-76) #76-2-24

Mr. David H. Correll, Black Hawk County Attorney: You have requested an opinion of the Attorney General with regard to the following question:

"We have recently filed the Minutes of Testimony in . . . [a] case . . . [and] [t]he news media have requested copies of those Minutes indicating that they plan to use the contents in news stories about the case.

"I have read Chapter 772.4 and 769.13 of the Iowa Code which, in my judgement, makes the Minutes of Testimony filed with a County Attorney's Information a record which is not public but may only be disclosed to the prosecutor, defendant and his attorney.

"I would like an opinion in this regard . . . ."

Chapter 68A, Code of Iowa, 1975, entitled "Examination of Public Records" gives initial assistance in providing a reference point for determining whether minutes of testimony attached to a county attorney's information are public records. Section 68A.1, Code of Iowa, 1975, provides:

"Whenever used in this chapter, 'public records' includes all records and documents of or belonging to this state or any county, city, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing."

In light of this, it seems clear that minutes of testimony are public records within the above definition. Notice should be taken, however, that even though documents may be classified as public records, they still may not be public records subject to examination. Section 68A.2, Code of Iowa, 1975, states in pertinent part:

"Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, *unless some other provision of the Code expressly limits such records to be kept secret or confidential . . .* ." (emphasis added).

Section 772.4, Code of Iowa, 1975, concerns itself with the confidentiality of minutes of testimony (evidence) with regard to grand jury indictments and provides in part:

"Such minutes of evidence shall not be open for the inspection of any person except the judge of the court, the county attorney or his assistant or clerk, the defendant and his counsel, or the assistant or clerk of such counsel . . . ."

The above statutory language applies with equal force to minutes of testimony attached to a county attorney's information as directed by §769.13, Code of Iowa, 1975:

". . . All provisions of law applying to prosecutions on indictments . . . and all other proceedings in cases of indictments, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as nearly as may be, apply to information and all prosecutions and proceedings thereon."

The Iowa Supreme Court has many times commented on the preceding sections of the Code, and has held that unless otherwise provided, the provisions relating to grand jury indictments are applicable to county attorney informations. See: *State v. Hines*, Iowa, 1975, 225 N.W.2d 156, 158 (speedy trial requirements the same); *State v. Grindle*, Iowa, 1974, 215 N.W.2d 268, 269, 270 (delays in challenges to informations the same as with indictments); *State v. Williams*, Iowa, 1972, 193 N.W. 2d 529, 530 (informations construed in same manner as indictments); *State v. Hunley*, Iowa, 1969, 167 N.W.2d 645, 646, 647 (charging of crimes). See also: *State v. Nelson*, Iowa, 1974, 222 N.W.2d 445; *Lamb v. David*, 1953, 244 Iowa 231, 56 N.W.2d 481.

Because §772.4, supra, renders the minutes returned with an indictment confidential, and because §769.13, supra, equates, for purposes of your question, indictments and informations, it is our opinion that the minutes of testimony filed with a county attorney's information are expressly excluded from the broad category of public records, set out in §§68A.1 and 68A.2, supra, available for public inspection. Consequently, the minutes of testimony should only be released by the clerk to those authorized by statute.

February 25, 1976

COMMUNITY-BASED CORRECTIONAL PROGRAMS: Article III, Section 1, Iowa Constitution. §§217.24 to 217.29, Code of Iowa, 1975.

The statutes providing for community-based correctional programs are not constitutionally defective even though no designation is made as to who should make the initial decision to institute a community-based correctional program, nor is there an unconstitutional delegation of powers to the judicial department in this instance. (Robinson to Redmond, State Senator, 2-25-76) #76-2-25

The Honorable James M. Redmond, State Senator: You have requested an opinion regarding the authority to establish community-based correction programs under §§217.24 to 217.29, Code of Iowa, 1975, to-wit:

"(1) Who is charged by the law for making the initial decision to *institute* a community-based correctional system—the Judicial District or the Department of Social Services. (The above cited sections seem to be in conflict.)

"(2) If the initial decision lies with the Judicial District, is this a violation of Article III, Section 1, of the Constitution of Iowa regarding the separation of powers. In other words, is the decision to institute a program an executive decision unconstitutionally delegated to the Judicial Department."

Sections 217.25 to 217.27, Code of Iowa, 1975, provide:

"217.25 Judicial districts. Community-based correctional programs and services may be established to serve the judicial districts of the state.

"217.26 Assistance by department. The department of social services shall provide assistance, support and guidelines for the establishment and operation of community-based correctional programs and services.

217.27 State funds used. The department of social services shall provide for the allocation of any state funds appropriated for the establishment, operation, maintenance, support and evaluation of community-based correctional programs and services. State funds shall not be allocated unless the department has reviewed and approved the programs and services for compliance with state guidelines.

"If community-based correctional programs and services are not established in a judicial district, or if established are designed to serve only part of the judicial district, the department of social services may provide community-based correctional programs and services for the judicial district or the parts of the judicial district not served by an established program."

We agree with the thrust of your first question that the above statutes do not indicate who is to make the initial decision to institute a community-based correctional system. Perhaps legislation could be drawn to clarify this. We do not believe, however, that the statute is constitutionally defective in this regard. When considering an ambiguity in the law, there are certain basic principles of statutory construction that the Iowa Supreme Court applies. The Court will examine both the language used and the purpose for which legislation is enacted. Each section of an act is to be construed with the act as a whole so that all parts are interpreted together. The subject matter, reason, consequence and spirit are to be considered as well as the words used. The statutes are to be accorded a sensible, practical, workable and logical construction. *Matter of Estate of Bliven*, 236 N.W.2d 366, 369 (Iowa 1975); *Northern Natural Gas Co. v. Forst*, 205 N.W.2d 692, 695 (Iowa 1973).

Applying these rules to the situation you raise, we note that community-based programs and services "may" be established to serve the judicial districts of the state. Section 217.25, Code of Iowa, 1975. The

word "may" confers a power. Section 4.1(36)(c), Code of Iowa, 1975. Sections 217.26 to 217.29, the Code, contain the verb "shall" which imposes a duty [§4.1(36)(a), the Code] upon the Department of Social Serviess to provide the assistance, support and guidelines for community-based correctional programs and services. Apparently the legislature recognized that in order for these programs to work successfully, it would involve the cooperation of the judges who in fact do the sentencing of the individual. The legislature also recognized that the local communities did not have the funding to adequately establish these programs and services and thus provided for state funding, albeit with state guidelines. It is significant to note that the state cannot force a judicial district into community-based correctional programs.

The fact that no one is specifically charged by law for making the initial decision to institute a community-based correctional system does not make the above statutes invalid. Your questions presuppose that either the judicial district or the Department of Social Services have this responsibility. We do not interpret these statutes so narrowly. In other words, perhaps the sheriff, a group of law enforcement officials or a group of members of the various boards of supervisors within the judicial district would institute the process.

In the area of the law dealing with social services, there are many examples where "provider groups" are formed to fulfill a need. These providers qualify for funding if they meet the existing standards (see §217.28) even though they are not specifically defined in the statute. Flexibility in this regard is desirable in order to meet the need.

Turning now to your second question, the Iowa Supreme Court has held, even in a criminal case, that one who challenges constitutionality has the heavy burden to negate every reasonable basis upon which the statute may be sustained, and that a statute will not be declared unconstitutional unless it is clearly, palpably and without doubt violative of a constitutional right. *State v. Kramer*, 235 N.W.2d 114 (Iowa 1975); *Burchette v. Chicago, R.I. & P.R. Co.*, 234 N.W.2d 149 (Iowa 1975); *State v. Leins*, 234 N.W.2d 645 (Iowa 1975).

We note that Section 217.25, the Code, states that the program is "to serve the judicial districts of the state." A judge or the judicial department need not be directly involved in the program. In practice, of course, a judge should be well informed as to the program so that his sentencing practices will provide the best results for the individual and the community. In our opinion, based upon the above cases, there is no unconstitutional delegation of powers to the judicial department in this instance.

February 25, 1976

STATE OFFICERS AND DEPARTMENTS: Department of Agriculture; Care of Animals; Commercial Breeder's Licensing. §162.8, Code of Iowa, 1975; Chapter 1148, §8, Acts, 65th G.A., 1974 Session. Iowa commercial breeders license is not required of a commercial breeder who has obtained a valid federal license and a certificate of registration issued by the secretary of agriculture. (Haesemeyer to Van Gilst, State Senator, 2-25-76) #76-2-26

The Honorable Bass Van Gilst, State Senator: I quote the pertinent part of your letter requesting an Attorney General's opinion:

"Does a commercial breeder who has obtained a valid federal license have to do anything more than obtain upon payment of a five dollar fee a certificate pursuant to Section 162.8?"

The statutory requirement contained in §162.8 to which your letter makes reference clearly provides that a commercial breeder must possess a license issued by the secretary of agriculture *unless* he possesses a federal license in which case he may obtain a certificate of registration in lieu of state licensing.

The relevant portion of §162.8 reads:

"No person shall operate as a commercial breeder unless he has obtained a license issued by the secretary or unless he has obtained a certificate of registration issued by the secretary if his kennel is federally licensed. Application for the license or the certificate shall be made in the manner provided by the secretary."

The Code further provides in §162.11, entitled "Exceptions":

"Any dealer or commercial breeder and any person who operates a commercial kennel or public auction who has obtained and is operating his business under a current and valid license shall, upon payment of the prescribed fee, be forwarded a certificate of registration."

This Code section when read with the applicable part of §162.8, demonstrates the intent of the legislature that breeders who possess a valid federal license not be required to obtain a state license. In view of the above, it is our opinion that a commercial breeder who has obtained a valid federal license satisfies statutory requirements by securing a certificate of registration from the Secretary of Agriculture in accordance with §162.8.

February 25, 1976

COUNTIES: Boards of Supervisors; Expenditure of Funds. §332.3, Code of Iowa, 1975. A reasonable expenditure of county funds for an "Open House" function in conjunction with the completion of remodeling of a county courthouse is legal and within the purview of the discretionary powers granted the county board of supervisors. (Haesemeyer to Smith, Auditor of State, 2-25-76) #76-2-27

Honorable Lloyd R. Smith, State Auditor: I quote from your request for an Attorney General's opinion regarding the legality of a particular expenditure of county funds:

"The question has arisen as to whether or not a county of the State of Iowa may legally use county funds for an 'Open House' function in connection with the completion of remodeling of the county courthouse.

"Your opinion is respectfully requested as to whether or not such expenditures of county funds is legal."

You do not state exactly what would be involved in the "Open House" but we assume it would involve inviting the public to view the renovated courthouse and would entail perhaps some decorations, brochures and modest refreshments.

The Iowa Code §332.3, which deliniates the general powers of county boards of supervisors, provides in subsection six that the board of supervisors shall have the power:

" * * *

"(6). To represent its county and have the care and management of the property and business thereof in all cases where no other provision is made."

This subsection when read in conjunction with the other subsections deliniating the general powers of the county boards, clearly expresses the legislative intent that the county boards be clothed with broad powers in the conduct of county affairs.

The Iowa Supreme Court has held that the county board of supervisors has wide discretion in the exercise of powers conferred on it to conduct county affairs. *Sorenson v. Andrews*, 1936, 221 Iowa 44, 264 N.W. 562.

It is therefore our opinion that a reasonable expenditure of county funds for an "Open House" function in conjunction with the completion of a county courthouse is legal and within the purview of the discretionary powers granted the county board of supervisors.

February 26, 1976

STATE OFFICERS AND DEPARTMENTS: Department of Social Services. §§17A.2(7)(a) and (k), Code of Iowa, 1975. The Department of Social Services should have rules for the Juvenile Home, Training School for Boys and the Training School for Girls, wherein their actions relate or affect the public but not pertaining to the internal matters affecting students. (Robinson to Burns, Commissioner, Department of Social Services, 2-26-76) #76-2-28

Mr. Kevin J. Burns, Commissioner, Department of Social Services: On the 13th of this month you asked for an Opinion of the Attorney General concerning the following question:

"We are requesting an Attorney General's opinion on whether or not the internal policies of the Iowa State Juvenile Home, the Iowa Training School for Girls, and the Iowa Training School for Boys are exempt from rule-making procedures under Chapter 17A of the Code."

Section 17A.2(7)(k), Code of Iowa, 1975, provides:

"17A.2 Definitions. As used in this chapter: * * *

"7. '*Rule*' means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of an existing rule, but does not include: * * *

"k. A statement concerning only inmates of a penal institution, students enrolled in an educational institution, or patients admitted to a hospital, when issued by such an agency."

The institutions you mentioned in your question are not penal institutions. (See OAG, Robinson to Senator Doderer, 2/9/76.) It is our opinion that rules are not required for the internal policies of said institutions because the definition of a rule quoted above does not include students enrolled in an educational institution or patients admitted to a hospital in addition to inmates at a penal institution.

For a comprehensive review of the law in this area, see Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 Iowa Law Rev. 731 (1975). Bonfield discusses §17A.2(7)(k) at pp. 843-44, to-wit:

"The final exception to the definition of 'rule' in section 2(7) parallels a similar provision found in the earlier Iowa statute. The prior law stated that 'rule' does not mean 'rules adopted relating to the management, discipline, or release of any person committed to any state institution. . . .' The IAPA broadens the scope of this exception in section 2(7)(k) by having it apply to 'statements concerning only inmates of a penal institution, students enrolled in an education institution, or patients admitted to a hospital, when issued by such agencies.' There are two major differences between the old and new exceptions. First, the IAPA provision applies to statements relating to students and voluntary patients in state institutions whereas the prior exemption did not. Second, unlike the earlier provision, the IAPA exemption excludes such statements if they concern '*only* inmates . . . students . . . or patients.' That is, if the statement is not addressed to inmates, students, or patients, or if it is addressed to such inmates, students, or patients and others, it is not exempted under paragraph (k). So, for example, statements prescribing visiting hours at the prison would not be exempt under paragraph (k), but statements prescribing the mealtimes and daily routine of inmates are exempt. Similarly, statements about admission policies at the state universities or state hospitals are not exempt since they are directed at nonstudents and nonpatients. But statements prescribing the academic routine of students admitted to the state universities or the routine and treatment of patients admitted to the state universities or the routine and treatment of patients admitted to the state hospitals are exempted. They concern only the students or patients —that is, they are directed only at students and patients, they mainly affect only students and patients, and they bind only students and patients. * * *

"Like paragraphs (g), (h) and (i), paragraph (k) is a practical exemption. The sheer burden of subjecting all of the thousands of statements concerning the details of these agencies' daily relationships with inmates, students and patients to public rulemaking procedures would be intolerable. Members of the public are not directly affected by these statements. Their interest is general, peripheral, and remote, if at all. Consequently, procedures designed to elicit broad-scale public participation in the making of everyday agency policies of this type is not as important as public participation in other kinds of policymaking. Beyond this, the reality is that state operated penal, educational, and medical facilities are controlled by agencies that have a special relationship to the persons who use or inhabit those institutions. These agencies have peculiar responsibilities for the welfare of such persons. In order to meet their special responsibilities, these agencies are given some unusual powers. The public, of course, has an interest in how these powers are exercised. Because of this special relationship, however, it is felt that the expertise of the agency members in running such establishments should be allowed to dominate more than usual in the making of determinations relating only to the 'inmates' of these institutions. Furthermore, if anyone should have a fair opportunity to participate in the making of policy concerning those persons it should be the inmates, students, and patients themselves, through appropriate internal agency procedures devised specially for this purpose, rather than through the rulemaking procedures of the IAPA which are geared for input by the public at large. On these bases then, section 2(7)(k) is also probably justified."

Your attention is also drawn to §17A.2(7)(a), the Code, which provides that a rule is not reqired for those matters "concerning only the

internal management of an agency and which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof."

In summary, the Department should have rules covering the institutions you mentioned as their actions relate or affect the public but not pertaining to internal matters affecting students.

February 27, 1976

CITIES AND TOWNS: Annexation — A city, which began annexation proceedings prior to the effective date of Chapter 368 of the Code, may continue those proceedings even though the annexation proposal has been amended, and need not appear before the City Development Board. (Blumberg to Leitch, Administrative Assistant, City Development Board, 2-27-76) #76-2-29

Mr. Duane W. Leitch, Administrative Assistant to the City Development Board: We have received your opinion request of February 4, 1976, regarding annexation proceedings. A proposal for annexation by the city of West Burlington originated in May, 1975. On June 23, 1975, the city council adopted a resolution on the annexation, with a hearing being called for sometime in July, 1975. Later, the city amended the annexation by removing some of the area from consideration. We understand that the city had not adopted any part of the new City Code prior to July 1, 1975. You ask whether the annexation should have come under the jurisdiction of the City Development Board.

Chapter 368, 1975 Code, provides for the City Development Board, and requires that annexations be made under its jurisdiction. That Chapter became effective July 1, 1975. West Burlington was operating under Chapter 362, 1973 Code, when it started the proceedings. You ask whether the fact that the annexation proceedings were amended renders the proceedings void, thereby requiring that new proceedings be brought before the Board.

There are no cases in Iowa directly on point. *State ex rel. Mercer v. Town of Crestwood*, 1957, 248 Iowa 627, 80 N.W.2d 489, reh. 81 N.W.2d 452, stands for the principle that adoption of a resolution regarding annexation or incorporation is the first procedural legislative step and that it vests jurisdiction to complete the procedure. In *City of Cedar Rapids v. Cox*, 1961, 252 Iowa 948, 108 N.W.2d 253, the city began involuntary annexation proceedings. Sometime thereafter, during the process, part of the area sought to be annexed involuntarily was voluntarily annexed upon petition by the property owners. The issue was whether the change voided the remaining proceeding for the involuntary annexation, and deprived the District Court, to where the proceeding had progressed, of jurisdiction. The Court ruled that the change in the involuntary annexation did not deprive the lower court of jurisdiction. In other words, the involuntary annexation could proceed to completion. We find these cases to be analogous.

Accordingly, we are of the opinion that West Burlington may continue its annexation proceedings under the law pursuant to which it began. The proceeding need not be brought before the City Development Board.

March 1, 1976

CONSTITUTIONAL LAW: Abortion; Conscience Clause. Article III, §1, Constitution of Iowa; §347.18, Code of Iowa, 1975; S.F. 387, 66th G.A., (1976). Under S.F. 387, a hospital or doctor could not refuse to treat a woman who is aborting spontaneously on the grounds that it was not an emergency "necessary to save the life of a mother." S.F. 387 confers no right not to participate in medical treatment connected with spontaneous abortions nor grant any freedom from liability for refusal to so participate. The word "person" in line 6 of S.F. 387 refers to medical personnel and medical institutions. The "intent" referred to in line 14 of S.F. 387 is that of medical personnel in charge of the medical care of the pregnant woman. It would not be necessary for medical personnel to state that their "religious beliefs or moral convictions" object to abortions which are elected and induced but not those which are spontaneous, and it is not necessary to put these convictions in writing. The bill requires no test for showing that the refusal to serve a patient is a "religious belief or moral conviction" against participation in an abortion. A medical employer may ask potential employees if the employee is willing to assist in abortions prior to employment when that is a duty of the job for which the individual is being considered. The hospital pharmacist who prepares the saline solution used in abortions, nurses providing aftercare and other personnel providing food service to abortion patients are not performing or assisting in abortions. A system used by several large hospitals wherein the hospital has transferred all personnel who do not wish to participate in abortions to one shift where no elective abortions are performed is lawful. Those performing or assisting in an abortion procedure normally would include those medical persons directly in attendance on and in reasonably close proximity to the patient at the time the abortion procedure is being performed. §2 of S.F. 387 does not discriminate against public hospitals. Employees obeying the mandate of private hospitals against allowing abortions would not have individual liability for refusing to perform abortions. There is no irreconcilable conflict between the right of an individual to participate in an abortion procedure without fear of reprisals and the right of a private hospital to prohibit abortions on its premises. A public hospital does not have to adopt rules in accordance with the provisions of Chapter 17A, Code of Iowa, 1975, governing the manner in which its employees assert their conscientious objection to participation in abortion procedures. If S.F. 387 is enacted, it will be an exception to §347.18 and take precedence oved such §347.18. (Haesemeyer to Doderer, State Senator, 3-1-76) #76-3-1

The Honorable Minnette Doderer, State Senator: You have requested an opinion of the Attorney General with respect to Senate File 387, a bill for "An Act relating to liability for the performance of or refusal to perform abortions", currently pending before the Iowa Senate. This measure in the form in which it has been returned to the Senate from the House of Representatives provides:

"Section 1. *NEW SECTION.* LIABILITY OF PERSONS RELATING TO PERFORMANCE OF ABORTIONS. An individual who may lawfully perform, assist, or participate in medical procedures which will result in an abortion shall not be required against that individual's religious beliefs or moral convictions to perform, assist, or participate in such procedures. A person shall not discriminate against any individual in any way, including but not limited to employment, promotion, advancement, transfer, licensing, education, training or the granting of hospital privileges or staff appointments, because of the individual's participation in or refusal to participate in recommending, performing or assisting in an abortion procedure. For the purposes of this Act, 'abortion' means the termination of a human pregnancy with the intent other than

to produce a live birth or to remove a dead fetus. Abortion does not include medical care which has as its primary purpose the treatment of a serious physical condition requiring emergency medical treatment necessary to save the life of a mother.

"Sec. 2. *NEW SECTION.* LIABILITY OF HOSPITALS REFUSING TO PERFORM ABORTIONS. A hospital, which is not controlled, maintained and supported by a public authority, shall not be required to permit the performance of an abortion. The refusal to permit such procedures shall not be grounds for civil liability to any person nor a basis for any disciplinary or other recriminatory action against the hospital."

Your request for an opinion contains ten separate questions, many of which have subparts to them. In what follows, we will first set forth each of your questions in the form and order in which presented to us and follow each such question with our answer thereto. However, before turning to your specific inquiries, it is well to bear in mind not only what S.F. 387 would do if enacted, but also what it does not do. S.F. 387 does not confer on anyone any new rights to receive an abortion or to perform one. Those rights are derived from the decisions of the United States Supreme Court in *Roe v. Wade*, 1973, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 and *Doe v. Bolton*, 1973, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, in which the criminal abortion statutes of Texas and Georgia were struck down as being unconstitutional. In *Doe v. Turner*, 1973, 361 F.Supp. 1288, the Iowa criminal abortion statute, which is similar to those of Texas and Georgia, was subsequently found to be unconstitutional by the Federal District Court for the Southern District of Iowa sitting as a three-judge panel. Section 1 of S.F. 387 is simply designed to insure that persons having moral or religious scruples against participating in abortion procedures may refuse to participate in such procedures without liability and without fear or reprisals in their conditions of employment. It also makes it clear that one may participate in abortion procedures without fear of reprisals. Section 2 merely provides that a private hospital cannot be required to permit abortions.

Additionally, it is well to bear in mind certain basic principles of statutory construction which have been laid down by the Iowa Supreme Court and which will guide us in our efforts to answer your questions. It is so well settled as to be axiomatic that the court will examine both the language used and the purpose for which legislation is enacted. Each part of the act is to be construed with the act as a whole so that all parts are interpreted together. The subject matter, reason, consequence and spirit are to be considered as well as the words used. The statute is to be accorded a sensible, practical, workable and logical construction. *Matter of Estate of Bliven*, Iowa 1975, 236 N.W.2d 366, 369. *Northern Natural Gas Co. v. Forst*, Iowa 1973, 205 N.W.2d 692, 695. The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense which may be uncovered by ingenuity and study of an acute and powerful intellect. *Dingman v. City of Council Bluffs*, 1958, 249 Iowa 1121, 90 N.W.2d 742. With these principles in mind, it is appropriate to turn to your specific questions.

"1. Under the above wording, would 'spontaneous' (not induced by anyone) abortions be included under the definition of what an abortion

is not? Numerous women have spontaneous abortions (known by lay persons as miscarriages) without medical treatment, but it is frequently necessary to receive some medical attention at the time, but rarely treatment necessary to save the life of the woman. Could a hospital or doctor refuse to treat the woman who is aborting spontaneously on the grounds that it was not an emergency 'necessary to save the life of the mother'."

In our opinion, under S.F. 387, a hospital or doctor could not refuse to treat a woman who is aborting spontaneously on the grounds that it was not an emergency "necessary to save the life of a mother". The term "abortion" is defined for the purposes of S.F. 387 in §1 thereof, to mean, "the termination of a human pregnancy with the *intent* other than to produce a live birth or to remove a dead fetus." A miscarriage, or spontaneous abortion as you call it, is not an "abortion" within the meaning of this term. In using the word "abortion" in the last sentence of §1, the statutory definition previously given must be used. In other words, the bill defines the term "abortion" for the purposes of the act and then further defines it, but in negative terms, in the last sentence.

"2. Does the word 'mother' give any problem when the woman is not actually a mother, but pregnant? Does S.F. 387 differentiate between abortions which are induced at the request of the pregnant woman and abortions that occur spontaneously without help from medical personnel and are not desired by the pregnant woman? If the bill does not differentiate, what guarantee does a pregnant woman have that she will receive care to the natural termination of her pregnancy if she is forbidden by the language in section one from inquiring of the doctor when she first goes for medical help how the doctor feels about abortion? Does the 'person' referred to in line 6 mean the pregnant woman?"

The use of the word "mother" does not create any problems. The meaning and intent of the language used is manifestly clear and no useful purposes would be served by splitting hairs on this account. As we pointed out in answer to your first question, S.F. 387 does differentiate between induced abortions and spontaneous abortions in that it has absolutely nothing whatsoever to do with spontaneous abortions or miscarriages. Since S.F. 387 confers no right not to participate in medical treatment connected with spontaneous abortions nor grant any freedom from liability for refusal to so participate, a pregnant woman no more needs a guarantee that she will receive care to the natural termination of her pregnancy because of anything contained in S.F. 387 than she needs a guarantee that she will receive treatment for complications arising from an appendectomy, if that is what she is in the hospital for. The word "person" referred to in line 6 of the bill, is found in the following context,

"A person shall not discriminate against any individual in any way, including but not limited to employment, promotion, advancement, transfer, licensing, education, training or the granting of hospital privileges or staff appointments, because of the individual's participation in or refusal to participate in recommending, performing or assisting in an abortion procedure."

Obviously, "person" in this frame of reference does not mean the pregnant woman. The pregnant woman, unless, I suppose, she owns the hospital, would not be in the position to discriminate against any staff member refusing to participate in an abortion procedure. As we pointed out at the outset, a certain amount of common sense has to be used in

interpreting statutes and we think this is an instance where that is self-evident. "Person" refers to medical personnel and medical institutions.

"3. Whose *intent* does the bill refer to in line 14? The language of the bill says that 'abortion means the termination of a human pregnancy with the intent other than to produce a live birth or to remove a dead fetus.' Medical statistics indicate that the large majority of terminations of pregnancy happen through no fault or desire on the part of the pregnant woman. Does the bill indicate whose *intent* is necessary to be labelled abortion "

The intent referred to in line 14 of the bill is that of medical personnel in charge of the medical care of the pregnant woman.

"4. How will S.F. 387 affect employment practices of doctor's office, clinics, and hospitals by the willingness of some employees and the refusal of other employees to participate in abortion procedures?"

This is not a legal question. We have no way of knowing what affect S.F. 387 would have on the employment practices of doctor's offices, clinics and hospitals. We are not prepared to indulge in gratuitous conjecture on this subject.

"4. (a) Would it be necessary for medical personnel to state that their 'religious beliefs or moral convictions' object to abortions which are elected and induced but not those which are spontaneous?"

No it would not be necessary for medical personnel to make this distinction. As we have pointed out earlier, S.F. 387 has nothing to do with spontaneous abortions.

"4. (b) Would it be necessary to put employee's convictions in writing?"

No it would not be necessary to put employee's convictions in writing. The bill is silent on the manner in which one asserts one's conscience.

"4. (c) Does the bill require any test for showing that the refusal to serve a patient is a 'religious belief or moral conviction' against participation in an abortion?"

The bill contains no requirement as to any test.

"4. (d) Can the medical employer ask the potential employee if the individual is willing to assist in abortions prior to employment when that is a duty of the job for which the individual is being hired?"

In our opinion, the medical employer may ask potential employees if the employee is willing to assist in abortions prior to employment when that is a duty of the job for which the individual is being considered. While the bill prohibits discrimination against any individual in employment, among other things, because of that individual's refusal to participate in abortion procedures, it would produce an absurd result to conclude that because of this, one must hire someone to do a job which they cannot conscientiously do and which they cannot legally be compelled to do.

"5. The language in Section 1 is as follows:

" '. . . A person shall not discriminate against any individual in any way, including but not limited to employment, promotion, advancement,

transfer, licensing, education, training or the granting of hospital privileges or staff appointments, because of the individual's participation in or refusal to participate in recommending, performing or assisting in an abortion procedure.'

"a. Is the above language covering participation or refusal to participate in abortion procedures so broad as to cover refusal of the hospital pharmacists to make up the saline solution used in abortions;

"b. the nurse who refuses to attend to the physical comfort and care of the patient in the ward after she has had an abortion?

"c. Can personnel refuse to serve food to the room of a patient who is in a hospital room for 'aftercare' following an abortion?

"d. What hospital tasks are included in an abortion procedure? Which ones are included in the words in line 12, 'in recommending, performing or assisting in an abortion procedure'?

"e. With the prohibition against 'transfer' in paragraph one, would the present system used by several large hospitals be lawful wherein the hospital has transferred all personnel who do not wish to participate in abortions to one shift? All elective abortions are then performed on the other shift. Would the hospital be required to maintain and pay those employees who refuse to participate in abortion procedures on the shift which schedules abortions rather than transfer them to the other shift?"

In answer to questions 5 (a), (b) and (c), it is our opinion that these particular tasks do not constitute participation in "recommending, performing or assisting in an abortion procedure". In construing language of this sort, a rational, reasonable and sensible approach has to be taken. If it were otherwise, one could eventually get to the point where the man who mines the iron ore that goes to make the steel, which is used by a factory to make instruments used in abortions could refuse to work on conscientious grounds. *Reductio ad absurdum.*

The answer to question 5(d) is essentially a medical one which we are not qualified to answer. However, we would suggest that those performing or assisting in an abortion procedure normally would include those medical persons directly in attendance on and in reasonably close proximity to the patient at the time the abortion procedure is being performed. In answer to 5(e), it is our view that the establishment of separate shifts such as you describe would not constitute a discriminatory transfer within the meaning of S.F. 387. In the situation you described, it is evident that the establishment of the shifts is not designed as a punitive or coercive measure directed at those refusing to participate in abortions, rather it is a reasonable and sensible effort to accommodate both the patients desiring to receive abortions and employees who do not wish to participate in them. We do not construe S.F. 387 as conferring a right on a person who does not believe in abortions to sit around and do nothing or to stubbornly hang on to a job a principal duty of which is to perform elective abortions. Some concern must be given to the interests of the patients and the economical and business-like operation of the medical institutions.

"6. Do you interpret paragraph two of the bill to discriminate between private and public hospitals in that private hospitals and all their personnel seem to be exempt from 'civil liability to any person nor a basis for any disciplinary or other recriminatory action against the hospital' while hospitals controlled by the public would be subject to civil liability as well as their personnel?"

It seems to me that your question misstates what §2 does. It does not create any civil liability on the part of public hospitals or their personnel where none existed before. All §2 does is say the refusal to permit abortions by *private* hospitals is not grounds for civil liability; etc.

On February 27, 1974, Attorney General Turner, in a letter to Senator George Kinley, advised that a conscience clause then under discussion could not constitutionally be made applicable to public hospitals, and included the following quotation from *Nyberg v. City of Virginia,* 8th Cir. 1974, 495 F.2d 1342:

"We are not dealing here with the denominational hospital or the religious or moral convictions of any individual. Instead, we deal with unnecessary restrictive rules imposed by a state facility upon a constitutionally protected choice.

". . . we propose to fashion no specific procedures which must be followed nor to require any individual staff members to participate in abortion procedures . . . ."

However, in this 1974 letter, the Attorney General went on to say:

"A private hospital could probably refuse to provide facilities for abortion services. In *Doe v. Bolton,* 93 S.Ct. 739, 750 (1973), the Court approved a section of a Georgia statute which provided that hospitals did not have to admit any patient for the purpose of performing an abortion and that no physicians or other persons having moral or religious objections should be required to participate in medical procedures which would result in an abortion. The Court said:

" 'These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the *denominational hospital'.*" 93 S.Ct. at 750 (Emphasis added)

Thus, we have already dealt with the problems created by the fact that there is a distinction between public hospitals and private hospitals and concluded that the former cannot prohibit abortions while the latter may. This is a distinction which the courts recognize and in our opinion, does not amount to invidious discrimination in the constitutional sense.

"7. While personnel of hospitals, both private and public, cannot be discriminated against by the hospital in any way listed in paragraph one, is this same personnel exempt from the civil liability of paragraph two as is the hospital itself? The 'refusal to permit such procedures' exemption from civil liability appears to go to persons who do not permit the procedure in the hospital, but does it go to the person or persons refusing to perform the service? Would we be in a situation in Iowa wherein the private hospital itself would not be subject to civil liability, but the hospital personnel and the doctors could be sued for some action dealing with abortion procedures?

As we pointed out previously, *Doe v. Bolton, supra,* makes it clear that private hospitals do not have to permit abortions. Section 2 of H.F. 387 merely reiterates this right and makes it clear that such refusal is not grounds for civil liability to any person. In our opinion, employees obeying the mandate of these private hospitals would not have individual liability for refusing to perform abortions.

"8. Is there an irreconcilable conflict in the bill? The bill states "no person can discriminate against any individual for participation in recommending, performing or assisting in an abortion procedure' which would

appear to confer a right on those individuals who are willing to participate. The right to refuse to participate is conferred in this same section. The bill in section two allows private hospitals to refuse to permit the performance of an abortion in their facilities, which would then be a conflicting higher level right, than the right to participate conferred on personnel who are willing to participate but are denied the facilities of the hospital for this procedure?

"Is this irreconcilable conflict constitutional under Section 3 of the Iowa Constitution which states:

" 'The General Assembly shall make no law respecting an establishment of religion, or *prohibiting the free exercise* thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.'

"and the first amendment to the United States Constitution:

" 'Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise* thereof; or abridging the freedom of speech, or of the press; or the right of the people to keep and bear Arms, shall not be infringed.'

"Does the bill choose one religious belief over another in that the refusal of the hospital is granted without reference to conscience, religious beliefs or moral convictions but allows the corporate person, the hospital, to cancel the individual's religious belief or moral conviction by refusing its facilities to those who wish to participate in abortion procedures which was granted as a right in Section one?"

In our opinion, there is no irreconcilable conflict between the right of an individual to participate in an abortion procedure without fear of reprisals and the right of a private hospital to prohibit abortions on its premises. The right of an individual to participate in an abortion procedure granted by §1 is not the right to perform abortions anywhere he wants to. In other words, a person affiliated with or on the staff of a private hospital who wanted to perform or participate in the performance of an abortion could go somewhere else and do so and in that event, it would be unlawful for the private hospital to discriminate or take reprisals against that individual.

"9. Would the administrative procedures act be responsible for the approval of rules to implement this act for state facilities?"

I am not sure I understand your question. However, if what you are asking is, does a public hospital have to adopt rules in accordance with the provisions of Chapter 17A, Code of Iowa, 1975, governing the manner in which its employees assert their conscientious objection to participation in abortion procedures, the answer is no. Section 17A.2(7) provides in relevant part:

" 'Rule' . . . does not include:

" (a) a statement concerning only the internal management of an agency and which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof. * * * "

Any policies or statements concerning the manner in which the conscience provisions of §1 of S.F. 387 are to be invoked would in our opinion be a matter concerning the internal management of the public hospital and would not substantially affect the legal rights of the public. S.F. 387 confers a right on the employees of the hospital, not on the public.

"10. Does the protection provided for each individual's religious beliefs or moral convictions regarding performance, assistance or participation in abortion procedures go so far as to conflict with Chapter 347.18 wherein the nurse is specifically subjected to the orders of a physician in county hospitals? Does S.F. 387 supersede 347.18?

"347.18 Discrimination. In the management of such hospital, no discrimination shall be made against the practitioners of any recognized school of medicine; and each patient shall have the right to employ at his expense any physician of his choice; and any such physician, when so employed by the patient, shall have exclusive charge of the care and treatment of the patient; and attending nurses shall be subject to the direction of such physician.

"Should the above section be amended to clarify any conflict in the two sections."

In our opinion, if S. F. 387 is enacted, it will be an exception to §347.18 and take precedence over such §347.18. This would be so both because S.F. 387 would be the later enacted of the two statutes and because S.F. 387 would be a special statute dealing as it does with the very narrow area of participation or refusal to participate in abortion procedures whereas §247.18 is a general statute having to do with the relationship between physicians and patients and physicians and nurses. Sections 4.7 and 4.8, Code of Iowa, 1975, provide respectively:

"If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision."

"If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment by the general assembly prevails. If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails."

We offer no opinion as to whether or not §347.18 should be amended in light of S.F. 387. That is a legislative decision for you to make.

March 3, 1976

CONSTITUTIONAL LAW: Contracting Debt by State; Borrowing from Federal Unemployment Trust Fund. Article VII, §2, Constitution of Iowa. Advances to the state of Iowa from the Federal Unemployment Trust Fund would not constitute debts of the state and therefore do not violate Article VII, §2 of the Constitution of Iowa. (Haesemeyer to Hultman, State Senator, 3-3-76) #76-3-2

The Honorable Calvin O. Hultman, State Senator: This letter is in response to your request for an opinion of the Attorney General regarding the constitutionality of borrowing from the Federal Unemployment Trust Fund. In your letter you state:

"According to Article VII, Section Two of the Constitution of the State of Iowa, the state may not go into debt over $250,000. There is a possibility that the Unemployment Reinsurance Fund Trust may go broke next year which would force the State to borrow from the Federal Government.

"I would like your written opinion as to whether this would raise a question of constitutionality."

The place to begin a determination as to the constitutionality of a particular action is with the language of the Constitution itself. Article

VII, Section Two of the Constitution of the State of Iowa to which you have made reference reads in part:

"The state may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct or contingent, whether contracted by virtue of one or more acts of the General Assembly, or at different periods of time, shall never exceed the sum of two hundred fifty thousand dollars; . . ."

Based on this constitutional language, the answer to your inquiry turns on whether or not an advance from the Federal Unemployment Trust Fund constitutes a debt, direct or contingent.

The Iowa Supreme Court in *Hubbell v. Herring*, 216 Iowa 728, 249 N.W. 430 (1933) held that in determining whether an obligation incurred by the state is a debt within the constitutional limitation, the character of the obligation assumed must be determined as of the time of creation.

The Kentucky court said that a "debt" within the meaning of constitutional provisions limiting legislative authority to contract debts on behalf of the commonwealth arises out of a contract wherein the creditor is unconditionally entitled to receive and the debtor is obligated to pay. *Preston v. Clements*, 313 Ky. 479, 232 S.W.2d 85.

For reasons which will be set forth below, an advance from the Federal Unemployment Reinsurance Trust Fund would not be considered a "debt".

The controlling Federal statute regarding advances from the Federal Government to meet deficiencies in state unemployment compensation funds is commonly referred to as the "Reel Act" and appears in Title XII, 42 USCA, §1321. It provides in pertinent part:

"(1) Advances shall be made to the states from the Federal Unemployment account in the Unemployment Trust Fund so provided in this section, and shall be repayable, without interest, in the manner provided in sections 1101(d)(1), 1103(B)(2), and 1322 of this title . . . ."

The Act then goes on to provide a "procedure for the governor of a state to request such funds, procedures for disbursement of same and a provision limiting the amount a state may request during any monthly period.

Thus, in accordance with the above legislation, the governor of a state may request an advance from the Federal government and such an advance will be repayable without interest by one of the following methods:

(1) By reduction in the state's share of the amount of any excess in the Federal employment security administration account which would otherwise have been transferred to the state's account in the Unemployment Trust Fund. In this regard, 42 USCA, §1103(a)(1) and (b)(2) reads as follows:

"(a)(1) If as of the close of any fiscal year after the fiscal year ending June 30, 1972, the amount in the extended unemployment compensation account has reached the limit provided in section 1105(b)(2)

of this title and the amount in the Federal unemployment account has reached the limit provided in section 1102(a) of this title and all advances pursuant to section 1105(d) of this title and section 1323 of this title have been repaid, and there remains in the employment security administration account any amount over the amount provided in section 1101(f)(3)(A) of this title, such excess amount, except as provided in subsection (b) of this section, shall be transferred (as of the beginning of the succeeding fiscal year) to the accounts of the States in the Unemployment Trust Fund.

(2) Each State's share of the funds to be transferred under this subsection as of any July 1 —

(A) shall be determined by the Secretary of Labor and certified by him to the Secretary of the Treasury before that date on the basis of reports furnished by the States to the Secretary of Labor before June 1, and

(B) shall bear the same ratio to the total amount to be so transferred as the amount of wages subject to contributions under such State's unemployment compensation law during the preceding calendar year which have been reported to the State before May 1 bears to the total of wages subject to contributions under all State unemployment compensation laws during such calendar year which have been reported to the States before May 1. * * *

(3) The amount which, but for this paragraph, would be transferred to the account of a State under subsection (a) of this section or paragraph (1) of this subsection shall be reduced (but not below zero) by the balance of advances made to the State under section 1321 of this title. The sum by which such amount is reduced shall —

(A) be transferred to or retained in (as the case may be) the Federal unemployment account, and

(B) be credited against, and operate to reduce —

(i) first, any balance of advances made before September 13, 1960, to the State under section 1321 of this title, and

(ii) second, any balance of advances made on or after September 13, 1960, to the State under section 1321 of this title."

Under the above statutory provisions, there would be a transfer of any excess amount in the Federal account to the State account under the provisions of (a)(1) *if* certain conditions occur. However, until there is actually a transfer, the funds involved are *strictly Federal funds.* Furthermore, by indicating in (b)(2) that these funds must be applied first toward the repayment of any advance, the Federal Government is actually using *Federal funds* raised by the Federal taxing authority to reduce the balance of any advance. Insofar as the State itself receiving funds under this section, it is wholly conjectural, and the funds are clearly not State funds until they would be received by the State. Therefore, it is submitted that this method of repayment does not create a State liability.

(2) Through a transfer of funds from the State's account in the Unemployment Trust Fund to the Federal unemployment account. In this regard, 42 USCA, §1322 reads as follows:

"The Governor of any State may at any time request that funds be transferred from the account of such State to the Federal unemployment account in repayment of part or all of that balance of advances, made to such State under section 1321 of this title, specified in the request.

The Secretary of Labor shall certify to the Secretary of the Treasury the amount and balance specified in the request; and the Secretary of the Treasury shall promptly transfer such amount in reduction of such balance."

It should be noted that the above language provides that the Governor of any State *may* at any time request that funds be transferred from the account of such State to the Federal unemployment account in repayment of part or all of that balance of advances.

In this regard, there is abundant authority to support the proposition that the word "*may*" is permissive, rather than mandatory. §4.1(36)(c). See *Words and Phrases*, Vol. 26A, p. 390. As a result, this method of repayment is discretionary with the Governor of the State, and so long as he does not exercise his discretion there is *no* State liability created. Therefore, it is our view that this method of repayment does not create any *mandatory* obligation of payment by the State itself.

(3) *By a reduction in the total credit otherwise allowed to an employer subject to the Unemployment Compensation Law of a State when filing his Federal Unemployment Tax form.* In this regard, 42 USCA, §1101(d)(1) provides as follows:

"(d)(1) The Secretary of the Treasury is directed to transfer from the employment security administration account —

(A) To the Federal unemployment account, an amount equal to the amount by which —

(i) 100 per centum of the additional tax received under the Federal Unemployment Tax Act with respect to any State by reason of the reduced credits provisions of section 3302(c)(3) of such Act and covered into the Treasury for the repayment of advances made to the State under section 1321 of this title, exceeds

(ii) the amount transferred to the account of such State pursuant to subparagraph (B) of this paragraph.

Any amount transferred pursuant to this subparagraph shall be credited against, and shall operate to reduce, that balance of advances, made under section 1321 of this title to the State, with respect to which employers paid such additional tax.

(B) To the account (in the Unemployment Trust Fund) of the State with respect to which employers paid such additional tax, an amount equal to the amount by which such additional tax received and covered into the Treasury exceeds that balance of advances, made under section 1321 of this title to the State, with respect to which employers paid such additional tax.

(2) Transfers under this subsection shall be as of the beginning of the month succeeding the month in which the moneys were credited to the employment security administration account pursuant to subsection (b)(2) of this section."

Also, 42 USCA, §3302(c)(3) provides as follows:

"(3) If an advance or advances have been made to the unemployment account of a State under Title XII of the Social Security Act on or after the date of the enactment of the Employment Security Act of 1960, then the total credits (after applying subsections (a) and (b) and paragraphs (1) and (2) of this subsection) otherwise allowable under this section for the taxable year in the case of a taxpayer subject to the unemployment compensation law of such State shall be reduced —

(A) (i) in the case of a taxable year beginning with the second consecutive January 1 as of the beginning of which there is a balance of such advances, by 10 percent of the tax imposed by section 3301 with respect to the wages paid by such taxpayer during such taxable year which are attributable to such State; and

(ii) in the case of any succeeding taxable year beginning with a consecutive January 1 as of the beginning of which there is a balance of such advances, by an additional 10 percent, for each such succeeding taxable year, of the tax imposed by section 3301 with respect to the wages paid by such taxpayer during such taxable year which are attributable to such State;

(B) in the case of a taxable year beginning with the third or fourth consecutive January 1 as of the beginning of which there is a balance of such advances, by the amount determined by multiplying the wages paid by such taxpayer during such taxable year which are attributable to such State by the percentage (if any) by which —

(i) 2.7 percent, exceeds

(ii) the average employer contribution rate for such State for the calendar year preceding such taxable year; and

(C) in the case of a taxable year beginning with the fifth or any succeeding consecutive January 1 as of the beginning of which there is a balance of such advances, by the amount determined by multiplying the wages paid by such taxpayer during such taxable year which are attributable to such State by the percentage (if any) by which —

(i) the 5-year benefit cost rate applicable to such State for such taxable year or (if higher) 2.7 percent, exceeds

(ii) the average employer contribution rate for such State for the calendar year preceding such taxable year."

Thus, under the above statutory provisions, any advances made under Title XII to a State after 1960 which have not been reimbursed by repayment methods #1 and #2 within a specified period of time are recouped by means of a reduction of Federal credit allowed to employers subject to the Unemployment Tax Act. An explanation as to how this procedure mechanically works is set forth in the C.C.H. *Unemployment Insurance Report*, §1160, p. 4249.-3, which reads as follows:

"If no such repayment is made, reductions in credit are made as follows: for the taxable year beginning with the second January 1 after an advance is made, the credit is reduced by 10% of 3% (the deemed federal rate for credit purposes), or .3%. For the following taxable year, the credit is reduced by 20% of 3%. In the case of the third and fourth consecutive taxable years for which there has been an outstanding balance of advances as of January 1, if the state has (for the calendar year preceding such taxable year) collected as contributions from employers on remuneration subject to the state law less than an amount equal to 2.7% of the total remuneration subject to contributions under the state law (as determined by the state by April 30 of the taxable year, using a March 31 cutoff date), the tax credit against the federal tax due on wages paid in such taxable year will be further reduced by the amount (rounded to the nearest 0.1%) by which the average employer contribution rate is less than 2.7%.

"In the case of the fifth and succeeding consecutive taxable years for which there has been an outstanding balance of advances as of January 1, if the state has collected (for the calendar year immediately preceding the taxable year) in employer taxes less than an amount equal to one-fifth of the aggregate benefits paid in the first 5 of the last 6 years preceding the taxable year (as determined by the state by the following

April 30, using a March 31 cutoff date) or an amount equal to 2.7% of the state taxable remuneration (for the calendar year immediately preceding the taxable year), whichever is higher, then the tax credit against the federal tax will be further reduced. The reduction will be a rate, rounded to the nearest 0.1%, which, when applied to the state's taxable wages for such immediately preceding calendar year, would have produced the revenue necessary to make up the differences between the contributions actually paid and the average benefit cost rate (or 2.7% if higher). In determining the amount collected by the state, employee contributions may be included, if employer contributions average 2.7% or more."

As you can see, an employer normally receives a large credit against the amount of Federal tax, but unless an advance is repaid by methods #1 or #2 outlined above, that credit is steadily reduced until the advance is repaid. The repayment of advances under this method is accomplished under the Federal taxing power on employers subject to the Federal Unemployment Tax Act. There is actually no State liability created or any mandatory obligation of repayment by the state itself under this method of repayment.

Fifteen states have received advances under Title XII because of depleted unemployment funds as of January 1, 1976. Connecticut, who first received a loan in March of 1972, had not repaid the loan by November 10, 1974, and thus there was a reduction in the Federal Unemployment tax credit in accordance with 26 USCA, §3302(c)(3). C.C.H. *Unemployment Insurance Reports*, §1160, p. 4249-5. The Attorney General of Missouri, in an opinion dated January 16, 1976, from which a portion of this opinion is derived, stated that it was his opinion that the method of repayment most frequently used is that used by Connecticut in the example situation noted above. Opinion-Attorney General of Missouri, 1976.

From the foregoing discussion, we conclude that there is no statutory obligation that the state repay advances received pursuant to Title XII of the Social Security Act (42 USCA, §1321). It is the opinion of this office that such advances to the State of Iowa will not constitute debts and thus are not violative of Article VII, Section Two of the Constitution of Iowa.

March 4, 1976

CONSTITUTIONAL LAW: Abortion; Conscience Clause. Article III, §1, Constitution of Iowa; S.F. 387, 66th G.A. (1976). Public hospitals and employees of public hospitals acquire no exemption from civil liability for the refusal to permit or perform abortions by reason of §2 of S.F. 387. However, §1 grants to all individuals who may lawfully perform, assist or participate in abortions the right to refuse to do so on the basis of such individual's religious beliefs or moral convictions. Thus, in the event of the enactment of S.F. 387, the effect would be the same as if a specific exemption from civil liability for refusal to perform abortions on religious or conscience grounds had been granted to such public hospital employees. (Haesemeyer to Schroeder, State Representative, 3-4-76) #76-3-3

The Honorable Laverne W. Schroeder, State Representative: Reference is made to your letter of March 3, 1976, in which you state:

"In the opinion you issued for Senator Doderer dated March 1, on

page 8, point 7, you state: 'As we pointed out previously, *Doe v. Bolton, supra,* makes it clear that private hospitals do not have to permit abortions. Section 2 of H.F. 387 merely reiterates this right and makes it clear that such refusal is not grounds for civil liability to any person. In our opinion, employees obeying the mandate of these private hospitals would not have individual liability for refusing to perform abortions.'

"Section 2 of the bill states:

" 'Sec. 2. *NEW SECTION.* LIABILITY OF HOSPITALS REFUSING TO PERFORM ABORTIONS. A hospital, which is not controlled, maintained and supported by a public authority, shall not be required to permit the performance of an abortion. The refusal to permit such procedures shall not be grounds for civil liability to any person nor a basis for any disciplinary or other recriminatory action against the hospital.'

"The question I now have is, since only private hospitals are exempt from civil liability as stated in section 2 of S.F. 387, are employees of the public hospitals exempt from civil liability also?"

It is clear that §2 of S.F. 387 grants nothing to public hospitals or their employees. The section is directed only at private hospitals, and public hospitals and employees of public hospitals acquire no exemption from civil liability for the refusal to permit or perform abortions by reason of that section. However, §1 grants to all individuals who may lawfully perform, assist or participate in abortions the right to refuse to do so on the basis of such individual's religious beliefs or moral convictions. Since such right to refuse on a moral or religious basis would become a matter of law in the event of the enactment of S.F. 387, the effect would be the same as if a specific exemption from civil liability for refusal to perform abortions on religious or conscience grounds had been granted to such public hospital employees.

Please bear in mind that when the term "abortion" is used in either §1 or §2 of S.F. 387, the definition of such term, which is set forth in §1, has application. In other words, "abortion" means the termination of a human pregnancy with the intent other than to produce a live birth or remove a dead fetus and does not include medical care which has as its primary purpose the treatment of a serious physical condition requiring emergency medical treatment necessary to save the life of a mother.

March 5, 1976

CITIES AND TOWNS: Filling Vacancies — §§28A.3, 69.12, 372.13(2) and 372.14(3), Code of Iowa, 1975; §§122 and 150, Chap. 81, Acts of the 66th G.A. (1975). A council need not always make an appointment to fill a vacancy. If it does, the term of the appointment is only until a successor is elected. A mayor pro tem may not appoint, employ or discharge officers or employees without council approval. (Blumberg to Norpel, State Senator, 3-5-76) #76-3-4

Honorable Richard J. Norpel, Sr., State Senator: We have received your opinion request of February 9, 1976. You ask the following questions:

"The Bellevue City Council went into closed session to discuss candidates for mayor because the previous mayor had resigned. Personalities were discussed but no decisions were arrived at. Was this action by the city council legal under Iowa law?

"If the city council appoints a new mayor, how long is his or her term? If I understand the Code correctly it is until the next regular election. Please clarify this point.

"If the mayor resigns, what powers does the mayor pro-temp have concerning the hiring or firing of city employees?

"Last of all, how soon does the city council have to appoint a mayor after the resignation of the mayor?"

Our anwers to your questions will not be in the same order as asked.

Section 372.13(2) of the Code, as amended by §150, Ch. 81, Acts of the 66th G.A. (1975) reads:

"A vacancy in an elective city office during a term of office may be filled by the council for the period of time until it is filled pursuant to section sixty-nine point twelve (69.12) of the Code."

Section 69.12 of the Code, as amended by §122, Chap. 81, Acts of the 66th G.A. (1975) provides in part:

"When a vacancy occurs in any elective office of a political subdivision of this state, and a method for electing a person to the vacant office for the remainder of the unexpired term is not otherwise provided by law, the vacancy shall be filled pursuant to this section. As used in this section, 'pending election' means any election at which there will be on the ballot either the office in which the vacancy exists, or any other office to be filled or any public question to be decided by the voters of the same political subdivision.

"1. If the unexpired term in which the vacancy occurs has more than seventy days to run after the date of the next pending election, the vacancy shall be filled as follows:

a. A vacancy occurring fifty or more days prior to the next pending election that is not a general election or sixty or more days prior to a general election shall be filled at that election. The fact that absentee ballots were distributed or voted before the vacancy occurred or was declared shall not invalidate the election.

b. A vacancy occurring less than fifty days prior to the next pending election that is not a general election or less than sixty days prior to a general election shall be filled by appointment as provided by law until the succeeding pending election."

This section is controlling. The council need not fill the vacancy by appointment. Whether or not it makes an appointment, an election must be held pursuant to §69.12.

We assume from your facts, that more than sixty days exist from this point in time until the next pending election be it general or otherwise. By next pending election, we mean the next election concerning a city matter. If more than seventy days remain in the term from the date of that election, the vacancy must be filled at that election. If less than seventy days from that election exist, the person elected there shall fill the unexpired term as well as the new term. Therefore, if the council appoints someone to fill the vacancy, that person will hold office until a successor is elected for the remainder of the term.

There is no time requirement for the council to fill a vacancy by appointment within §372.13. However, §69.12(1)(b) provides that if

less than fifty days exist prior to the next pending election, a successor *shall* be appointed until the following election. If the council does not make an appointment, the vacancy will exist until a successor is elected. In the case of a mayor, the mayor pro tem will assume the mayoral duties until such a successor is elected. The mayor pro tem is, however, restricted from appointing, employing or discharging officers or employees without council approval. See, §372.14(3) of the Code.

It appears that the council went into closed session to discuss candidates to be appointed to the vacated position. City council meetings are, by law, subject to the Open Meetings Law (Chap. 28A of the Code). Section 28A.3 provides that a meeting may be held in closed session upon a vote of two-thirds of the members, and when necessary to prevent needless harm to an individual's reputation whose employment or discharge is under consideration, or for some other exceptional reason so compelling as to override the general public policy. Not having before us any information as to what transpired in that closed session, we are unable to reach a decision on the legality of the meeting. We are not, however, condoning the closed meeting. We wish to emphasize that closed meetings are the exception, not the rule. They should be used sparingly, if at all, and only for exceptional and compelling reasons. We are not convinced that discussion of possible appointments to fill a vacancy automatically fall within §28A.3.

Accordingly, pursuant to your facts, we are of the opinion that the council need not make an appointment to fill the mayor's vacancy. An election should be held to fill it, and if the council has made an appointment it would only be until a successor is elected. The mayor pro tem fills in for the mayor during the mayor's absence, but is restricted in what he or she may do.

March 4, 1976

COUNTIES: Hospitals. Chapter 347, 347A, Code of Iowa, 1975. The board of supervisors may sell property not needed for a county hospital organized under Chapter 347 of the Iowa Code. Bids should be submitted as provided in §347.30 and if all bids are rejected the sale should be readvertised rather than permitting the raising of bids until only one bidder is left. (Nolan to Anderson, Howard County Attorney, 3-4-76) #76-3-5

Mr. Mark B. Anderson, Howard County Attorney: We have received your letter in the office of the Attorney General and this will answer the questions which you posed with respect to the authority of the board of supervisors to sell a portion of hospital property for use as a medical clinic or other health related purpose pursuant to §§347.28-347.30, Code of Iowa, 1975. Your letter states that the hospital and grounds are being purchased pursuant to the provisions of Chapter 347A and you wish to know the following:

"1. May the Board of Supervisors sell real property pursuant to Ch. Sec. 347.28, 347.29, and 347.30, when the hospital is organized pursuant to Chapter 347A."

The answer to this question is an affirmative one. Section 347.24, Code of Iowa, 1975, provides:

"Hospitals organized under chapter 37 or chapter 347A may be oper-

ated as provided for in this chapter in any way not clearly inconsistent with the specific provisions of their chapters."

Your second question is whether the board of supervisors may ask that the bids be submitted on a date and at a time certain which would be prior to the expiration of the six months after the second publication of the notice. The answer to this is also affirmative. Section 347.30 provides in pertinent part:

". . . Bids shall not be accepted prior to two weeks after the second publication nor later than six months after the second publication."

Your third question is whether when the bids are submitted pursuant to §347.30 and are deemed by the board of supervisors not to be adequate and therefore rejected, may the board of supervisors at that time allow all bidders to raise their bids, if they so desire, until there is only one bidder left.

It is the opinion of this office that when all bids are rejected, the sale should be re-advertised.

March 10, 1976

INSURANCE: Medical Malpractice Act, sections 2.5 and 3.3, Chapter 239, Acts, 66th G.A. "Specific type of licensed health care provider" as that term is used in sect. 3.3 of the Act means one of the type of "licensed health care providers" named in section 2.5 of the Act and does not mean a subclass of a section 2.5 "licensed health care provider". Where the decision of the Commissioner of Insurance as to whether an emergency existed relative to malpractice insurance was based within the statutory standards prescribed by the Act, we cannot say that the decision was improper. (Hager to Hansen, State Representative, 3-10-76) #76-3-6

The Honorable Willard R. Hansen, State Senator: Reference is made to your letter of February 11, 1976, in which you request an Attorney General's opinion relative to the decision of Feburary 6, 1976, by the Commissioner of Insurance concerning medical malpractice insurance. That decision grew out of the malpractice hearing held January 28, 1976, at the State Historical Building pursuant to the Medical Malpractice Act, Chapter 239, laws of the 66th G.A., 1975 Session, to determine whether such insurance was available to physicians and surgeons.

Specifically you first inquire as to whether the Commissioner's decision improperly construed the definition of "specific type of health care provider" (see section 3.3 of the Act) by limiting that definition to mean the kinds of "licensed health care providers" defined in section 2.5 of the Act such as physicians and surgeons and not to mean a subclass of such providers such as neurosurgeons.

Your second question is whether the Commissioner's decision that the facts presented at the January 28th hearing did not constitute an emergency as that term is used in the Act, is improper.

It is the opinion of this office that "specific type of licensed health care provider" as that term is used in section 3.3 of the Act means one of the kinds of "licensed health care providers" named in section 2.5 of the Act, such as physician and surgeon and does not mean a subclass of such a section 2.5 health care provider.

It is further our opinion that the Commissioner's finding — that under the facts presented at the hearing no emergency existed — is not improper.

Before stating the reasons for our conclusion a brief inspection of the here applicable sections of the Medical Malpractice Act is deemed appropriate.

The legislative purpose of the Act is set out in section 1:

"The purpose . . . of this Act (is) to assure that the *public* is protected against losses arising out of Medical Malpractice . . . (by establishing the Joint Underwriters Association) . . . upon a finding of an *emergency* by the commissioner of insurance (with an emergency defined by the fact that) either such insurance is not available through normal channels or that it is not available on a reasonable basis because of lack of competition . . .

It is the intent of this Act to provide only an interim solution to the impending unavailability of medical malpractice insurance."

Section 2 sets out definitions as used in the Act. Relevant here is section 2(5):

"Licensed health care provider" means and includes a physician and surgeon, osteopath, osteopathic physician and surgeon, dentist, podiatrist, optometrist, pharmacist (etc.) . . ."

Section 3 sets out the format of the Joint Underwriting Association. Relevant to your inquiry is section 3(3):

"The Association shall not commence underwriting operations for *health care providers* until the commissioner . . . has determined that (such) insurance is not available at a reasonable cost for a specific type of *licensed health care provider* in the voluntary market." . . .

With this definitional background we now consider your first inquiry as to whether the Commissioner's decision improperly construed "specific type of licensed health care provider", as that term is used in section 3.3 of the Act. Section 3.3 (set out above) provides in part that the Joint Underwriting Association will be activated upon the Commissioner's finding that malpractice insurance is not available for a "specific type of licensed health care provider" in the voluntary market.

The Commissioner's construction of that term in his decision is as follows:

"'Specific type of licensed health care provider' as that term is used in section 3.3 of the Act means one of the kinds of provider named in section 2.5 (of the Act — set out above), such as physician and surgeon, and does not mean a subdivision or specialty within such type of health care provider."

Your question is whether by adding in section 3.3 the words *specific type* to the already defined term *licensed health care provider*, the legislature intended that a showing of unavailability of malpractice insurance by a subclass or specialty within the classes of providers defined in section 2.5, as opposed to a showing by a class of providers, would justify activation of the Joint Underwriting Association. The language of the Act does not so provide. If the legislature intended a unique

definition for "specific type of licensed health care provider" separate and apart from or more detailed than those classes of providers defined in section 2.5 "licensed health care provider", they were apprised of how to proceed. The Act does not specifically define a "specific type of licensed health care provider" and as such the plain meaning of the term must prevail. It is the privilege of neither the Commissioner nor this office to assign a new meaning to plain language. It is therefore the opinion of this office, as was the decision of the Commissioner, that "specific type of licensed health care provider" means one of the class of providers defined in section 2.5 of the Act, such as physician and surgeon and does not mean a subclass, or specialty within the section 2.5 defined class, such as neurosurgeon.

With this definitional conclusion we now proceed to your second inquiry as to the propriety of the Commissioner's finding that no "emergency" existed. The facts presented in your letter as well as at the January 28th hearing may briefly be put as follows: A Waterloo-Cedar Falls area medical doctor and neurosurgeon, the sole practitioner with that specialty in that immediate area, was unable to obtain medical malpractice insurance in the voluntary market. Because malpractice insurers refuse to insure anesthesiologists if they practice with the doctor and refuse to insure hospitals that permit the doctor to practice, he is no longer able to practice medicine thus leaving the immediate area without the services of a neurosurgeon. Your question is whether under these facts the Commissioner's "no emergency" decision was proper.

The Commissioner's decision, after concluding that the doctor was unable to obtain such insurance, and that activating the Joint Underwriting Association could well result in the withdrawal from the market of insurers presently providing malpractice coverage found:

"No emergency presently exists whereby, because medical malpractice insurance is not available, the public is inadequately protected against losses arising out of medical malpractice."

In view of the right of appeal from such decision (Section 10 of the Act) and as Attorney General's opinions are statutorily limited to submitted *questions of law* our analysis here is whether the Commissioner's "no emergency" decision complies with the criteria imposed by the Act.

The underlying philosophy of the medical malpractice law is set out in the language of the Act itself, that is, to protect the *public* against malpractice losses. (Section 1 of the Act.) That philosophy is an appropriate element of consideration relative to the decision of whether an "emergency" exists. The decision did so consider the underlying philosophy of the Act. The Act further authorizes the finding of an "emergency" when it is determined that:

"Medical malpractice insurance is not available at a reasonable cost for a 'specific type of licensed health care provider' in the voluntary market." Section 3.3 of the Act.

Implicit in our decision above as to the meaning of a "specific type of licensed health care provider" we have here a single member of the class of physicians and surgeons who is unable to obtain such insurance. No other physician and surgeon alleged unavailability of medical malpractice

insurance. The Commissioner could then properly conclude that though insurance was unavailable to one physician and surgeon, such insurance was available for the class of physicians and surgeons generally. The Commissioner further concluded that activating the Association under the facts could well result in the withdrawal of present malpractice insurers, thereby creating a threat to the public relative to protection from malpractice losses, the very evil the Act was intended to eliminate.

Under the facts, it is the opinion of this office that the Commissioner's decision was within the statutory standards prescribed by the Act and that it was not therefore improper for the Commissioner to conclude that "no emergency" existed.

March 11, 1976

CONSTITUTIONAL LAW: Criminal Penalties; Restoration of Elector's Rights; Pardons; Definition of Crimes. §§301, 304, 305, 613, Chapter 3, Senate File 85; Article II, Section 5; Article III, Section 1; Article IV, Section 16, Constitution of the State of Iowa. The definition of "aggravated misdemeanors" and "simple misdemeanors" contained within Senate File 85 makes these crimes, "infamous crimes" under the Iowa Constitution. The legislature may not by statute restore elector rights to individuals who have been convicted of "infamous crimes." (Coleman to Spear, State Representative, 3-11-76) #76-3-7

The Honorable Clay Spear, State Representative: You have requested an Opinion of the Attorney General with regard to the following questions:

"Section 613, page 228, of Senate File 85 provides that discharge from parole shall have the effect of restoring the right to vote and hold public office. My question is whether the 'privilege of an elector' can be restored by statute to a convicted felon. Section 5, Article II, and Section 16, Article IV, of the Constitution indicate that only the governor can restore the right to vote.

"SF 85 provides for a sentence of up to two years for an aggrevated misdemeanor (page 220A). If passed in this form, could an aggravated misdemeanor be considered an infamous crime within the meaning of Section 5, Article II?"

It will be more benefical to the continuity of this Opinion to answer your second question first.

Article II, Section 5, of the Constitution of the State of Iowa provides:

"No . . . person convicted of any infamous crime, shall be entitled to the privilege of an elector."

The Iowa Supreme Court has declared that the words "infamous crime" contained in this section of the Constitution mean "[A]ny crime punishable by imprisonment in the penitentiary . . . ." *State ex rel. Dean v. Haubrich*, 1957, 248 Iowa 978, 83 N.W.2d 451, 452; *Blodgett v. Clarke*, 1916, 177 Iowa 575, 159 N.W. 243, 244; *Flannagan v. Jepson*, 1916, 177 Iowa 393, 158 N.W. 641, 642. This definition is one that has been rooted in the law in England and the United States for at least two centuries.

Having determined exactly what an "infamous crime" is, you ask whether or not an "aggravated misdemeanor" under Senate File 85

(Proposed Criminal Code Revision) could be so included or categorized. Section 301, Division III, Chapter 3, Senate File 85 (page 220A) states in regard to sentences for misdemeanors:

"When a person is convicted of a misdemeanor and a specific penalty is not provided for, the court shall determine the sentence, and shall fix the period of confinement or the amount of fine, if such be the sentence, within the following limits:

"1. For an aggravated misdemeanor, imprisonment not to exceed two years, or a fine not to exceed five thousand dollars or both."

If Section 301 stood alone, an "aggravated misdemeanor" would not be an "infamous crime" within the meaning of the Iowa Constitution or Iowa case law on the subject. This is because the place of confinement is not stated in this section. See: *State v. DiPaglia*, 1955, 247 Iowa 49, 71 N.W.2d 601, 606, 607.

You will note, however, that Section 301 *does not stand alone*, but must be read in conjunction with Sections 304 and 305, which provide:

Section 304

"All persons sentenced to confinement for a period of ninety days or less shall be confined in a place to be furnished by the county where conviction was had. *All persons sentenced to confinement for a period of more than ninety days shall be committed to the custody of the director of the division of adult corrections to be confined in a place to be designated by the director and the cost of such confinement shall be borne by the state.* The director may contract with local goverpmental units for the use of detention or correctional facilities maintained by such units for the confinement of such persons. (Emphasis added)

Section 305

"In designating places of confinement of misdemeanants, the department shall make optimum use of local facilities offering correctional programs, where such are available. Where a choice of facilities is offered, a choice of the facility nearest the prisoner's home shall be preferred, if such choice is compatible with the rehabilitation of the prisoner."

The italicized portion of Section 304, set out above, directs that when an individual is sentenced to confinement for a period greater than ninety days that he shall be committed to the custody of the division of adult corrections, to be confined at a place designated by the director. This could certainly mean incarceration in the penitentiary — even though Section 305 directs that optimum use be made of local facilities.

Under the present Code, crimes "which are, or in the discretion of the court may be, punishable by imprisonment in the state penitentiary or reformatory" are felonies. See: *State v. Gabrielson*, Iowa 1971, 192 N.W.2d 792, 794. They are also, because of this, "infamous crimes" within the meaning of the Constitution as previously discussed. It would now appear that the legislature is seeking to change this established guideline in the law, as they may do. Certainly the legislature has always been its own lexicographer and further, "[A]ll crimes in this state are statutory and the legislature may define an offense by a particular description of the act or acts constituting it." See: *State v. Wallace*, Iowa, 1966, 145 N.W.2d 615, 620. Therefore, under Section 301.1, the legislative direction, one convicted of an "aggravated misde-

meanor" (and also a "serious misdemeanor") while being classified as a misdemeanant (§305, line 12) may be punished by being committed to the penitentiary, and therefore it is our opinion that by legislative determination, the crimes of "aggravated" and "serious" misdemeanors would be includable within the classification of "infamous crimes."

Your first question concerns itself with Section 613 of Senate File 85 which reads:

"Unless sooner discharged, a person released on parole shall be discharged when his term of parole equals the period of imprisonment specified in this sentence, less all time served in confinement. Discharged from parole may be granted prior to such time, when an early discharge is appropriate. The board shall periodically review all paroles, and when it shall determine that any person on parole is able and willing to fulfill the obligations of a law-abiding citizen without further supervision, it shall discharge him from parole. *In either event, discharge from parole shall terminate his sentence, and shall have the effect of restoring the right to vote and hold public office, and the certification of discharge shall so state.*" (Emphasis added)

You ask whether or not the legislature has the authority to restore the rights of an elector to a person who has been incarcerated in the penitentiary. In light of this, it may be said that the legislature cannot by statute reinstate the rights of an elector convicted of an "infamous crime," and as Section 613, Senate File 85 attempts to do this, it flies in the face of the constitutional directive of Article II, Section 5, as a contradiction of the constitutional qualification of electors.

As addressed previously, Article II, Section 5 of the Constitution of the State of Iowa provides that no person convicted of an "infamous crime" can exercise the privilege of an elector. This is a constitutional requirement and cannot be contradicted by the legislature. As the Iowa Supreme Court stated in *Coggeshall v. City of Des Moines*, 1908 Iowa , 117 N.W. 309, 311:

"Ours is a representative government, wherein only a limited number express the will of all the people, and the Constitution having declared, by prescribing definite qualifications, the persons who shall represent the interests of all at the polls, it is not competent for the legislature to add to or subtract from the qualifications as determined by the fundamental law at any election therein contemplated. *Wherein the Constitution has prescribed the qualifications of electors, they cannot be changed or added to by the legislature or otherwise than by an amendment to the Constitution.* (Emphasis added)

Moreover, it is our opinion that Section 613, supra, is additionally disallowed because of the legislative usurpation of an executive prerogative, to wit, the power to pardon. Article III, Section 1 of the Constitution of the State of Iowa makes certain what the intended distribution of powers of the three branches of government is to be:

"The powers of the government of Iowa shall be divided into three separate departments . . . and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted."

Article IV, Section 16, of the Constitution of the State of Iowa provides:

"The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment . . . ."

The constitutional delineation previously mentioned is perhaps best applied in the case of *Slater v. Olson*, 1941, 230 Iowa 1005, 299 N.W. 879, 880, 881, wherein the Supreme Court discussed pardons and the pardoning power:

"*We do hold however, that a full pardon* granted after conviction contemplates, as stated in State v. Forkner, 94 Iowa 1, 62 NW 772, 777, 28 L.R.A. 206, supra, a remission of guilt 'both before and after a conviction,' forgives the offender and relieves him from the results of the offense, relieves not only from the punishment which the law inflicts for the crime but also *exempts him from additional penalties and legal consequences in the form of disqualifications or disabilities based on his conviction.* Undoubtedly the legislature may prescribe qualifications for office but the power must be exercised subject to the right of the pardoned man to be exempt from additional disabilities or disqualifications imposed because of the conviction. *When, through the power of the pardon, the doors of the penitentiary opened to plaintiff, he took his place in society with all his civil rights restored* entitled to start life anew unburdened of the onus of his conviction.

"*The Constitution vests the pardoning power exclusively in the governor, and, because of the division of the powers of government by section 1, Article III of the Constitution, neither the judiciary nor the legislature may interfere with or encroach upon this constitutional power lodged in the chief executive of the state.*" (Emphasis added) See also: *State ex rel. Preston v. Hamilton*, 1928, 206 Iowa 414, 220 N.W. 313.

In summary, therefore, it is our opinion that Section 613 of Division III of Chapter 3, Senate File 85 (p. 228) is first unconstitutional because it contravenes the elector requirements established in the Constitution without additional requisite Constitutional authority to so do, and secondly, is an unconstitutional infringement on the powers of the governor because it restores rights which may only be reinstated by the chief executive.

March 12, 1976

STATE OFFICERS AND DEPARTMENTS: Employer. §307.12(2), Code of Iowa, 1975. One is an employee of the office or department which hires him or her. An individual also falls into the broader category of state employee in determining rights, duties and benefits available to such employees. In the absence of conflict with state and federal statutes, each agency may devise an overtime policy for its employees. (Schroeder to Tieden, State Senator, 3-12-76) #76-3-8

The Honorable Dale L. Tieden, State Senator: This is in response to your recent letter in which you posed the following questions:

a. Are all employees, such as employees of the state Highway Commission, employees of the state or employees of the state Highway Commission?

b. If they are all employees of the State of Iowa, must all employees be under the same rules on overtime?

c. Are the enclosed rules on overtime for the Highway Commission legal?

Employment of persons necessary to carry out the duties of the Iowa Department of Transportation (including its Highway Division, formerly Iowa State Highway Commission) is provided for by section 307.12 of the 1975 Code of Iowa, to-wit:

"307.12 Duties of the Director. The director shall:

* * *

"2. Employ such personnel as are necessary to carry out the duties and responsibilities of the department, consistent with the provisions of Chapter 19A and subject to the policies of the commission."

Clearly employment is by the Department, qualified only by Chapter 19A (Merit System) and the policies established by the Transportation Commission.

An employee of the DOT is an employee of the State in the sense that certain benefits, protections and obligations described in our statutes are applicable to this category of employee.

There are no statutes, rules or policies in effect at this time which purport to control determination of overtime for employees of the State (as a single group). In view of the wide variety of duties being discharged by the many branches of State government, wisdom would dictate a certain latitude to each department in adopting policies, enabling it to make most efficient use of its work force, and to accomplish its tasks, within the restraints of its budget.

I have also reviewed overtime policy provisions enclosed with your letter. Said policy has been developed by the maintenance office of the Highway Division of DOT. I find nothing in that statement that is in conflict with either state or federal statutes.

Answers to your questions are:

a. All employees of state offices, and departments may be identified as employees of the state, it is all inclusive of a class of public employees. But one must look to the employing department to determine terms and conditions of employment, subject only to statutory limitations.

b. Employees of the state are not now subject to statutes, rules or policies which purport to contorl determination of overtime for them, as a single group, therefore it falls to the employing department or office to devise such rules.

c. Highway Division (DOT) rules on overtime, submitted with your letter are legal.

March 12, 1976

STATE OFFICERS AND DEPARTMENTS: Law Enforcement Academy, Rules, Chapter 610A, Code of Iowa, 1975. Maximum age and minimum height requirements for males for qualifications for employment as a law enforcement officer are invalid. Possession of an Iowa drivers license is a valid requirement. Background investigations and educational requirements are valid only if they are job related and do not operate to exclude any class of persons from employment and written standards are developed for the implementation of the requirements. Law Enforcement Academy, Iowa Departmental Rules 1.1(2), 1.1(3), 1.1(6), 1.2(1), 1.2(2). (Mann to Cusack, State Representative, 3-12-76) #76-3-9

The Honorable Gregory D. Cusack, State Representative: This is to respond to your letter of June 26, 1975, in which you requested an opinion on whether the Davenport Civil Service Commission must follow the rules

pr mulgated by the Iowa Law Enforcement Academy in certifying applicants to be eligible for law enforcement academies. Sjecifically, you inquired about the following standards:

"1.1(2) Has reached his or her twenty-first birthday and has not reached his or her sixtieth birthday at the time of his or her appointment.

"1.1(3) Has a current active drivers license issued by the State of Iowa. * * *

"1.1(6) Is of good moral character as determined by a thorough background investigation including a fingerprint search conducted of local, state and national fingerprint files and has not been convicted of a felony or a crime involving moral turpitude. * * *

"1.2(1) Is a high school graduate with a diploma, or possesses an equivalency certificate which meets the minimum score required by the State of Iowa as determined by the state department of public instruction.

"1.2(2) If a male, is at least 5′ 7″ in height without shoes."

On May 18, 1973, this office issued an opinion (1973 OAG 132) which addressed itself to standard 1.1(2) above. That opinion concluded that the minimum age of twenty-one stated in the standard contravened the intent of the legislature, and that qualified individuals who have reached eighteen years are eligible for the position of a law enforcement officer. In conformity with that opinion standard 1.1(2) has been amended to lower the minimum age to eighteen.

On May 2, 1973, this office issued an opinion (1973 OAG 116) in which maximum age limits for employment was discussed. That opinion concluded that a maximum age limit for employment is permissible only if the nature of the particular position sought by the applicant required an age limitation. Since there will be some positions with law enforcement agencies that will not require an age qualification and are essentially civilian in nature, any rule that automatically screens-out and prohibits older persons from seeking positions that by their nature cannot justify an age qualification contravenes §610A.7(1), 1975 Code of Iowa. This office concludes, therefore, that to the extent that standard 1.1(2) is sought to be applied to such positions it contravenes the intent of the legislature.

You ask about standard 1.1(3) which requires the applicant to possess a current Iowa drivers license. This standard is not prohibited by the United States or Iowa Constitution. However, such a standard would be unlawful if it had no rational relationship to job performance, and operated to preclude a class of individuals from employment. *Thompson v. Gallagher*, 489 F 2d 443 (5th Cir. 1974). The question then is whether the requirement of an Iowa drivers license operates to exclude any class of persons, and whether the requirement is rationally related to job performance. This is, of course, a factual question and must be determined by the facts pertinent to a particular case. You have related no facts which indicate that this requirement would impose a burden on any class. However, the standard appears to have a rational relationship to the job performance of a police officer on its face. Possession of a drivers license by all officers may be necessary to the safe and efficient use of a police force. All jobs which require the employee to

drive a state motor vehicle may reasonably require a state drivers license. Therefore, it has a rational relationship to job performance and falls within the "business necessity" rule articulated by the courts. *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Officers for Justice v. Civil Service Commission of the City and County of San Francisco*, 371 F.Supp. 1328 (D.C. N.D. Calif., 1973). Therefore, I advise that standard 1.1(3) be followed absent the production of facts that establishes that it operates to exclude a class of persons from employment and is not rationally related to job performance.

You ask about standard 1.1(6) which requires an investigation into the background of an applicant to determine if he is of good moral character and has not been convicted of a felony or a crime involving moral turpitude. However, 1.1(6) does not provide guidelines or regulations for disqualifying an applicant on the basis of these investigations. Decisions on what constitute good moral character or what constitutes a crime of moral turpitude can presently be made on a case-by-case basis, and results may vary according to the whim or caprice of the decision maker. There are no rules with respect to what weight will be given to factors such as arrests records, previous occupation, community reputation, or credit ratings. The investigations and information obtained are therefore subject to arbitrary or discriminatory applications. By using a standard that allows arbitrary or discriminatory practices the civil right of the applicants are violated. *Arnold v. Ballard*, 390 F. Supp. 723 (D.C. N.D. Ohio, 1975); *Bridgeport Guard, Inc. v. Members of the Bridgeport Civil Service Commission*, 354 F. Supp. 778 (D.C. D. Conn. 1973); *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (D.C. C.D. Calif. 1970). I therefore advise that written criteria be developed for the performance and evaluation of background investigations. The criteria should set forth the areas of a person's background that will be evaluated, which factors will be automatically disqualifying, and which factors will be considered detrimental.

You ask about standard 1.2(1) which requires the applicant to possess a high school diploma or a graduate equivalency certificate which meets the minimum score set by the State Department of Public Instruction. Educational standards may be used in selecting persons for employment opportunities only if they fairly measure the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly afford the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. *Armstead v. Starkville Municipal Separate School District*, 325 F. Supp. 560 (D.C. N.D. Miss. 1971). In addition to the job-relatedness requirement such standards, although ostensibly neutrally applied, must not place an unreasonable and discriminatory burden upon minority groups in its operation. *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Wilson-Sinclair Company v. Griggs*, 211 N.W.2d 133 (Iowa 1973); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972). Thus if the effect of the standard is to disqualify substantially more minority applicants than white applicants its effect will be discriminatory. This will be particularly burdensome where a prospective employer has a history of employment practices that have discriminated against minority applicants.

Educational standards which have not been tested or validated in

terms of their relation to job performance should not be relied upon. In *Duke Power Co.* ,supra, the Supreme Court stated the following:

"On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance on the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability . . . ."

See also *Officers for Justice v. Civil Service Commission of the City and County of San Francisco*, 371 F. Supp. 1328 (D.C. N.D. Calif. 1973); *Harper v. Mayor and City Council of Baltimore*, 359 F. Supp. 1187 (D.C. Md. 1973). I therefore advise that studies be made to show 1.2(1)'s relation to job performance and its non-discriminatory effect upon minorities.

You ask about standard 1.2(2) which requires that an applicant, if a male, be at least 5′ 7″ in height without shoes. On September 11, 1974, this office issued an opinion (1974 OAG 664) which discussed height and weight requirements as job standards. That opinion concluded that height and weight requirements are not *a priori*, unconstitutional. It reasoned that "business necessity" might uphold such requirements even though they denied employment to a class of persons. However, standard 1.2(2) facially discriminates against male applicants. It requires that a male applicant be at least 5′ 7″ and does not impose any height requirement on females. This of course is an unequal application of a height requirement based on sex, and is therefore in violation of §610A.7(1)(a), 1975 Code of Iowa.

It should be noted, however, that standard 1.2(2) is presently in the process of being abandoned. I have been advised by the Assistant Director of the Law Enforcement Academy that the procedures outlined in §17A of the 1975 Code of Iowa are being followed in totally eliminating the height requirement as a job standard.

In discussing the above standards, I have concluded that some of them appear to contravene the intent of the legislature. However, that is not totally controlling on the question of whether they should be followed or not. Those standards were promulgated by the Law Enforcement Academy pursuant to a mandate from the legislature. Section 80B.11, 1975 Code of Iowa, authorizes the director of the academy, subject to the approval of the academy council, to promulgate rules governing law enforcement academies relative to minimum entrance requirements, minimum qualifications for instructors, course study, attendance requirements, and equipment and facilities required at approved law enforcement training schools. Since the academy council is authorized by the legislature to promulgate the governing standards, it should have the opportunity to revise, amend, or repeal the same.

The legislature has provided an avenue for the adoption, amendment, or repeal of rules governing state agencies in §17A.4(1), 1975 Code of Iowa. I conclude that the legislature intended that the agency charged with primary responsibility for the promulgation of rules have an opportunity to make necessary changes in the same. Therefore the above standards should be followed until the Law Enforcement Academy has followed the statutory procedures for changing rules that have demonstrable objections.

March 12, 1976

CONSTITUTIONALITY OF CIVIL SERVICE EXAMINATIONS: Section 400.11. Section 400.11 is not unconstitutional. The requirement that in order to be considered for a civil service position, an applicant must receive a grade that places him or her among the highest ten applicants does not discriminate unfairly. Furthermore, posting of examination results is not an unwarranted invasion of an applicants right to privacy. Conlin to Hansen, State Senator, 3-12-76) #76-3-10

Honorable Willard Hansen, State Senator: You have requested an opinion of the Attorney General regarding whether or not Section 365.11, Code of Iowa, 1975, is unconstitutional in either of the following particulars:

1. Is the section discriminatory because an applicant for promotion is ineligible, even if the applicant passes the promotional examination unless he or she is among the ten individuals who have the highest scores, and the determination of eligibility is not based on seniority.

2. Does posting of the results of the merit examination constitute an undue invasion of privacy.

The code section has been renumbered and now appears at Section 400.11. It provides in pertinent part as follows:

"The commission shall, within ninety days after the beginning of each competitive examination for original appointment or for promotion, certify to the city council a list of the names of the ten persons who qualify with the highest standing as a result of each examination for the position they seek to fill, or such number as may have qualified if less than ten, in the order of their standing, and all newly created offices or other vacancies in positions under civil service which shall occur before the beginning of the next examination for such positions shall be filled from said lists, or from the preferred list existing as provided for in case of diminution of employees, within thirty days. Preference for temporary service in civil service positions shall be given those on such lists.

In cities of fifty thousand or more population, the commission shall hold in reserve a second list of the ten persons next highest in standing, in order of their grade, or such number as may qualify and, thereafter, if the list of ten persons provided in the first paragraph hereof he exhausted within one year, may certify such second list of persons to the council as eligible for appointment to fill such vacancies as may exist."

Where a test given by a government institution is competitive, judicial interference is not undertaken unless there is a showing of arbitrary, fraudulent, or capricious conduct, or a clear abuse of discretion. *Pratt v. Rosenthal,* 181 Cal. 158, 183 P. 542 (1919); *Nelson v. Dean,* 27 Cal.2d 873, 168 P.2d 16 (1946). In this case, the fact that one passes the examination is not sufficient grounds for promotional consideration. Merit and fitness as determined by the highest score are the basis for consideration and such determination is objective and based on a numerical scale.

However, once the names of those eligible because of the grade is established, the appointing officer may exercise his discretion in choosing the candidate "best" suited taking into consideration those factors which would make the individual the best qualified. One of those factors may be seniority. The court in *Wilson v. Los Angeles County Civil Service Commission,* 103 Cal. App.2d 426, 229 P.2d 406 (1951), held that the evaluation of efficiency and seniority as part of an examination

conducted by the Civil Service Commission for promotion was within the discretion of the Commission. The consideration of seniority as a factor for evaluation was also supported in *Almassy v. Los Angeles County Civil Service Commission*, 34 Cal.2d 387, 210 P.2d 503 (1949).

Therefore it is not an abuse of discretion and not discriminatory for an appointing officer to give seniority whatever weight it merits so long as the criteria is to select the best qualified from an equally qualified group.

With regard to the question of whether posting of civil service examination grades is an unconstitutional invasion of privacy, an analogy from similar situations is necessary, since this specific issue has not been litigated. However, it clearly appears from a review of case law that it is not an unconstitutional invasion of privacy to post examination results.

The right of privacy has been defined as the right to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808, 62 Am.Jur.2d 677, (1953).

Iowa recognizes the right to privacy. *Yoder v. Smith*, 253 Iowa 505, 112 N.W.2d 862 (1962). In *Varnish v. Best Medium Publishing Co.*, (CA2 N.Y.) 405 F.2d 608 (1968) the court held that the right of privacy does not prohibit the publication of matter which is of legitimate public or general interest. In this instance the individual was seeking public employment for which a qualifying examination is required. It would appear quite clearly that the public has an interest in the relative scores of those individuals who seek a civil service position. The individual's right of privacy must in some instances yield to certain paramount rights of the public to know certain information. *Seller v. Henry*, 329 S.W.2d 214 (1959). Public interest in information such as test qualification scores of potential civil servants becomes dominant over the individual's desire for privacy. *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 311 U.S. 711, (1940); *Barker v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942). For example, there is no unwarranted invasion of the right of privacy by reporting the issuance of a marriage license or the official recording of a marriage or passage of a state bar examination. Public interest includes not only subjects which are news, but any informational material of legitimate public interest. *Buzinski v. Do-All Co.*, 31 Ill. App.2d 191, 175 N.E.2d 577 (1961).

The right of privacy, like other rights that rest in an individual, may be waived by the individual either expressly or by implication. *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953); *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949). With the taking of the examination, the individual has at least impliedly waived his right of privacy. Further, since this is a public employment position the general public has a need to know the relative qualifications of those who may be eligible for a position.

In conclusion, Section 400.11, Code of Iowa, 1975, is not unconstitutional. The requirement that in order to be considered for a civil service position, an applicant must receive a grade that places him or her among the highest ten applicants does not discriminate unfairly. Furthermore, posting of examination results is not an unwarranted invasion of an applicants right to privacy.

March 12, 1976

PUBLIC RECORDS: LIEN FOR INSTITUTIONAL CARE: §24(1) Ch. 139 Acts 66 G.A., 1st Session. §§230.25, 230.26, 68A.2, Code of Iowa, 1975. Records in the County Auditor's Office relating to the cost of care and treatment for an individual hospitalized are open and subject to public inspection. (Robinson to Kopecky, Linn County Attorney, 3-12-76) #76-3-11

Mr. Eugene J. Kopecky, Linn County Attorney: You recently asked for an Opinion of the Attorney General on a question presented by the Linn County Auditor's Office, to-wit:

"Are the records in the Auditor's Office relating to the cost and of the care and treatment for an individual hospitalized under Senate File 499 subject to public inspection, or must the Auditor keep the names and amounts owing confidential?"

Senate File 499 is now Ch. 139 Acts of the 66th G.A., 1st Session. By way of explanation, this legislation is a major revision of Iowa's laws governing the hospitalization of persons for treatment of mental illness, and, in particular, the involuntary commitment for hospitalization. The old County Commission is abolished. The responsibility for deciding whether a person should be hospitalized against his wishes is now with the district court.

You quoted Section 24(1) of Ch. 139 Acts of the 66th G.A., 1st Session which provides:

"1. All papers and records pertaining to any involuntary hospitalization or application for involuntary hospitalization of any person under this Act, whether part of the permanent record of the court or of a file in the department of social services, are subject to inspection only upon an order of the court for good cause shown. Nothing in this section shall prohibit a hospital from complying with the requirements of this Act and of chapter two hundred thirty (230) of the Code relative to financial responsibility for the cost of care and treatment provided a patient in that hospital, nor from properly billing any responsible relative or third-party payer for such care and treatment."

Whereas the procedures regarding commitment of a person have undergone a major change, the financial responsibility for the cost of care has not changed. Section 230.25, Code of Iowa 1975 provides for a lien for any assistance and Section 230.26 provides that the County Auditor shall keep an accurate account of the cost of the maintenance of any patient and the indexing of the account shall constitute notice of the lien.

It is our opinion, therefore, that a straight forward interpretation of the last sentence of Section 24(1) Ch. 139 (quoted above) together with §§230.25, 230.26, requires that such records in the County Auditor's Office relating to the cost of care and treatment for an individual hospitalized are open and subject to public inspection.

This opinion, of course, has no bearing on medical records of the patient which §25 of Ch. 139 provides shall be confidential with certain exceptions. We believe this opinion is consistent with §68A.2 of the Code of Iowa which provides that every citizen of Iowa shall have the right to examine *all* public records as there are "other provisions of the Code", which we state specifically above, that expressly limit the right of examination.

March 12, 1976

STATE OFFICERS AND DEPARTMENTS: Facilities for the Handicapped. §§104A.1 and 104A.2, Code of Iowa, 1975. The term "general public", as used in Chapter 104A, means the public as a whole, and is not limited to a particular group. Apartments fall within the purview of that Chapter. (Blumberg to Westergard, Executive Secretary, Governor's Committee on Employment of the Handicapped, 3-12-76) #76-3-12

Donald W. Westergard, Executive Secretary, Governor's Committee on Employment of the Handicapped: We have received your opinion request of February 19, 1976, regarding Chapter 104A, 1975 Code. You stated in your request:

"Problems of interpretation revolve around the definition of what is meant by 'general public' and the phrase 'intended for use by the general public' as it is used in Chapter 104A. The difficulty is especially crucial when applying Chapter 104A to the section which deals with new construction of apartment buildings. Some people have devised various methods for bypassing this section. For example, it has been suggested that apartments are not *open* to the 'general public'. Our position has been that in new construction, a person *will* be renting to the 'general public'.

"What is needed, is your guidance of what is exactly meant by 'general public' as it is used in Chapter 104A so that consistent and effective enforcement of Chapter 104A will be the rule throughout the state."

Section 104A.1 provides:

"It is the intent of this chapter that standards and specifications are followed in the construction of public and private buildings and facilities which are intended for *use by the general public* to ensure that these buildings and facilities are accessible to and functional for the physically handicapped." [Emphasis added]

Section 104A.2 provides:

"The standards and specifications set forth in this chapter shall apply to all public and private buildings and facilities, temporary and permanent, *used by the general public.* The specific occupancies and extent of accessibility shall be in accordance with the conforming standards set forth in section 104A.6. Notwithstanding the standards set forth in section 104A.6, in every multiple-dwelling-unit building containing five or more individual dwelling units the requirements of this chapter which apply to apartments shall be met by at least one dwelling unit or by at least ten percent of the dwelling units, whichever is the greater number, on the ground floor level and on each of the other floor levels in the building which are accessible to the physically handicapped." [Emphasis added]

There is no definition of "general public" within that chapter. Nor, have we found a definition of that term in any Iowa case.

In *Petition of Krebs*, 1942, 213 Minn. 344, 6 N.W.2d 803, the petitioner sought to have a street vacated because the property owners had other access to a nearby lake. The Court, in rejecting the request, stated (6 N.W.2d at 805):

"Moreover, we must not forget that the public includes persons other than those in the immediate vicinity. The general public has a true concern in the recreational facilities offered by the lakes . . . Their generous sharing by all will make for a wealthier and happier people. The many not fortunate enough to be able to acquire the advantage of ownership of lake shore properties should not be deprived of these benefits."

The Court equated "general public" with any who could, did or might want to use the lake. No restriction was placed on that term.

Other cases and authorities merely define "public". In 73 C.J.S. *Public* 275 (1951) we find:

"*As a noun.* It has been said that the public exists in thought as an unexclusive group of persons, natural and artificial, and includes all who are subject to the state's jurisdiction. The word 'public' is inclusive of all the people and inhabitants, and is not exclusive or limited to a part or portion of the people, and in its enlarged sense takes in the entire community, the whole body politic. In its broadest meaning, the term 'public' distinguishes the populace at large from groups of individual members of the public segregated because of some common interest or characteristic, yet it has been said that such a distinction is inadequate for practical purposes.

"The word 'public' is defined as meaning the whole body politic, or all the citizens of the state; everybody; the people; the body of the people at large; the community at large, without reference to the geographical limits of any corporation like a city, town, or country."

This was cited to with approval in *People v. Powell*, 1937, 280 Mich. 699, 274 N.W. 372, where it was also stated (274 N.W. at 374-375), citing to *Cowker v. Meyer*, 147 Wis. 320, 133 N.W. 157, 158:

"It is very difficult, if not impossible, to frame a definition for the word 'public' that is simpler or clearer than the word itself. The Century Dictionary defines it as: 'Of or belonging to the people at large; relating to or affecting the whole people of a state, nation or community; not limited or restricted to any particular class of the community.' The New International defines it as: 'Of or pertaining to the people; relating to or affecting a nation, state or community at large.' *The tenants of a landlord are not the public, neither are a few of his neighbors, or a few isolated individuals with whom he may choose to deal, though they are a part of the public.* The word 'public' must be construed to mean more than a limited class defined by the relation of landlord and tenant, or by nearness of location, as neighbors, or more than a few who, by reason of any peculiar relation ot the owner of the plant, can be served by him." [Emphasis added]

In *Gottlieb v. Schaffer*, 141 F.Supp. 7 (S.D.N.Y. 1956), regarding a fraud statute, the court defined "public" to include not only the wise, but also "that vast multitude * * * the ignorant, the unthinking and the credulous." In other words, everyone. See also, *Charles of the Ritz Distributors Corp. v. Federal Trade Comm'n*, 143 F.2d 676. In *City of Lakewood v. Thormyer*, 154 N.E.2d 777 (Ohio 1958), the court, citing to Webster's New International Dictionary defined "public" as the general body of mankind, or of a nation, state or community; the people indefi-

nitely. See also, *Merrill v. Maine Public Utilities Comm'n*, 1958, 154 Me. 38, 141 A.2d 434, 435.

The word "general" has been defined in 38 C.J.S. *General* 762-763 (1951) as follows:

In General

"A relative term, the meaning of which must be determined by a process of inclusion and exclusion. It comes from the Latin 'genus,' and relates to the whole kind, class, or order.

As a Noun

"The total or whole; that which comprehends or relates to all or the chief part; the public; the interest of the whole.

. . .

As an Adjective

"The word is said to import unity rather than division and distribution, and has been variously defined as meaning belonging to a whole rather than to a part; common to the whole or having a relation to all; comprehending, or directed to, the whole, as distinguished from anything applying to, or designed for, a portion only; obtaining commonly, or recognized universally, as opposed to particular; of or pertaining to the whole; pertaining to a whole class or order; that which comprehends all, the whole; universal, not particularized, as opposed to special; universal or unbounded, as opposed to limited; whole; also common to many, or to the greatest number; extensive, although not universal; prevalent; relating to a genus or kind; that which pertains to a majority of the individuals which compose a genus or whole; true of a large number or proportion; widely spread. In somewhat different senses, not local, not particular, or particularized; principal or contral, as opposed to local; also indefinite, lax in signification, not restrained or limited to a precise or detailed import, not specific, vague; and, in still another sense, open or available to all, as opposed to select; vulgar.

" 'General' has been held equivalent to 'extensive' see 35 C.J.S. p. 291 note 79, and sometimes the word is used as synonymous with 'public,' meaning merely that which concerns a multitude of persons. It has been compared with, distinguished from, or said to be opposed to, 'common' see 15 C.J.S. p. 590 note 51, 'limited,' 'local,' 'majority,' 'particular,' 'public,' 'separate,' 'special,' 'specific,' and 'universal'."

Blacks Law Dictionary 812 (4th Ed. 1951) defines "general" as:

"From Latin word genus. It relates to the whole kind, class, or order. Leuthold v. Brandjord, 100 Mont. 96, 47 P.2d 41, 45. Pertaining to or designating the genus or class, as distinguished from that which characterizes the species or individual; universal, not particularized, as opposed to special; principal or central, as opposed to local; open or available to all, as opposed to select; obtaining commonly, or recognized universally, as opposed to particular; universal or unbounded, as opposed to limited; comprehending the whole or directed to the whole, as distinguished from anything applying to or designed for a portion only. Board of Sup'rs of Attala County v. Illinois Cent. R. Co., 186 Miss. 294, 190 So. 241. Extensive or common to many. Record v. Ellis, 97 Kan. 754, 156 P. 712, 713, L.R.A. 1916E, 654, Ann. Cas. 1917C, 822; McNeill v. McNeill, 166 Iowa, 680, 148 N.W. 643, 651."

Webster's New World Dictionary 602 (1958) defines "general" in part as "from the whole or all; not particular; not local . . . ."

From the above definitions it is obvious that the term "general public" as used in Chapter 104A refers to a vast number of persons. There can

be no doubt that a department store which opens up its doors to anyone who wishes to enter falls within "public and private buildings and facilities intended for use by the general public". Similarly, an apartment building or complex that makes its facilities (units) available to those desiring to rent falls within that phrase. The argument that those facilities are intended for use only by a select group (e.g. the tenants) and not by the general public is illogical and unpersuasive. As stated above in *People v. Powell*, tenants are a *part* of the public. These facilities are available to guests of the tenants, some of whom may be handicapped, and to the body of persons at large when a vacancy occurs, some of whom may also be handicapped. The purpose of this Chapter is to have facilities that will not bar the handicapped. To state that apartments, which do cater to the public at large, are not within this Chapter would defeat a large portion of that purpose. In addition, apartments are specifically mentioned in §104A.2.

Accordingly, we are of the opinion that the term "general public" means the public as a whole and is not limited to a particular group. Apartments fall within the purview of Chapter 104A.

March 12, 1976

COUNTIES: County Care Facility. Chapter 253, Code of Iowa, 1975. An expenditure of public funds to cover cost of printing a pamphlet authorized by the Board of Supervisors to inform voters of specific reasons for a new county care facility is proper even though the voters did not authorize construction of the proposed building. (Nolan to Bradley, Keokuk County Attorney, 3-12-76) #76-3-13

Mr. Glenn M. Bradley, Keokuk County Attorney: This is written in response to your request for an opinion as to whether the cost of printing a circular entitled "Why? Does Keokuk County Need a New Care Facility?" is a proper expenditure of public funds.

We have closely examined the circular in question which presents questions and answers giving reasons for construction of a new care facility including a statement of the anticipated need of additional beds and new county care facility standards. The pamphlet also presents the architect's estimate of cost for the proposed building and a statement of the known alternatives.

Your letter states that this circular was prepared by the Keokuk County Board of Supervisors. It lists the names of the care facility administrators and architects.

It is well-settled that the construction and maintenance of a county care facility is a proper function of county government. Chapter 253 of the 1975 Code of Iowa makes express provisions for such facilities.

An opinion dated November 19, 1953, issued by this office pertaining to the power of the board of supervisors to employ architects to prepare tentative plans for the improvement of county buildings to submit to the voters for approval, advised that if the voters vailed to authorize such improvement the cost of preparation of the material necessary to inform the voters may be paid from the county general fund. 1954 O.A.G. 98. The data prepared and circulated by means of pamphlet in question appears to serve the same purpose, and the cost of printing is therefore a proper expenditure of public funds.

March 15, 1976

INSURANCE: Newly born coverage, Chapter 514C, Code of Iowa, 1975. Chapter 514C, requiring that certain health policies provide coverage for the newly born at birth, becomes a mandatory provision of policies issued before its effective date at such time when the policy is first amended or renewed subsequent to the Act's effective date in a manner that constitutes a new agreement between the parties. (Hager to Huff, Commissioner of Insurance, 3-15-76) #76-3-14

The Honorable William H. Huff, III, Commissioner of Insurance: Reference is made to your request of February 9, 1976, for an Attorney General's Opinion concerning the proper application of Chapter 514C, the Code. Your letter reads in part as follows:

"In recent months, several questions have arisen with regard to Chapter 514C. This chapter is entitled "Health and Accident Policies for Newly Born Children". The question concerns the extent to which this chapter is to be prospectively or retroactively applied. In addition, please find a copy of a letter to the Department inquiring as to the effect of a certain amendment to a policy after the effective date of Chapter 514C. Therefore, I am, at this time, requesting an Attorney General's Opinion on this issue. I would hope that the Opinion would speak to the issue raised by the enclosed letter and to the general issue of whether this chapter should be retroactively or prospectively applied to existing insurance contracts."

Specifically, the question you pose is as follows:

"Does Chapter 514C cause immediate coverage to be granted newborn children on insurance policies which were in existence on and before the effective date of the statute? If there is no coverage, then at what point, if any, does coverage become mandated?"

The second questions raised is:

"Does the subsequent amending of the insurance contract (under an automatic continuation clause) affect the date at which there would be coverage for newly born children?"

It is the conclusion of this office that the Act applies *prospectively* in the following manner: As to relevant policies first delivered or issued for delivery subsequent to the effective date of the Act — at the time of such delivery or issuance; as to relevant policies issued prior to the effective date — the Act becomes a mandatory provision of such policies on the first renewal date subsequent to the effective date of the Act where the renewal constitutes a new agreement between the parties; as to relevant policies issued prior to the effective date but amended prior to the first renewal date but subsequent to the effective date of the Act — at the time of the amendment where the amendment results in the formation of a new contract between the parties. We further conclude that an amendment changing the named insured under an automatic continuation clause providing that if the insured dies, their spouse, if covered, automatically becomes the insured does not result in the formation of a new contract, and the amendment alone does not affect the date of coverage under Chapter 514C.

Before stating the reasons for our conclusion, it is thought that a brief statement of the legislative history of Chapter 514C is appropriate. Chapter 514C originated in the 1974 session of the 65th General Assembly as Senate File 1290 (Chapter 1245 of the 1974 Session Acts). Research

indicates the Act was based upon the model newborn children bill of the American Academy of Pediatrics, adopted by that body in November of 1973. Thus the language of Chapter 514C substantially tracks with that of the model bill.

The Act itself provides that any health policy with dependency coverage which provides coverage on an expense incurred basis and any health policy with dependency coverage issued under Chapters 509, 514 or 514A, the Code, shall cover the newborn from birth. The level of coverage is set out in section 1(2) of the Act.

The obvious design of 514C was to force carriers to provide for the newborn from the moment of birth. Prior to the date of the Act, most health insurance coverage excluded the newborn for periods ranging from 14 to 90 days.

Though the Act was signed into law April 23, 1974 (1974 Senate Journal, p. 1671), the Act did not become effective until January 1, 1975. See section 2 of the Session Act. The apparent intent of the legislature was to extend additional time to insurers to prepare for mandatory provision.

With this background, we now consider your questions as to applicability of Chapter 514C. For simplicity the questions will be considered in this order: (1) whether the Act applies prospectively (2) the manner in which it applies prospectively and (3) the effect of a specific amendment to the policy.

In answer to the first inquiry we conclude that Chapter 514C applies prospectively. Section 4.5, the Code; *Young v. O'Keefe*, 82 NW2d 111 at p. 113 (Iowa 1957); *Statute and Statutory Construction*, Southerland, Vol. II pp. 247-253.

The second question is critical, that is, the manner in which Chapter 514C applies prospectively. The pertinent language of Chapter 514C as it relates to the second question is set out as follows:

"Any (relevant) policy of individual or group accident and sickness insurance . . . *shall* provide (effective January 1, 1975, see section 2 of Session Act) . . . benefits . . . with respect to (the) newborn."

It is settled law that statutory provisions are a part of all applicable insurance contracts as though such provisions were written into the policy:

"Contracts of insurance . . . are presumed to have been made with reference to the law of the land, including the statutory laws which are in force and applicable, and such statutes . . . enter into and become a part of the contract as much as if they were actually incorporated therein." *Couch on Insurance* 2d, section 13:6.

In view of this rule and the statutory language of the Act, it is clear that where a relevant policy is first issued subsequent to January 1, 1975, the insurer must provide Chapter 514C coverage, regardless of whether a provision to that effect is contained in the policy.

The language of Chapter 514C is not instructive as to its applicability to a policy issued prior to the effective date of the Act, but subsequently

renewed. As to the renewal question, we turn then to other sources of the law:

"Any statutes . . . pertaining to an insurance policy enacted after its issuance are incorporated into the *renewal policy.* 43 Am Jur 2d Insurance, section 384. See also Op. Atty. Gen. (Nolan to Huff), August 15, 1973.

Though the renewal question appears to be one of first impression in Iowa in terms of case law, holdings in other jurisdictions support the generally accepted rule. Thus, in *Taylor v. American National Insurance Company,* 117 NW 2d 408 (Minn. 1962), Justice Nelson speaking for the Minnesota Supreme Court reiterated the rule:

"On each reinstatement or renewal of the policies, any statutes or amendments pertaining to such policies and enacted after their issuance are incorporated into the new policies." Taylor at p. 411. See also *Gladstone v. Metropolitan Life Insurance Company,* 322 N.Y.S. 2d 528 at p. 530.

The renewal rule has been qualified. Briefly put, the mandatory provision of the Act becomes a provision of the policy where the renewal constitutes a new agreement between the parties. *Maryland Medical Service, Inc. v. Carter,* 209 A.2d 582 at p. 594 (Maryland 1965). *Couch* above instructs us that where the renewal constitutes a new agreement, Chapter 514C becomes a provision of the policy. Examples of renewals formulating a new agreement between the parties include: policies where the insurer could terminate coverage on the renewal date or amend the policy without the insured consent (*Taylor* supra at p. 410; *Gladstone v. Metropolitan Life Insurance Company,* 322 N.Y.S. 2d 528 at p. 530 (N.Y. 1975) or accept or reject each renewal premium. *Tebb v. Continental Casualty Company,* 430 P.2d 597 at p. 599 (Wash. 1967). Thus in a contract renewable at the option of the insurer or a contract without a provision for renewal, the insured cannot *unilaterally* continue the contract in force by timely payment of premium. The premium must be accepted by the insurer to keep the contract in force. The generally accepted rule is that a policy renewed under such condition is reissued. *World Insurance Company v. Perry,* 210 Md. 449, 124 A.2d 259 (1956). Accordingly it is our opinion that Chapter 514C is applicable to and a part of all such contracts originally issued before the effective date of the Act and renewed under the circumstances described above subsequent to the Act's effective date.

In a noncancellable health contract, the insured has the right to continue the contract in force by making timely premium payments and the insurer does not have the right to reject the tendered premium. In such a contract, the insured unilaterally continues the policy in force, It is our opinion that a renewal of a noncancellable health contract merely continues the contract in force, and such renewal does not constitute a new and independent contract between the parties. Under such circumstances, it is our opinion that Chapter 514C would not become a provision of such a contract. We note however that such policies are noncancellable only for a certain period of time. Our conclusion therefore that Chapter 514C is not applicable, is limited to that period of time that the contract retains its noncancellable characteristics.

In a guaranteed renewable health policy, the insured has the right to continue the policy in force for a designated period of time by timely premium payments. During the designated period of time the insurer has no right to *unilaterally* make any change in the contract, except that the insurer may adjust the premium by classes. Vol. I, 1960 *Proceeding of the National Association of Insurance Commissioners*, p. 293. We note that in contrast to the noncancellable contract, in the guaranteed renewable health policy the insurer reserves the right to change the premium by class. Thus the insured can *unilaterally* continue the contract in force by timely paying the designated premium. In our opinion, such factors manifest the parties' understanding of such a renewal to be an extension of the original contract and as such Chapter 514C would not apply. Once the insurer exercises its option to adjust the rate, however, the terms of the original agreement are obviously no longer acceptable to the insurer. The original contract then, can not be said to be continued. At that point in time, the premium adjustment constitutes an offer by the insurer to the insured for a new contract with different terms covering a different period of time. Thus guaranteed renewable health policies are a continuing contract and Chapter 514C does not apply until the insurer does in fact exercise its right to terminate the original contract and adjust the premium for the contract. It is therefore our opinion that Chapter 514C does not apply to a guaranteed renewable health policy originally issued prior to the effective date of the Act and renewed subsequent to the effective date of the Act, so long as the insurer does not exercise its option to change the rate.

In conclusion as to the question of renewal, we advise that the critical factor in determining whether Chapter 514C is applicable to an appropriate health insurance contract originally issued prior to the effective date of the Act is the wording of the contract with respect to its renewal occurring after the effective date of the Act. If there is no renewal provision or if the contract is renewable at the option of the insurer, then the Act would apply at the first renewal date subsequent to the effective date of the Act. If the contract is a noncancellable health insurance contract, the Act would not apply at a renewal date subsequent to the effective date of the Act for that period of time that the contract retains its noncancellable characteristics. If the contract is a guaranteed renewable health insurance contract, the Act would not apply at a renewal date occurring subsequent to the effective date of the Act for so long as the insurer does not exercise its option to change the premium rate for the contract. However, the Act would apply to the first renewal date of a noncancellable or guaranteed renewable health insurance contract occurring after the effective date of the Act if the renewal of the contract does not become effective until approved or accepted by the insurer.

As to the renewal question, we note finally that when Chapter 514C becomes a provision of such policies, a premium adjustment is implicitly permitted. Section 514C.1(3). The additional coverage mandated by Chapter 514C is significant and as such the insurer would be permitted to adjust the premium commensurate with the added exposure.

Having considered the effect of Chapter 514C upon renewals, we now

consider its effect upon policies amended subsequent to January 1, 1975, but prior to the first renewal of consequence. As was the case with renewals, the language of Chapter 514C is not instructive as to its applicability to a policy issued prior to the effective date of the Act, but amended subsequent to the first renewal. It is our opinion that where the amendment results in the formation of a new contract between the parties, Chapter 514C coverage is a statutorily imposed provision of the contract.

Support of the amendment rule is found by analogy in *Taylor* supra where the court, considering a policy which was reinstated subsequent to the effective date of a statutory requirement, held the statutory provision became incorporated into the policy at the time of reinstatement where such reinstatement resulted in the formation of a new contract:

"It is clear that the parties were making a new contract upon (the reinstatement) . . . and we must agree . . . that the statutory law in force and effect at the time (of the reinstatement) became part of the contract as though expressly written therein and that the policy must be considered as containing these requirements." *Taylor* supra at p. 410.

Having set out our conclusions as to how Chapter 514C applies prospectively, we consider the third question. You inquire as to whether Chapter 514C becomes a required provision of a policy amended subsequent to the effective date of the Act. The answer is contingent on the type and legal effect of the amendment. Under the facts you present, the amendment merely changed the named insured under an automatic continuation clause providing that upon the insured's death, the spouse, if covered, automatically becomes the named insured.

It is the opinion of this office that, under such circumstances, the amendment alone does not constitute the making of a new contract and, as such, Chapter 514C does not at the time of such amendment become a provision of the contract.

We note finally that this construction of the Act does not impair the insurer's contracts with their insureds. It does not apply to any contract in force on January 1, 1975, when the statute became effective, but only to contracts entered into or renewed subsequent to the effective date of the statute. The legislation, therefore does not impair any vested right in any existing contract and is not within the guarantee provided by Article I, Section 10 of the Federal Constitution.

March 17, 1976

CITIES AND TOWNS: Residence of Employees — §400.17, Code of Iowa, 1975. A city under 1000 population may hire as an employee a person not living in that city. (Blumberg to Newhard, State Representative, 3-17-76) #76-3-15

Mr. Scott D. Newhard, State Representative: We have received your opinion request of March 3, 1976. In it you ask about the legality of a city under a population of 1000 to hire as employees persons who do not live in that city.

There is nothing in the Code which speaks to your specific situation. Section 400.17, 1975 Code of Iowa, which concerns qualifications of

employees under civil service, provides that such employees "shall not be required to be a resident of the city in which they are employed . . . ." This section answers your question for all cities under civil service. For those cities not under civil service we can find no indication that such a hiring would be illegal.

Accordingly, we are of the opinion that a city under 1000 population may hire as an employee a person not living within that city.

March 18, 1976

CITIES AND TOWNS: Libraries. City library employees may, pursuant to appropriate city ordinance, be hired and fired by the Board of Library Trustees; however, such employees are employees of the city rather than employees of the Board. (Nolan to Porter, State Librarian, 3-18-76) #76-3-16

Mr. Barry L. Porter, State Librarian: Your letter requesting advice on provisions of the model ordinance for library services in the City of Davenport has been received. Therein you state that the librarian has expressed some concern over §18-5.03 of the city ordinance providing for the qualifications, powers and duties of the board of library trustees for the City of Davenport. This section provides:

"CITY PROCEDURES. The board shall comply with all policies, practices and procedures established by the City Council or its appropriate committee governing city departments in the area of personnel, affirmative action, budget and finance, purchasing and record keeping."

The librarian asks specifically:

"Who is the employer? The Library Board of Trustees or the City Council?"

Under §18-5 of the ordinance, the library board is authorized:

"To employ a librarian, and authorize the librarian to employ such assistants and employees as may be necessary for the proper management of the library, and fix their compensation; provided, however, that prior to such employment, the compensation of the librarian, assistants and employees shall have been fixed and approved by a majority of the members of the board voting in favor thereof."

Under subsection 5 of §18-5, the library board is authorized to remove the librarian by two-thirds vote of the board and to "provide procedures for the removal of assistants or employees for misdemeanor, incompetency or inattention to duty, subject, however, to the provisions of Chapter 70, Code of Iowa".

In your letter there is an inference that the library board of trustees can delegate its responsibilities to a city agency, and that such delegation is contemplated under the ordinance in question. As we see it, the library board and its employees derive their power from the city council and through ordinances such as the one submitted for review.

It is the view of this office that the library board has express power to hire and fire the librarian and other library employees. However, it must be remembered that all such employees are employees of the City of Davenport and the library board is an agency of the city deriving its power under the municipal code.

March 18, 1976

COUNTIES AND COUNTY OFFICERS: Open Meetings Law, Iowa Public Relations Act; Chapter 20, §20.17(3); Chapter 28A; Chapter 68A, §68A.7(6), 1975 Code of Iowa. The results of collective bargaining sessions must be made public, protecting the public's right to know the contracted terms agreed upon in the negotiations. Pre-negotiation materials relative to collective bargaining, as well as working papers and studies are not subject to Chapter 68A, and are confidential. (Beamer to King, Assistant Polk County Attorney, 3-18-76) #76-3-17

Mr. John H. King, Assistant Polk County Attorney, Chief, Civil Division: Reference is herein made to your letter of February 4, 1976, in which you submitted the following questions:

"At the present time Polk County, Iowa, is about to enter into labor negotiations and there are several questions we would like your opinion on:

"1. What is the obligation of the County to make public those pre-negotiation materials written and otherwise developed to effect and establish the County's negotiation position with respect to the mandatory subjects of bargaining found in section 20 Iowa Code 1975?

"2. Given that closed negotiation strategy sessions are permitted under the Public Employment Relations Act, are working papers drawn for, at, or subsequent to such meetings concerning bargaining positions, strategies and guidelines available to anyone making an inquiry?

"3. Do said working papers and studies concerning the matters defined about (questions 2) retain in their confidentiality status (if they are found to be such) after a labor contract has been fully negotiated and ratified by the respective parties?

"4. Do the work products recommendations, written or otherwise prepared or solicited by the designated labor negotiator retain confidentiality after a labor contract has been fully negotiated and ratified by the respective parties?

"5. Do the bargaining guidelines made available by the public employer to their designated labor negotiator fall within that part (of) the law which provides that . . . the union representative must bargain with the employers designated labor negotiator and not circumvent negotiations with him by seeking out and discussing negotiable matters with the appropriate governmental body either in collectively or with members individually?"

This opinion request raises two legislative policies which are not necessarily consistent. The first policy is that found in Chapter 68A, 1975 Code of Iowa, "Examination of Public Records". Chapter 68A is designed to protect the democratic process by making public the decisions and considerations on which government is based and allows for these records and decisions to be reproduced by the media. The second consideration is that of the collective bargaining statute, Chapter 20, 1975 Code of Iowa, which recognizes the right of public employees to organize and bargain collectively. This process includes the right of public employees to negotiate the terms of their contracted relationship with the government by using many of the well-established techniques of private sector bargaining. *Timberlane Regional School Dist. v. Timberlane Regional Educ. Ass'n.*, 1973, 317 A.2d 555, 557. The question then presented is whether an unlimited extension of the public records section would consume the effectiveness of the collective bargaining process if

all materials, work product, studies and the like are required to be released by the government and made public during or after negotiations.

As Chapter 68A was enacted prior to Chapter 20 there is nothing in the legislative history of the public records act to indicate that the legislature specifically gave consideration to the impact of its provisions on public sector bargaining. Section 68A.7(6), "Confidential Records", does contain a limitation which may be relevant to your question:

"Reports to government agencies which, if released, would give advantage to competitors and serve on public purpose."

Chapter 28A, generally referred to as the Open Meetings Law, prohibits "closed meetings" of many public agencies in this state. Section 20.17(3) of the Code contains an exclusion from Chapter 28A which is as follows:

"Negotiating sessions, including strategy meetings of public employers or employee organizations, mediation and the deliberative process of arbitrators shall be exempt from the provisions of Chapter 28A. Hearings conducted by arbitrators shall be open to the public."

Whether the information you refer to in your question is protected by sections 68A.7(6) and 20.17(3) of the Code is not easily answered. There is no Iowa case law on point, and limited case law from other state jurisdictions. A review of those cases may be helpful in answering your questions.

Those cases have dealt with the issue in terms of striking a balance among the interests to be protected, the right of the public to know and the public's interest in effective public management. The latter requires non-disclosure of information when such disclosure would damage the public representative's effectiveness in getting the best "bargain" available for his client. *Talbot v. Concord Union School District*, 1974, 323 A.2d 912.

Courts have recognized the need for non-disclosure when a public representative is a participant in the delicate mechanism of collective bargaining. In *Talbot v. Concord Union School District*, supra, a newspaper reporter, among others, sought injunctive relief under the New Hampshire "Right to Know Law." The New Hampshire Supreme Court ruled that negotiation sessions between a school board and union committees were not within the ambit of the Right to Know Law, but the public was entitled to know the contracted terms agreed upon by the negotiators.

The court stated at pp. 913-914:

"There is substantial authority in support of the defendant's position that the delicate mechanisms of collective bargaining would be thrown away if viewed prematurely by the public. Bassett v. Braddock, 262 So. 2d 425 (Fla. 1972); R. Smith, H. Edwards & R. Clark, Jr., Labor Relations Law in the Public Sector 569-594 (1974); Edwards, The Emerging Duty to Bargain in the Public Sector, 71 Mich. L.Rev. 885, 901-02 (1973); Wickham, Let the Sun Shine In! Open-Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government, 68 Nw.U.L. Rev. 480, 491-92 (1973); see R. Smith, L. Merrifield & D. Rothschild, Collective Bargaining and Labor Arbitration 36-44 (1970). In fact, a number

of State labor boards have gone so far as to hold that a party's insistence on bargaining in public constituted a refusal to negotiate in good faith, reasoning that bargaining in the public arena 'would tend to prolong negotiations and damage the procedure of compromise inherent in collective bargaining.' Menominee Bd. of Educ., MERC Lab.Op. 383, 386 (Mich. 1968); see Mayor Samual E. Zoll and the City of Salem, MLRC Case No. MUP-309 (Mass. 1972); Bethlehem Area School Directors, Penn.Lab. Rel.Bd. Case No. PERA-C-2861-C, Gov't Employ Rel. Rep't No. 505, E-1 (1973). See also Cal. Govt. Code §54957.6 (West 1974) (Authorizing school boards to deny public access to 'consultations and discussions' with public employee representatives concerning salaries and other matters); Grodin, Public Employee Bargaining in California: The Meyers-Milac-Brown Act in the Court; 23 Hast.L.J. 719, 752 (1972); cf. Min.-.Stat.Ann. ch. 179, §179.69 (1971) (Permitting public access to all negotiating sessions unless otherwise provided by the director of mediation services)."

In *Bassett v. Braddock*, 1972, 262 So.2d 425, the Supreme Court of Florida held that labor negotiators employed by the school board in preliminary or tentative teacher contract negotiations with teachers' representatives may negotiate outside of public meetings. Furthermore, the court held that the board may instruct and consult with its labor negotiators in private without violating Florida's open meeting law, the "Sunshine Law." The court did consider some of the aspects involved in your questions and at page 428 stated:

"It might be noted that in a case like the present where the negotiator is an attorney that certainly he is entitled to consult with the Board on matters regarding preliminary advices. He is also thereby guided toward an effective result. It is not that appellees are 'hiding' anything but simply trying to get the best 'bargain' available for the public schools and not to be placed at a disadvantage in their efforts. It therefore follows that this is not in violation of the 'Sunshine Law' for the Board to instruct and to consult with its labor negotiator in private without it being a violation of §286.011."

Surely, this balance would also be in danger if pre-negotiation materials, developed to affect the county's bargaining position were released to the public, as guidelines and possible strategies of the county would be exposed.

This position is supported by the Florida legislature which passed the Public Employment Relation Act, Fla. Stat. 447, two years after the Supreme Court of Florida decided *Bassett v. Braddock*, supra. While including collective bargaining negotiations sessions within the provisions of the Florida Sunshine Law, Fla. Stat. §286.011, an exemption was specifically provided for collective bargaining discussions between the chief executive officer of the public employer and the legislative body, Fla. Stat. §447.605(1) and all work products developed in preparation for negotiations. Fla. Stat. Ch. 119. See also, Fla. Stat. §447.605 (3). See also *Bigelow v.Howge*, (1974) 291 So.2d 645, 647.

With this background in mind an examination of recent United States Supreme Court decisions and federal court decisions may also be helpful. While these cases do not deal with the issue of nondisclosure of records in the collective bargaining process, the cases do direct themselves to the same questions we are concerned with here.

The actions are ones brought under Freedom of Information Act 5 U.S.C.A. §552 hereinafter referred to as FOIA.

The FOIA provides "that any citizen may have access to all identifiable records" of a federal agency, except those falling within nine specified exemptions. The actions involve requests for materials prepared by government agencies and in some cases materials prepared by non-government consultants. *N.L.R.B. v. Sears Roebuck & Co.*, 1975 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29; *Renegotiation Board v. Grumman Aircraft Eng. Corp.*, 1975, 421 U.S. 168, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975); *Brockway v. Department of Air Force*, 1975, 518 F.2d 1184; *Schwartz v. Internal Revenue Service*, 1975, 511 F.2d 1303; *K.C.W.U. v. National Endowment for Humanities*, 1972, 460 F.2d 1030.

The one exemption most applicable to our discussion and discussed in the above cases is 5 U.S.C.A. §552.(b)(5) which relates to "intra agency advisory opinions" and withholds from a member of the public documents which a private party could not discover in litigation with the agency. The purpose of this privilege being is to prevent injury to the quality of agency decisions. *N.L.R.B. v. Sears Roebuck & Co.*, supra, 95 S.Ct. 1517. This exemption is firmly based on the privileges which the Government enjoys under statutory and case law in the pretrial discovery context; "and both exemptions 5 and the case law incorporates distinguish between predecisional memoranda prepared in order to assist an agency decision-maker in arriving at his decision, which are exempt from disclosure and post decisional memoranda setting forth the reasons for an agency decision already made, which are not." *Renegotiation Board v. Grumman Aircraft Eng. Corp.*, supra at 1500; *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 157 U.S. App. D.C. 121, 129, 482 F.2d 710, 718 (reports not exempt because they were not part of the consultative and deliberative process, but rather reflected decisions communicated outside the agency).

The courts have also suggested that there is a limited public interest in reports to an agency which are used as merely a basis for discussion.

"The public only marginally concerned with reasons supporting a [decision] which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a [decision] which was actually adopted on a different ground." N.L.R.B. v. Sears Roebuck & Co., 95 S.Ct. 1517.

The possibility that such reports might be interpreted as rational for a final decision, when in fact they are not, might be affirmatively misleading. *International Paper v. F.P.C.*, 438 F.2d 1349, 1358 (2nd Cir. 1971), cert. denied 404 U.S. 827, 92 S.Ct. 61, 30 L.Ed.2d 56 (1971).

The courts have imposed an important limitation on exemption 5 of the FIOA. Factual material may not be withheld from the public. Furthermore, documents are not protected merely because they contain partly "opinion" and partly fact. *E.P.A. v. Mink*, 410 U.S. 73, 89, 91, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). In contrast, advice, recommendations, opinions and other subjective material are protected. *WU v. National Endowment for Humanities*, 1972, 460 F.2d 1030; *Soucie v. David*, 1971, 145 U.S. App. D.C. 144, 448 F.2d 1067.

An exception to this general limitation has been carved out in a recent case. In *Brockway v. Department of Air Force*, 1975, 518 F.2d 1184, 1194 the court indicated that if exemption 5 "is to be interpreted to

protect the agency's deliberative process, then a factual summary prepared to an administrator in the resolution of a difficult complex question would be within the scope of the exemption."

State courts recognize the business like operations of local government. Decisions must be made involving dealings with private parties. Strategy and bargaining position may be lost if both sides do not operate on equal grounds. ". . . to give away one's hand to the opposition which remains free to operate in private, can prove very detrimental to the side of the public." Little, *Open Government Laws: An Insider's View*, 53 N. Carolina L.Rev. 451, 459 (1975).

It has been stated that the attorney-client privilege is just as available to public agency-clients and their lawyers as to their private counterparts. *People v. Barger*, 1975, 332 N.E.2d 649, *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 1968, 69 Cal. Rptr. 480, 263 Cal. App.2d 41. Furthermore, such private communications should be privileged to the extent necessary for the attorney to do his job professionally. *People v. Barger*, supra, at 659.

This privilege would be of limited value if documents and other written materials which were the basis of advice and strategy were summarily disclosed to the public. This problem is clearly addressed under the attorney-work product doctrine. *Hickman v. Taylor*, 1947, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed.2d 451.

Case law clearly makes the attorney-work product rule of *Hickman v. Taylor*, applicable to government attorneys in litigation. *Kaiser Aluminum & Chemical Corp. v. United States* 1958, 757 F.Supp. 939.

The purpose of this privilege is to prevent injury to the quality of agency decisions. Frank discussions of "legal and policy matters" in writing might be inhibited if made available to the public. *N.L.R.B. v. Sears Roebuck & Co.*, supra, 95 S.Ct. 1516.

Congress had the attorney-work product privilege specifically in mind when it adopted exemption 5.

"The Senate Report states, that Exemption 5 'would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties.' S.Rep. No. 813, 2; and N.L.R.B. v. Sears Roebuck & Co., supra, 95 S.Ct. at 1518."

In *Winston v. Mangan*, 1972, 338 N.Y.S.2d 654, 660, the Court noted that while the state's right gave the public the right to inspect all public records, the law did not give the public the right to "harass or disrupt public operations unreasonably in the process."

In regard to question five (5) of your opinion request, Section 20.17(9) sets forth the limitations on the action you describe in your request:

"A public employee or any employee organization shall not negotiate or attempt to negotiate directly with a member of the governing board of a public employer if the public employer has appointed or authorized a bargaining representative for the purpose of bargaining with the public employees or their representative, unless the member of the governing board is the designated bargaining repersentative of the public employer."

Clearly, the courts have ruled that results of the bargaining sessions must be made public, thus protecting the public's right to know what contracted terms were agreed upon in the negotiations. In the development of this background for your questions regarding pre-negotiation materials, however, it is apparent that the courts have reached a different conclusion. Pre-negotiation materials relative to collective bargaining, as well as working papers, are not subject to Chapter 68A, and thus may be kept confidential.

March 19, 1976

STATE OFFICERS AND DEPARTMENTS: Department of Transportation; Organization. §§307.10, 307.14, 307.25, Code of Iowa, 1975. Reorganization of divisions within the Department of Transportation pursuant to §307.10 may include more divisions than eight divisions specifically authorized by §307.14 and the legislature may appropriate money for such divisions as may be established. (Schroeder to Welden, State Representative, 3-19-76) #76-3-18

The Honorable Richard W. Welden, State Representative: You have requested an Opinion of the Attorney General with respect to whether the Department of Transportation could establish ten divisions rather than the eight divisions specifically authorized by statute, and whether the legislature may appropriate money for the additional two divisions without further amendment to the statute creating only eight divisions.

While you refer to the provisions of §307.14 of the 1975 Code of Iowa which sets out the eight divisions originally provided for in Section 14 of Chapter 1180 of the Acts of the 65th General Assembly, Second Session, you are perhaps unaware that the Code Editor in editing the 1975 Code has omitted the last paragraph of said Section 14 contained in the act passed, which provided:

"This section shall not restrict the authority of the director to reorganize existing divisions which may be necessary for the proper and efficient operation of the department, subject to the approval of the commission."

This provision, coupled with the authority granted in subsection 7 of §307.10 of the Code, which provides the Transportation Commission shall "approve the reorganization of any existing divisions within the department" gives ample evidence that in creating the Department, there was no legislative intention to limit its organization to eight divisions or prohibit the reorganization of one of the statutory divisions into three divisions having the same functions.

The statutory expression of eight separate divisions is one which is directory, not mandatory. It limits the form and organization only if the Department fails to effect a reorganization. The doctrine of "expressio unius exclusio alterius est" is not applicable.

Certainly in view of the later fact that the Department of Transportation has been reorganized into ten divisions, it is unfortunate one may be mislead by the Code provisions. That is not to say the reorganization approved by the Commission is not lawful. The legislature could easily clarify the authority of the Department by deleting the discrepancies and specifically authorizing ten divisions to coincide with the reorganization.

Certainly it is without argument that appropriation is a legislative power. When it chose to appropriate to ten, rather than to eight divisions of the Department, one must conclude the legislature authorized, or at least acquiesced in the establishment of two additional divisions.

Likewise, the legislature could have denied such appropriations if it disapproved the reorganization, just as it could abolish the entire Department it created. Transportation is not a constitutional department, but a statutory one created by the legislature. The propriety of its appropriation is entirely discretionary and within its constitutional powers.

March 23, 1976

ANTI-TRUST: Fuel Oil Distributor Franchise. Any provision of a fuel oil distributor franchise which allows the franchiser to terminate or refuse to renew the franchise solely because of a change of ownership in the distributorship is invalid under §323.6, Code of Iowa, 1975, unless entered into prior to July 1, 1976. (Perkins to Gallagher, State Senator, 3-23-76) #76-3-19

Honorable James V. Gallagher, State Senator: This letter is in response to your opinion request of July 29, 1975, concerning §323.6, Code of Iowa, 1975, which provides in part that:

"Notwithstanding the terms, provisions or conditions of a distributor franchise, the following shall not constitute good cause for the termination or refusal to renew a distributor franchise:

1. . . .

2. . . .

3. The sale or change of ownership of the distributor's business, unless the transfer of the distributor's license pursuant to chapter 324 is denied or the new owner is unable to obtain a license under chapter 324."

Your question is whether a distributor contract, which provides in part:

1. That the distributor may not sell his business without first giving the franchiser the right to purchase the business on such terms as the distributor is willing to sell;

2. That the distributor shall not assign the contract without the franchiser's prior consent;

3. That upon breach of any provision of the contract the franchiser may terminate the same;

is valid and enforceable under §323.6 of the Code.

Chapter 323 of the Code as a whole, sets up a method of protecting fuel distributors, and dealers from having their franchises terminated without good cause by franchisers and provides for the Iowa Commerce Commission to hear and decide such cases. The franchiser has the burden of showing good cause for terminating or not renewing a franchise. §323.6 of the Code, as previously cited, states that mere change in ownership of a distributorship is not good cause. Thus, provisions of any contract subject to Chapter 323 of the Code which allow a franchiser to terminate or refuse to renew a franchise solely on the grounds that

the ownership of the distributorship has changed in any manner, unless it is for the two reasons listed in §323.6 of the Code are not valid or enforceable.

It is the opinion of this office that the contract provisions cited above allowing the franchiser the right of first refusal and consent to assignment would be invalid and unenforceable if they were the sole reasons used to terminate a contract subject to Chapter 323 of the Code.

The question now arises as to whether provisions of the type cited above are nontheless valid and enforceable if they are part of a contract entered into prior to the effective date of Chapter 323 of the Code which is July 1, 1974, except for the sections dealing with hearings which were not effective until July 1, 1975.

Article I, §10 of the U. S. Constitution holds that no state may pass any law which impairs the obligation of contracts. The Iowa Supreme Court in *Davenport Osteopathic Hosp. Assn. v. Hospital Serv.*, 154 N.W.2d 153 (Iowa 1967) held that the legislature cannot, by statute, constitutionally abrogate the terms of an existing contract.

The provisions of the contract under discussion which are offensive under Chapter 323 of the Code allow for the termination of the contract if any provision of the contract is breached. The statutes make such a provision void where the only reason for termination is failure to grant the franchiser the right of ownership without the franchisers permission, both of which provisions are contained in the contract.

If Chapter 323 were to be applied retrospectively, franchisers who entered into contracts prior to the effective date of the statute would not be able to enforce that provision of the contract solely for the two reasons previously stated.

It is a fundamental principle of law that:

[A] statute impairs the obligation of a contract if it prevents enforcement, tends to postpone or retard enforcement, or seriously interferes with the enforcement of a contract. 16 Am.Jur.2d, Constitutional Law, §448.

It should be further noted there is nothing in Chapter 323 of the Code which would indicate the legislature intended this chapter to be applied retrospectively. As the U. S. Supreme Court held in *Greene v. United States*, 376, U.S. 149, 160, 84 S.Ct. 615, 621, 11 L.Ed.2d 576 (1964);

[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.

It is the further opinion of this office that the contract terms as set out in your opinion request are not subject to the provisions of Chapter 323 if the contract was entered into prior to the effective date of the enactment of Chapter 323 of the Code.

March 23, 1976

STATUTES: Conflict of Interest — The provisions of §68B.4, Code of Iowa, 1975, preclude an employee of the Department of Public In-

struction from teaching for pay at an institution whose teacher training program is subject to regulation by the State Board of Public Instruction as a certifying board. (Nolan to Benton, State Superintendent of Public Instruction, 3-23-76) #76-3-20

Dr. Robert D. Benton, State Superintendent, Department of Public Instruction: You have requested an opinion concerning the applicability of §68B.4, Code of Iowa, 1975, to your department. In your letter you state:

". . . We have professional staff members who have recognized expertise in certain specialized areas of education. Because of this our staff may be contacted relative to teaching an evening or Saturday class at a nearby institution of higher education.

"May a staff member of the Department of Public Instruction teach a class for remuneration at a college or university so long as the teaching is done at a time other than the working hours of state government? Also, could a staff member of this department who has accrued vacation time teach a seminar for a short period of time for remuneration in a college or university in the state of Iowa while on vacation?"

The Code section you refer to in your request states in pertinent part as follows:

"No official or employee of any regulatory agency shall sell, either directly or indirectly, any goods or services to individuals, associations, or corporations subject to the regulatory authority of the agency of which he is an official or employee."

The question arises from the prospect of a state department employee teaching in the college of education at a private university. Since the State Board of Public Instruction constitutes the board for certification of all administrative, supervisory and instructional personnel for the public school systems of the state, and establishes the subjects and fields in which certificates are issued as well as determining the standards for the acceptance of degrees, credits, courses and other evidences of training and preparation pursuant to §257.10(11), Code of Iowa, 1975, there is some doubt as to whether or not such authority operates to preclude an employee of the Department of Public Instruction from teaching in any teacher-training program within the state while employed with the Department of Public Instruction.

We find no ambiguity in the language of §68B.4. The statute has application to the State Department of Public Instruction and its employees. The power to issue rules and regulations for the certification of teachers is a regulatory act. Accordingly, the statute forecloses dual employment of the type in question, regardless of whether the teaching is done during vacation or outside the ordinary working hours of the Department of Public Instruction.

March 24, 1976

MOTOR VEHICLE: Driver's License. §§321.216, 321.190, and 321.195, Code of Iowa, 1975. Citizen's photostat copy of his own driver's license is not a valid license certificate. (Hogan to Norpel, State Senator, 3-24-76) #76-3-21

The Honorable Richard J. Norpel, Sr., State Senator: Reference is made to your letter of January 26, 1976, in which you state:

". . . Since Mr. Goodenow owns several cars and does not carry a billfold, he produced a photocopy of his driver's license which he kept in his car. The officer told him that the copy was not a valid driver's license and that he was in violation of the code.

"I would like to request your opinion on this matter. Simply stated, is a photocopy of a driver's license a valid document? . . ."

Generally, the right to operate a motor vehicle is a privilege subject to the exercise of the state's police power and subject to reasonable regulation by the state. 60 *C.J.S. Motor Vehicles* §146 (1969).

Iowa Code Chapter 321, Code of Iowa, 1975, has numerous sections regulating the driving license certificate; such as, regulations regarding suspension, revocation, expiration and cancellation of the driving license privilege and the procedures for handling the certificate itself. Also, §321.195 establishes duplicating procedures for a lost or a destroyed certificate. To allow an individual citizen's photostat copy of his driver's license to be a valid document would defeat the intent of these statutes and create undesirable consequences. Iowa Code Chapter 4.4 and .6, Code of Iowa, 1975.

An individual citizen's photostat copy of his driver's license certificate would also be contrary to the certificate itself. The paper, the color, the symbols upon the paper, and the signatures would lose some of their purpose and value if a photostat copy was the same as the original certificate.

Section 321.190 requires every licensee to have his driver's license certificate in his immediate possession at all times when operating a motor vehicle. A photostat copy of the original certificate is only some evidence that the licensee has the driving privilege. But it is not proof of the privilege, for the original certificate might be in the hands of the government due to a suspension, revocation, expiration or cancellation of this privilege.

Section 321.216, Code of Iowa, 1975, makes unlawful certain uses of the license certificate. The photostating of an individual's *own license* is not a crime under this section. Photostating of a driver's own license for his personal use is not a forgery, misrepresentation or alteration of the certificate. However, §321.190 does require the certificate to be carried in the immediate possession of the licensee at all times. Section 321.190 does allow reasonable time for the licensee to produce in court a valid certificate. An individual's photostat copy of his own license would not be a valid certificate.

Therefore, an individual's photostat copy of his own driver's license is not a valid document. It is only some evidence that a valid document may exist.

March 24, 1976

STATE OFFICERS AND DEPARTMENTS: Members of the General Assembly; Limitations on Gifts to. §§68B.2 and 68B.5, Code of Iowa, 1975. The inclusion of wives as being within the statutory definition of "member of the general assembly" does not operate to combine the husband and wife for purposes of aggregating gifts to them for purposes of the $25.00 gift limitation under the Iowa Public Officials Act. (Haesemeyer to Plymat, State Senator, 3-24-76) #76-3-22

The Honorable William Plymat, State Senator: You have orally requested an opinion of the Attorney General with respect to an interpretation of certain sections of Chapter 68B, Code of Iowa, 1975, the Iowa Public Officials Act.

Specifically you inquire as to whether or not gifts to members of the General Assembly and their wives are lumped together for purposes of the $25.00 gift limitation imposed by §68B.5.

Section 68B.2 is the definitions section of Chapter 68B. It provides in relevant part:

"When used in this chapter, unless the context otherwise requires:
* * *

"3. 'Member of the general assembly' means any individual duly elected to the senate or the house of representatives of the state of Iowa.
* * *

"The use of the above terms shall also include wives and unemancipated minor children."

Section 68B.5 provides:

"No official, employee, member of the general assembly, or legislative employee shall, directly or indirectly, solicit, accept, or receive any gift having a value of twenty-five dollars or more whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form. No person shall, directly or indirectly, offer or make any such gift to any official, employee, member of the general assembly, or legislative employee which has a value in excess of twenty-five dollars. Nothing herein shall preclude campaign contributions or gifts which are unrelated to legislative activities or to state employment."

While the matter is by no means free from doubt, it is our opinion that the inclusion of wives as being within the statutory definition of "member of the general assembly" does not operate to combine the husband and wife for purposes of aggregating gifts to them for purposes of the $25.00 gift limitation. In other words, the same donor could make a gift of $25.00 to each of them without being in violation of §68B.5. It is to be observed that Chapter 68B is a penal statute, a violation of which is a misdemeanor. Section 68B.8. It is well settled in Iowa that criminal statutes are to be strictly construed and any doubt is to be resolved in favor of the accused. *State v. Nelson*, Iowa 1970, 178 N.W.2d 434, certiorari denied 91 S.Ct. 864, 401 U.S. 923, 27 L.Ed.2d 826. See also cases cited at 17 Iowa Digest, *Statutes*, §241(1).

March 26, 1976

CITIES AND TOWNS: Public Records; Garbage collection assessment disclosure. Chapter 68A and Chapter 537, Article 7, Code of Iowa, 1975. Disclosure of individual garbage collection assessments as public records does not violate Chapter 537, Article 7, if the disclosure does not indicate whether or not the assessments have been paid. (Smalley to McDonald, Cherokee County Attorney, 3-26-76) #76-3-23

Mr. James L. McDonald, Cherokee County Attorney: Your opinion request of September 3, 1975, concerning public records has been referred to me for reply. According to the facts of this situation the City of Cherokee has a uniform garbage collection assessment for all residential users. That assessment is collected with the water bills. There are exemptions from the assessment that are granted to residents on ex-

tended vacations or absences from the city. Certain residents have refused to pay their garbage assessments and wish access to records of the City Clerk to determine the exemptions that have been granted. You wish to know whether there is any prohibition of a public inspection of these records, in specific reference to §537.7103, Code of Iowa, 1975. Since no separate list or record of these exemptions is kept an audit and review of bills rendered to residents would be necessary.

There can be no doubt that the uniform garbage collection assessments are public records pursuant to Chapter 68A, Code of Iowa, 1975. As such, the public has a right to inspect them unless there is contrary language in another statute. You have questioned whether §537.7103(3), Code of Iowa, 1975, prohibits the public from inspecting such records. That section provides in part:

"A debt collector shall not disseminate information relating to a debt or debtor as follows:

"a. The communication or threat to communicate or imply the fact of a debt to a person other than the debtor or a person who might reasonably be expected to be liable for the debt, except with the written permission of the debtor given after default."

We believe that this section is applicable. In soliciting payments from purchasers of the city garbage collection service the City of Cherokee is acting as a debt collector pursuant to §537.7102, Code of Iowa, 1975. This is true even though the city bills are not payable in installments and do not carry a finance charge. Debt as defined in §537.7102(1), Code of Iowa, 1975, includes transactions which would have been consumer credit transactions if a finance charge had been made. If a finance charge had been made by the City of Cherokee the garbage collection assessments would be consumer credit transactions. Therefore, §537.7103 would prohibit the City of Cherokee from divulging information concerning individual garbage collection debts except as authorized by Chapter 537, Article 7, Code of Iowa, 1975.

Disclosing the fact that a particular individual was or was not assessed a certain fee for garbage collection is permissible because this disclosure in and of itself does not indicate whether or not that assessment was paid. Based on the facts you have presented, however, the City of Cherokee is prohibited by the debt collection provisions of the Iowa Consumer Credit Code from releasing information as to whether or not a particular individual owes a debt to the city.

March 26, 1976

STATE OFFICERS AND DEPARTMENTS: Commission for the Blind; Guide Dogs Accompanying Students. §§601B.6 and 601B.7, Code of Iowa, 1975. The Iowa Commission for the Blind may require blind persons to leave their guide dogs at home in order to participate in training programs which require an extended stay at the Commission facility in Des Moines. (Haesemeyer to Sovern, State Senator, 3-26-76) #76-3-24

The Honorable Steve Sovern, State Senator: You have requested an opinion of the Attorney General concerning the policy of the Iowa Commission for the Blind as it regards admission to their vocational training program. Specifically you ask:

"Can persons who otherwise qualify for vocational training from the commission be excluded from training because they wish to have guide dogs with them during the training program? That is, can they be required to leave the guide dogs at home in order to participate in the training programs which require an extended stay at the commissions facility in Des Moines?"

Pursuant to the authority contained in Chapter 601B, Code of Iowa, 1975, the Commission is given broad powers to do various things to assist the blind. Among its extensive duties are those set forth in subsections 5 and 9 of §601B.6 which provide:

"5. Provide for suitable vocational training whenever the commission shall deem it advisable and necessary. The commission may establish workshops for the employment of the blind, paying suitable wages for work under such employment. The commission may provide or pay for, during their training period, the temporary lodging and support of persons receiving vocational training. The commission shall have authority as provided in this chapter to use any receipts or earnings that accrue from the operation of workshops, but a detailed statement of receipts or earnings and expenditures shall be made monthly to the state comptroller.

"9. Establish, manage and control a special training, orientation and adjustment center or centers for the blind. Training in the centers shall be limited to persons who are sixteen years of age or older, and the commission shall not provide or cause to be provided any academic education or training to children under the age of sixteen except that the commission may provide library services to these children. The commission shall have the power to provide for the maintenance, upkeep, repair, and alteration of the buildings and grounds designated as centers for the blind. Such power shall include the power to spend such moneys as may be appropriated to the commission by the state for the purpose of carrying out the provisions of this chapter. The director of the commission for the blind shall have the power to employ the necessary personnel to maintain and operate the center or centers, at salaries fixed by the director with the approval of the commission."

Also relevant to your inquiry is §601B.7, which provides in part:

"The Iowa commission for the blind is hereby authorized to accept financial aid from the government of the United States for the purpose of assisting in carrying out rehabilitation and physical restoration of the blind and to provide library services to the blind and physically handicapped, and shall have the same powers and duties for that purpose, as provided the state board for vocational education in chapter 259. * * *"

The duties of the State Board of Vocational Education to which reference is made in §601B.7 are found in §259.4. It is to be observed that like the Commission for the Blind, the State Board of Vocational Education is given broad latitude and discretion in providing rehabilitation services to handicapped persons. For example, §259.4(17) authorizes the State Board of Vocational Education to:

"Provide services as may be desirable and practicable for the vocational rehabilitation of severely handicapped persons and others entitled to the benefits of this chapter, including the establishment and operation of rehabilitation facilities and workshops."

It is our opinion that these sections of the law give the Commission discretion in making determinations on an individual basis as to persons who are most likely to profit the most from a residential stay in the training center in Des Moines and to grant the staff of the Commission

latitude in adopting policies aimed at maximizing the benefits derived from use of the facilities and programs of the Commission, including a policy against allowing guide dogs to stay with their blind masters for the duration of a residential training program conducted by the Commission. It is no more unreasonable for the Commission to refuse to allow a guide dog to accompany a blind person undergoing training at the Commission than it is to prohibit a person's mother or wife from staying with him in the Commission building during a training program. It is my understanding that the Commission makes certain programs and facilities available to blind persons with guide dogs but has found that persons entering a rehabilitation program requiring a stay in the center derive the most benefit from the program if they are not accompanied by a dog. I understand this is also a policy in a great many other states.

Sections 601D.3 through 601D.5 are not relevant to your inquiry. These sections simply make it clear that a blind or partially blind person has the right to be accompanied by a guide dog on streets, highways, public buildings, hotels, eating places, places of public accommodation, etc. The Iowa Commission for the Blind does not prohibit blind persons from being accompanied by their dogs when they enter the Commission's building. It merely has adopted a policy on the basis of the professional advice of its staff that the persons wishing to enter a rehabilitation program requiring an extended stay in the Commission center not bring their guide dogs with them.

March 26, 1976

CONSTITUTIONAL LAW: Separation of Powers, Supreme Court, appointment of Code Editor. Article III, §1, Constitution of Iowa; Chapter 14, Code of Iowa, 1975. The statutory power given to the Supreme Court to appoint the Code Editor does not contravene the constitutional separation of powers doctrine. (Haesemeyer to Redmond, State Senator, 3-26-76) #76-3-25

The Honorable James M. Redmond, State Senator: You have requested an opinion of the Attorney General on the question of whether or not the authority conferred on the Supreme Court under §14.1, Code of Iowa, 1975, to appoint the Code Editor is a proper judicial function under the Iowa Constitution. In your request for an opinion, you inquire as to whether or not this power of appointment does not violate Article III, §1 of the Iowa Constitution, which provides that no person charged with the exercise of powers properly belonging to one department of the government shall exercise any function appertaining to either of the other departments.

In approaching your question, it is well to remember that when considering questions of constitutionality of statutes, the rule is well settled that a statute will not be declared unconstitutional unless it clearly, palpably and without doubt infringes the Constitution. *Lee Enterprises, Inc. v. Iowa State Tax Commission*, Iowa 1968, 162 N.W.2d 730. The challenger of the statute has the burden of demonstrating that the statute is unconstitutional. *Miller v. Schuster*, 1940, 227 Iowa 1005, 289 N.W. 702. Also, if any reasonable state of facts can be conceived to support the constitutionality of a statute, then the statute must be sustained. *Lewis Consolidated School District v. Johnston*, 1964, 256 Iowa 236, 127 N.W.2d 118.

As you pointed out, §14.1 provides that the Supreme Court shall appoint a Code Editor who shall serve at the pleasure of the court. Section 14.6 sets forth the specific duties of the Code Editor, including action on the laws, acts, and resolutions of the general assembly, duties concerned with the Iowa Administrative Code, and the specific duty, as stated in §14.6(4) to:

"Prepare and cause to be published, at such times as the supreme court shall by order direct, the rules of civil procedure and supreme court rules."

To place the matter in its proper historical context, it is well to note that the Code Editor formerly served as the supreme court reporter, in addition to the duties enumerated in §14.6. This function was eliminated from the duties of the Code Editor by the repealing provisions of Chapter 80, §13, 64th G.A., and is now separately set forth in §684.13, Code of Iowa.

The judicial power is ordinarily defined as the power to consider and interpret the constitution and laws, and to apply them and decide controversies. *Hutchins v. City of Des Moines*, 1916, 176 Iowa 189, 157 N.W. 881, 887. However, the concept of judicial function cannot and has not been so narrowly construed as to limit it to the "cases" and "controversies" determinations. *Newby v. District Court of Woodbury County*, 1967, 259 Iowa 1330, 147 N.W.2d 886, 891; *Harding v. McCullough*, 1945, 236 Iowa 556, 19 N.W.2d 613, 617.

By the terms of Article V, §4, Constitution of Iowa, as amended, Amendment 21 (1962):

"The Supreme Court . . . shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the State."

As a function of this constitutional supervisory power, and inherent in the nature of the judicial power, the Supreme Court has the power to select such persons as may be required to aid the judges in the performance of their judicial functions. As stated in *Hutchins v. City of Des Moines, supra*:

"That each department may make such appointments as are essential to the proper and independent discharge of its functions is not questioned. There are administrative acts essential to the discharge of legislative as well as of judicial functions, which economically and conveniently may be performed by assistants, and as either the legislature or the judiciary might, may or must, under the Constitution, perform such acts, they may select those who are to aid in such performances." 157 N.W. at 887.

Based both in the constitutional grant of supervisory powers to the court and in the inherent power of the court is the principle that the court shall make all rules and regulations necessary for the procedural operations of the court. Annot. 110 A.L.R. 22; Annot. 158 A.L.R. 705. This is recognized in §684.18 outlining the powers of the Supreme Court to prescribe all rules of pleading, practice, and procedure for all proceedings of a civil nature in all the courts of the state. The underlying principle is strong, as indicated by the court's language in *State v. Roy*, 1936, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1, 21:

"The powers essential to the functioning of courts, in the absence of the clearest language to the contrary in the constitution, are to be taken as committed solely to us to avoid a confusion in the methods of procedure and to provide uniform rules of pleading and practice."

That the Iowa Supreme Court has power in the proper exercise of its judicial function to formulate Rules of Civil Procedure for the courts of the state and rules for actions coming before itself cannot be doubted.

The grant of power to the court implies a duty to exercise it. *In Re Judges of Municipal Court of Cedar Rapids*, 1964, 256 Iowa 1135, 130 N.W.2d 553, 554. Rules of the courts must be legally adopted and promulgated to be effective:

"They ought not only to be formally promulgated but they should be definitely stated, published, and made known in some permanent form."

McDonald v. State, 1909, 172 Ind. 393, 88 N.E. 673, 674; *Brewer v. State*, 1948, 187 Tenn. 396, 215 S.W.2d 789, 801. See also *State v. Ensley*, 1859, 10 Iowa 149.

Consistent with the authorities heretofore cited herein, the Supreme Court is acting in furtherance of its judicial function in prescribing and formulating its own rules and Rules of Civil Procedure for the state, and any aids or assistants as the court may need for effective formulation, promulgation and distribution of those rules may be appointed without contravening its judicial function. Section 14.1 allows the Supreme Court to appoint a Code Editor who will, among other duties, publish at the court's order the rules of civil procedure and supreme court rules. Section 14.6. Such appointment by the court is consistent with its inherent judicial powers and constitutional grant.

The Code Editor, by the terms of §14.6, also has duties that are not so strictly judicial as the work with the rules of procedure. This in itself does not make the power of appointment by the court constitutionally infirm as violating the separation of powers provision. The court, in acting under §14.1 is not appointing "a person to an office or position exacting the discharge of executive or legislative duties only." *Hutchins v. City of Des Moines, supra.* At this point, the Code Editor has an overlapping of judicial, legislative and executive functions that never could be completely, absolutely and technically separated in any practical administration of the law. *State v. Roy, supra*, 110 A.L.R. at 18. The Supreme Court is not precluded from appointing someone who will exercise such hybrid duties, as long as an exercise of the judicial power is delegated to the appointee.

Accordingly, it is our opinion that the appointment of the Code Editor by the Supreme Court pursuant to §14.1, Code of Iowa, 1975, is a proper judicial function under the Iowa Constitution.

March 26, 1976

TAXATION: Assessment — Chapter 441, Code of Iowa ,1975. Cost of soil surveys is to be paid from the assessment expense fund. The Board of Supervisors is required to levy a tax for such fund when assessors budget is certified by the county conference board. (Nolan to Locher, Jones County Attorney, 3-26-76) #76-3-26

Mr. Stephen E. Locher, Jones County Attorney: Your letter requesting an attorney general's opinion is hereby acknowledged. In your letter you state:

"Jones County is one of a handful of counties in the State of Iowa which does not have an adequate soil survey. A letter of intent with the applicable State agency conducting soil surveys has been signed by the Assessor's Office. It is a contract for the taking of the soil survey. The cost of the soil survey is high, it is believed the cost to Jones County will be approximately $80,000. Due to the expense involved there is considerable conflict between various citizens and governmental officials in the county concerning the necessity of the survey. There may be various individuals in favor of preventing a soil survey from taking place due to the high cost. The difference of opinion and conflict has given rise to several legal questions concerning which I am hereby making a request for an attorney general's opinion.

"The first question could be stated as follows: Can the Conference Board approve and contract for the soil survey to be taken, thus leaving the Board of Supervisors with no voice in the approval of and contracting for said survey?

"The second question is as follows: Can the county's share of the cost for the soil survey be included in the Assessor's budget? If so, could this come under a heading such as 'miscellaneous items' under the Assessor's budget?

"As a related question to number two above, if the county's share of the soil survey costs cannot be included in the Assessor's budget, from what budget, if any, must it be included?

"The third question is as follows: If the conference board authorizes the Assessor's budget which includes the county's share of the soil survey costs, may the Board of Supervisors refuse to levy a tax for the Assessor's budget.

"My research has led me to believe that question number three is answered in the negative by Section 24.12. It is a somewhat related question, and is being included in this request."

The county conference board is the certifying board for all budget expenditures of the county assessor's office. Accordingly, the first question presented in your letter is answered affirmatively. Under §441.16, Code of Iowa, 1975, the assessor, the examining board and the board of review each prepare a proposed budget for the expenses of the ensuing year; these budgets are combined by the assessor and filed with the conference board. The statute further provides that the combined budget shall "contain an itemized list of the proposed salaries of the assessor and each deputy, the amount required for field personnel and other personnel, their number and their compensation; the estimated amount needed for expenses, printing, mileage and other expenses necessary to operate the assessor's office . . .". The chairman of the conference board then, by written notice, calls a meeting to consider the proposed budget and fix and adopt a consolidated budget for the ensuing year. At the meeting called for this purpose, the conference board "shall authorize:

* * *

"3. The miscellaneous expenses of the assessor's office, the board of review and the examining board, including office equipment, records, supplies, and other required items."

Under §441.17(2) of the Code, the assessor is required to cause all the property, except such as may be exempt from taxation, to be assessed in accordance with the provisions of §441.21. Section 441.21 provides in pertinent part:

"In assessing and determining the actual value of agricultural property fifty percent consideration shall be given to each of the following factors:

"a. The productivity and net earning capacity determined on the basis of the use for agricultural purposes . . .

"b. The fair and reasonable market value of such property as defined herein, but such market value shall be based only on its current use . . .

"In counties or townships in which field work on a modern soil survey has been completed since January 1, 1949, the assessor and the department of revenue shall place emphasis upon the results of such survey in determining the productive and earning capacity of such agricultural property."

Your second question also is answered affirmatively. The cost of the soil survey should be included in the assessor's budget under the heading of miscellaneous expenses.

As stated in §441.16, any tax for the maintenance of the office of the assessor shall be levied only upon the property in the area assessed by said assessor and the county treasurer shall credit the sums received from such levy to a separate fund, to be known as the "assessment expense fund". All expenses incurred under Chapter 441 are to be paid from the "assessment expense fund".

In answer to your third question, if the conference board authorizes the assessor's budget, including soil survey costs, and the board of supervisors fails or refuses to levy a tax for such assessor's budget, the board may be subject to mandamus to levy the required tax. 1966 O.A.G. 456 et seq. Accordingly, we agree with your conclusion that the board of supervisors is required to make levy as certified, pursuant to the provisions of §24.12 of the Code of Iowa.

March 26, 1976

COUNTIES: County Hospitals. §347.8, Code of Iowa, 1975. Funds derived from the sale of general obligation county hospital bonds may be invested pursuant to §347.8 and the interest earned used for the purposes for which the bonds were issued. (Nolan to Kelso, Supervisor of County Audits, Office of Auditor of State, 3-26-76) #76-3-27

Mr. William E. Kelso, Supervisor of County Audits, Office of Auditor of State: This is written in response to your request as follows:

"It has come to our attention that in one of the counties, there was, by a direct vote of the people, a bond issue passed for the building of an addition to a county hospital.

"We are familiar with Section 453.7, Code of Iowa, which states that such interest on the investment shall be credited to the retirement of the bonds of the fund for which they were levied.

"We are also familiar with Section 347.8, of the Iowa Code, concerning the sale of bonds for a county public hospital. The wording of this section seems to indicate that any interest earned from these bonds can

be used for construction in addition to that which was voted for in the bond issue.

"My question is this: Is my interpretation of Section 347.8 correct on this point? And if so, does it make any difference if the funds were invested in Time Certificates rather than Government bonds?"

We agree with your interpretation of §347.8, Code of Iowa, 1975, which in the view of this office does permit the bond sale proceeds to be invested and the interest earned thereon to be used for county hospital construction. The pertinent language in the section construed is as follows:

"Sale of bonds. The county treasurer shall dispose of the bonds in the same manner as other county bonds, and the same shall not be sold for less than par with accrued interest. Upon the issuance of the bonds as herein authorized and the sale thereof by the county treasurer the board of supervisors may direct the county treasurer to invest the proceeds from the sale of said bonds in United States government bonds which said proceeds, when so invested, *and the accumulation of interest on the bonds so purchased shall be used for the purposes for which said hospital bonds were authorized;* such investment when so made shall remain in said United States government bonds until such time as in the judgment of the board of supervisors it is deemed advisable to commence the construction of said county hospital or in the case of an addition to an already existing hospital until such time in the judgment of the board of hospital trustees it is deemed advisable to commence the construction of such addition." [emphasized]

In an opinion dated March 12, 1973, this office advised that unless the supervisors direct the treasurer to invest the proceeds of such bond sale in government bonds the treasurer would be authorized to invest such funds in time certificates. 1974 O.A.G. 74. In either event, such funds would be available for hospital construction purposes.

March 29, 1976

STATE OFFICERS AND DEPARTMENTS: Appointment of Officers — §2.40, Code of Iowa, 1975; and §455A.4, Code of Iowa, 1975, as amended by Ch. 67, §42, Acts of the 66th G.A., 1975 Session. Failure of the Senate to act upon an appointment by the Governor prior to final adjournment of the session of the General Assembly to which the appointment was submitted constitutes a rejection thereof pursuant to §2.40 of the Code and it is the duty of the nominating power to make a new appointment. (C. Peterson to Culver, State Senator, 3-29-76) #76-3-28

The Honorable Louis P. Culver, State Senator: Reference is made to your request for an opinion of the Attorney General as to whether appointments to the Iowa Natural Resources Council requiring senate approval pursuant to §455A.4, Code of Iowa, 1975, as amended by Chapter 67, §42, Acts of the Sixty-sixth General Assembly, 1975 Session, that were submitted by the Governor to the 1975 Session of the Sixty-sixth General Assembly and were not finally acted upon during that Session are carried over for consideration by the Senate during the 1976 Session.

This question was considered in an opinion issued April 7, 1969, by Attorney General Richard C. Turner to William C. Ball, Executive Assistant, Office of the Governor (1970 OAG 98, copy enclosed), wherein

it was concluded that the failure to act upon an appointment prior to final adjournment of a particular session of the General Assembly constitutes a rejection pursuant to §2.40 of the Code.

That opinion noted, however, that each house of the General Assembly has exclusive power to determine its rules of proceedings and that, in making rules applicable to two annual sessions of each General Assembly, the Senate should consider whether pending appointments of the Governor should be carried over to the second session as part of the pending business.

The rules of the Senate, Sixty-sixth General Assembly, adopted January 15, 1975, contain carry over provisions as follows:

Rule 4

Sessions of the General Assembly

The organization and committees of the senate shall carry over from the first to the second regular sessions of the same general assembly.

All bills and resolutions introduced in the first regular session of a general assembly which are not withdrawn, lost, or indefinitely postponed shall carry over into the second regular session of the same general assembly, and shall be returned to committee. Committees may refer such bills and resolutions to a subcommittee for consideration or place them on the calendar.

Senate Rule 3 states that Mason's Manual of Legislative Procedure shall govern in cases not covered by senate or joint rules and §445 thereof provides, in pertinent part, as follows:

"a motion to adjourn sine die has the effect of closing the session and terminating all unfinished business before the house, and all legislation pending upon adjournment sine die expires with the session . . ."

Thus the Senate of the Sixty-sixth General Assembly has not provided for carrying over appointments of the Governor, either directly by rule of the Senate or indirectly by reference to Mason's Manual, and all such appointments not finally acted upon expired upon final adjournment of that session.

There are then four appointments by the Governor required to complete membership on the Iowa Natural Resources Council, two with respect to the terms of the holdover members (Hugh A. Templeton and Mabel E. Miller), one with respect to the term of J. Justin Rogers which expired June 30, 1975 (Rogers did not requalify and the appointment of his successor, Richard R. Ayres, was rejected by Senate), and one with respect to the remainder of the term of Lee Feil which expires June 30, 1977 (the appointment of Joyce Repp to fill the vacancy created by Feil's resignation was not acted upon by the Senate during the 1975 Session, which constitutes rejection under the rule enunciated above). Where there is a failure to confirm on the part of the confirming body, it is the duty of the nominating power to make a new appointment. See 67 C.J.S. Officers §32, page 160, citing State v. Johnson, 8 Ohio Cir. Ct., N.S. 535, 28 Ohio Cir. Ct. 793.

April 6, 1976

COUNTIES: County Compensation Board. §6, Chapter 191, Laws, 66th G.A., 1975. Notice of a public hearing on county compensation board's recommendations for county officer's salaries is not invalidated by a failure to literally comply with statute requiring publication of a comparison study where statute was substantially complied with after 3 day delay and the public was neither misled nor prejudiced by the published notice. (Nolan to Thatcher, Webster County Attorney, 4-6-76) #76-4-1

Mr. William J. Thatcher, Webster County Attorney: You have requested an attorney general's opinion with respect to the legality of the acts of the Webster County Compensation Board. Your letter states:

"The Webster County Attorney's office requests an opinion from the Iowa Attorney General's office concerning the interpretation of House File 802, which was signed into law last summer by the Governor. House File 802 established a Compensation Board in each Iowa county.

"The notice, which was published seven days before the Webster County Compensation Board met in a public meeting, did not contain a survey of suggested salaries for county officials. This survey was received by the Legislature within the last five years and according to House File 802, should have been included in the public notice. A correct notice was published four days before the public meeting. The Webster County Compensation Board then recommended salary levels for the selected county officials. The Webster County Board of Supervisors accepted these recommendations.

"What effect, if any, will the improper notice have on the Compensation Board's recommended salaries and the Supervisor's approval of these recommendations? Should the Compensation Board meet again, formulate new recommended salaries and submit new recommendations to the Supervisors for their approval?"

Under §6 of Chapter 191, Laws of the 66th General Assembly, 1975 Session, the county compensation board is directed to prepare and publish the compensation schedule in a newspaper having general circulation throughout the county. The statute further provides:

". . . If a county officer compensation study has been received from the general assembly within the preceding five years, a comparison of the compensation recommendations of such study and the compensation schedule prepared by the board shall be included in the publication. The publication shall also include a public notice of the date and location of a hearing to be held by the board not less than one week nor more than three weeks of the date of notice. Upon completion of the public hearing, the county compensation board shall prepare a final compensation schedule recommendation."

Clearly, use of the word "shall" in §6 of Chapter 191, Laws of the 66th General Assembly, 1975 Session, imposed a duty to publish the compensation study along with the other required information to effect a legal notice. Section 4.1(36), Code of Iowa, 1975. Statutory provisions pertaining to notice are governed by the general rules applicable to statutes with respect to construction. Statutory requirements for giving notice of contemplated administrative action and of a hearing thereon must be at least substantially complied with. 66 C.J.S. Notice, §9.

". . . A notice is sufficient where it reasonably apprises interested persons of the action that may be taken, and will not be held insufficient

for nonprejudicial deficiency; what is sufficient in this respect necessarily depends on the facts of each case . . ." 73 C.J.S. Public Administrative Bodies & Procedure, §131.

On the basis of the facts stated in your letter, it is the view of this office that reasonable notice of the county compensation board's public meeting was given, and the statute was substantially complied with by publication of an amended notice several days prior to the date for the public hearing. Partial compliance has been determined to be substantial compliance with a statutory provision requiring publication of proposed constitutional amendments when the full text of the proposed amendments was published from 81 to 87 days before the election in each county and not three months before such election as required and where the electorate was neither misled or prejudiced by the few days delay. *Opinion by the Justices* (Del., 1971), 275 A.2d 558, 562. The *Opinion by the Justices* at page 561, *supra*, states:

"While some authorities classify the publication requirements as directory rather than mandatory, we are of the opinion that they are mandatory—but subject to the substantial compliance rule."

Although we agree that any extension of the substantial compliance principle must be carefully drawn and limited so as not to undermine the purpose and intent of the publication provisions, it is our view that a delay of three days in publishing a general study of county officer compensation to be used for comparison purposes at a public meeting to be held, as previously announced by timely published notice, did not invalidate that public meeting.

April 6, 1976

CITIES AND TOWNS: Filling Vacancies — §§372.4 and 372.13(2), Code of Iowa, 1975; §19, Ch. 203, Acts of the 66th G.A. (1975). A mayor, in a mayor-council form of government, may not vote to break a tie to fill a vacancy on the council. (Blumberg to Anderson, State Representative, 4-6-76) #76-4-2

Honorable Robert T. Anderson, State Representative: We have received your opinion request of March 26, 1976. You ask whether, pursuant to §372.4, 1975 Code of Iowa, a mayor may vote to break a tie on the filling of a vacant council seat.

Section 372.4, as amended by §19, Ch. 203, Acts of the 66th G.A. (1975) provides:

"A city governed by the mayor-council form has a mayor and five councilmen elected at large, unless by ordinance a city so governed chooses to have a mayor elected at large and an odd number of councilmen but not less than five, including at least two councilmen elected at large and one councilman elected by and from each ward. The council may, by ordinance, provide for a city manager and prescribe his powers and duties, and as long as the council contains an odd number of councilmen, may change the number of wards, abolish wards, or increase the number of councilmen at large without changing the form.

"However a city governed, on the effective date of this section, by the mayor-council form composed of a mayor and a council consisting of two councilmen elected at large, and one councilman from each of four wards, or a special charter city governed, on the effective date of

this section, by the mayor-council form composed of a mayor and a council consisting of two councilmen elected at large and one councilman elected from each of eight wards, may continue until the form of government is changed as provided in section 372.2 or section 327.9. While a city is thus operating with an even number of councilmen, the mayor may vote to break a tie vote on motions *not involving ordinances, resolutions or appointments made by the council alone,* and in a special charter city operating with ten councilmen under this section, the mayor may vote to break a tie vote on all measures.

"The mayor shall appoint a councilman as mayor pro tem, and shall appoint the marshal or chief of police except where an intergovernmental agreement makes other provisions for police protection. Other officers must be selected as directed by the council. *The mayor is not a member of the council and may not vote as a member of the council.*" [Emphasis added]

The two italicized portions are of significance in answering your question. The first provides that when a city was governed by the mayor-council form at the effective date of the section (July 1, 1975) with an even number of councilpersons the mayor can vote to break a tie on motions only, not involving ordinances, resolutions or appointments made only by the council. The section italicized provision applies in all other circumstances.

Under your facts, the first provision is not applicable since the council, on July 1, 1975, was operating with five members. A vacancy has occurred since that time. Section 372.13(2) of the Code provides:

"A vacancy in an elective city office during a term of office may be filled by the council for the period of time until it is filled pursuant to section sixty-nine point twelve (69.12) of the Code."

The filling of a vacancy is not mandatory, but when done it is by the council. Thus, the second provision is applicable.

Accordingly, we are of the opinion that a mayor under the mayor-council form of government may not vote to break a tie on the filling of a vacant council seat.

April 6, 1976

STATE OFFICERS AND DEPARTMENTS: Practice of Medicine and Surgery—§§148.1 and 150A.1, Code of Iowa, 1971. An individual or corporation which indicates to another whether that person's diet contains the U.S. Recommended Daily Allowance of vitamins, minerals and the like is not, per se, practicing medicine and surgery. (Blumberg to Pawlewski, Commissioner of Health, 4-6-76) #76-4-3

Norman L. Pawlewski, Commissioner of Health: We have received your opinion request regarding a possible illegal practice of medicine. It appears, from your facts, that a laboratory that develops and manufactures products for sale and use by cosmetologists and barbers has set up a program to assist persons with their diets and nutrition. A local cosmetologist gives a customer what the laboratory calls a Nutritional Diet Analysis. The person indicates all foods, including quantities, consumed in a three day period. The analysis is then sent to the lab in another state where it is analyzed. The person is then sent "confidential" material which lists the amounts of the U.S. Recommended

Daily Allowance of vitamins, minerals and the like, what that person actually intakes, and the percentage of the U.S. RDA that is taken.

The "confidential" material tells the person that "[a]lthough these nutrients do have an indirect relationship to hair, skin and nails, the . . . Diet Analysis is primarily concerned with protein, vitamin and mineral intake . . . . For more information on protein and nutrition ask your cosmetologist." Further on, the material indicates that any serious or health related questions regarding "your . . . Diet Analysis" should be answered only by a physician.

In another publication, the president of the company states that "severe hair, skin and nail problems were *most always* caused by poor nutrition." Later on, in that publication it is stated:

"The . . . Diet Analysis Evaluation will help you and your stylist understand your dietary habits and will provide the information needed to enhance and maintain your health and well-being."

All through the materials on this nutritional program, including those materials for the cosmetologists, is the recurring theme of proper diet and nutrition for good health and nail, skin and hair problems. We are not concerned with the truthfulness of any statement made in these publications, and do not intend to imply that any statements are untrue. You specifically asked:

"1) Is it a violation of the healing arts laws for a corporation to engage in the above described activities?

"2) May a person licensed as a cosmetologist or barber in conjunction with their practice give consultation or advice to persons concerning vitamins or nutrition?

"3) May a person licensed as a cosmetologist or barber sell vitamins or food supplements in a shop where cosmetology or barbering is practiced?"

We must first look to see if the above activity violates any statute.

Section 148.1, Code of Iowa, provides:

"Persons engaged in practice. For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of medicine and surgery:

1. Persons who publicly profess to be physicians or surgeons or who publicly profess to assume the duties incident to the practice of medicine or surgery.

2. Persons who prescribe or prescribe and furnish medicine for human ailments or treat the same by surgery.

3. Persons who act as representatives of any person in doing any of the things mentioned in this section."

Section 150A.1, dealing with osteopathic medicine and surgery, is similar. We have held that certain acts, although initially appearing to fall within medicine and surgery, are actually not within the proscriptions of the Health Title. See, for example, 1974 O.A.G. 452 where we held that ear piercing was not the practice of medicine since none of the requisites of Chapter 148 or 150A were met. We must emphasize that each case is

determinative upon its own set of facts. We are unable to state with any certainty that these facts constitute an illegal practice of medicine and surgery, as will be shown below.

Diagnosis is a tool of the physician, and one of the incidencies of medicine and surgery. It is defined in J. E. Schmidt, Attorney's Dictionary of Medicine D-27 (1974), as the determination of what disease a patient has; the art of distinguishing between several possibilities; and, the name of the disease decided upon. Webster's Dictionary defines "diagnosis" as the act or process of deciding, by examination, the nature of a diseased condition. Finally, Black's Law Dictionary 540 (4th ed. 1951) defines "diagnosis" as the discovery of a patient's illness or determination of the nature of a disease from a study of its symptoms. Thus, from the information we have, it does not appear that diagnosis is involved.

The key phrase is "prescribe or prescribe and furnish medicine for human ailments". "Ailment" is defined by Webster as "any bodily or mental disorder; illness, especially a mild one." Black's Law Dictionary defines it as an "indisposition of body or mind, a slight illness." The divergence of definitions is best shown by 3 CJS, *Ailment* 765:

"The word 'ailment' is generally defined as meaning disease; pain; illness; indisposition; morbid affection of the body.

"It has been said that the word 'ailment' covers disorders which could not properly be called diseases, and ordinarily is not applied to acute diseases, but rather it denotes a slight illness; an indisposition of the body or mind. It may include mere symptoms, so long as they are in themselves troublesome, but it does not denote a physiological fact which occurs in the regular course of nature, as in the case of pregnancy or a normal case of confinement.

"However, the term may signify something which substantially impairs the health, materially weakens the vigor of the constitution, or seriously deranges the vital functions, and may refer to something more than a mere passing discomfort, or a mere transitory and temporary illness in the accepted sense. Thus, it may be applicable only to a disorder of a substantial nature and not to a mere temporary functional indisposition, which, even though requiring medical treatment, is readily remediable.

" 'Ailment' has been held to be equivalent to, or synonymous with, 'disease or disorder,' and 'sickness,' and has also been distinguished from 'disease'."

See also, *Federal Life Ins. Co. v. Hase*, 193 Ark. 816, 102 S.W. 2d 841, 845; *Cromeens v. Sovereign Camp W.O.W.*, 247 S.W. 1033, 1034 (Ct. App. Mo. No. 1923); *McDermott v. Modern Woodmen of America*, 1903, 97 Mo. App. 636, 71 S.W. 833, 838; *Washington Fidelity Nat. Ins. Co. v. Lacey*, 45 Ohio App. 104, 186 N.E. 751, 754; *Mutual Life Ins. Co. of New York v. Burton*, 167 Tenn. 606, 72 S.W.2d 778, 781. Most of the cases on this subject concern insurance policies. In a case interpreting a medical practice act it was held, in *Rock v. Maryland*, 1969, 6 Md. App. 618, 253 A.2d 401, that the word "ailment" included pregnancy. Thus, many things could be an ailment, including conditions of the skin, hair and nails. Although not attempting to define "ailment" as it is used in Chapter 148, we believe that a very broad definition should be placed on the word.

"Medicine" is defined in the Attorney's Dictionary of Medicine, supra at M-29, as a substance taken internally or applied to the surface in the treatment of a disease; a drug. In 57 C.J.S., Medicine 1042-1043 is a discussion of what "medicine" is:

"In its other distinctive sense, the word signifies a drug, indicating nothing more than a remedial agent that has the property of curing or mitigating diseases, or is used for that purpose, and in its ordinary sense, as applied to human ailments, it means something which is administered, either internally or externally, in the treatment of disease or the relief of sickness. In this sense the word 'medicine' is variously defined as a remedial agent; a remedy; a physic, a medicament; any substance or preparation used in treating disease; articles intended for use in the diagnosis, cure, medication, treatment, or prevention of disease in man or other animals; a substance supposed to possess curative or remedial properties; a combination of drugs in largely varying proportions.

"There are many things, not in themselves medicines, but which may be put to a medicinal use, and when so used they may become medicines. Thus electricity, conveyed by instruments or by human hands, may be a medicine. The fact that the substance employed as a remedial agent may have value as a food, and a tendency to build up and restore wasted or diseased tissue, will not deprive it of its character as a 'medicine,' if it is administered and employed for that purpose. On the other hand, there are a great many articles which, under certain circumstances and conditions, may possess some medicinal properties, but they are not classed as 'medicine,' as the word is generally used and understood; so tobacco or cigars are not classed as medicine. While medicine may be something which is applied externally, it need not necessarily be a substance which may be seen and handled."

See also, *State v. Breese*, 1907, 137 Iowa 673, 114 N.W. 45, 47; *Harris v. State*, 229 Miss. 755, 92 So.2d 217, 222; *State ex rel. and to Use of Gibson v. Missouri Bd. of Chiropractic Examiners*, 365 S.W.2d 773, 778. Thus, vitamins and food supplements containing minerals, protein and the like can, under certain circumstances, be medicines.

As can be seen, the limited information we have cannot suffice for us to rule that the acts in question constitute the practice of medicine and surgery. Thus, there is no answer to questions one and two of your request. However, it should be noted that the acts which you described are close to that line between what can be done by anyone, and what can only be done with a medical license. The danger is that a cosmetologist may in fact discuss and advise on vitamins, minerals and the like regarding a skin, hair or nail problem or even a general condition that would fall within Chapter 148. We have no authority to prohibit them, at this time, from discussing these things. We can, however, warn of a possible violation of the law.

In answer to your third question, we can find nothing that would prohibit the sale of vitamins or food supplements by cosmetologists or barbers. Similar products are found on the shelves of grocery stores. There may be a problem, however, if either Chapters 155 or 203A are violated. Those chapters concern pharmacists and their scope of practice and the misbranding and adulteration of drugs and medicines.

In sum, it is not feasible for us, at this time, to give definitive answers to your questions.

April 7, 1976

COUNTIES: Supervisors. §331.9, Code of Iowa, 1975. The terms of all members of the board of supervisors expire on the same date where the electors change the plan of representation pursuant to §331.9, and an incumbent wishing to continue to serve on the board must run for re-election. Terms of supervisors to be elected under the newly adopted plan should be determined by lot prior to the primary election. (Nolan to Hennessey, State Representative, 4-7-76) #76-4-4

The Honorable Maurice Hennessey, State Representative: This is written in response to your request for an attorney general's opinion on a matter pertaining to the election of supervisors, pursuant to §331.9, Code of Iowa, 1975. Your letter states:

"In a recent election (January 1976, I think) the voters of Delaware County changed their method of electing supervisors from being elected at large to being elected by the people of the districts they serve.

"The question here is whether a supervisor who has been elected at the last election and still having two years to serve must now seek reelection in order to serve after January 1, 1977."

Where a special election has been held pursuant to §331.9 of the Code, and the plan adopted at the special election is "not the supervisor representation plan currently in effect in the county, the members of the board serving at the time of the special election shall continue their terms until the second secular day in January following the next general election, at which time the terms of all such members shall expire . . ."

The language of this statute is clear that where the plan of representation for the board of supervisors is changed, the terms of all of the members of the board of supervisors expire in January following the next general election. Accordingly, a supervisor who was elected at the last election and who would otherwise have two years remaining as the unexpired portion of his term must now seek reelection in order to continue to serve as supervisor after January 1, 1977.

A subsequent question has been raised as to whether or not, in view of the statutory provision that the terms of all of the members of the board of supervisors expire on the same date, the terms of members of the board of supervisors to be elected at the next general election can be staggered.

It is the opinion of this office that such terms can and should be staggered as provided under §331.25 of the Code, which states:

"The determination as to whether a term of office shall be for two or four years shall be decided by lot prior to the primary election, and the results of such determination indicated on the ballot in such primary and general elections."

We arrive at this conclusion from the following language stated in §331.9:

". . . and members shall be elected pursuant to the requirements of the plan adopted by the people and set out in sections 331.25, 331.26 and 331.27."

Section 331.27 provides:

"If plan 'three' is selected pursuant to section 331.8 or 331.9, the county board shall be elected as provided in section 331.26, except that each member of the board, and candidates for such office, shall, at the

primary and general elections, be elected only by the electors of the district which he or they seek to represent."

Section 331.26 then states in pertinent part:

"4. At the primary and general elections the number of supervisors, or candidates for such offices, which constitute the county board in such county shall be elected as provided in this section. Terms of members shall be as provided in section 331.25, subsection 2."

Subsection two of §331.25 contains the language quoted above providing for the determination by lot as to whether a term of office shall be for two or four years.

April 8, 1976

CITIES AND TOWNS: Airport Commissions — §§330.17 and 330.21, Code of Iowa, 1975. Funds from taxation or otherwise for airport purposes are under the full and absolute control of the airport commission if one is established. (Blumberg to Palmer, Director, Aeronautics Division, Department of Transportation, 4-8-76) #76-4-5

Mr. Michael E. Palmer, Director, Aeronautics Division, Department of Transportation: We have received your opinion request of March 1, 1976, regarding airport funds. You ask who has control of city airport funds when an airport commission exists.

Section 330.17, 1975 Code, provides for airport commissions for cities, counties or townships. The management and control of the airport is in the hands of the airport commission where one is established. Section 330.21 provides:

"The commission has all of the powers granted to cities, counties and townships under this chapter, except powers to sell the airport. The commission shall annually certify the amount of tax within the limitations of this chapter to be levied for airport purposes, and upon such certification the governing body may include all or a portion of said amount in its budget.

"All funds derived from taxation or otherwise for airport purposes shall be under the full and absolute control of the commission for the purposes prescribed by law, and shall be deposited with the treasurer or city clerk to the credit of the airport commission, and shall be disbursed only on the written warrants or orders of the airport commission, including the payment of all indebtedness arising from the acquisition and construction of airports and the maintenance, operation, and extension thereof."

That section leaves the municipality with the discretion of how much of its budget will be for airport purposes. However, it mandates that all funds derived from taxation or otherwise for airport purposes shall be under the absolute control of the commission. Thus, where a city budgets for the airport and more revenues (from taxation and use of the facilities) come in than were budgeted, that excess amount belongs to the airport commission. Similarly, if revenue is derived from the sale of services, equipment or the like, including portions of land, that revenue belongs to the airport commission. In other words, all such funds shall be deposited to the credit of the airport commission and not with the general fund or any other fund of the city.

April 9, 1976

CITIES AND TOWNS: Resolutions of Necessity — §§384.42, 384.49 and 384.51, Code of Iowa, 1975. A city may include more than one project in a resolution of necessity. (Blumberg to Junker, State Representative, 4-9-76) #76-4-6

Honorable Willis E. Junker, State Representative: We have received your opinion request regarding resolutions of necessity for street improvements. You indicated that a city is contemplating resurfacing several streets. Not all of the streets are contiguous to or intersecting one another. The proposed resolution of necessity includes all of these streets as one project. Most of the residents on one of the streets have indicated their objections to the resurfacing of that street. You ask whether the city can include all of these streets in one project in relation to §384.51, 1975 Code of Iowa.

Section 384.42 of the Code provides in part:

"To construct or repair a public improvement [street repair] the council shall proceed as follows:

. . .

2. Adopt a preliminary resolution by the vote of a majority of all the members of the council. . . .

. . .

4. A preliminary resolution may include more than one improvement or class of improvement."

Section 384.49 provides in part:

"If, upon adoption of the plot, schedule, and estimate, the council determines to proceed with all or any part of the public improvement, it shall cause a proposed resolution of necessity to be prepared and introduced.

. . .

2. A resolution of necessity may include:

. . .

b. All improvements which are included in the preliminary resolution."

Section 384.51 provides in pertinent part:

"A resolution of necessity requires for passage the vote of three-fourths of all members of the council, or, in cities having but three members of the council, the vote of two members, and *where a remonstrance has been filed with the clerk signed by the owners subject to seventy-five percent of the amount of the proposed assessments for the entire public improvement included in the resolution of necessity, a resolution of necessity requires a unanimous vote of the council.*" [Emphasis added]

The italicized portion is significant, for the property owners who are objecting comprise the seventy-five percent requirement for a unanimous vote if that street was a single project, but fall short of the required percentage of the overall project encompassing many other streets.

There is a divergence of opinion as to whether a city must designate

a separate project for each street or the like that is improved. In 63 C.J.S., *Municipal Corporations* §1087, it is stated:

"*In the absence of a statute otherwise providing it has been held that separate improvements may be joined in one proceeding.* It is generally provided by statute, however, that separate improvements must be carried out by separate proceedings, and in such cases the consolidation of unrelated improvements in a single proceeding will render the proceeding, and all subsequent proceedings based thereon, void. In determining what constitutes a single improvement the tendency of the courts is toward liberality. The mere fact that an improvement embraces a number of different units of territory does not bring it within the statutory interdiction, where the units are contiguous or otherwise closely related, and the same kind of work is to be done to each, nor does the fact that an improvement involves the doing of different kinds of work render it multifarious, within the meaning of the rule, where the various parts of the work are merely incidental to the main purpose of the improvement; but distinct improvements are properly provided for by separate proceedings, although they may constitute a general system of improvement. *Provisions may be made in one ordinance or resolution for paving different streets in the same manner, for grading, draining, and sodding, for running sewers or sidewalks along different streets, and for building a bridge and constructing a sewer when the latter is necessary for the proper drainage of the bridge.* An ordinance will not be regarded as invalid as providing for two independent improvements by the fact that in providing for the construction of a sewer it requires it to be laid so as to discharge from either way into a sewer in an intersecting street. Where the power to widen and to grade was given in different sections of an act, it has been held that the widening and grading of a street may not be ordered in a single proceeding. Two improvements under a single ordinance have been treated as if provided for in separate ordinances, where the cost of one was to be borne by the city and the cost of the other by the abutting owners." [Emphasis added]

In 13E. McQuillen, Municipal Corporations §37.75, is found the following:

"Generally speaking, each separate and distinct improvement requires a separate proceeding and ordinance. Thus, under authority to lay out 'any one street' between certain termini, etc., only one street may be included in one proceeding. So where an ordinance provides for the widening of an alley running north and south through a block, and the opening of a new alley running east and west through the same block, and also the condemnation of two triangular pieces of land at the intersection of these alleys for the purpose of improving the ingress and egress to and from the alleys, two distinct improvements are contemplated and they cannot be united in one proceeding.

. . .

"Under the usual charter power, a single ordinance may provide for the improvement of a single street, or a part thereof, or for several streets. *When an improvement of streets constitutes a single scheme, the ordinance may provide for the pavement of several streets, a single street or a portion of a street, and when streets are practically similar and are to be paved in the same manner and with the same material and are grouped as a unit, in the absence of provision to the contrary, they may generally be treated as a single improvement. To constitute a single improvement physical connection between the different portions is not essential.* So, under some charters, a resolution to improve a street may include a declaration of intention both to grade and macadamize. And an ordinance for grading a street may properly include filling in; also adjustment of sewers, manholes, etc. An improvement in which part of a street is ordered widened and extended and the whole graded is single. An ordinance providing for the laying of water

pipes which requires the laying to begin on one street, and, after being laid in that for some distance, to turn by right angle into another street, is not void in that it authorizes in one proceeding two separate and distinct improvements." [Emphasis added]

In *Flynn v. City of Worthington*, 1929, 177 Minn. 28, 224 N.W. 254, a city was prohibited from including three consecutive blocks of an alley in one improvement plan. The statute in question required a petition signed by 35 percent of the abutting property owners. The city had a petition signed by 35 percent of the property owners along the entire three blocks. The court held that the percentage referred to abutting property owners of each block. The court also distinguished alleys from streets, as though there might be a different application of the statute for streets, but did not fully discuss the point. See also, *Bancroft v. Town of Chesterton*, 1927, 86 Ind.App. 5, 155 N.E. 624; *Oregon Transfer Co. v. City of Portland*, 1905, 47 Ore. 1, 81 P. 575; and, *John P. Sharkey Co. v. City of Portland*, 1911, 58 Ore. 353, 114 P. 933, where the courts found that the statutory scheme did not permit several improvements to be done as one.

There are several cases which hold otherwise. In *Wilson v. Blanks*, 95 Ark. 496, 130 S.W. 517, it was held that unless a statute so provides, separate improvements may be joined in one proceeding. In *Remillard v. Blake & Bilger Co.*, 1915, 169 Cal. 277, 146 P. 634, the work called for by the resolution consisted of various street work upon several distinct streets. The court held (146 P. at 636):

"The main question in the case is whether the assessment is void because 'based upon a single proceeding, order and contract for the doing of street work of various kinds upon several different streets.' The opinion of Mr. Justice Hall shows that the statute, as construed by this court, authorizes the city council to include in a single scheme of improvement work upon more than one street. Mahoney v. Braverman, 54 Cal. 565, and White v. Harris, 116 Cal. 470, 48 Pac. 382, in which this rule was declared, were cases of sewer improvements. We are unable to find in the statute any language which justifies the drawing of a distinction, in this respect, between the construction of a sewer and any other kind of street improvement authorized by the Vrooman Act. If the various streets, or, rather, the portions thereof to be improved, are so related that the improvement of them as a whole may fairly be deemed to be a benefit to all the property fronting upon such parts, the council does not exceed its jurisdiction by treating the work on the several streets as an entirety, and including it in a single proceeding. Whether one or more streets should form a unit for improvements is a question committed primarily to the discretion of the council. No abuse of discretion appears here."

It was held in *Bates v. Twist*, 1902, 138 Cal. 52, 70 P. 1023, 1024:

"Under the authority thus conferred, it is within the legislative power of the board of supervisors, after having acquired jurisdiction therefor, to order the improvement of the whole or of any portion of one or more streets, whether connected or remote from each other, at the same time, and in the same resolution. The statute does not limit the number of improvements which the board may order at the same time, or require that a separate resolution shall be adopted for each of said improvements. As in the case of any other legislative body, in the absence of any restrictions upon its mode of action the board may include more than one item of legislation in a single ordinance or resolution. In Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535, we said: 'The resolution of intention is only a proposition by the council,

and frequently consists of distinct classes of improvements upon designated portions of the same street or of different streets; and in such case it is competent for the council to order only one or more of these classes to be done.' . . . It may often happen, as in the present case, that the public interest requires the improvement of streets situate in widely separated parts of the city, and, if so, no reason is shown or can be suggested why the board may not cause such improvements to be included in the same resolution of intention, without requiring them to be contracted for by the same individual." [Citations Omitted]

In *Frazier v. City of Rockport*, 1918, 199 Mo. App. 80, 202 S.W. 266, 268, the court cited the following from *City of Springfield v. Green*, 120 Ill. 269, 273, 11 N.E. 261, 262 and 2 Elliot on Roads and Streets (3rd Ed.) §694:

" 'While many streets and parts of streets are embraced in the scheme of improvement adopted by the city, yet we regard them all as but parts of the same improvement. The city authorities, in adopting the ordinance must have found, as a matter of fact, that these streets and parts of streets were so similarly situated, with respect to the improvement proposed to be made, as to justify treating them as parts of a common enterprise and single improvement, and from the record before us we think they were justified in doing so. They were all to be paved with the same material and in the same way, and the fact that there was a difference of a few feet in the width of some of them, and that the cost of paving the railway tracks in others was to be excluded from the estimate, should, in our opinion, make no difference in this respect. The similarity of the improvement proposed to be made, and the situation of the property to be assessed, with respect to it, afford a more satisfactory test as to whether they might all be embraced in a common scheme as one improvement than their actual connection or physical contact with one another.

. . .

" 'Improvements are not, however, necessarily distinct and different because different roads or different streets are included; for it may well be that the system is a single and uniform one, although it embraces more than one street. If, in fact, the improvement is a unity, an assessment may be valid, although it embraces in its line more than one street or road. It may often happen that in order to secure a complete and effective system it is necessary to construct a main line with branches, or to improve two or more streets at once so as to secure a uniformity of grade, and in these or similar instances there is no reason why the system may not be considered as a single improvement, except, of course, where the statute supplies a reason for a different rule.' "

The Court then held:

"There is no provision in the statute requiring each street to be treated as a single and separate improvement. Many streets and parts of streets may be embraced in one plan or scheme of improvement if in fact they can all be regarded as parts of the same improvement. The extent thereof and what shall be included in it, and its nature and character, are within the legislative discretion of the city council, and the courts will interfere only to correct a clear abuse of the discretion. People v. Latham, 203 Ill. 9, 67 N.E. 403, 406. The mere fact that more than one street was included in one proceeding was not regarded as fatal in the following Missouri cases, to wit: Seibert v. Cavender, 3 Mo.App. 421, involving the curbing, grading, guttering, and macadamizing of about 20 streets, and Willis v. Burbank, 182 Mo.App. 68, 167 S.W. 608, where three streets were included in one improvement. As a practical matter to require each street to be treated as one improvement and the property fronting on that street to participate only in the cost of improving it would lead to great difficulties, often forbidding

an improvement entirely or rendering it inadvisable unless adjacent streets were similarly improved and the whole done as one improvement."

See also, *H. Crummey, Inc. v. Howe*, 1920, 48 Cal. App. 542, 192 P. 122, and *Hammond v. City of Burbank*, 1936, 6 Cal.2d 646, 59 P.2d 495, where it was held that the inclusion of more than one street in a resolution was not invalid; and, *City of Burlington v. Quick*, 1877, 47 Iowa 222, where the city had included several different projects in the same resolution and the Court, not referring specifically to this point, affirmed the action of the city.

From the above-quoted statutes and the case law, it is apparent that pursuant to Chapter 384 of the Code, a city may include more than one project in a resolution of necessity.

April 12, 1976

TAXATION: Agricultural Property Valuation; "determined" construed as participle unqualified by modifiers. §17 of conference committee report on S.F. 1062, based on the language "as determined by the director" the latter would be justified in using for purposes of assessment of agricultural property values the 1975 actual value as he already has determined it or he might properly be persuaded to change his mind and use another basis. The word "determined" is a participle unqualified by words such as "previously," "to be," "heretofore," "hereafter" or "for equalization purposes." (Turner to Norland, State Representative, 4-12-76) #76-4-7

Honorable Lowell Norland, State Representative: You have requested an opinion as to the meaning of §17 of the Conference Committee Report on Senate File 1062, as amended by the Senate and now pending in the House, a property tax bill which, *inter alia*, makes changes in the procedures for the assessment and valuation of certain taxable property.

§17 specifies a new method of valuing agricultural property and provides in pertinent part as follows:

"Sec. 17. AGRICULTURAL PROPERTY VALUATION. Notwithstanding the provisions of section four hundred forty-one point twenty-one (441.21) of the Code, for assessments made as of January 1, 1976, the actual value of each tract of agricultural property consisting of more than ten acres shall be computed by multiplying the valuations established by the assessor and approved by the board of review by the percentage which the 1975 income value per acre bears to the 1975 actual value per acre of the agricultural property *both as determined by the director*. . . ." (Emphasis added)

You ask whether this language dealing with the 1975 income value per acre as determined by the Director of Revenue means "in fact the five year average income value that the director determined and used in his 1975 equalization order" or whether it could mean a determination to be made hereafter on some other basis such as for 1975 only and without regard to the average over the past 5 years.

The word "determined" is a participle unqualified by words such as "previously," "to be," "heretofore," "hereafter" or "for equalization purposes." Such qualifiers it appears could still be rather simply inserted if the General Assembly would ilke to speak more clearly.

Ordinarily, there is no tense to a participle. Participles as such do

not indicate the time when the event occurs. For example, the word "hatched" is a participle and if one says "Birds hatched in the spring fly by fall" he ordinarily means all birds hatched in all springs, past, present and future, according to Professor Bergen Evans. Dr. Evans, now deceased, was a distinguished professor of English at Northwestern University. He received his M.A. and Ph.D. from Harvard and attended Oxford University as a Rhodes Scholar. The foregoing was information he gave me in a letter in 1958, patiently explaining basic English to me during the time I was presenting the case of *Dingman v. City of Council Bluffs*, 1958, 249 Iowa 1121, 90 N.W.2d 742. Construing a statute therein, our Supreme Court found that the words "bonds issued" ("issued" also being a participle) did not necessarily mean either bonds "previously" issued or bonds "to be issued subsequently." The Court, speaking through Justice Larson, said:

". . . Without a strained, narrow, technical or grammatical examination of the term 'bonds issued,' we find no ambiguity in this enactment. We think it means bonds issued pursuant to this legislation." * * *

"The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense which may be uncovered by the ingenuity and study of an acute and powerful intellect. [Citation] * * *

". . . If the legislature had simply wished to exclude bonds previously issued in these classifications, it could have said so. It knew how, as is disclosed by the third classification in section 408A.7. On the other hand, if this class of improvements was not to be subject to the restrictions of the previous sections, . . . it would be difficult to devise language that would appear more sensible. To say that the legislature should have said 'bonds to be issued' would appear to require semantic experts as legislators or drafters of statute — a position we do not care to assume. . . ." * * *

"Obviously, then, we cannot determine the legislative intent by considering only the question of whether the isolated word 'issued' relates to past, or past, present and future, or future issues. We must consider the entire statute and its other language and provisions."

"Certainly as to procedure, the statute relates to the future. . . ." * * *

"In other words, the legislature clearly had in mind that after the effective date of this Act bonds issued by the designated authorities had to be issued pursuant to the requirements set forth therein." * * *

". . . If the section was intended as retrospective, the legislature could and, we think, would have simply said, 'This statute does not apply to bonds issued prior to its enactment.' This it did not do. Its use of 'bonds issued' in connection with specified operations must, therefore, have another and greater significance. . . ."

"Thus we find no real ambiguity involved herein, and conclude it would be difficult indeed to find any other logical construction which would indicate a different legislative intent." * * *

"It must be concluded here that the word 'issued' as such has no time significance, for when considered out of context, the tense cannot be determined. We can only determine the tense from reference to the other statutory provisions which, we think, refer to bonds to be subsequently issued. Our only conclusion here, then, is that the word 'issue' and the word 'issued' have many different meanings depending upon the subject matter of the writing or upon the context, or both."

I think the same is true here of the word "determined" and, unless the legislature intends to leave this decision as to when and over what period the determination is to be made to the discretion of the Director of Revenue, it ought to qualify the word as to time. As I understand it, the Director has determined the 1975 actual value per acre of agricultural property for equalization purposes on the basis of a five year average. And based upon the language of the conference committee report, he would be justified in using that 1975 actual value as he has already determined it for that purpose. Or he might properly be persuaded to change his mind and use another basis.

April 15, 1976

TAXATION: Muncipal Support of Industrial Projects; Pollution Control Property Tax exemption. Sections 419.11 and 427.1(32). Pollution control property is exempt from taxation even though owned by a municipality under Chapter 419. (Thompson to King, Assistant Polk County Attorney, 4-15-76) #76-4-8

Mr. John H. King, Assistant County Attorney, Chief, Civil Division: You have requested an opinion of the Attorney General regarding the taxability of pollution control facilities constructed under Chapter 419, Code of Iowa, 1975. Specifically, you have inquired (1) whether the exemption for "pollution-control property" in §427.1(32), Code of Iowa, 1975, applies to the pollution control facilities constructed under §419.11; (2) how a municipality is to follow the provisions of §419.11 assuming that the exemption is applicable; (3) who must make application for the exemption; (4) whether a municipality must make the application if the lessee has agreed to pay the taxes; and (5) whether §§427.1(32) and 419.11 conflict.

The statutory provisions, in relevant part, read as follows:

"Any muncipality acquiring, purchasing, constructing, reconstructing, improving, or extending any industrial buildings or pollution control facilities, as provided in this chapter, shall annually pay out of the revenue from such industrial buildings or pollution control facilities to the state of Iowa and to the city, school district and any other political subdivision authorized to levy taxes, a sum equal to the amount of tax determined by applying the tax rate of the taxing district to the assessed value of the property, which the state, county, city, school district or other political subdivision would receive if the property were owned by any private person or corporation, any other statute to the contrary notwithstanding . . . This section shall not be applicable to any municipality acquiring, purchasing, constructing, reconstructing, improving, or extending any buildings for the purpose of establishing, maintaining, or assisting any private college or university, nor to any municipality in connection with any project for the benefit of a voluntary nonprofit hospital, clinic, or health care facility, the property of which is otherwise exempt under the provisions of chapter 427." §419.11, Code of Iowa, 1975.

"Pollution-control property as defined in this subsection shall be exempt from taxation for the periods and to the extent provided in this subsection, upon the compliance with the provisions of this subsection." §427.1(32), Code of Iowa, 1975.

Since your fifth question is the most general and, consequently, has significant bearing on the other four, it will be discussed first. The apparent crux of the problem lies in the use of the words, in §419.11:

". . . pay out . . . a sum equal to the . . . tax . . . (paid) if the property were owned by any private person or corporation, any other statute to the contrary notwithstanding." Furthermore, the statute expressly exempts the following: "This section shall not be applicable . . . to any municipality in connection with any project to the benefit of a voluntary nonprofit hospital, clinic, or health care facility, the property of which is otherwise exempt under the provisions of Chapter 427." This language, on peripheral analysis, appears to trigger two common rules of statutory construction, viz., that exemption statutes are construed strictly against the taxpayer and expressio unius est exclusio alterius (expression of one thing is the exclusion of another). Under these rules, one could conclude that the exemption of §427.1(32) would not apply to facilities constructed under §419.11.

Strict construction of statutes exempting otherwise taxable transactions and property is a well established proposition often applied by the Iowa Supreme Court. *Dow City Senior Citizens Housing, Inc. v. Board of Review of Crawford County*, 1975, Iowa, 230 N.W.2d 497; *Northwest Community Hospital v. Board of Review of Des Moines*, 1975, Iowa, 229 N.W.2d 738; *Aerie 1287, Fraternal Order of Eagles v. Holland*, 1975, Iowa 226 N.W.2d 22. The rule is often stated as follows:

"Statutes passed for the purposes of exempting property from taxation must be strictly construed, and, if there is any doubt upon the question, it must be resolved against the exemption and in favor of taxation." *Readlyn Hospital v. Hoth*, 1973, 223 Iowa 341, 344, 272 N.W.90, 91.

It could be argued that the application of the §427.1(32) exemption is questionable due to the language" . . . any other statute to the contrary notwithstanding." This language was present in the original §419.11, enacted prior to §427.1(32). The obvious intent of the language is to make clear that the property governed by Chapter 419, even though owned by a municipality, is not exempt under §427.1(2), Code of Iowa, 1975, which exempts property of a "county, township, *city*, school corporation, levee district, drainage district or military company." (emphasis supplied).

The operation of §427.1(32) is entirely different from the operation of §427.1(2). Whereas the latter exempts city property qua city property and is, hence, contrary to the imposition of taxes contained in §419.11, the former merely exempts pollution control property. Pollution control property is exempt in the hands of "any private person or corporation" and, thereby, is similarly exempt in the hands of a city. Under §419.11 the city is liable only for those taxes that would be owing "if the property were owned by a private person or corporation."

The express reference in §419.11 to exemptions contained in §427.1 concerning colleges and universities and hospitals and health care facilities implicates another statutory construction doctrine. Under the maxim expressio unius est exclusio alterius such a reference would imply a legislative intent to defeat all other exemptions in §427.1. As a preface to the discussion of this maxim, it should be noted that:

". . . the maxim of statutory construction expression unius est exclusio alterius . . . is increasingly considered unreliable . . . for it stands

on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislature." *National Petroleum Refiners Ass'n v. F.T.C.*, 1973, 482 F.2d 672, (App. D.C.).

Also, the maxim is considered:

". . . inapplicable if there is some special reason for mentioning one thing and none for mentioning another which is otherwise within the statute." *Johnson v. General Motors Corp.*, 1967, 199 Kan. 720, 433 P.2d 585, 589.

The special reason for not mentioning the pollution control property exemption is rather clear: by the express terms of the statute, the city is not taxed on property that would not be taxed in the hands of a private owner.

It is imperative to note that a statute clear and unambiguous on its face need not and cannot be interpreted by a court and only those statutes which are of doubtful meaning are subject to the process of statutory construction. *State v. Hocker*, 1972, Iowa, 201 N.W.2d 74, *State v. Valeu*, 1965, 257 Iowa 869, 134 N.W.2d 911, *Herman v. Muhs*, 1964, 257 Iowa 41, 126 N.W.2d 400. This rule was stated in *Dingman v. Council Bluffs*, 1958, 249 Iowa 1121, 90 N.W.2d at 746:

"A statute is not to be read as though open to construction as a matter of course. Statutory construction may be property involved only when the legislature acts contain such ambiguities or obscurities that reasonable minds may disagree or be uncertain as to their meaning." (citations omitted).

The statute is neither unclear nor ambiguous and, as a result, should not be subjected to tools of analysis that will distort its plain meaning. There is no conflict between §§419.11 and 427.1(32).

Having discussed your fifth question, the other four are easily answered. First, for the reasons herein stated, the pollution control facilities constructed under Chapter 419 are exempt under §427.1(32).

Second, regarding §419.11 procedures, the municipality should assess all relevant property pursuant to Chapter 441. Section 419.11. The market value of the pollution control property is exempt unless it is assessed with other property as a unit. In this latter case, only the value added by the pollution control property is exempt. Section 427.1 (32).

In response to the third and fourth questions, it is the responsibility of person paying the taxes to file an application for the exemption with the assessing authority. Section 427.1(32). Although this usually is the city, §419.11 contemplates an agreement whereby the lessee may pay the taxes and, in doing so, absolve the city of liability. Section 419.11.

April 20, 1976

CITIES AND TOWNS — TOWNSHIPS: Fire Protection — §1, 6 and 9, Chapter 194, Acts of the 66th G.A. (1975). Fire departments of benefited fire districts, townships and cities are required to provide protection to all property (including governmental property) within their jurisdictions. (Blumberg to Tieden, State Senator, 4-20-76) #76-4-9

Honorable Dale L. Tieden, State Senator: We have received your opinion request of April 12, 1976, regarding fire protection for state owned property. It appears that some fire companies do not wish to provide fire protection to the State. Two of the reasons given revolve around the non-payment of taxes supporting the fire departments by the State, and the fact of possible liability for answering to a fire call on State property and therefore not being able to answer a similar call by a tax payer. You wish to know whether fire departments are required to answer calls on State owned property.

Chapter 194, Acts of the 66th G.A. (1975), entitled "Statewide Fire Protection," amended and promulgated several statutes regarding fire protection. Section one of the Act provides that a benefited fire district "shall provide fire protection within its boundaries . . . .". Section six provides that township trustees "shall provide fire protection for the township . . . .". And, Section nine provides that each city "shall provide for the protection of life and property against fire . . . .". This Act makes fire protection all encompassing. That is, it assures that *all* property in the State shall be afforded fire protection.

The arguments that because the State does not pay taxes supporting the fire departments it should not receive their assistance, and that by answering a call of the State might deprive a tax payer of a department's assistance are illogical and absurd. If those arguments were persuasive, it could mean that all governmental property, including county facilities and schools, could be without protection. If a fire department does not have enough equipment to answer more than one call at a time, non-protection to governmental property will not solve the problem . What is a city to do if two or more taxpayers need assistance at the same time?

We are not about to hold that governmental units are not entitled to fire protection and must set up their own fire departments across the State. We do not believe that the Legislature so intended. If a fire department refuses to provide protection to any property within its jurisdiction it is opening up itself to possible liability. See our prior opinion, Blumberg to Hullinger, February 9, 1976.

Accordingly, we are of the opinion that fire departments of benefited fire districts, townships and cities must provide fire protection for all property (including governmental property) within their jurisdictions.

April 20, 1976

CITIES AND TOWNS: Contracts — §362.5, Code of Iowa, 1975. A contract with a city is void if it is with the spouse of a council member and the stock ownership by the spouse is more than five percent and the remuneration will be directly affected by the contract. (Blumberg to Wiegel, Henry County Attorney, 4-20-76) #76-4-10

Mr. Gary L. Wiegel, Henry County Attorney: We have received your opinion request of February 19, 1976. You asked the following question:

"Is a purchase contract for a new vehicle void or voidable, if a city enters into a contract with a local auto dealer whose wife is a member of the City Council? This contract would be entered into after the city accepted the lowest competitive bid, which was submitted by the

councilperson's husband's firm. Would this be an illegal expenditure of city funds?"

Section 362.5, 1975 Code of Iowa, provides:

"When used in this section, 'contract' means any claim, account, or demand against or agreement with a city, express or implied.

"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 his city. A contract entered into in violation of this section is void. The provisions of this section do not apply to:

"1. The payment of lawful compensation of a city officer or employee holding more than one city office or position, the holding of which is not incompatible with another public office or is not prohibited by law.

"2. The designation of a bank or trust company as a depository, paying agent, or for investment of funds.

"3. An employee of a bank or trust company, who serves as treasurer of a city.

"4. Contracts made by a city of less than three thousand population, upon competitive bid in writing, publicly invited and opened.

"5. Contracts in which a city officer or employee has an interest solely by reason of employment, or a stock interest of the kind described in subsection 9, or both, if the contracts are made by competitive bid, publicly invited and opened, and if the remuneration of employment will not be directly affected as a result of the contract and the duties of employment do not directly involve the procurement or preparation of any part of the contract. The competitive bid requirement of this subsection shall not be required for any contract for professional services not customarily awarded by competitive bid.

"6. The designation of an official newspaper.

"7. A contract in which a city officer or employee has an interest if the contract was made before the time he was elected or appointed, but the contract may not be renewed.

"8. Contracts with volunteer firemen or civil defense volunteers.

"9. A contract with a corporation in which a city officer or employee has an interest by reason of stockholdings when less than five percent of the outstanding stock of the corporation is owned or controlled directly or indirectly by the officer or employee or the spouse or immediate family of such officer or employee.

"10. A contract made by competitive bid, publicly invited and opened, in which a member of a city board of trustees, commission, or administrative agency has an interest if he is not authorized by law to participate in the awarding of the contract. The competitive bid requirement of this subsection does not apply to any contract for professional services not customarily awarded by competitive bid."

The only two subsections that could apply are five and nine. However, they are not applicable since, by way of conversation with the city attorney and the council member, it is apparent that not only is more than five percent of the stock owned by the spouse, the remuneration will be directly affected by the contract. Thus, the contemplated contract would be void. We need not answer whether this would be an illegal expenditure of city funds since we understand that the contract in question has not been made.

April 21, 1976

TAXATION: Homestead Tax Credit -- §§425.11(2), 409.33, Code of Iowa, 1975. County auditors and assessors should not deny homestead tax credits for the purpose of getting compliance with §409.33. (Kuehn to Lamborn, 4-21-76) #76-4-11

The Honorable Clifton C. Lamborn, State Senator: We acknowledge receipt of your letter dated January 27, 1976, in which you have requested an opinion of the Attorney General as follows:

"In the instance where a county auditor has refused to enter a conveyance on a plat book under Chapter 409, may the Auditor or Assessor refuse to accept an application for homestead exemption?"

Further, you ask what the effect of House File 909 would have on the question you presented.

It is assumed that you refer to the County Auditor's refusal to enter a conveyance on the plat book under §409.33, Code of Iowa, 1975, due to a description which is not sufficiently definite and accurate. You wish to know whether the Auditor or Assessor may refuse to accept an application for homestead tax credit based upon the Auditor's refusal to enter the conveyance on the plat book. Section 409.33 states:

"409.33 Insufficiency of description — plat ordered. *Every conveyance of land in this state shall be deemed to be a warranty that the description therein contained is sufficiently definite and accurate to enable the auditor to enter the same on the plat book required to be kept;* and when there is presented for entry on the transfer book any conveyance in which the description is not sufficiently definite and accurate, the auditor shall note such fact on the deed, with that of the entry for transfer, and shall notify the person presenting it that the land therein is not sufficiently described, and must be platted within thirty days thereafter." (Italicizing added)

Sections 409.34 and 409.35 discuss appeal procedures and §409.36 discusses the remedies available to the auditor if the owner of real estate does not appeal or fails to comply with the auditor's demands or any orders entered after appeal procedures are exhausted.

Obviously, Chapter 409 is separate and distinct from the Homestead Tax Credit Chapter which is Chapter 425. Therefore, auditors and assessors do have a remedy provided to them under Chapter 409 and should not deny homestead tax credits for the purpose of getting compliance with §409.33.

Furthermore, House File 909, if enacted in its present form, would transfer some of the procedures that are set forth in Chapter 409 to other parts of the Iowa Code without changing any of the present qualifications for receiving the homestead tax credit.

Chapter 425, Code of Iowa, 1975, contains the provisions controlling Homestead Tax Credits. Section 425.2 states:

"Any person applying for homestead tax credit shall each year on or before July 1 deliver to the assessor, on forms furnished by the assessor, a verified statement and designation of homestead as claimed. The assessor shall return said statement and designation on July 2 of each year to the county auditor *with a recommendation for allowance or disallowance endorsed thereon.* . . ." (Italicizing added)

The various grounds for recommending an allowance or disallowance are set forth in Chapter 425. Your question as to whether or not the auditor or assessor can refuse to accept an application for homestead tax credits on grounds stated in your opinion request is answered by reference to §425.11(2) which defines an owner. It states:

"2. The word, 'owner', shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse or the person occupying under a contract of purchase which contract has been recorded in the office of the county recorder of the county in which the property is located, or the person occupying the homestead under devise or by operation of the inheritance laws where the whole interest passes or where the divided interest is shared only by persons related or formerly related to each other by blood, marriage or adoption, or the person occupying the homestead under a deed which conveys a divided interest where the divided interest is shared only by persons related or formerly related to each other by blood, marriage or adoption. For the purpose of this chapter the word 'owner' shall be construed to mean a bona fide owner and not one for the purpose only of availing himself of the benefits of this chapter. In order to qualify for the homestead tax credit, *evidence of ownership shall be on file in the office of the clerk of the district court or recorded in the office of the county recorder* at the time the owner files with the assessor a verified statement of the homestead claimed by him as provided in section 425.2." (Italicizing added)

Said section does not authorize the assessor or auditor to deny an application for the homestead tax credit by reference to §409.33. The owner is entitled to the homestead tax credit where he has complied with the requirements of Chapter 425 including the filing of evidence of ownership with the office of the clerk of the district court or recording said evidence in the office of the county recorder. The failure to comply with the requirements of §409.33 does not disqualify the owner from the homestead tax credit.

April 21, 1976

CITIES AND TOWNS: Utility Rates—§§384.91 and 388.6, Code of Iowa, 1975; §399.2, Code of Iowa, 1973. A municipality may charge special or reduced rates for governments, hospitals, charitable institutions and the like. Such rates are not, per se, discriminatory. (Blumberg to Drake, State Representative, 4-21-76) #76-4-12

Honorable Richard F. Drake, State Representative: We have received your opinion request regarding discriminatory utility rates. Your request concerns a combined utility under §384.80, 1975 Code. Its customers are charged in accordance with a rate schedule which classifies users and provides for various rates based upon economic factors including load, time of use, cost of supplying the service and the like within each class. The utility also provides for special rates and discounts to charities, churches, schools, hospitals, fraternal organizations, and other governmental units including the county, state and federal governments. The special rates or discounts are as follows:

"(a) a discount or reduction in the standard rate. This reduction is not based on cost of service, but is granted only because the organization is either a charity or governmental institution.

"(b) allowance of late payment without penalty. (This benefit is generally utilized by governmental agencies which are unable to pay the

utility bill within the required period of time, due to the fact that authorization must be obtained within the organization from boards or departments.)

"(c) Occasionally, the utility will provide its service personnel to a governmental institution free of charge or at a reduced rate."

You specifically asked:

"1. Does the utility have the right to create different rate classifications based on economic factors, such as load factor, time of use of the service, cost of supplying service and other relevant economic considerations?

"2. Is it permissible for the utility to provide special rates, discounts or other special considerations to churches and charitable organizations and fraternal organizations.

"3. Is it permissible for the utility to provide special rates, specifically schools, or other special considerations to governmental institutions.

"4. Is it permissible for the utility to allow governmental institutions to pay bills late without paying the normal standard penalties for late payments?"

Section 388.6, 1975 Code, provides that a city utility may not provide use or service at a discriminatory rate, except to a city as provided in §384.91. That section provides:

"The city shall pay for the use of or the services provided by the city utility, combined utility system, city enterprise or combined city enterprise, as any other customer, except the city may pay for use or service at a reduced rate or receive free use of service as long as the city complies with the provisions, terms, conditions and covenants of any and all resolutions, pursuant to which revenue bonds or pledge orders are issued and outstanding."

The answer to your first question is in the affirmative. In *Knotts v. Nollen*, 1928, 206 Iowa 261, 218 N.W. 563, it was held that a municipal utility must furnish its service impartially to all who are similarly situated. Discrimination, to be unlawful, must be unjust, unreasonable, and operate to the unjust advantage of one and the disadvantage of another. The Court went on to state that the classification of users is a practical necessity. Classification can be based upon economic factors, including load factors, types of businesses, time of use, quantity of service or use and the like. 64 Am. Jur.2d *Public Utilities* §§117-125 (1972); A.J.G. Priest, *Principles of Public Utility Regulation*, Chap. 7 (1969); 73 C.J. S, *Public Utilities* §27 (1951).

There is a divergence of opinion on your remaining questions. In *Idaho Power Co. v. Thompson*, 19 F.2d 547, 580 (S.D. Idaho 1927), it was held that no authority existed for a utility to grant special rates or reductions for hospitals, fraternal organizations, commercial clubs, and benevolent, religious or eleemosynary institutions. See also, *Board of Water Com'rs. of City of Detroit v. Board of Education of City of Detroit*, 100 N.W. 455 (Mich. 1904); *Board of Water Com'rs. v. Detroit Citizens' St. Ry. Co.*, 1902, 131 Mich. 1, 90 N.W. 657; *City of Detroit v. Board of Water Com'rs.*, 1896, 108 Mich. 494, 66 N.W. 377. In the last case, the Court held that the Water Board could not supply water to the city jail (run under the auspices of the Michigan Legislature) for no charge. This result was based upon the fact that the revenue of the

Water Board was from the sale of water, and to hold that city or governmental agencies should receive free service would be to place the entire burden upon the private consumers.

To the contrary, however, it is stated in 64 Am.Jur.2d *Public Utilities* Section 113:

"Although at common law a public utility was under no duty to furnish service at free or reduced rates for public or charitable purposes, it is apparently the rule that discriminations in favor of the public are not opposed to public policy, because they benefit the people generally by relieving them of part of their burdens, and that in the absence of legislation upon the subject, such discriminations cannot be held illegal as a matter of law. In a number of cases, therefore, it has been held that it does not constitute an unlawful discrimination for a public utility or a municipal corporation furnishing public service to give free service or reduced rates to or for public, municipal, charitable, or religious institutions or purposes. Where a large part of the operating expenses of a municipal plant is raised by general taxation, the furnishing of service for muncipal purposes without charge may not amount to an unjust discrimination against the ratepayers. A contract to furnish free water service to a municipality forever after it has paid certain rates for a period of time is not invalid after the payments have been made, for discrimination against other consumers, since the service is purchased by the payments made. On the other hand, there are many cases, particularly those decided by public service commissions, holding that the giving by a public utility or a municipal corporation furnishing public service of free or reduced rates to or for public, municipal, charitable, or religious institutions or purposes constitutes unjust discrimination against other consumers. It has been held, however, that constitutional rights of private customers of a gas company are not invaded by rate-making orders of the Public Utilities Commission of the District of Columbia, increasing the rates as to such customers, but leaving untouched the existing lower statutory rates charged the United States and the District, since such customers have no right to require equality with the government."

In *New York Telephone Co. v. Siegel-Cooper Co.*, 1911, 202 N.Y. 502, 96 N.E. 109, the issue was whether a public utility (telephone company) could make a discount of its rates in favor of the city, charitable institutions, and religious facilities. After stating the general rules regarding discrimination in rates, the Court held (96 N.E. at 112):

"No discrimination was made by the plaintiff in favor of any class of customers, except the three expressly named: and for time out of mind discounts have been allowed by common carriers and others conducting a business in which the public has an interest for services rendered to clergymen and institutions of charity, because they are engaged in the work of benefiting mankind, and are supported by contributions from the public. For these reasons, their property is exempt from taxation wholly or in part. They carry on no business, do not compete with others, and are not engaged in making money. It is the general belief that they render full value for what they receive by caring for the sick and wounded, or helping all to lead orderly lives.

. . .

"Moreover, the law against unreasonable discrimination rests on public policy. It is forbidden because it is opposed to the interest of the public, which requires that all should be treated alike under like circumstances. Discriminations, however, in favor of the public are not opposed to public policy, because they benefit the people generally by relieving them of part of their burdens. In the absence of legislation upon the subject,

such discriminations cannot be held illegal, as matter of law, without overturning the foundation upon which the rule itself is built."

The basis for this is that if the charities and the like were not to exist, the government would have to supply the services. Similarly, with respect to discounts for governments, being charged higher rates would put a greater burden on the taxpayers. See also, *Twitchell v. City of Spokane*, 1909, 55 Wash. 86, 104 P. 150, 151, where it was held that the "right of the city to furnish water for municipal and charitable purposes free can hardly be doubted." Thus, it has been held that reduced rates for local schools, *Guthrie Gas Light, Fuel & Imp. Co. v. Board of Education*, 166 P. 128 (Okl. 1917); reduced rates for a municipality, *City of Belfast v. Belfast Water Co.*, 1916, 115 Me. 254, 98A, 738; and special rates for state institutions, *Fretz v. City of Edmond*, 1916, 66 Okla. 262, 168 P. 800, did not constitute an unjust discrimination against a citizen, taxpayer, or consumer. In *Fretz*, the Court cited to Wyman on Public Service Corporations for the proposition that a special reduction or free service may be given to a government of whatever grade without it being discriminatory. See also, *Essex County Welfare Bd. v. New Jersey Bell Tel. Co.*, 1974, 126 N.J. Super. 417, 315A.2d 40.

We do not believe that the Legislature meant §§388.6 to bar rate reductions for governments other than municipalities, and charitable or religious institutions, hospitals and the like. That section according to a handbook on the New City Code, put out in 1972 by the Office for Planning and Programming, Division of Municipal Affairs, in conjunction with the League of Iowa Municipalities, Institute of Public Affairs of the University of Iowa, and Local Government Programs, Iowa State University Extension, was derived, in part, from §399.26, 1973 Code. However, we can find no similarity between the two sections. Section 399 made it unlawful to give or receive water free or at a more favorable rate than that accorded to the general public (with the exception of the city). This is substantially different than a proscription of discriminatory rates. Such reductions were never against public policy and §388.6 does not appear to change that policy.

To be discriminatory, rates must be favorable to some and unfavorable to others within a class. We do not believe that municipalities are prohibited from establishing classes for governments or hospitals, charitable institutions and the like.

Accordingly, we are of the opinion that municipalities may establish special rates for governments, hospitals, charitable institutions, and the like. This may take the form of lower rates, lower charges for maintenance, no late charges for payment of bills, or any combination thereof. If separate classes are established for these groups, the rates charged within them must be uniform.

April 21, 1976

INDUSTRIAL AND SMALL LOAN COMPANIES: Equal Credit Opportunity Act, Public Law 93-495; Rules 130-1.8(536A)IAC and 130-1.9 (536A)IAC. A husband and wife may each, without regard to any loans the other may have, apply for separate industrial loans or separate small loans from the same lender, or one spouse may obtain a small loan and the other spouse an industrial loan from the same

lender, so long as the loan is applied for voluntarily and on the initiative of the customer. (Garrett to Wilson, Supervisor, Industrial Loan Division, Auditor of State, 4-21-76) #76-4-13

Mr. K. R. Wilson, Supervisor, Industrial Loan Division, State Auditor's Office: Your opinion request of February 4 has been received. You ask about the effects of the new federal *Equal Credit Opportunity Act*, Public Law 93-495, and Regulation B promulgated pursuant thereto on certain sections of Iowa's industrial loan law. In particular you ask about the effects of this federal law and the regulations on 130-1.8(536A) IAC and 130-1.9(536A)IAC having to do with industrial loan companies.

The provisions of 130-1.8(536A)IAC state that:

"If any person or husband and wife, individually or together, are indebted in any amount under the provisions of the Iowa small loan law, no loan shall be made by the same office to said person or husband and wife, individually or together, under the Iowa industrial loan law."

Additionally, 130-1.9(536A)IAC states:

"If any person or husband and wife individually or together are indebted in any amount on a loan made under the provisions of the Iowa industrial loan law, no loan shall be made to said person or husband and wife, individually or together, under the Iowa small loan law unless the proceeds of the small loan, after deducting insurance premiums, exceed by two hundred or more the amount necessary to pay in full the balance due on the industrial loan after the normal rebates have been made. The proceeds of the small loan shall to the extent necessary be applied to pay off the balance of the industrial loan."

Section 202.8 of Regulation B of the *Equal Credit Opportunity Act* states:

"a. *Separate extension of consumer credit.* Any provision of state law which prohibits the separate extension of consumer credit to each spouse shall not apply in any case where each spouse voluntarily applies for separate credit from the same creditor. In any case where such a state law is pre-empted, each spouse shall be solely responsible for the debt so contracted.

"b. *Finance charges and loan ceiling.* When each spouse separately and voluntarily applies for and obtains a separate account with the same creditor, the accounts shall not be aggregated or otherwise combined for purposes of determining permissible finance charges or permissible loan ceilings under the laws of any state or of the United States. Permissible loan ceilings under the laws of any state or of the United States shall be construed to permit each spouse to be separately and individually liable up to the amount of the loan ceiling less the amount for which both spouses are jointly liable. For example, in a state with a permissible loan ceiling of $1,000, if a married couple were jointly liable for $250, each spouse could subsequently become individually liable for $750."

In addition, §202.11 of Regulation B states in part as follows:

"b. *Inconsistent state laws.* Except as provided in section 202.8, this Part alters, affects or pre-empts only those state laws which are inconsistent with this Part, and then only to the extent of the inconsistency. Such a state law is not inconsistent with this Part if the creditor can comply with the state law without violating this Part."

These provisions of the new federal law are intended to allow a spouse to voluntarily obtain separate credit and to pre-empt state laws which

prohibit the granting of separate credit to each spouse. At the outset, it should be noted that these requirements apply only where each spouse "voluntarily" applies for separate credit but does not pre-empt state laws prohibiting creditors from inducing spouses to apply for separate credit. The initiative must come from the customer, not from the creditor.

Therefore under the new federal law, a husband and wife may each voluntarily and on their own initiatives obtain separate industrial loans or separate small loans from the same lender. In addition, one spouse could obtain a small loan and the other spouse an industrial loan from the same lender so long as it was done voluntarily on the initiative of the customer.

However, if a husband and wife have a joint loan with a small loan company, they would be prohibited under the provisions of Rule 1.8 from taking out a loan either jointly or individually with an industrial loan company. There is nothing in the federal law that would pre-empt this restriction.

Similarly, if a husband and wife have a joint loan with an Iowa industrial loan company and one or both of them desires a small loan with the same lender, the provisions of Rule 1.9 would have to be complied with and the industrial loan paid off.

The federal law does not make any changes except where each spouse is voluntarily and separately applying for credit and in that case, each spouse must be treated as a separate individual and the fact that he or she might be married to another person who may have a small loan or an industrial loan from the same lender has no bearing.

April 26, 1976

STATUTORY CONSTRUCTION: Public Records — Chapter 68A, Code of Iowa, 1975. Section 68A.1 applies to the records of law enforcement agencies. Certain records specified in §68A.7 are confidential. Records not so excluded are available to the public under the provisions of Chapter 68A. (Nolan to Charles N. Poncy, State Representative, 4-26-76) #76-4-14

The Honorable Charles N. Poncy, State Representative: You have submitted to this office for an opinion, the following question on whether a reporter can be denied access to the "Police Blotter". The inquiry which you submitted includes the following statement from one of your constituents:

"I am requesting that you seek an opinion from the Iowa Attorney General's office on portions of Chapter 68A of the Iowa Code.

"I am acting on behalf of the Board of Directors of the Iowa Broadcast News Association, of which I am vice president.

"The Iowa Broadcast News Association represents over 100 working members of the broadcast news media throughout the State of Iowa.

"Listed are the portions of Chapter 68A, examination of public records, on which we would like the attorney general's opinion.

"68A.1 . . . Does this section apply to such records of law enforcement agencies such as initial complaint forms . . . arrest sheets and traffic

accident records. In other words, all records and documents of a law enforcement agency except those identified under 68A.7. Does 68A.1 also mean that the daily log kept by law enforcement agencies is also considered 'public records'.

"Under 68A.3, does the term lawful custodian apply to a shift commander of a law enforcement agency, and does the term authorized deputy apply to the officer on duty. 68A.7, 5 says peace officers investigative reports shall be confidential except where disclosure is authorized in the Code. Under what conditions can these investigative reports be made public.

"We also feel there is a contradiction in 68A.9.

"Criminal identification files of law enforcement agencies are confidential. However, records of current and prior arrests shall be public records. The Code does not say prior court appearances or convictions, just prior arrest records. These are usually part of the confidential criminal identification files, so how can they be released if part of those confidential files.

"The Board of Directors of the Iowa Broadcast News Association, representing a large portion of all radio and television news departments in Iowa, feels there is a growing problem with the availability of information from law enforcement agencies. We feel it is important that the Attorney General respond to the questions we have raised concerning Chapter 68A of the Iowa Code."

In general, §68A.1, Code of Iowa, 1975, defines "public records" as records and documents *of or belonging to* the State of Iowa or any political subdivision or agency thereof. Previous opinions of this office have stated information is either not public record or is confidential if: not required by state law (72 O.A.G. 610); not for public use (72 O.A.G. 616); preliminary work products (74 O.A.G. 403); does not enhance public interest (74 O.A.G. 430); and if revealing names of informants would hinder law enforcement (75-9-13). An initial complaint form prepared by a peace officer or a dispatcher who is not a peace officer would be a public record which would be available under the provisions of Chapter 68A. However, such record may contain confidential intelligence data which, if made public, would hinder law enforcement or criminal history data disseminated by the Department of Public Safety in which case §749B.18, Code of Iowa, 1975, controls and states specifically:

"Nothing in this chapter shall prohibit the public from examining and copying the public records of any public body or agency as authorized by Chapter 68A.

"Criminal history data and intelligence data in the possession of the department or bureau or disseminated by the department or bureau, are not public records within the provisions of Chapter 68A."

Accordingly, where information noted on an "initial complaint form" is confidential in nature as stated above, the complaint record may be withheld from public scrutiny and the nonconfidential information contained therein released at the discretion of the person under whose direction the "form" is completed.

The report made by an officer in the field in response to a dispatch is a public record under §68A.1, subject to the same restrictions as the initial complaint record. Where the case investigation results in the filing of a criminal charge, the arrest sheet is the first report entered

in the records. Arrest records are nonconfidential public records except in the state Public Safety files (74 O.A.G. 254).

We note that the inquiry states that there is a contradiction in §68A.9. It appears the writer means §68A.7(9), when asking how arrest records can be released if they are part of confidential criminal identification files. This matter was fully discussed in 74 O.A.G. 254, 256, where it was pointed out that "records of arrests, while a part of 'criminal history data' as defined . . . nevertheless, do not become criminal history data until they are 'in a manual or automated data storage system maintained by the department of public safety or bureau of criminal investigation'."

In 74 O.A.G. 345 we stated that a traffic accident report is a peace officer's investigative report and access to such report is limited by Code §68A.7. Under §321.271 the Department of Transportation is restricted in releasing such reports from its files. However, this code section does not appear to impose a similar restriction on the local law enforcement agency. Therefore, local officers may exercise discretion in the release of details concerning the data they obtain in preparing traffic accident reports, although the report itself is not a public record available to the news media. Information released by the investigating officer to any member of the news media cannot be withheld from others on "confidential" grounds. *Quad City Publications v. Jebens*, 1971, 334 F.Supp. 8.

Under §68A.7(5), police officers' investigative reports, except where disclosure is authorized elsewhere in the Code, are required to be kept confidential unless otherwise ordered by a court, by a lawful custodian of the records, or by another person authorized to release information. Such reports are usually supplemental to the field officers' preliminary report.

You have asked if the "daily log" is a public record. If, by "daily log" you mean a summary of the law enforcement agency's actions compiled on a 24-hour basis, such summary or bulletin is clearly a public document if it is prepared under the direction of the head of the law enforcement agency. If the "daily log" is the information of radio dispatchers compiled only for purposes of complying with FCC regulations, such log would not be a public record until the notes of the person responsible for maintaining it were in final form for filing. Prior to that time release of information contained in worksheets appears to be in discretion of the custodian.

The term "lawful custodian" referred to in §68A.3 is the head of the office or department. In the case of county law enforcement, it is the sheriff; and in the case of city law enforcement, it is the person or governing body of the department authorized to promulgate rules and regulations fixing a policy for appropriate dissemination of public information and also for protection of the records against damage or disorganization.

April 26, 1976

SCHOOLS: Secretary. §279.3, Code of Iowa, 1975. The secretary of the school board may be assigned the duties of business manager in addition to statutory duties but the secretary is a school officer and is not an employee with whom the board can contract for the

performance of business manager duties. (Nolan to Koogler, State Representative, 4-26-76) #76-4-15

The Honorable Fred L. Koogler, State Representative: We have your letter requesting an opinion on behalf of the citizens of the Knoxville Community School District on the following questions:

"1. Is it permissible under the laws of this state for a school district to employ a person under a written contract as secretary to the board and also assign to that person in addition to the normal statutory duties of secretary to the board, the additional duties of a 'business manager' of the district?

"(a) As to the method of employment, is it permissible to employ a person as described above and assign duties to such person by separate written 'job description'?

"(b) Is it permissible to employ a person as described above and direct their duties under one written 'job description' including both statutory duties of a secretary to the board and those of a business manager?

"2. Considering the provisions of Chapter 279.3 of the Code of Iowa, when is it permissible for a school district to employ a secretary to the board?"

We have carefully read the questions which you presented, and as stated, we must conclude that it is not permissible for a school district to *employ* a person as secretary to the board. The secretary of the school board is an officer rather than an employee. Under §279.3, Code of Iowa, 1975, as amended by Chapter 158, Laws of the 66th General Assembly ,1975 Session, the pertinent statutory requirements are stated:

"At a regular or special meeting of the board held in July prior to or on July fifteenth, the board shall appoint a secretary who shall not be a teacher or other employee of the board. It shall also, except in districts composed in whole or in part of a city, appoint a treasurer. Such officers shall be appointed from outside the membership of the board for terms of one year beginning with the date of appointment, and the appointment and qualification shall be entered of record in the minutes of the secretary. They shall qualify within ten days following their appointment by taking the oath of office in the manner prescribed by section 277.28 and filing a bond as required by section 291.2 and shall hold office until their successors are appointed and qualified."

In an opinion issued by this office on June 30, 1927 (1928 O.A.G. 164), the "employment" of a secretary was discussed in terms of the secretary being assigned duties in addition to the statutory duties. The attorney general stated:

"The secretary is also an officer of the board and is subject to the assignment of such duties as the board may prescribe. We are, therefore, of the opinion that the board may include in the duties of the secretary the keeping of the permanent records of the school and such other duties as it may prescribe and that the assignment of such duties to the secretary does not bring this employment within the prohibition of the statute that the secretary shall not be a teacher or other employee of the board."

Accordingly, in addition to the normal statutory duties of secretary to the board, it is permissible for the secretary to be assigned the duties of business manager of the district. However, it would not be permissible to employ a person under contract providing for that person to fulfill

the duties of the secretary to the board and those in a related job description pertaining to the duties of business manager, although the board may specify that such duties are to be performed by the secretary to the board.

With respect to the second question which you present, it is the opinion of this office that the secretary of the school board is required by statute to be appointed by the board at a meeting held "in July prior to or on July fifteenth". There is no statutory authority for the board to make an appointment at any other time except as necessary to fill a vacancy, in which case the vacancy in the office of secretary to the board shall be filled as prescribed in §279.6, Code of Iowa, 1975, as amended by §135, Chapter 81, Laws of the 66th General Assembly, 1975 Session, as follows:

"Vacancies occurring among the officers or members of a school board shall be filled by the board by appointment . . . A person appointed to fill a vacancy in an appointed office shall hold such office for the residue of the unexpired term and until his successor is appointed and qualified. Any person so appointed shall qualify within ten days thereafter in the manner required by section 277.28."

April 28, 1976

CITIES AND TOWNS — Incompatibility. The position of mayor and Executive Director of an intergovernmental agency, of which the mayor's municipality is a member, may be incompatible. (Beamer to Tyson, Director, Office for Planning and Programming, 4-28-76) #76-4-16

Mr. Robert F. Tyson, Director, Office for Planning and Programming:
We are in receipt of your opinion request regarding an Areawide Planning Organization organized pursuant to Chapter 28E, 1975 Code of Iowa. Specifically you have recited the following factual situation:

"The salaried Executive Director of an Iowa Areawide Planning Organization, which was organized under the Provisions of Chapter 28E, Code of Iowa, has accepted the position of Mayor in one of the member municipalities of that Areawide Planning Organization."

You asked whether this would be a conflict of interest.

Although conflicts of interest may arise from time to time, the issue here is actually one of compatibility of offices. The case of *State ex rel. Crawford v. Anderson*, 1912, 155 Iowa 271, 273, 136 N.W. 128, sets forth the criteria for incompatibility of offices:

"The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' State v. Bus, 135 Mo. 338,

36 S.W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra [112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211]; State v. Goff, 15 R.I. 505, 9 A. 226, 2 Am. St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both'."

In *State ex rel. LeBuhn v. White*, 1965, 257 Iowa 606, 133 N.W.2d 903, an action in quo warranto was brought to determine whether one person could concurrently serve as a member of the Community School District and the County Board of Education. The question presented for review was whether the two offices were incompatible. In an unanimous decision the Iowa Supreme Court held that the two positions were incompatible, not because of the incidents of the positions, but rather because of the revisory power of the County Board of Education over the Community School District. The Court held that the common law rule of incompatibility must be applied.

Article V of the intergovernmental agreement in question provides for the employment of a director, and sets forth the duties: Responsibility for coordinating all staff and consultant services provided by the Policy Council; preparing and administering the annual work program and budget; employing personnel; and performing other duties delegated by the council. Article III delineates the purpose of the organization:

"A. To serve as a mutual forum to identify, discuss, study, and bring into focus regional challenges and opportunities.

B. To provide a continuing organizational machinery to insure effective communication and cooperation among governments and agencies.

C. To foster, develop and review policies, plans, and priorities for regional growth, development, and conservation.

D. To furnish general and technical aid to member governments, as they direct; to coordinate and review federal, state and local programs of regional importance.

E. To foster, promote, and achieve objectives of regional planning as provided and set forth in Chapter 473A, Code of Iowa."

The By-Laws of the organization permit the member governments to receive the services of the organization.

The policy making body is composed of mayors, councilpersons and members of boards of supervisors. It appears that the director is not one of those comprising the Policy Council. As an elected official, a mayor is within that class of individuals who may be members of the Policy Council. To be an elected official of a local unit of government dealing with the organization, and the director of the organization overseeing the projects for the members presents the possibility of impropriety. As stated above, a conflict of interest is not the question. However, the following statement from *Wilson v. Iowa City*, 165 N.W.2d 813, 822 (Iowa 1969) is applicable:

"These rules, [conflict of interest] whether common law or statutory, are based on moral principles and public policy. They demand complete loyalty to the public and seek to avoid subjecting a public servant to the

difficult, and often insoluble, task of deciding between public duty and private advantage.

"It is not necessary that this advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the *potential* for conflict of interest which the law desires to avoid."

Thus, one need not find any illegal act for the law to apply. It is public policy that demands complete loyalty to the public.

Accordingly, we are of the opinion that the above facts could fall within the proscriptions of the law on incompatibility of offices. If so, the prior position is ipso facto vacated. *State ex rel. LeBuhn v. White*, supra.

May 3, 1976

COUNTIES: Hospitals — Chapter 28A and 28E, Code of Iowa, 1975. A consortium of private hospitals does not become a "public agency" within the meaning of §28A.1, Code of Iowa, 1975, when a county hospital becomes a member. The Broadlawns Polk County Hospital Board of Trustees is authorized to join a consortium of hospitals provided the requirements of Chapter 28E, Code of Iowa, are observed. (Nolan to John H. King, Assistant Polk County Attorney, 5-3-76) #76-5-1

Mr. John H. King, Assistant County Attorney, Polk County: Your letter of February 24, 1976, concerning the proposed hospital consortium for the City of Des Moines has been received. Therein you presented two questions, the first of which is whether Chapter 28A.1 of the Iowa Code would be applicable to this consortium if Broadlawns were a member.

As you point out, the board of trustees of the Broadlawns Polk County Hospital is required to comply with the open meetings law as stated in Chapter 28A of the Code. However, your letter indicates that the proposed hospital consortium would be a voluntary association of hospitals formed as an independent nonprofit corporation under the Code of Iowa, and it would not be a public agency as defined in §28A.1. Further, should Broadlawns Polk County Hospital become a member of such consortium, it would participate on a voluntary basis and not be bound by consensus decisions until such decisions were brought to Broadlawns' Board of Trustees for consideration and action at a public meeting.

In view of the above, it is the opinion of this office that the meetings of the consortium members are not subject to the requirements of Chapter 28A and that Broadlawns Polk County Hospital, upon joining the consortium, would not change the non-applicable status of the open meetings law.

A second question presented by your letter is whether the Broadlawns Board of Trustees would have the power and authority to make this hospital a member of such proposed consortium to foster improved quality health care at a reasonable cost if the association is to be incorporated as a nonprofit corporation. The proposal includes cooperative planning, development and provision of health care services. These objects appear

to be clearly within the scope of powers conferred upon the hospital trustees by §347.13, Code of Iowa, 1975:

" * * *

"3. Have general supervision and care of such grounds and buildings.

"4. Employ an administrator, and necessary assistants and employees, and fix their compensation.

"5. Have control and supervision over the physicians, nurses, attendants, and patients in the hospital. * * *

"11. Accept property by gift, devise, bequest, or otherwise . . . sell or exchange any property so accepted . . ."

Further, the trustees may, pursuant to §347.14, exercise optional powers:

" * * *

"2. Establish and maintain in connection with said hospital a training school for nurses.

"3. Establish as a department in connection with said hospital a suitable building for the isolation and detention of persons afflicted with contagious diseases subject to quarantine. * * *

"8. . . . establish a psychiatric department . . . * * *

"10. Do all things necessary for the management, control and government of said hospital and exercise all the rights and duties pertaining to hospital trustees generally . . . * * *

"12. Operate a health care facility as defined in section 135C.1 in conjunction with the hospital.

"13. Purchase, lease, equip, maintain and operate an ambulance . . . or to contract for such vehicles, equipment, maintenance or service when such ambulance service is not otherwise available."

The provisions of Chapter 28E of the Iowa Code encourage the cooperation of public and private agencies to make efficient use of their powers and to provide joint service for mutual advantage.

The term "private agency" is defined (§28E.2) as "an individual and any form of business organization authorized under the laws of this or any other state". Accordingly, it is our view that power does exist for the Broadlawns Board of Trustees to join with other hospitals in the city of Des Moines as a member of a consortium provided the requirements of §28E.4 are observed:

"Agreement with other agencies. Any public agency of this state may enter into an agreement with one or more public or private agencies for joint or co-operative action pursuant to the provisions of this chapter, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force."

May 3, 1976

CITIES AND TOWNS: Assessments — §§4.1(3), 4.4, 4.6, 307A.5, 384.54, 384.56, Code of Iowa, 1975; Ch. 34, Acts of the 64th G.A. (1971); Ch. 1129, Acts of the 63rd G.A. (1970). The last paragraph of §307A.5, which sets a monetary limit on assessments upon State property, is

ambiguous and a single, reasonable interpretation cannot be ascertained. (Blumberg to Nystrom, State Senator, 5-3-76) #76-5-2

Honorable John N. Nystrom, State Senator: We have received your opinion request of April 22, 1976, regarding special assessments upon State property. In one of the cities within your district, the paving of a street has resulted in assessments upon three parcels of land owned by the State. The first parcel, Department of Transportation property, is assessed at approximately $8,700.00. The remaining two parcels (National Guard property) are contiguous to each other, and have been assessed at $12,700 and $31,400. With reference to §307A.5, 1975 Code of Iowa, you ask the following:

"1. With one project, can there be more than one assessment in excess of $20,000.00? Due to land description, the National Guard has two parcels involved in the project.

"2. The National Guard and Iowa Department of Transportation are located on opposite sides of the road and thus can each State Agency be assessed up to $20,000.00 although they are involved in the same project? Furthermore, can the National Guard be assessed up to $20,000.00 per land description?"

Section 384.56 of the Code provides that assessments for public improvements abutting state property shall be paid by the executive council as provided in §307A.5. That section provides:

"Municipalities and counties may assess the cost of a public improvement when such improvement benefits property owned by the state and under the jurisdiction and control of the highway division of the department. The commission shall pay from the primary road fund such portion of the cost of the improvement as would be legally assessable against the land if privately owned.

"Assessments against property under the jurisdiction of the highway division of the department shall be made in the same manner as those made against private property, except that the municipality or county making the assessment shall cause a copy of the public notice of hearing to be mailed to the commission by restricted certified mail.

"Assessments against property owned by the state and not under the jurisdiction and control of the highway division of the department shall be made in the same manner as those made against private property and payment thereof shall be made by the executive council from any funds of the state not otherwise appropriated.

"No such assessment in excess of twenty thousand dollars shall be valid unless it is provided for by or contained within a capital appropriation by the general assembly."

This section, originally §307.10, was enacted in its present form (except for the final paragraph) in 1970. Ch. 1129, Acts of the 63rd G.A. (1970). There was no indication in that Act of any monetary limit. On January 13, 1971, this office issued an opinion that the State had to pay the city of Ames over $360,000.00 in ten special assessments for a paving project. 1972 O.A.G. 2. Thereafter, on March 16, 1971, Ch. 34, Acts of the 64th G.A. was passed. That Act appropriated money to pay for the assessments and added the last paragraph to then §307.10 (§307A.5) setting a monetary limit. There are no cases under that section nor any opinions of this office other than the one cited above. The real question is whether the $20,000 limit applies to an entire

project which may encompass more than one parcel of state owned property, or, is the limit only applicable upon each separate piece of land. If the former is true, then all three assessments must be totaled and the excess over $20,000 must be appropriated. If the latter is true, then only one piece of land must have an appropriation.

It has been suggested to us that because the first paragraphs speak of "assessments" (plural) while the last paragraph speaks of "such assessment" (singular) that the Legislature intended the limit to be placed upon each assessment, that is, upon each piece of land. Section 4.1(3) of the Code provides that singular includes the plural and vice-versa, unless specifically provided by law. Therefore, we cannot state with any certainty that the use of both the singular and plural in that section is of any significance. We must also recognize that the precipitating factor of this limit was the large assessment of the city of Ames upon state property. Thus, the Legislature may have intended to set a limit on the total project. The rules of statutory construction found in §§4.4 and 4.6 of the Code, and the case law of this State do not aid us in the search for legislative intent. The paragraph in question is ambiguous in that it is open to at least two reasonable interpretations. We feel that because of the history of this section, the Legislature probably intended to limit the expenditures, without appropriation, to $20,000. However, we are not prepared at this time to state unequivocably, that such was the intent.

This does not mean that the city in question must be hopelessly deadlocked on this issue. Section 384.54 provides that before the awarding of the contract the council may direct the city attorney to file in District Court a petition praying that the council's acts be confirmed. The court may correct irregularities or inequalities in the schedule of assessments. We are not holding that a court would have jurisdiction over the questions of this request in such a proceeding. We are merely indicating the statute's existence. The city could also seek a declaratory judgment. In addition, the Legislature may amend the section to more clearly express its intent.

May 6, 1976

STATE OFFICERS AND DEPARTMENTS: Public Employment Relations Board; "Employee Organization" defined. §20.3(4), Code of Iowa, 1975. Only an organization "in which public employees participate and which exists for the primary purpose of representing public employees in their employment relations" may be considered as bargaining organizations for public employees. (Turner to Hultman, State Senator, 5-6-76) #76-5-3

The Honorable Calvin O. Hultman, State Senator: You have requested an opinion of the attorney general as follows:

"Iowa's public employment relations law, at Section 20.3, subsection 4 of the 1975 Code of Iowa, defines 'employee organization' as 'an organization of any kind in which public employees participate and which exists for the primary purpose of representing public employees in their employment relations.'

"It has come to my attention that several private sector employee organizations have petitioned for certification as public employee or-

ganizations. Furthermore, my understanding is that one or more of these private sector employee organizations has won election as a public employee bargaining unit.

"Assuming that private sector employee organizations do not exist 'for the primary purpose of representing public employees in their employment relations', can they legally win bargaining unit determination elections?

"I realize that the Public Employment Relations Board ruled affirmatively on this question in *Black Hawk County and Painters and Allied Trades Local Union #246.* Nonetheless, I request your opinion pursuant to the authority given you by Section 13.2, subsection 4 of the 1975 Code of Iowa."

As you note, §20.3(4) provides:

" 'Employee organization' means an organization of any kind in which public employees participate and which exists for the primary purpose of representing public employees in their employment relations."

Thus, only an organization "in which public employees participate and which exists for the *primary purpose* of representing public employees in their employment relations" may be considered as bargaining organizations for public employees.

Such an organization as the Iowa State Education Association (ISEA) would probably qualify. But it is less clear whether the AFL-CIO or the Teamster's Union would qualify. Perhaps, if a local of such a union were "for the primary purpose of representing public employees in their employment relations" such local would qualify as an employee organization within the meaning of §20.3(4), Code of Iowa, 1975, which is very loosely written.

Whether a particular organization will qualify is a fact question which will have to be determined upon a case by case basis and the Public Employment Relations Board has a broad discretion in making that determination. §20.14, Code of Iowa, 1975.

May 19, 1976

TAXATION: ADMINISTRATIVE PROCEDURE: OPEN RECORDS: Chapters 17A, 68A and 422. Protests of tax assessments filed with the Department of Revenue must be disclosed in their entirety unless such disclosure would constitute an unwarranted invasion of personal privacy or trade secrets in which case identifying details must be deleted. (Thompson to Bair, Department of Revenue Director, 5-19-76) #76-5-4

Mr. G. D. Bair, Director, Iowa Department of Revenue: You have requested an opinion of the Attorney General concerning the applicability of §§422.20 and 422.72, Code of Iowa, 1975, to protests filed under Rule 730-7.8(17A)I.A.C. of the Rules and Regulations of the Department of Revenue. Specifically, you have inquired whether the Department of Revenue may divulge (1) the identity of persons filing protests, (2) the information contained in a protest even if such information includes trade secrets or details the general business affairs of the protestor. Additionally, you have asked whether the Department of Revenue has a right to inquire into the motives of the person seeking disclosure and a right to delete identifying materials in the protest.

Section 422.20, pertaining only to income tax, and Section 422.72, pertaining to income, sales, use and franchise taxes, prohibit the disclosure by Department of Revenue employees of certain described information. Criminal penalties, as well as discharge from employment, are provided for those employees who violate the sections. The sections, in relevant part, read as follows:

"It shall be unlawful for any officer or employee of the state of Iowa to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income profits, losses, or expenditures appearing in any income return. . . . ." §422.20, Code of Iowa, 1975.

"It shall be unlawful for the director, or any person having an administrative duty under this chapter, to divulge or to make known in any manner whatever, the business affairs, operations, or information obtained by an investigation of records and equipment of any person or corporation visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; provided, however, that the director may authorize examination of such returns by other state officers, or, if a reciprocal arrangement exists, by tax officers of another state, or the federal government. This subsection shall prevail over the provisions of any general law of this state relating to public records. . . ." §422.72, Code of Iowa, 1975.

It is imperative to note that the language of the two sections refers to information revealed through a "return" or through a departmental investigation. The statutes do not prohibit disclosure of all materials in the possession of the department that pertain to individual taxpayers; they prohibit disclosure of returns and investigations only.

Neither the Iowa Code nor the Department's Rules and Regulations define "return". For purposes of the federal confidentiality statute, 26 U.S.C. §6103, the Internal Revenue Service has determined that "return" includes in relevant part:

"Information returns, schedules, lists and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return. . . ." Regulation 301.6103(a)—1(3)(i).

The above quoted definition is an appropriate vehicle to use in understanding the meaning of "return" in §§422.20 and 422.72 due to the similar function served by state and federal returns as well as the similar statutory purposes for which the term was defined. By using this definition, it is clear that a protest is not part of a return; it is intended to be more. See, 730-7.8(2) I.A.C.

This conclusion is consistent with the distinction that is usually drawn by courts between the return, i.e., the document filed, and the informa-

tion disclosed on the return. For example, the federal statutory privilege extends only to the original document and not to photocopies in the taxpayer's possession. *Connecticut Transporting Co. v. Continental Distilling Corp.*, 1 F.R.D. 190 (D.C. Conn. 1940); *U.S. v. O'Mara*, 122 F.Supp. 399 (D.C. 1954). Furthermore, it is often held that a taxpayer who has chosen to litigate an issue wherein his tax liability is relevant cannot claim that such information is privileged. *Matchen v. McGahey*, 1969, 455 P.2d 52 (Okla.); *Miller v. Dept. of Revenue*, 1969, 171 N.W.2d 3 (Mich.) *Tollefsen v. Phillips*, 16 F.R.D. 348 (D.C. Mass. 1954).

Furthermore, since a protest is prepared and filed by the taxpayer, it cannot be considered to be a result of an investigation by the department. It would seem, therefore, that the protest cannot be considered confidential under §§422.20 or 422.72. It is merely a document that alleges error in the department's determination of the tax.

You have also inquired about the applicability of Chapter 17A, Code of Iowa, 1975. This chapter, the Iowa Administrative Procedure Act (IAPA), establishes a "minimum procedural code for the operation of all state agencies." §17A.1(2), Code of Iowa, 1975. The purposes of the act, inter alia, are as follows:

". . . to increase public accountability of administrative agencies; . . . to increase public participation in the formulation of administrative rules; to increase the fairness of agencies in their conduct of contested case proceedings . . ." §17A.1(2), Code of Iowa, 1975.

It is also provided that the act is to be "construed broadly in order to effectuate its purposes. §17A.23, Code of Iowa, 1975.

The relevant provision of the Iowa Administrative Procedure Act is §17A.3(1)(d). It provides that every agency shall:

"d. Make available for public inspection and index by name and subject all final orders, decisions and opinions: Provided that to the extent required to prevent a clearly unwarranted invasion of personal privacy or trade secrets, an agency shall delete identifying details when it makes available for public inspection any final order, decision or opinion; however, in each case the justification for the deletion shall be explained fully in writing."

It is imperative to note that the statute, strictly construed, requires only "final orders, decisions and opinions" to be made available. Preliminary documents filed in contested case proceedings, viz., protests, answers, et cetera, are not expressly covered. However, the primary purpose of the IAPA is to increase access to agency law; and a final order is agency law to the extent that it contains precedential value. This value may not be apparent if the order, decision or opinion does not adequately delineate all salient facts and allegations upon which the disposition was based. The requirement of §17A.3(1)(d) must be construed in light of the Act's purposes and, therefore, disclosure is necessary when the precedential value of the order would not otherwise be understood. Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process," 60 Iowa Law Review 730, 794 (1975).

The Iowa Administrative Procedure Act does not, then, require disclosure of protests except in those rare circumstances where agency law

is otherwise unclear. However, Chapter 68A, Code of Iowa, 1975, requires "the public disclosure, with certain exceptions, of all written documents or records in the possession of government agencies." Bonfield, supra, at 781. This section applies to "public records" which §68A.1 defines as

". . . all records and documents of or belonging to this state or any county, city, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council or committee of any of the foregoing."

Although, as noted in 1974 O.A.G. 403, "not every record which comes into the possession of a public official is a public record," a protest filed by a taxpayer definitely is within the language of §68A.1 and the interpretation of that language given by this office. 1972 O.A.G. 616; 1974 O.A.G. 403.

Section 68A.2 gives to every "citizen of Iowa" the right to examine all public records. Therefore, when no other statute prohibits disclosure the Department of Revenue has no authority to conceal (to an Iowa citizen) either the taxpayer's identity or the contents of the protest. And the motive of the person seeking disclosure is irrelevant: Records not otherwise made confidential are open to examination by *every* citizen. See, 1968 O.A.G. 516.

To this general proposition several exceptions should be observed. The department must delete any details that identify the taxpayer if a failure to delete will cause "a clearly unwarranted invasion of personal privacy or trade secrets." §17A.3(1)(d). This is a mandatory, not discretionary, responsibility:

"Because the IAPA uses the word '*shall* delete' and the Federal Act uses the word 'may delete' it is clear that the IAPA meant to make mandatory that which the Federal Act made only permissive." Bonfield, supra, at 798. (Emphasis in the original)

Sections 68A.7(3) and 68A.7(6) make confidential, within the department's discretion, "[t]rade secrets which are recognized and protected as such by law" and "[r]eports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose," respectively.

With regard to information the disclosure of which would be an unwarranted invasion of personal privacy, but which is not a trade secret, the department should disclose the protest with identifying details deleted. Although §17A.3(1)(d) requires such deletion from "final orders, decisions and opinions" only, and does not specifically mention preliminary documents, it is a necessary inference that the preliminary documents are impliedly included. Without this inference, i.e., if deletion occurred only in the final order and not in the protest, the unwarranted invasion of personal privacy would not be prevented.

Germane to this discussion is §17A.12(1), Code of Iowa, 1975, which provides that notice of hearing shall commence contested case proceedings. Again, the confidentiality requirement must apply to protests even though they have not yet resulted in a contested case proceeding.

Each protest is potentially a contested case proceeding. Premature disclosure without proper deletions could ultimately result in violation of the protections in §17A.3(1)(d).

Although chapter 68A has no exemption for personal privacy, the Iowa Administrative Procedure Act takes precedence over its general disclosure provisions:

"Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, *unless some other provisions of the Code expressly limits such right or requires such records to be kept secret or confidential.* §68A.2, Code of Iowa, 1975 (Emphasis added)

"Except as expressly provided otherwise by this chapter or by another statute referring to this chapter by name, the rights created and the requirements imposed by this chapter shall be in addition to those created or imposed by every other statute now* in existence or hereafter* enacted." §17A.23, Code of Iowa, 1975.

Both §17A.3(1)(d) and §68A.7(3) treat trade secrets as confidential. Section 68A.7(6) also allows information "which would give advantage to competitors and serve no public purpose" to be confidential. The difference between a trade secret and the information described in §68A.7(6) is probably negligible. See, *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Also, the distinction between the requirement in §17A.3(1)(d) that "identifying details" be deleted and the requirement in §68A.7 that the "public record shall be kept confidential" is probably more apparent than real. First, the federal provision analogous to §17A.3(1)(d), 5 U.S.C. §552(a)(2), has been interpreted to allow deletion of the trade secret itself when disclosure of it would render the data identifiable. *National Cable Television Ass'n, Inc. v. F.C.C.*, 479 F.2d 183 (D.C. Cir. 1973). Second, if deletion of identifying details is sufficient to protect the trade secret, then a public record, with appropriate deletions, is no longer confidential within the meaning of §68A.7.

It is important to understand that §68A.7 imposes a discretionary duty of confidentiality whereas §17A.3(1)(d) imposes a mandatory duty. The result is the same as a protest containing an unwarranted invasion of personal privacy: the trade secret must be protected under the proviso of §17A.3(1)(d). The discretion conferred by §68A.7 is subjugated to the IAPA's mandatory confidentiality provision. §68A.2 and §17A.23; see page 6, supra.

Similarly, the seemingly narrow confidentiality language of §17A.3(1)(d) regarding trade secrets must be extended, by the same necessary inference, to protests at all stages of the proceedings. A contrary conclusion would undermine the efficacy of the intended protection.

By way of corroboration, requiring protests to be confidential would be ludicrous in light of §17A.12(7) which requires oral proceedings to be open to the public. Filing a protest is the first step in a process that could culminate in an evidentiary hearing. 730-7.8(17A)I.A.C. It is the protest that frames the issues for the hearing 730-7.8(2)(d)I.A.C. It is difficult to conceive a situation in which the oral proceeding would

not, either by express or implied reference, reveal the most material portions of the protest.

In conclusion, protests must be disclosed in their entirety as public records pursuant to §68A.2 unless such disclosure would constitute an unwarranted invasion of personal privacy or trade secrets. If the protest does contain such information, the department must delete identifying details.

May 19, 1976

SUBPOENA POWER OF CIVIL RIGHTS ORDINANCES: A city council can enact a Civil Rights ordinance which includes subpoena powers both for investigation and for hearing for the agency charged with carrying out the mandate of the ordinance. (Conlin to Doyle, State Representative, 5-19-76) #76-5-5

Honorable Donald V. Doyle, State Representative: You have requested an Attorney General's opinion on the question of whether or not the city council of Sioux City can enact a Civil Rights ordinance which includes subpoena powers for the agency charged with carrying out the mandate of the ordinance.

Section 622.81, Code of Iowa, 1975, provides as follows:

"Any officer or board authorized to hear evidence shall have authority to subpoena witnesses and compel them to attend and testify, in the same manner as officers authorized to take depositions."

It appears to allow any board or officer authorized to hear evidence to use subpoena power.

Furthermore, Chapter 392.1 (Administrative Agencies), Code of Iowa, 1975, states that the city council may establish an administrative agency and determine its powers and duties. The Code forbids the council to delegate to an administrative agency any of the powers, authorities, and duties prescribed in Division V of Chapter 384 which deals with revenue financing or in Chapter 388 which deals with city utilities. Except as otherwise provided in this section, the city council may delegate authority to the agency for matters within the scope of the agency's powers and duties.

Therefore, it appears that a city council can enact a Civil Rights ordinance which includes subpoena powers both for investigation and for hearing for the agency charged with carrying out the mandate of the ordinance.

May 24, 1976

SCHOOLS: Appropriation for Resource Materials. Chapter 62, Laws, 66th G.A., 1975 Session. Funds appropriated to the Department of Public Instruction to replace resources lost in fire and reestablish the Heartland Agency are not subject to restricted use imposed by federal law or state plan and may be made available to schools other than elementary or secondary schools where mutual benefit under a 28E agreement can be shown. (Nolan to Byerly, State Representative, 5-24-76) #76-5-6

The Honorable Richard L. Byerly, State Representative: This is written in reply to your request for an opinion on the following question:

"When state money is appropriated to replace materials purchased previously with federal dollars, do the federal regulations limiting the use apply to the replacement of materials?"

We understand your request is prompted by the fact that an area school instructor was denied access to sixteen millimeter films purchased from monies appropriated to the Department of Public Instruction for the purpose of replacing Heartland Area Education Agency materials which were lost in a fire in 1975. The original materials were purchased by Heartland with federal funds under the Elementary Secondary Education Act Title II. The appropriation statute providing funds for the replacement materials is §1(15), Chapter 62, Laws of the 66th G.A., 1975 Session, which provides:

"There is appropriated from the general fund of the state for the fiscal period beginning July 1, 1975, to the following named agencies for the purposes indicated, the following amounts, or so much thereof as is necessary: * * *

"15. Department of Public Instruction

"For replacement of films, film strips, books, and other educational media material destroyed in the Ankeny, Iowa, fire $1,000,000

"Unobligated or unencumbered funds remaining on June 30, 1976, from funds appropriated by this subsection shall revert to the general fund on September 30, 1976."

We find nothing in the Elementary and Secondary Education Act which requires that grants made thereunder be maintained subsequent to the distribution made in accordance with the state plan, or that any future appropriations would be required by the state to replace such materials in the event of loss. Accordingly, it is our view that the state appropriations of $1,000,000 to re-establish the Heartland Agency media resources stands on its own and is not subject to any limitations imposed by federal rules or regulations, nor by any inconsistent provision in the state use plan submitted in expectation of any ESEA Title II allotment. Section 205 of ESEA Title II provides:

"(a) Title to library resources, textbooks, and other printed and published instructional materials furnished pursuant to this title, and control and administration of their use, shall rest only in a public agency.

"(b) The library resources, textbooks, and other printed and published instructional material made available pursuant to this title for use of children and teachers in any school in any State shall be limited to those which have been approved by an appropriate State or local educational authority or agency for use, or are used, in a public elementary or secondary school of that State."

Clearly, subparagraph b refers to materials rather than schools, teachers or children.

Accordingly, it is within the province of the Department of Public Instruction to obtain and distribute resource materials pursuant to the state appropriation authority and to permit the use of such materials by other public agencies through 28E agreements where mutually beneficial to both agencies.

May 25, 1976

TOWNSHIPS: Fire Protection — §28E.2, Code of Iowa, 1975 and §§359.42 and 359.43, Code 1975 as amended by §§6 and 7, Ch. 194, 66th G.A. (1975). The township trustees may divide the annual tax levy it receives for fire protection in order to pay the benefited fire districts and cities providing fire protection to the township under a Chapter 28E Agreement. (Turner to Briles, State Senator, 5-25-76) #76-5-7

Honorable James Briles, State Senator: You have requested an opinion of the attorney general as to whether township trustees may, pursuant to an agreement under Chapter 28E, Code of Iowa, 1975, divide any annual tax levied pursuant to the provisions of §359.43, of said Code, as amended by §7, Ch. 194, Acts of the 66th G.A. (1975), between any benefited fire districts or cities which agree to serve the property in the township outside said district or city.

Section 359.43 as amended by Ch. 194, 66th G.A., provides:

"The *township trustees may levy an annual tax* not exceeding forty and one-half cents per thousand dollars of assessed value of the taxable property in the township, excluding any property within a benefited fire district or within the corporate limits of a city, *for the purpose of exercising the powers granted in section three hundred fifty-nine point forty-two (359.42) of the Code.* However, in any township having a fire protection agreement with a special charter city having a paid fire department, the township trustees may levy an annual tax not exceeding fifty-four cents per thousand dollars of the assessed value of the taxable property for such purpose and in any township which has a common boundary with a city having a population of two hundred thousand or more, the township trustees may levy an annual tax not exceeding sixty-seven and one-half cents per thousand dollars of assessed value of taxable property for fire protection purposes." [Emphasis added]

Section 359.42, as amended by §6, Ch. 194, 66th G.A. (1975), contains the following language: "The [township] trustees may contract with any public or private agency under chapter [28E] of the Code for the purpose of providing fire protection under this section." Section 28E.2 defines "public agency" in part as any political subdivision of this state or any agency of the state. Thus, township trustees may contract with benefited fire districts or cities for fire protection within the township, and may levy a tax in order to exercise the powers within §359.42, as amended, which include agreements with fire districts and cities.

The tax levied is to pay for the fire protection. Therefore, the township trustees must be allowed to divide the monies received from the levy to pay the fire districts and cities providing the fire protection, which many times is to different portions of the same township. To state otherwise would hinder the townships in being able to provide such protection.

Accordingly, I am of the opinion that a township may divide the annual tax levy it receives for fire protection in order to pay the benefited fire districts and cities providing fire protection to the township.

May 27, 1976

COUNTIES: Supervisors — §§332.3(15), 332.6, 332.9, 444.10, 602.5, Code of Iowa, 1975. Expenditures for equipping a judge's office should come from the general fund. Court expense fund may be used only where general revenues are insufficient to provide for operation of the courts. (Nolan to Pahlas, Clayton County Attorney, 5-27-76) #76-5-8

Mr. Harold H. Pahlas, Clayton County Attorney: You have requested an opinion by this office concerning the payment of expenditures incurred in Clayton County as a result of the selection of the Honorable L. John Degnan, Guttenberg, Iowa, as the judge of the First Judicial District. From your letter, it appears that the board of supervisors informed Judge Degnan at the time of his appointment that there was no space in the courthouse for an office for him and it was, therefore, understood that Judge Degnan would provide his own office facilities in Guttenberg, Iowa. The question now presented is whether expenditures for equipping the Judge's office in Guttenberg should come from the general fund or the court fund.

Your specific questions are:

"(1) Does the court fund or does the general fund pay the bill to Wahl & Wahl for dictating equipment and maintenance in the sum of $1,107.08;

"(2) Does the court fund or does the general fund pay the bill to C. F. Cody Company, Inc., for furniture in the sum of $874.10;

"(3) Were the payments previously paid from the court fund of $675.00 for the court reporter's typewriter, $31.15 maintenance for one year contract for the typewriter, $252.53 for the telephone at the Guttenberg office of Judge Degnan, and $200.00 for U.S. Law Week for 1975 for Judge Degnan, proper expenditures from the court fund;

"(4) In the event a claim is filed by Judge Degnan for rent of office space in Guttenberg, Iowa, is that a proper expenditure from the general fund or from the court fund?"

In the first instance, we feel constrained to say that we find no authority for the supervisors to furnish office space for a district judge outside the county seat of Elkader, Iowa, although it is clear under §602.5 that court may be held at other places. The board of supervisors is empowered:

"To build, equip and keep in repair the necessary buildings for the use of the county and of the courts." §332.3(15), Code of Iowa, 1975.

Under §332.6, the county board of supervisors may provide a suitable law library "in the county courthouse" for the use of the judges, county attorney, county officers and others; such library is to be under the supervision and control of the judges of the district court. Under §332.9 of the Code, the board of supervisors is required to furnish the clerk of the district court and the county attorney with offices at the county seat. The law does not specify that offices must be provided for judges, but the necessity of furnishing such offices may fairly be implied from the duty to provide buildings for the use of the court.

It is our opinion that the costs of providing space or improving the court rooms and offices of the court is to be paid from the general fund. While there is a "court expense fund" created by §444.10 of the Code, this fund may be used only to pay expenses chargeable to the court. 1972 O.A.G. 693, 694. The court fund is an auxiliary fund which can be used only when ordinary county revenues are found to be insufficient to pay "expenses incident to the maintenance and operation of the courts". 1948 O.A.G. 224. However, where the Court orders the supervisors to provide space for court related services required by the Uniform Trial

Court Act, the court expense fund may be used to supplement the amount budgeted from the general fund for maintenance and repair in a courthouse building used exclusively for the courts and court related functions. O.A.G. February 6, 1975 (Haesemeyer to Holliday).

Accordingly, we answer your third question affirmatively, and we are of the opinion that the payment of claims indicated by your first, second and fourth questions should be made from the general fund.

May 27, 1976

CITIES AND TOWNS: Incompatibility of Positions. The positions of Assistant City Manager and Director of the City Human Relations Commission may be incompatible, depending upon the duties of each. (Blumberg to Rodenburg, Pottawattamie County Attorney, 5-27-76) #76-5-9

Lyle A. Rodenburg, Pottawattamie County Attorney: We have received your opinion request of April 23, 1976, regarding compatibility of positions. Under the facts, as you indicated, the city has combined the positions of assistant city manager and Human Relations Director. As Human Relations Director, the individual would serve as an aide to the Human Relations Commission in order to provide them with necessary information. The duties of assistant city manager are somewhat vague, but appear to be widespread at the discretion of the City Manager and upon the need of the Budget Review Committee and Labor Negotiations team. In conferring with the individual involved at an earlier date, we were able to ascertain that as assistant city manager he would take part in the budget talks and negotiations of each city department and board, including the Human Relations Commission. You ask whether the two positions, occupied by the same person, would be incompatible.

The case of *State ex rel. Crawford v. Anderson,* 1912, 155 Iowa 271, 273, 136 N.W. 128, sets forth the criteria for incompatibility of offices:

"The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' State v. Bus, 135 Mo. 338, 36 S.W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra [112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211]; State v. Goff, 15 R.I. 505, 9 A. 226, 2 Am.St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both'."

See also, *State ex rel. LeBuhn v. White,* 1965, 257 Iowa 606, 133 N.W.2d 903.

We can foresee that some conflicts may arise with an individual holding two such positions. Depending upon the specific duties imposed

upon an assistant city manager, there is a distinct possibility that as assistant city manager the individual may exercise some revisory power over the Human Relations Commission. Said another way, as director of the Human Relations Commission, that individual may be subordinate to the position in the City Managers Office. Accordingly, an incompatibility may exist.

May 27, 1976

MUNICIPALITIES: Municipal Band Tax — §384.12(1), Code of Iowa, 1975; §§375.4 and 375.5, Code of Iowa, 1973; §5839, Code of Iowa, 1927. A city which authorized a band tax prior to the effective date of the city code may continue to collect said tax in the future, even though it did not collect the tax for many years. Said tax may be collected until eliminated by the electorate or by some affirmative action of the council. (Blumberg to Monroe, State Representative, 5-27-76) #76-5-10

Honorable W. R. Monroe, State Representative: We have received your opinion request of May 10, 1976, regarding a municipal band tax. You presented the following facts:

"In 1926 the City of Burlington, Iowa, by ordinance, established a municipal band. The voters of Burlington had by majority vote, authorized the city to levy an additional tax each year to support the band in accordance with Chapter 296 of the 1924 Code, Sections 5835-5840. This chapter appears in the Codes of 1946 through 1973 as Chapter 375.

"Until approximately 1951 the City Council of Burlington funded the municipal band through a levy of the additional tax under the authority given to it by the voters. Commencing in 1952 the city chose, as an alternative for funding the band, to use the recreation fund under Section 404.11(8). Funding under the recreation fund was in lieu of the tax provided by Chapter 375 and no election to revoke the authority of the city to levy the additional tax for the band was ever held as provided for in Chapter 375.

"The Burlington Municipal Band was funded through the fiscal year July 1, 1975-June 30, 1976. Due to financial problems facing the city, the council removed from the budget certified to the County Auditor for the fiscal year July 1, 1976-June 30, 1977, any funds for the municipal band and the city did not certify for the new fiscal year any additional tax for the band. No other action was taken by the City Council of Burlington with respect to the band and no resolution or ordinance was adopted to abolish the band or to revoke or eliminate the council's authority under Section 384.12(1) of the Code to certify an additional tax for the band."

Based upon the above facts, you asked the following questions:

"1. Does the failure of the City Council of Burlington, Iowa, to budget any money for the municipal band for the upcoming fiscal year and the failure of the City Council to certify additional tax under Section 384.12 for the support of the municipal band during the upcoming fiscal year without any further action such as the adoption of an ordinance or resolution abolishing the band or revoking or eliminating the authority of the city to certify the additional tax for the support of a municipal band constitute an elimination of said authority within the meaning of Section 384.12(1)(d), 1975 Code of Iowa.

"2. If not, may the City Council of Burlington certify an additional tax under Section 384.12(1) for the support of the municipal band in future fiscal years commencing with the fiscal year July 1, 1977-June 30, 1978?

"3. If the answer to the first question is yes, must there be a new petition and new vote under Section 384.12(1) before the city council in future years may certify an additional tax for the support of the municipal band?

"4. If the answer to the first question is yes, must the question be put to the voters in a general election or may the proposition be submitted to the voters at a special city election?"

Section 384.12(1), 1975 Code of Iowa, provides for the band tax. It is stated there that a city may levy additional taxes as follows:

"A tax not to exceed thirteen and one-half cents per htousand dollars of assessed value for the support of a municipal band, subject to the following:

a. Upon receipt of a petition valid under [§362.4], the council shall submit to the voters at the *next regular city election* the question of whether a tax shall be levied.

b. If a majority approves the levy, it *may* be imposed.

c. The levy can be eliminated by the same procedure of petition and election.

d. A tax *authorized by an election held prior to the effective date of the city code may be continued until eliminated by the council,* or by petition and election." [Emphasis added]

Certain portions of the above statute have been emphasized because they have a bearing on your questions.

Prior to the new city code the procedure for implementing such a tax was similar. However, pursuant to §375.4, 1973 Code of Iowa, and prior Codes dating back to 1927, the city had a duty to levq the tax each year until said tax was eliminated by the electorate. Thus, in 1932 O.A.G. 105, 106, this office held that a city council "must . . . after the voters have authorized the levy of a tax for band purposes make a levy for said purpose." We also held that the provisions of §5839, 1927 Code [§375.5, 1973 Code providing for elimination of the tax upon a vote of the electorate] must be followed in order to eliminate such a levy.

Section 384.12(1) contains different language. Subsection "b" of that section only provides that the levy *may* be imposed. "May" confers a power, but does not necessarily confer a requirement or duty. §362.2 (11), (12), (13), 1975 Code. Subsection "d" provides that in the event such a tax had been authorized prior to the effective date of the city code it may be continued until eliminated by the council or the electorate. The issue here is whether the failure of the city to levy the tax since 1951 eliminated it. Pursuant to our prior opinion such a tax could only be eliminated by the electorate. Thus, even though the city did not levy the tax, it still had the authority to do so. Similarly, §384.12(1)(b) now provides that a city need not impose the tax even though it is authorized. Thus, when §384.12(1)(d) speaks of the council eliminating the tax there must be some affirmative action by the council rather than an ommission. With that in mind, the authority to levy the tax still exists in your city. Thus, the city could levy the tax in future years until it is eliminated pursuant to §384.12(1)(d).

We need not answer questions three and four. However, regarding

question four, §384.12(1)(a) provides that the question is put to a vote at a regular city election, not a special election.

Accordingly, we are of the opinion that the city can continue to levy a tax for a municipal band if authorized prior to the effective date of the city code, even though it did not collect such a tax for many years. Said tax can be collected until eliminated by the electorate or some affirmative action by the council.

May 27, 1976

COUNTIES: Board of Supervisors. §331.13, Code of Iowa, 1975. Generally, the chairman of the Board of Supervisors is not restricted from making motions or voting as a member of the Board. (Nolan to Wyckoff, State Representative, 5-27-76) #76-5-11

The Honorable Russell L. Wyckoff, State Representative: This is in reply to your request for an opinion of the Attorney General as to the effect an election as chairman has on a member of a county board of supervisors, where he is elected pursuant to §331.13 of the Code. Section 331.13 of the Code of Iowa states:

"The board of supervisors, at its first meeting in each year, shall organize by choosing one of its members as chairman, who shall preside at all of its meetings during the year."

Your question was, as stated in your letter of January 14, 1976:

"Does this, in any way, prevent the chairman of the board from making or seconding motions or otherwise restricting his duties as a voting member of the Board?"

In Iowa, it has long been held that proceedings before a board of supervisors and like tribunals are necessarily informal and courts are not disposed to review them with technical strictness. *Thorson v. Board of Supervisors*, 249 Iowa 1088, 1097, 90 N.W.2d 730, 735 (1958). *Harris v. Board of Trustees*, 244 Iowa 1169, 1176, 59 N.W.2d 234, 238 (1953).

In the absence of the adoption of rules of procedure and in the absence of statutory regulation, the generally accepted rules of parliamentary procedure control. 59 Am.Jur.2d *Parliamentary Law*, §3 (1971). No parliamentary rules are imposed on the boards by the Code, so where a board has not adopted its own rules, its procedure is governed by general parliamentary law.

As an example of the general parliamentary law which would apply to small boards, I would refer you to *Robert's Rules of Order, Newly Revised*, §48, at 405 (1970). This section states that the formality necessary in a large assembly would hinder business in a small board, so rules are much more casual. The chairman can usually make motions and usually votes on all questions.

Other sections of Chapter 331 of the Iowa Code often refer to a "majority of the board" with no special reference to the chairman's position. For example, §331.14 defines a quorum as "a majority of the board", and §331.18 refers to a "majority of the whole board" in defining acts which require a majority vote. It would thus appear that the chairman is to be considered as a general member of the board, except where special duties are set forth in the Code, as in §331.16 where he is granted the power to call special sessions of the board.

May 27, 1976

CITIES AND TOWNS: Policeman and Fireman Retirement Systems — Chapter 411, Code of Iowa, 1975. §411.6(1), (2), (3), (11) and (14). An individual convicted of a felony who otherwise meets the procedural requirements of Chapter 411 may receive pension benefits afforded under the Chapter. (Kelly to Newell, Muscatine County Attorney, 5-27-76) #76-5-12

Mr. David W. Newell, Muscatine County Attorney: This opinion is in response to your request dated February 6, 1976, regarding Chapter 411 pension benefits. Your request makes reference to a specific individual and the application of the pension provisions to him. My opinion will be confined to answering all general questions of law and will not determine the accuracy of the pension board's accountant's calculations. The individual who is the subject of your opinion request, was suspended from service after being charged with a felony and was subsequently convicted of a felony. It should be noted, that this individual was appointed to service on June 16, 1953, and suspended on March 8, 1975. He attained the age of fifty-five years on September 26, 1975.

The first question of your multifaceted request states:

"Does the fact that he was convicted of a felony have any effect on his benefits under Chapter 411 and if so, what effect?"

I have been unable to find any provision in Chapter 411 or any other part of the Code of Iowa that would disqualify an individual from receiving pension benefits because of a felony conviction. The Constitution of the State of Iowa makes reference to individuals convicted of "infamous" crimes losing their right to sufferage, see Art. II Iowa Constitution §5, however, that seems to be the extent of a felon's forfeiture of rights, see also *Butts v. Nichols*, 381 F. Supp. 573 (S.D. Iowa 1973). Laws creating pension rights are to be liberally construed with the view of promoting the objects of the Legislature, *Flake v. Bennett*, 261 Iowa 1005, 156 N.W.2d 849 (1968). Even though the payment of a pension to a convicted felon may offend the public conscience, it is my opinion that such payment should be made if the individual otherwise meets the various qualifications of Chapter 411, i.e., age and time of service.

You additionally asked:

"3. If the Board votes to allow him to remove the $9,548.15, does he still receive a monthly pension of $346.16?

"4. Do his benefits fall under Section 411.6(1)(c) or under Section 411.6(2)? If under 411.6(1)(c), does the withdrawal of the $9,548.15 prevent him from receiving a monthly pension as seems to be indicated by the last sentence of that subsection?

"5. Is the optional allowance outlined in Section 411.6(11) available to him and if so, does that override either Section 411.6(1)(c) or 411.6(2)? They seem to be inconsistent."

Your questions dealing with Sections 411.6(1)(c), 411.6(2) and 411.6(11) have been answered by previous Attorney General Opinions, but for the purpose of clarity, I will attempt to comment on each of your questions. These three sections state:

411.6(1) Service retirement benefit. "Retirement of a member on a service retirement allowance shall be made by each board of trustees as follows:

a. Any member in service may retire upon his written application to the board of police or fire trustees as the case may be, setting forth at what time, not less than thirty nor more than ninety days subsequent to the execution and filing therefor, he desires to be retired, provided, that the said member at the time so specified for his retirement shall have attained the age of fifty-five and shall have served twenty-two years or more in said department, and notwithstanding that, during such period of notification, he may have separated from the service.

b. Any member in service who has attained the age of sixty-five years, shall be retired forthwith, provided, that upon the request of the superintendent of public safety, the respective board of trustees may permit such member to remain in service for periods not to exceed one year from the date of the last request from the superintendent of public safety. Provided further that no member of said departments employed on July 4, 1965, shall be so retired until he has completed twenty-two years' service for service retirement and will receive his pension benefits.

c. Any member in service who has been a member of the retirement system fifteen or more years and whose employment is terminated prior to his retirement, other than by death or disability, shall upon attaining retirement age, receive a service retirement allowance of fifteen-twenty-seconds of the retirement allowance he would receive at retirement if his employment had not been terminated, and an additional one twenty-second of such retirement allowance for each additional year of service not exceeding twenty-two years of service. The amount of the retirement allowance shall be based on the average final compensation at the time of termination of employment. The allowance shall not be available to a member who has chosen to withdraw his accumulated contributions as provided in subsection 10 of this section."

411.6(2) Allowance on service retirement. "Upon retirement from service, a member shall receive a service retirement allowance which shall consist of:

a. An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement; and

b. A pension given by the city in addition to his annuity which together with his annuity shall make a total service allowance equal to one-half of his average final compensation.

411.6(11) Optional allowance. "With the provision that no optional selection shall be effective in case a beneficiary dies within thirty days after retirement, in which event such a beneficiary shall be considered as an active member at the time of death; until the first payment on account of any benefit becomes normally due, any beneficiary may elect to receive his benefit in a retirement allowance payable throughout life, or he may elect to receive the actuarial equivalent at that time of his retirement allowance in a lesser retirement allowance payable throughout life with the provision that an amount in money not exceeding the amount of his accumulated contributions shall be immediately paid in cash to such member or some other benefit or benefits shall be paid either to the member or to such person or persons as he shall nominate, provided such cash payment or other benefit or benefits, together with the lesser retirement allowance, shall be certified by the actuary to be of equivalent actuarial value to his retirement allowance and shall be approved by the board of trustees; provided, that a cash payment to such member or beneficiary at the time of retirement of an amount not exceeding fifty percent of his accumulated contributions shall be made by the board of trustees upon said member's or beneficiary's election."

If an individual withdraws all of his accumulated contributions pursuant to Section 411.6(10), he will not be entitled to a pension allowance, see Section 411.6(1)(c) last sentence. However, utilizing the options found in Section 411.6(11) does not disqualify an individual from receiving a pension allowance, see also 1974 O.A.G. 144 and 1968 O.A.G. 744.

Secondly, Section 411.6(2) merely describes the dollar composition of the allowance paid upon a service retirement it is not another type of retirement benefit. Section 411.6(1), subsections (a) (b) and (c) merely lists the three types of service retirement benefits.

Your last two questions, regarding the escalation of payments and widow benefits, are determined by the specific facts before your pension board. If the board determines that an individual has met the requirements of Chapter 411, then naturally the board is required to make the proper annual readjustments pursuant to Section 411.14(a) (b) (c) (d) (e). Also, Chapter 411 clearly provides that certain benefits are to be paid to the widow of a pensioner. I will not and cannot issue an opinion to you with specific dollar amounts without having all the facts encompassing an individual's service background. Also, Attorney General Opinions are to be public in nature and answer only questions of law. I have determined that a felony conviction should not prevent an individual from receiving Chapter 411 pension benefits. However, it is the pension board's duty to determine whether that individual meets the Chapter 411 requirements and the amount of such benefit.

May 27, 1976

COUNTIES: Auditor. §409.31, Code of Iowa, 1975. The auditor must keep the plat book in his office and in determining whether to require a plat of land to be transferred should follow standards prescribed in §409.31. The right of appeal from the Auditor's determination of need for a plat is to the Board of Supervisors. (Nolan to Lamborn, State Senator, 5-27-76) #76-5-13

The Honorable Clifton C. Lamborn, State Senator: This is written in response to your letter which states that you wish an opinion on the following questions so that you may determine whether corrective legislation is needed at this time:

"1. In Jackson County the assessor's office rather than the auditor's office make and keep up the plat books. Is this legal under the Code?

"2. May the auditor (as directed by the assessor in Jackson County) legally refuse to transfer lands for tax purposes until a requested survey and plat have been made and filed?

(Present practice is for the auditor to return the deed to the recording attorney with a notation that the property will not be transferred for tax purposes unless or until a requested survey is made and plat filed.)

"3. Is there any standard which must be used by the auditor under section 409.33, or elsewhere in Chapter 409, in the exercise of his judgment, to apply to and determine whether a description in a conveyance is sufficiently definite and accurate to enable the auditor to enter same upon the plat book?

"(Iowa law seems to provide, for a conveyance to be operative and the record thereof effective, that the description must identify the property sufficiently to enable a surveyor to locate it. Otherwise stated, the description must distinguish the land to be conveyed from all other land

— the description must not be equally applicable to other property. If this or some other standard is not required to be applied by the auditor, it is impossible for an attorney or other person to anticipate when a survey and plat will be required. If there is no standard, then the requirement for a survey and plat may depend upon the varying levels of competence of the auditor or the office staff from time to time, whether the office is busy or not, whether it happens to be a Monday morning after a busy weekend, and so on ad infinitum.)

"4. If there is no standard, then are the statutory provisions pertinent to survey and plat invalid and void by reason of indefiniteness?

"5. The auditor considers that section 409.1 applies to all areas in the county, interpreting 'urban' as referring to areas within cities, and 'suburban' as referring to all areas in the county outside of incorporated cities. What is your construction?

"(Section 409.1 actually appears to be quite restricted in its application under your prior opinions construing 'suburban'.)

"6. Does the lack of a provision for an appeal from the decision of the Board of Supervisors under section 409.34 invalidate all or part of Chapter 409 as depriving the appellant of constitutional or statutory rights?

"(Cost of survey and plat can be quite substantial so that property rights are involved.)

"7. Can the auditor require a survey and plat where the frontage or other part of a metes and bounds description, or other description, happens to be a stream, road or other legally proper monument, where angles and distances are not specified?

"(On the attached deed, for example, the north boundary of the premises is the center line of the street. This is at an angle with the sidelines of the premises, and neither such angle nor the distance is given. The assessor states that he cannot use this description as the frontage distance must be known to enable him to properly assess for tax purposes. Many descriptions are referred to as being north (for example) of a named stream or roadway, which frequently are irregular, or at one or more angles with the premises conveyed, and with reference to which this length of such line is not known. These are customarily proper from the standpoint of being a legal description.)

"8. Can the auditor require a survey and plat because the description (for example a metes and bounds description) takes more time for him to draw and locate than does a description referring to a lot and block, or the U.S. Government land survey?

"9. If a description takes the auditor more or time to draw and locate than some other description, may the auditor require a survey and plat on the theory or grounds that he is justified in so doing as a measure 'equalizing' the costs of his office among the taxpayers of the county, by requiring the grantor of such premises to go to the expense of a survey and plat?"

Taking the questions in the order in which they were presented, we advise:

1. Chapter 558 of the 1975 Code of Iowa provides in pertinent part:

§558.60 "The county auditor shall keep in his office books for the transfer of real estate, which shall consist of a transfer book, index book and plat book."

§558.63 "The auditor shall keep the book of plats . . . and shall designate thereon each piece of real estate, and mark in pencil the name

of the owner thereon, in a legible manner; which plats shall be lettered or numbered so that they may be conveniently referred to by the memoranda of the transfer book. . . ."

§558.64 ". . . the auditor shall enter in the index book . . ."

§558.67 "The auditor from time to time shall correct any error appearing in the transfer books, . . ."

§441.29 "The county auditor shall furnish to each assessor a plat book on which shall be platted the lands and lots in his assessment district, showing on each subdivision or part thereof, written in ink or pencil, the name of the owner, the number of acres, or the boundary lines and distances in each, and showing as to each tract the number of acres to be deducted . . .

"The auditor of any county with the approval of the board of supervisors may establish a permanent real estate index number system with related tax maps for all real estate administration purposes, including the assessment, levy and collection of such taxes. Wherever in real property tax administration the legal description of tax parcels is required, such permanent number system may be adopted in addition thereto or in lieu thereof. If established, the permanent real estate index number system shall describe real estate by township, section, quarter section, block series and parcel; and the auditor shall prepare and maintain permanent real estate index number tax maps, which shall carry such numbers and reflect the legal description of each parcel of real estate and delineate it graphically; and the auditor shall prepare and maintain cross indexes of the numbers assigned under said system, with legal description of the real estate to which such numbers relate. Indexes and tax maps established as provided herein shall be open to public inspection."

From all of the above, it would appear that the auditor is required to make and keep the plat book, and that it is not legal under the Code for the assessor's office to assume this duty.

2. It is our opinion that the auditor may not refuse to transfer land for tax purposes until a requested survey and plat have been made and filed. If the auditor, pursuant to §409.33, determines that "the description is not sufficiently definite and accurate", he may note such fact on the transfer book and on the deed; and "shall notify the person presenting it that the land therein is not sufficiently described, and must be platted within thirty days thereafter". Under §409.36, if the grantor neglects to file a plat for record, then the auditor "shall proceed" to cause the plat to be made and recorded in his office and in the office of the county recorder.

3. The standards to be used by the auditor in determining whether to require a plat are stated in §409.31:

"Whenever a congressional subdivision of land of one hundred sixty acres or less, or any lot or subdivision, is owned by two or more persons in severalty, and the description of one or more of the different parts or parcels thereof cannot, in the judgment of the county auditor, be made sufficiently certain and accurate for the purposes of assessment and taxation without noting the metes and bounds of the same, he shall cause to be made and recorded in his office and in the office of the county recorder a plat of such tract or lot with its several subdivisions, including and replatting in such plat such other plats or parts thereof included within the same lot or congressional subdivision of land as may seem to him to be required in accordance with the provisions of this chapter, . . ."

4. It is the view of this office that the present statutory provisions pertinent to surveys and platting are sufficiently clear to withstand any challenge on grounds of indefiniteness.

5. This office has previously construed §409.1 of the Code to apply to "any land which is subdivided into three or more tracts, regardless of size, when the land is intended to be used to originate a city or town or to constitute an addition to a city or town, or when the land is in an area contiguous to a city or town and such area may become populated in the foreseeable future". 1974 O.A.G. 668, 669. A suburban lot is "one located on land which is in the process of being presently, or in the reasonably foreseeable future, overflowed with the expanding population of nearby urban areas". 1970 O.A.G. 673.

6. The right of appeal is a statutory right and in this incidence, the right of appeal is from the decision of the auditor (§409.34) to the board of supervisors, which is authorized by statute (§409.35) to determine the matter and direct whether the plats shall be executed and filed, and within what time. In the opinion of this office, the absence of provisions for appeal from the supervisors decision does not deprive an individual of constitutional or statutory rights. The cost of survey and platting is not material to the obligation of the proprietor to comply with §409.1 of the Code, when this section is applicable.

7. Assuming only the conditions stated in your seventh question, it would appear that a metes and bounds description should be sufficient legal description to permit the conveyance to be entered on the plat book and the transfer book. If the assessor requires further information for purposes of taxation, he has authority under §441.17 to cause such property to be assessed in accordance with §441.21.

8. Assuming no other factors other than those stated in question number eight are involved, the answer is no.

9. Assuming no other factors other than those stated in question number nine are involved, the answer is no.

May 28, 1976

AGING, COMMISSION ON THE: Political Activities of Area Agency on the Aging Personnel — Applicability of Hatch Act — Rule 1.3(8)a and Rule 1.3(8)c, Vol. I, I.A.C. "Aging, Commission on (20)", 5 U.S.C. §7324(e), 5 U.S.C. §§1501, 1502, 1503. Area Agency on the Aging employees who are paid with Federal funds and employed by community colleges are subject to the political activity restrictions of the Hatch Act. (Dent to Peterson, Executive Director of the Commission on the Aging, 5-28-76) #76-5-14

Ms. Leona I. Peterson, Executive Director, Commission on the Aging: You have requested an opinion of this office with respect to the following questions:

1. ". . . whether or not Area Agency on the Aging staff, who are employed by community colleges and whose salaries are paid with Federal funds under the Older Americans Act, are subject to the provisions of the Hatch Act", and;

2. "If affected, will such individuals who are candidates for public elective office in a partisan election be required to obtain a leave of absence, or to tender a resignation", and finally;

3. "Are primaries considered a partisan election?"

With respect to your first question, the Rules of the Iowa Commission on the Aging, as found in Volume I of the Iowa Administrative Code, "Aging, Commission On (20)" pp 1-13, specify the policies and personnel standards to which each Area Agency on the Aging must adhere. Rule 1.3(8)a of the Iowa Administrative Code, "Aging, Commission On (20)", provides that:

"All employees of projects funded by the Older American's Act are subject to basis [sic] [basic] political activities restrictions in Subchapter III of Chapter 73 of Title 5, U.S.C. (The Former Hatch Act). Employees are individually responsible for refraining from prohibited political activity. Ignorance of a prohibition does not excuse a violation. The subrule summarizes provisions of law and regulation concerning political activity of employees."

Subchapter III of Chapter 73 of Title 5 U.S.C. prohibits Federal Employees from engaging in certain specified types of political activities. The counter part to Subchapter III of Chapter 73, which applies to state and local employees engaged in projects which are federally funded, is Chapter 15 of Title 5, U.S.C. Sections 1501 through 1508.

The basic restrictions on political activity contained in Subchapter III and Chapter 15 are substantively the same, the basic difference between them being that Subchapter III is addressed to federal employees and Chapter 15 is addressed to state and local employees working on federally assisted projects. Rule 1.3(8)a (supra) might have more properly referenced the restrictions of Chapter 15 than those of Subchapter III. However, since it is the basic restrictions on political activity which are referred to and those basic restrictions in Subchapter III and Chapter 15 are, for all practical purposes, identical, the reference to Subchapter III in the Rule is not prejudicial nor invalidating.

Having established the applicability of the political activity restrictions of the Hatch Act generally, it is necessary in order to answer your question to look at the duties performed by an employee and the source of funding for those duties in order to determine whether or not the Hatch Act will apply specifically to that employee. As stated by the Civil Service Commission in the Matter of Caude E. Huber and the State of Ohio, 2 P.A.R. 325, at 326 (1948):

"Responsibility [under the Hatch Act] . . . does not depend upon the nature of a person's tenure of employment, — the test being whether his 'principal [public] employment' is in connection with activities financed in whole or in part by Federal loans or grants."

Applying this test to the situation you present, one must look at the specific jobs performed by each of the Area Agency personnel in order to ascertain whether or not the Hatch Act will apply. However, the fact that Area Agency personnel are paid with federal funds would certainly indicate that that employee's principal employment was in connection with activities financed in whole or part by federal loans so as to make that employee specifically subject to the restrictions of the Hatch Act.

However, both Subchapter III and Chapter 15 provide an exemption from the restrictions of their respective sections for "an individual em-

ployed by an educational or research institution", 5 U.S.C. §1501 (4) (b) and 5 U.S.C. §7324 (c). Your first question then would appear to come down to a question of whether or not the Area Agency personnel mentioned are exempted from the restrictions of the Hatch Act, which would otherwise apply, because their employer is an educational institution.

The exemption for individuals employed by educational institutions was first adopted as an amendment in 1942. The debates of the 1942 Amendment reveal the legislators were concerned about the possibility of letting "everyone . . . engage in political activity if the work is educational or in the nature of research . . .", 88 Cong. Rec. 8041 (1942) (Remarks of Rep. Halleck). The U. S. Civil Service Commission has been even more specific in its construction of the exemption. In the case of *Bambrick, et al. v. State of West Virginia*, 3 Political Activities Reporter 224 at 228, decided December 10, 1973 before the Civil Service Commission, the Commission held, citing to *United Federal Workers of America v. Mitchell*, 56 F. Supp. 621 at 627 (1946), that, "The proponents of the exemption were concerned primarily with teachers."; and that therefore the restrictions of the Hatch Act did apply to Respondent Bambrick, an employee of the West Virginia Industrial Home for Girls.

It would appear therefore that the "educational institution" exemption is neither all encompassing nor automatic, given that one is employed by an educational institution. In fact, in light of the legislative history of the exemption and the constructions placed upon it by the Civil Service Commission, the exemption will only be applied to persons who are employed by an educational institution in teaching positions.

Therefore, if the Area Agency personnel you describe in your first question are not employed as teachers or working in teaching positions, and their employment is in connection with activities financed in whole or in part by federal loans or grants, the exemption will not apply and the employee will be subject to the basic political activity restrictions of the Hatch Act.

The answer to your second question may be found by again resorting to the Rules of the Commission on the Aging. Subrule 1.3(8) (c) provides in part:

"Employees on leave, on leave without pay, or on furlough or terminal leave, even though the employee's resignations have been accepted, are subjct to the restrictions."

While it is unclear exactly what is meant by the words, "even though the employee's resignations have been accepted", it is clear that an employee on leave, or, on leave without pay, or on furlough or terminal leave, will be subject to the political activity restrictions of the Hatch Act. In order to avoid being subject to the political activity restrictions of the Hatch Act, the unconditional resignation of the employee effective prior to the commencement of any restricted political activity, such as candidacy for elected public office, appears to be necessary.

The Hatch Act itself and the Rules of the Civil Service Commission provides the answer to your third question.

Section 1502 of the Hatch Act (5 U.S.C. 1501-1508), provides in part that,

"(a) A state or local officer or employee may not — * * *

(3) be a candidate for elective office."

A 1974 amendment to the Hatch Act modifies the prohibition against being a candidate for elective office to the extent that an employee subject to the restrictions of the Hatch Act may be a candidate for elective office in a non-partisan election. This amendment is codified as Section 1503 of Title 5 of the U.S.C. and states as follows:

"Section 1502(a)(3) of this title does not prohibit any State or local officer or employee from being a candidate in any election if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected." As amended Pub.L. 93-443, Title IV, §401(b)(1), Oct. 15, 1974, 88 Stat. 1290.

However, unless candidacy for elective office were nonpartisan within the meaning of Section 1503 (supra), running in a primary would be prohibited since a primary is defined by the Rules of the U. S. Civil Service Commission to be an election within the meaning of Section 1502(a)(3). See 5 C.F.R. Part 151, specifically rules 151.101(f) and 151.121(c).

The answer to your third question, then, is yes, a primary is normally considered a partisan election.

May 26, 1976

ELECTIONS: Write-in Candidates, Votes required. §43.66, Code of Iowa, 1975. In the event there was no candidate for a particular office in any preceding primary election it is appropriate to use 35% of the total vote cast for the gubernatorial candidates of a particular political party in the 1974 primary election to calculate the required number of votes to nominate a candidate for the general assembly by write-in vote in the 1976 primary election, and it would be proper for the State Commissioner of Elections to certify the name of a candidate receiving 35% of the aforementioned gubernatorial vote to the County Commissioner of Elections for the general election. (Haesemeyer to Tauke, State Representative, 5-26-76) #76-5-15

The Honorable Tom Tauke, State Representative: Reference is made to your letter of April 20, 1976, in which you request an opinion of the attorney general and state:

"Section 43.66, Code of Iowa, states that if there is no candidate on the official primary ballot of a political party for nomination to a seat in the General Assembly, 'a write-in candidate may obtain the party's nomination to that office in the primary if the candidate receives a number of votes equal to at least *35 percent of the total vote cast for all of that party's candidates for that office in the last preceding primary election for which the party had candidates on the ballot for that office.*' (emphasis added.)

"When the April 2, 1976, filing deadline passed, there were districts in the General Assembly in which one party or the other did not have a candidate. It would therefore appear that the write-in procedure described in section 43.66 could be utilized by a party to nominate a candidate for those districts.

"Some of the districts in the General Assembly for which no candidate has filed in 1976 also had ballot vacancies in both the 1972 and 1974 primaries. Since the districts in existence now are not the same as in 1970 due to reapportionment, it would appear it is impossible to use any election prior to 1972 to determine the number of write-in votes needed under section 43.66.

"Therefore, the following question:

"The obvious intent of the General Assembly in adopting section 43.66 was to require a significant number of votes to nominate a candidate who sought nomination by the write-in procedure. Therefore, in the event there was no candidate for that office in any preceding primary, would it be appropriate to use 35 percent of the total vote for the gubernatorial candidates of each political party in the 1974 primary to calculate the required number of votes to nominate a candidate for the General Assembly by write-in vote in the 1976 primary?

"If your response to this question is affirmative, would it be proper for the State Commissioner of Elections to certify the name of a candidate receiving 35 percent of the aforementioned gubernatorial vote to the County Commissioner of Elections for the general elections?"

As you quite correctly point out §43.66 completely fails to come to grips with the problem you describe. Moreover, we have been unable to find any authorities which are of any assistance in resolving this question. While we are extremely reluctant to attempt by any attorney general's opinion to move into an area which is essentially legislative in nature, we believe that there is an intent manifest in §43.66 and the other provisions of Chapter 43, that a significant number of votes be required for a write-in candidate to be nominated in the primary election. The number of votes required is 35 percent of the total vote cast for all of a particular party's candidates for the office in question in the last precinct primary election for which the party had candidates on the ballot for that office. Where, as in the situation you describe there is no total to which to apply the 35 percent, we do not believe it would be unreasonable to require that the vote cast for the party's candidate for governor in the last primary election be used.

Accordingly, it is our opinion that in the event there was no candidate for a particular office in any preceding primary election it is appropriate to use 35 percent of the total vote cast for the gubernatorial candidates of a particular political party in the 1974 primary election to calculate the required number of votes to nominate a candidate for the general assembly by write-in vote in the 1976 primary election, and that it would be proper for the State Commissioner of Elections to certify the name of a candidate receiving 35 percent of the aforementioned gubernatorial vote to the County Commissioner of Elections for the general election.

May 28, 1976

ELECTIONS: Nomination; Political Non-party organization; nomination by petition. Chapters 44 and 45, Code of Iowa, 1975. Nonparty political organizations may place presidential electors into nomination in compliance with the requirements of §44.1. Specifically, the two at large electors provided for in §54.1 may be placed into nomination by a convention or caucus which is convened to nominate persons for statewide elective office or specifically for the purposes of nomination of presidential electors. The nomination for an elector from each of

the congressional districts provided in §54.1 may be made at a convention or caucus called to nominate a candidate for United States representative or again for the specific purpose of nominating such elector. (Haesemeyer to Synhorst, Secretary of State, 5-28-76) #76-5-16

The Honorable Melvin D. Synhorst, Secretary of State: This letter is in response to your request for an opinion of the Attorney General regarding the selection of candidates for presidential elector by nonparty political organizations. Your letter reads in pertinent part:

"Under Chapter 44 should a district convention be held for each congressional district for the purpose of selecting a presidential elector? Would a minimum number of eligible electors be required to be in attendance? Should one-half of the counties within the district be represented at the district convention? Should a state convention be held to select the two candidates at large for presidential elector?

"Under Chapter 45 must the signatures of petitioners for each of six presidential electors be representative of a congressional district? Should the required number of signatures be equal to at least two percent of the total vote cast for all candidates for president of the United States or governor, as the case may be, at the last preceding general election in the district? Are 1,000 signatures required for each of the two candidates at large for presidential elector?"

Section 44.1, Code of Iowa, 1975, which deals with political nonparty organizations provides in part:

"Any convention or caucus of eligible electors representing a political organization which is not a political party as defined by law, may, for the state, or for any division or municipality thereof . . . for which such convention is held, make one nomination for each office to be filled therein at the general election."

The office of presidential elector is such an office since as provided in §54.1 of the Code in the years of presidential election . . . "there shall be elected by the voters of the state one person from each congressional district into which the state is divided, and two from the state at large as electors of president and vice-president . . . ."

Section 44.1 of the Code, a portion of which is quoted above, further provides:

"In order to qualify for any nomination made for statewide elective office by such political organization, there shall be in attendance at the convention or caucus where the nomination is made a minimum of two hundred fifty eligible electors, including at best one eligible elector from each of twenty-five counties. In order to qualify for any nomination to the office of United States representative there shall be in attendance at the convention or caucus where the nomination is made a minimum of fifty eligible electors who are residents of the congressional district including at least one eligible elector from at least one-half of the counties of the congressional district."

In light of the above language and the fact that political parties make nomination for presidential elector at their respective district conventions as provided in §43.101 and state conventions as provided in §43.109, it is our opinion that nonparty political organizations may place presidential electors into nomination in compliance with the requirements of §44.1 as set out above. Specifically, the two at large electors provided for in §54.1 may be placed into nomination by a convention or caucus

which is convened to nominate persons for statewide elective office or specifically for the purpose of nomination of presidential electors. The nomination for an elector from each of the congressional districts provided in §54.1 may be made at a convention or caucus called to nominate a candidate for United States representative or again for the specific purpose of nominating such elector.

With regard to your questions pertaining to nomination by petition, it is our opinion that, as you suggest, the provisions of §45.1 are depositive. Such §45.1 provides:

"Nominations for candidates for state offices may be made by nomination paper or papers signed by not less than one thousand eligible electors of the state, for candidates for offices filled by the voters of a county, district or other division by such papers signed by eligible electors residing in the county, district or division equal in number to at least two percent of the total vote received by all candidates for president of the United States or governor, as the case may be, at the last preceding general election in such county, district or division; and for township, city or ward, by such papers signed by not less than twenty-five eligible electors, residents of such township, city or ward."

In this regard, §43.121, specifically provides that Chapter 43 "shall not be construed to prohibit nominations of candidates for office by petition, or by nonparty organization, as provided in Chapters 44 and 45 . . . ." Thus, nominations for the two at large electors may be made by compliance with the provisions of §45.1 for state offices and those for the specific congressional districts by compliance with the requirements for nomination of candidates for offices filled by the voters of a county, district or other division.

June 7, 1976

COUNTIES: Board of Supervisors; County Detention Facilities. §§332.3 (12), 356A.1, 356A.2, 1975 Code of Iowa. Board of supervisors may lease physical structure to be used as county detention facility for period exceeding two years. Statute limiting certain contracts to two years or less does not apply to such lease. (Murphy to Cutler, Chairperson, Black Hawk County Board of Supervisors, 6-7-76) #76-6-1

Ms. Lynn G. Cutler, Chairperson, Black Hawk County Board of Supervisors: We have received your opinion request of May 3, 1976, regarding county detention facilities. The Black Hawk County Board wants to establish and maintain such a facility pursuant to Chapter 356A, 1975 Code of Iowa. The Salvation Army would have a new building constructed and lease it to the County for such purpose, but that agency is reluctant to do so unless the county can commit itself to a long-term lease. The staffing and services for the facility would be purchased by the county from the Department of Court Services, First Judicial District, a public agency. You have raised the question whether Section 356A.2, which limits certain contracts with public or private nonprofit agencies or corporations for establishing and maintaining county detention facilities, precludes the above-described lease arrangement for a period exceeding two years.

Section 356A.1, 1975 Code of Iowa, provides in pertinent part:

". . . A county board of supervisors may, by majority vote, establish and maintain by lease, purchase, *or contract with a public or private nonprofit agency or corporation to establish and maintain,* facilities where persons may be detained or confined pursuant to a court order as provided in section 356.1. . . ." [Emphasis added.]

Section 356A.2, 1975 Code of Iowa, provides in pertinent part:

". . . If the board of supervisors contract with a public or private nonprofit agency or corporation for the establishment and maintenance of such a facility, the contract shall state the charge per person per day to be paid by the county; that each such facility shall insure the performance of the duties of the keeper as defined in section 356.5; the activities and service to be provided those detained or confined; the extent of security to be provided in the best interests of the community; the maximum number of persons that can be detained or committed at any one time; the number of employees to be provided by the contracting private nonprofit agency or corporation for the maintenance, supervision, control, and security of persons detained or confined therein; and any other matters deemed necessary by the supervisors. *All such contracts shall be for a period not to exceed two years.* . . ." [Emphasis added.]

Section 332.3(12), 1975 Code of Iowa, generally empowers the county board to least property for county purposes. This section does not restrict the term of the lease, and has been interpreted to authorize long-term leases (beyond the terms of the board members) where reasonably necessary to protect public interests or affairs being administered, as opposed to where the lease would merely be an attempt to bind successors in matters incident to a particular administration. 1966 OAG 136. The facts you have presented do not seem to contradict the "public interest" standard described above. We will assume there are no facts indicating otherwise for purposes of this opinion. We will also assume that statutes other than Section 356A.2, or case law, do not constrain the lease Black Hawk County proposes to execute, since your question relates only to the effect of Section 356A.2 on the duration of the lease.

The crux of your question is thus whether the words "such contracts" in Section 356A.2, include the term "lease" as used in Section 356A.1 and the fact situation you have presented. This is a matter of statutory construction, a process in which many rules or canons of construction are enunciated in the law.

The first rule of statutory interpretation is that the intention of the legislature must be ascertained and given effect. *State v. Prybil,* 211 N.W.2d 308 (Iowa 1973); *State v. Vietor,* 208 N.W.2d 894 (Iowa 1973). In attempting to ascertain such intent, one looks primarily at the language used, considering the words used according to context and approved usage of language. *State v. Kool,* 212 N.W.2d 518 (Iowa 1973); *McReynolds v. Municipal Court of City of Ottumwa,* 207 N.W.2d 792 (Iowa 1973); *Northern Natural Gas Co. v. Forst,* 205 N.W.2d 692 (Iowa 1973). In determining the meaning of a particular provision, all provisions of the act of which it is a part, and other pertinent statutes, must be considered. *Boomhower v. Cerro Gordo County Bd. of Adjustment,* 163 N.W. 2d 75 (Iowa 1968).

Utilizing these general rules of construction, we would conclude that Section 356A.2 does not prohibit the county board from entering a lease for the physical structure to be used as a county detention facility, for a period exceeding two years.

The language of Section 356A.1, read in context, establishes three methods of establishing and maintaining county detention facilities — lease, purchase, or contract. Section 356A.2 then concentrates on the precise language of the third method listed in Section 356A.1, describes the terms which must be included in the contracts, and provides that *such* contracts must be limited to two years or less in duration. Thus the context and normal usage of language and grammar would indicate that in Chapter 356A "contract" is distinguished from "lease", and only "such contracts" described in the statute would be limited in duration.

This reasoning is supported by another rule of statutory construction, stated in *City of Cedar Rapids v. Cox*, 250 Iowa 457, 469, 93 N.W.2d 216, appeal dismissed 359 U.S. 498 (1959), as follows:

"In the absence of anything in the statute clearly indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and, where its meaning in one instance is clear, this meaning will be attached to it elsewhere." (Citations.)

The contract referred to in Section 356A.2 relates to services provided and activities conducted in relation to persons detained in the facility, rather than the physical structure of the facility. The fact situation you describe is a combination of methods of establishing and maintaining a county detention facility, in that the board proposes to lease the physical structure and contract for services separately. It is the opinion of the Attorney General that only the contract for services is subject to the two-year limitation, in the situation you describe. Of course, the method of establishing and maintaining a county detention facility could be totally on a contractual basis, where the provider of services owns or leases the facilities and includes costs related to such facilities in the per diem rate. This type of contract would also be subject to the two-year limitation of Section 356A.2.

It appears that the intent of the legislature in enacting Section 356A.2 was to limit the county boards of supervisors in contracting with providers of services, so as not to bind the counties to certain personnel or agencies for a long period, extending beyond the terms of the members of the boards. Section 356A.1 authorizes the board to purchase a facility outright, so it would not be contrary to the legislative intent to allow leasing of physical facilities for periods exceeding two years. It is not unreasonable to conclude that the legislature recognized that transactions involving real property, as they relate to county detention facilities, may of necessity be of longer duration than two years, whereas "service contracts" need not and should not be.

June 14, 1976

MOTOR VEHICLES: Safety Regulations, Private Carriers — §§325.1(1) and (2), 325.37, 325.38, 327.1, 327A.1(1), 327.20, 1975 Code of Iowa. §820-07, F 5.3(327B) Iowa Administrative Code. The term private carriers does not include "all persons who operate commercial vehicles not for hire on the highways of this state" and the safety regulations prescribed in §820-07, F 5.3(327B) Iowa Administrative Code do not apply to the operation of those vehicles. (Tangeman to Preisser, Department of Transportation, 6-14-76) #76-6-2

Mr. Victor Preisser, State Director, Department of Transportation: This is in response to your letter of March 31, 1976, concerning the definition of and application of the term "private carrier". Your entire letter is hereinafter quoted. I have numbered the paragraphs of your letter for easy reference.

1. "July 1, 1975, the Iowa Department of Transportation adopted the Federal Motor Carrier Safety Regulations which set out the equipment standards and driver qualifications for commercial vehicles operated on Iowa's highways. The rules were adopted per Chapter 325, 327, 327A, and 327B of the Iowa Code. By the rule adoption the regulations apply to intrastate operations as well as interstate operations of vehicles weighing in excess of 10,000 pounds.

2. "There are several Code sections providing authorization for the Department to adopt safety regulations and to enforce them. Those sections are 325.37, 325.38, 325.39, 327.20.

3. "Recently a question has been raised as to the applicability of the regulations to 'private carriers'. Section 325.37 defines 'motor carrier' to include 'private carriers' in addition to those other carriers named. While the Code provides no definition of 'private carrier', common usage of the term means to us, any person operating a vehicle not for hire.

4. "The Federal Regulation adopted uses in Part 390.33(a) the following:

'The term 'private carrier of property by motor vehicle' is defined in section 203(a)(17) of the Interstate Commerce Act as any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.'

5. "An official opinion is respectfully requested on the following question:

For purposes of the Motor Carrier Safety Regulations adopted by the Department of Transportation, does the term 'private carriers' as used in Section 325.37 of the Code include all persons who operate commercial vehicles not for hire on the highways of this state and do the safety regulations apply to the operation of those vehicles?"

In your paragraph 1 you indicate that "the Iowa Department of Transportation adopted the Federal Motor Carrier Safety Regulations which set out the equipment standards and driver qualifications for commercial vehicles operated on Iowa's highways".

Section 820-[07, F], 5.3(327B) of the Iowa Administrative Code is the regulation by which the Federal Regulation is adopted. That regulation includes the words "not in conflict with the laws of the state of Iowa". We must therefore look to the laws of the state of Iowa to determine the limitations of the federal regulations so adopted.

In your paragraph 1 you also state "The rules were adopted per Chapter 325, 327, 327A and 327B of the Iowa Code". Further, in your paragraph number 2, you list the Iowa Code sections which provide "authorization for the Department to adopt safety regulations and to enforce them". ". . . 325.37, 325.38, 325.39, 327.20 . . . ."

Section 325.37, 1975 Code of Iowa, provides:

" 'Motor carrier' when used in this section and §§325.38 and 325.39 means carriers holding a certificate under this chapter, truck operators and contract carriers holding permits under Chapter 327, liquid transport carriers holding a certificate under Chapter 327A, and private carriers."

The term "motor carrier" is defined in §325.1(2) as ". . . any person operating any motor vehicle upon any highway in this state". The term "motor vehicle" is also defined; therefore, the term "motor carrier" including the definition of "motor vehicle" would be as follows:

"Any person operating any automobile, automobile truck, motor bus, or other self propelled vehicle, including any trailer, semi-trailer, or other device used in connection therewith not operated upon fixed rails or track, used for the public transportation of freight or passengers for compensation between fixed termini, or over a regular route, even though there may be occasional, periodic, or irregular departures from such termini or such routes, except those owned by school corporations or used exclusively in conveying school children to and from schools."

Note particularly the reference to "public transportation of freight or passengers for compensation".

Section 325.38 is the section which specifically imposes on the Department of Transportation the obligation to ". . . establish reasonable requirements prescribing standards of equipment for vehicles operated by motor carriers on the highways of this state . . . ." The reference to motor carriers incorporates the special definition contained in §325.37 which as we have pointed out with reference to "motor carriers" is limited to those "used for the public transportation of freight or passengers for compensation".

Section 325.37 goes on to include "truck operators and contract carriers holding permits under Chapter 327". §327.1 defines "motor truck" as:

". . . any automobile, automobile truck, or other self propelled vehicle, including any trailer, semi-trailer or other device used in connection therewith, not operated upon fixed rails or track, used for the public transportation of freight for compensation, not operating between fixed termini, nor over a regular route, or used in connection with the transportation of property for compensation under an individual written contract."

Note again the reference to "public transportation of freight for compensation". At §327.1(6) "contract carrier" is defined as:

". . . any person who does not hold out to the general public to serve it indiscriminately and who, for compensation, engages in the business of transportation of property by motor truck under individual written contract, thereby providing a special and individual service required by the peculiar needs of a particular shipper, but does not include (1) a motor carrier as defined in Chapter 325, (2) a truck operator, or (3) a person whose transportation by motor vehicle is in furtherance of a private enterprise other than the business of transportation for others for compensation."

In the definition of "contract carrier" I would especially note that we are again limited to transportation for compensation and we specifically exclude a person whose transportation is in furtherance of a private enterprise (other than transportation for compensation).

Section 325.37 continues with the next category which is "liquid transport carriers holding a certificate under Chapter 327A". In §327A.1(1) the term "liquid transport carriers" is defined as, ". . . any person engaged in the transportation, for compensation, of liquid products in bulk upon any highway in this state". Note that again there is the requirement of "for compensation".

Returning again to §325.37, we find that the last category included in the definition of motor carrier for purposes of the three sections of Chapter 325 is "private carriers". Unfortunately we find no statutory definition of "private carriers". Our reference to Black's Law Dictionary discloses the definition of "private carriers" as those "who transport or undertake to transport in a particular instance for hire or reward". Reference to the legal encyclopedia, Corpus Juris Secundum at 13 C.J.S. Carriers §4, defines "private carrier" as "One who undertakes by special agreement in a particular instance to transport property without being bound to serve every person who may apply". This establishes the distinction between a "common carrier" and a "contract carrier". However it still retains the requirement of transporting property of another. If one were transporting ones own property there would, of course, be no requirement of a "special agreement in a particular instance". A further elaboration of the definition of "private carrier" is given as:

"One who without making it a vocation, or holding himself out to the public as ready to act for all who desire his services, undertakes, by special agreement in a particular instance only, to transport property from one place to another, either gratuitously or for hire."

We therefore have the added aspect of transporting "gratuitously"; but nevertheless, there is still the requirement that it be for another party rather than for ones self because again we find a reference to "special agreement in a particular instance only".

You refer in paragraph 2 of your letter to §327.20 as one of the sections "providing authorization for the Department to adopt safety regulations". §327.20 provides:

"Rules for Operation. The transportation commission shall promulgate such other safety rules as it may deem necessary to govern and control the operation of motor trucks upon the highways and the maintenance and inspection thereof."

Chapter 327 contains the definition of "motor truck" which includes the provision for "public transportation of freight for compensation", thus excluding "private carriers" from its application.

In your paragraph 1 you include reference to paragraph 327B which is entitled "Interstate Commerce Commission Authority of Motor Carriers". Since your question is directed to the definition of the term "private carriers", it is not necessary to consider Chapter 327B any further since §327B.4 provides, "The provisions of this chapter shall not be construed to include private carriers."

In each of the instances cited above in which we have interpreted the statutes you cite as the authority for enactment or adoption of the safety regulations, with which the subject at issue is concerned, we have found that these statutes do not apply to "persons operating commercial vehicles not for hire on the highways of this state".

Therefore, in response to your specific question contained in paragraph 5 of your letter, it is my opinion that the term "private carriers" as used in §325.37 of the Code does *not* include "all persons who operate commercial vehicles not for hire on the highways of this state" and the safety regulations do *not* "apply to the operation of those vehicles".

Nowhere in any of the definitions of carrier, whether common, private or contract, is there any statement that one who carries his own goods for his own purposes is a carrier.

The term carrier in all the definitions examined refers to or implies carriage of someone elses goods, property or person, whether for compensation or gratuitously.

June 15, 1976

ELECTIONS: Corporations; Legality of Continuing Salary of Candidate or Office Holder. Chapter 56, Code of Iowa, 1975, as amended by House File 431, Acts, 66th G.A., 1st Session (1975). A corporation may retain a salaried person on its payroll while such person is running for political office provided he continues to fulfill his usual duties and obligations with such corporation. There is no prohibition in the Code against a corporation keeping a salaried person on its payroll after he has been elected to public office. (Coleman to Millen, House Minority Leader, 6-15-76) #76-6-3

The Honorable Floyd H. Millen, House Minority Leader: In your letter of May 10, 1976, you requested an opinion of the Attorney General regarding the following questions:

"1. The legality of a corporation keeping a salaried person on its payroll while that person is running for political office; and

"2. The legality of a corporation keeping a salaried person on its payroll after that person has been elected to public office."

During the 1975 Session of the 66th General Assembly, House File 431 was passed, repealing §491.69 of the Code and adding new sections to Chapter 56. These new sections, found at page 83 of Laws of the Sixty-Sixth General Assembly, 1975 Session, provide that "it shall be unlawful for any . . . corporation, to contribute any money, property, labor or thing of value, directly or indirectly, to any committee, or for the purpose of influencing the vote of any elector." The statute also states that no committee or candidate for any office may "solicit, request, or knowingly receive from any . . . corporation . . . any money, property, or thing of value belonging to such . . . corporation for campaign expenses, or for the purpose of influencing the vote of any elector."

It is our opinion that the first clause cited above would not prohibit a salaried person from remaining on his corporation's payroll while he is running for office, assuming that he continues to fulfill his usual duties and obligations with that corporation. In this opinion, we are not considering the situation where the person receives full salary, yet does less work for the corporation while running for office, or after election to office. That situation raises many questions which will not be answered here.

The above statute is clearly intended to prohibit corporate contribu-

tions to compaign committees or to other schemes which would influence the vote of any elector, and it in no way states that a corporate employee must take leave of his job while running for office.

The second clause confirms this position in that it specifically forbids a candidate from taking funds from a corporation *for campaign expenses* or for the purpose of influencing the vote of any elector.

Among the grounds for removal from office, a public officer may be removed for bribery (§§739.1 - 739.3), conflicts of interest (§68B.1, et seq.), corruption, extortion, or any willful misconduct or maladministration in office (§66.1). Section 68B.6 prohibits an official from receiving compensation for services rendered by himself or another "against the interest of the state in relation to any case, proceeding, or other matter before any court of the state of Iowa, any federal court, or any federal . . . department."

While many of these statutes place restrictions on a public official's business dealings with state government, there is no specific provision in the Code which would prohibit a corporation from keeping a salaried employee on its payroll after that person has been elected to public office.

Of course each legislator is, under §68B.10 of the Iowa Code, subject to either the Senate or the House Code of Ethics. Both Codes of Ethics set guidelines for a legislator's business transactions with the state, but neither expressly forbids a legislator from working for a corporation while in office.

June 15, 1976

COURTS: Commitment of Juveniles to Commissioner of Social Services. §§232.33, 232.34, 232.35, 232.36, Code of Iowa, 1975. (1) The juvenile court loses jurisdiction when it commits a person pursuant to §232.34 (4), The Code, to the Commissioner of Social Services. (2) The juvenile court may not commit a child to the Training School for Boys but only to the Commissioner of Social Services for placement under 232.34(4), The Code. (3) The recommendation of the juvenile court that placement of a delinquent child be "until he is eighteen years of age without release" is without effect as the juvenile court has no jurisdiction once the commitment is made under §232.34(4), The Code. (Robinson to Burns, Commissioner, Iowa Department of Social Services, 6-15-76) #76-6-4

Mr. Kevin J. Burns, Commissioner, Department of Social Services: You recently asked for an opinion of the Attorney General. In your letter you stated:

The superintendent of the Training School for Boys, pursuant to §218.24 of the Code of Iowa, questions the commitment of certain individuals by the juvenile courts.

In one case the court found the child to be a delinquent child as defined in §232.2(12)(a) of the 1975 Code of Iowa in that said person committed larceny in violation of §711.3, the Code. The court denied the application to transfer to the district court and committed the child to the Iowa State Training School for Boys, Eldora, Iowa, until said child reaches the age of majority, and, also, that the juvenile court shall retain jurisdiction of said child until he reaches majority.

In a similar case the court adjudicated the child to be a delinquent child as defined in Chapter 232, the Code, and ordered that he be referred to the Commissioner of the Department of Social Services with recommendation for placement at Eldora and that said placement shall be until he is eighteen years of age without release.

What are the legal effects of such commitments?

It is our opinion that the juvenile court lost its jurisdiction when it committed these persons pursuant to §232.34(4), Code of Iowa, 1975, to the Commissioner of Social Services or his designee for placement. Our authority for this is §232.35, the Code, and *In Interest of Kelly*, 236 N.W.2d 50, 52 (Iowa 1975). §232.35 provides:

"Commitment to the state director shall vest guardianship of the person of the child so committed in the state director and shall terminate the court's jurisdiction."

Justice Uhlenhopp in the *Kelly* case carefully distinguished §232.33, relating to dependency and neglect (now amended to read a "Child in Need of Assistance", Ch. 142, §14, Acts of the 66th G.A., 1st Session) and §232.34 relating to delinquency. Subsection 4 under both §232.33 and §232.34 is the same with commitment made to the Commissioner of Social Services. Section 232.33(3)(b) allows also for the transfer of custody of the child to the Department of Social Services. This subsection provides for the continued jurisdiction of the court.

The trial judge found Jeffrey Kelly dependent and neglected as well as delinquent. The Iowa Supreme Court found in that event the juvenile court retained jurisdiction. We quote from the *Kelly* case at page 52 of 236 N.W.2d:

"Section 232.36 permits a juvenile court to make other dispositions so long as it retains jurisdiction. Since the juvenile court retained jurisdiction here, it could proceed under §232.36 to hold the subsequent dispositional proceedings."

Since in the cases you have presented there was not the dual commitment (that is, under dependent and neglected plus delinquent) but only the commitment under the delinquent section [§232.34(4)], the trial court does not retain jurisdiction. Section 232.35, Code of Iowa, 1975. Since it does not retain jurisdiction, §232.36 does not apply. This is the only way that we can harmonize these somewhat inconsistent sections with the *Kelly* case to make a consistent whole.

We note a further discrepancy in the first example you cited where the trial court committed the child to the Iowa State Training School for Boys, Eldora, Iowa. This part of the order is of no effect as the commitment under the statute is clearly with the Commissioner of Social Services for placement. §232.34(4), the Code. Our authority again is *In Interest of Kelly*, 236 N.W.2d 50, 53 (Iowa 1975), where we find:

"When Judge Hendrickson originally disposed of the case, the portion of his order was of no effect in which he placed Jeffrey specifically in the Juvenile Home. His commitment of Jeffrey to the Department was proper, and the Department had authority to determine where in its facilities it could best help Jeffrey overcome his problems. Likewise, the portion of Magistrate Phelan's order placing Jeffrey specifically in the Training School was of no effect. That again was a Department decision."

Finally, in the second example you cited, we find: "said placement shall be until he is eighteen years of age without release". It is our opinion that such a statement is without effect as the court has no jurisdiction once the commitment is made under §232.34(4), the Code. If, however, the trial court is acting under §232.33(3)(b), the Code (which does not pertain to the Training School), the transfer of custody is subject to the continued jurisdiction of the court.

June 16, 1976

SCHOOLS: Insurance. (1) Under Ch. 509A, Code of Iowa, 1975, school districts may provide group coverage for employees but may not pay premiums for the dependents of employees. (2) A teacher for whom a tax sheltered annuity is purchased under §294.16 may have payroll deductions for premiums paid by the school district while employed by the district even though assigned to work with the Area Education Agency. However, if the teacher's employment by the district is terminated the AEA is authorized to purchase such contract and make payroll deductions under §273.3(15). (Nolan to Halvorson, State Representative, 6-16-76) #76-6-5

The Honorable Roger A. Halvorson, State Representative: We have your letter presenting two matters for the consideration of this office as follows:

"I would request your opinion on a matter concerning the legality of school districts in paying the premium for families of employees in addition to the employee.

"Also, I would request your opinion on the question of continuing employment of teachers who leave the employment of a school district and transfer to one of the new Area Education Associations as a new employer. I raise this question on behalf of Mrs. Dorothy Oberfels who has been a teacher in the Garnavillo school district and has now been assigned to the new AEA in Northeast Iowa. The IRS has held that she has had a break in continuous employment and therefor she is not eligible to continue her tax shelter annuity program that she started at Garnavillo high school. Because she is nearing retirement age she needs to continue this annuity program and the IRS ruling would appear to work grave hardships for her. This is of no fault of Mrs. Oberfels."

In response to the first request, this office has on several occasions issued opinions stating that the provisions of Chapter 509A of the Code of Iowa permit public bodies to pay only insurance premiums for "employees" and thus, they lack power to pay insurance premiums for the dependents of employees. 1974 O.A.G. 46, 1970 O.A.G. 570. However, it is a matter of general practice for public employers in this state to authorize an employee to participate in a plan whereby the employee could purchase further coverage for his dependents. See 1966 O.A.G. 22 and 1974 O.A.G. 369.

With respect to the second question raised by your letter, the applicable Iowa statute is §294.16, Code of Iowa, 1975, which provides in pertinent part as follows:

"At the request of an employee through contractual agreement a school district may purchase group or individual annuity contracts for an employee, from such insurance organization authorized to do business in this state and through an Iowa-licensed insurance agent as the employee may select, for retirement or other purposes and may make payroll deductions in accordance with such arrangements for the purpose of

paying the entire premium due and to become due under such contract. The deductions shall be made in the manner which will qualify the annuity premiums for the benefit afforded under section 403b (26 USC §403b) of the federal internal revenue code and amendments thereto. The employee's rights under such annuity contract shall be nonforfeitable except for the failure to pay premiums. . . ."

Under Chapter 273 of the Iowa Code, the Area Education Agency is established as an independent statutory body with "boundaries which are conterminous with the boundaries of the merged areas as provided in chapter 280A." The Area Education Agency board is authorized under §273.3(12) to employ an administrator and other personnel. Provision is also made in §273.3(15) for the Area Education Agency to purchase individual annuity contracts for its employees:

"At the request of an employee through contractual agreement the board may arrange for the purchase of an individual annuity contract for any of its respective employees from any company the employee may choose that is authorized to do business in this state, and through an Iowa-licensed insurance agent that the employee may select, for retirement or other purposes and may make payroll deductions in accordance with such arrangements for the purpose of paying the entire premium due, and to become due, under the contract. The deductions shall be made in the manner which will qualify the annuity premiums for the benefits afforded under section 403b of the Internal Revenue Code of 1954 and amendments thereto. The employee's rights under such annuity contract shall be nonforfeitable except for the failure to pay premiums."

Assuming that Mrs. Oberfels is no longer employed by the Garnavillo District, it is correct that there has been a break in the continuity of her employment and that district can no longer make payroll deductions for her. If, however, as you suggest, she is still an employee of the Garnavillo District and has merely been assigned under a mutual employee interchange arrangement (Chapter 28D) then it would seem that she would be eligible to continue the same annuity program started with the Garnavillo District. In either event, she should be able to participate in an appropriate tax shelter annuity program authorized by Iowa statute.

June 16, 1976

COUNTIES: Supervisors — Code §340.4 and Chapter 191, Acts of the 66th G.A., 1975 Session, are not in conflict and supervisors may not lower the salaries of deputy officers when the amounts certified for such salaries by the principal officers are within the limitations fixed by statute. (Nolan to Mennenga, State Representative, 6-16-76) #76-6-6

The Honorable Jay Mennenga, State Representative: By letter dated May 25, 1976, you requested an opinion asking who has authority to set salaries for the deputies of county office holders. Your letter makes reference to §340.4, Code of Iowa, 1975, and asks:

"In light of the above section of the Code, does the Board of Supervisors have the authority to lower deputies' salaries while not lowering the salaries of the respective principal officers? In other words, is there a conflict between 340.4 of the Code and House File 802 (creating a compensation board) as passed by the 1975 legislature?"

Code §340.4 provides:

"The first and second deputies and the deputy in charge of the motor vehicle registration and title departments, may be paid an amount not to exceed eighty percent of the amount of the annual salary of his or her principal. In counties where more than two deputies are required, deputies in excess of two may be paid an amount not to exceed seventy-five percent of the annual salary of his or her principal. Upon certification to the board of supervisors by the elected official concerned, the amount of the annual salary for each deputy as above provided, the supervisor shall certify to the county auditor of any said county the annual salary certified by the elected officials, but in no event shall said board of supervisors be required to certify to the auditor of any such county an amount in excess of the amount authorized above. The board of supervisors shall fix all compensation for extra help and clerks."

We find no authority in the language set out above for the board of supervisors to lower salaries of deputies when the amounts certified for such salary by the principal officers are within the limitations imposed by this section of the Code. The only time that the board of supervisors may lower salaries of the deputies is when the amounts certified to the board are "in excess of the amounts authorized above". Should the county compensation board lower the principal office holders' salaries under authority given to it by Chapter 191, Laws of the 66th G.A., 1975 Session (H.F. 802), and should the board of supervisors accept a recommended compensation schedule submitted to it by the compensation board, then it might be necessary to lower the salaries of the deputies in accordance with the reduced salaries in the final compensation schedule adopted by the board of supervisors.

June 16, 1976

COUNTIES: Municipal Assistance Fund — Chapter 61, Laws of the 66th G.A., 1975 Session. Funds from the county government assistance fund may be used only for "projects and programs" for citizens residing outside of the incorporated areas of a city and could be used to develop grounds for holding a county fair if the supervisors determine that the county derives benefit from such project. (Nolan to Bradley, Keokuk County Attorney, 6-16-76) #76-6-7

Mr. Glenn M. Bradley, Keokuk County Attorney: Your letter requested an opinion as to whether monies received pursuant to Chapter 61, Acts of the 66th General Assembly, 1975 Session (Municipal Assistance Fund), may be granted by the Keokuk County Board of Supervisors to Keokuk County Exposition, Inc., for use and development of exposition grounds and buildings. Keokuk County Exposition, Inc., is a nonprofit corporation incorporated under the laws of Iowa for the advancement of instruction in and promotion of agricultural, horticultural and civic activities among rural residents and among members of the public in general in Keokuk county. Keokuk County Exposition, Inc., appears to qualify as a fair "society" within the meaning of §174.1, Code of Iowa, 1975.

The Municipal Assistance Fund created by Chapter 61, Laws of the 66th G.A., 1975 Session, provides in pertinent part as follows:

"Sec. 2. There is created a 'county government assistance fund' in the office of the treasurer of state. The moneys appropriated to such fund shall be used to provide financial assistance to counties for the fiscal year beginning July 1, 1975 and ending June 30, 1976. * * *

"Sec. 4. Funds received from the county government assistance fund by the counties shall be expended, insofar as practicable, for projects and programs developed and maintained for citizens of the county residing outside the incorporated areas of any city in the county."

County aid in counties where a county fair society is located may be provided to the fairground fund pursuant to §174.13, which provides for the use of such funds as follows:

". . . for the purpose of fitting up or purchasing fairgrounds for the society, or for the purpose of aiding boys and girls 4-H club work and payment of agricultural and livestock premiums in connection with said fair . . ."

The use of the county government assistance fund for the purpose of developing exposition grounds for the holding of a county fair would, in the opinion of this office, be a proper expenditure of such funds if the county board of supervisors and the officers of the Keokuk County Exposition, Inc., agree that such development constitutes a *project* for the mutual benefit of both the county and the nonprofit corporation. Such mutual understanding should be expressed in a Chapter 28E agreement, defining the services to be performed which are to be funded with public money.

You have also asked whether Keokuk County Exposition, Inc., can use the funds to pay for real estate, build fair buildings, or other lawful purposes for which this nonprofit organization is organized as stated in their articles of incorporation. It is the view of this office that funds appropriated by the county to the nonprofit corporation do not constitute an unrestricted gift. Consequently, use of such funds is limited to those purposes set out in the statute. Accordingly, it is the view of this office that funds derived from the county government assistance fund must be used for "projects and programs" rather than for the erection and repair of buildings and permanent improvements on real estate, which is an authorized use of the fairground fund under §174.18.

June 16, 1976

MUNICIPALITIES: Quorum — §§4.1(30), 414.6 and 414.7, Code of Iowa, 1975. In the absence of a statutory requirement setting a quorum, a quorum consists of an absolute majority of the members of a body. (Blumberg to Gallagher, State Senator, 6-16-76) #76-6-8

Honorable James V. Gallagher, State Senator: We have received your opinion request of April 29, 1976, regarding the requirements of a quorum for a city board. Under your facts, only two members out of seven of a zoning board were present for a meeting. You ask what constitutes a quorum, and whether a quorum is necessary for an open meeting to take place.

Chapter 414, 1975 Code of Iowa, establishes a zoning commission and a board of adjustment. §§414.6 and 414.7 respectively. There are no requirements in that chapter regarding a quorum for either the commission or the board of adjustment, although §414.14 requires a concurring vote of at least three members of the board of adjustment under certain circumstances. Nor is there anything setting a quorum for such a body within the city code (Title XV, 1975 Code of Iowa).

"Quorum" is defined in 74 C.J.S. *Quorum* 171 (1951) as follows:

"The word 'quorum now in common use, is from the Latin, and has come to signify such a number of the officers or members of any body as is competent by law or constitution to transact business; such a number of an assembly as is competent to transact its business; such a number of the members of any body as is, when duly assembled, legally competent to transact business; such a number of a body as is competent to transact business in the absence of the other members. *The quorum of a body is an absolute majority of it unless the authority by which the body was created fixes it at a different number.* The idea of a 'quorum' is that when that required number of persons goes into a session as a body the votes of a majority thereof are sufficient for binding action. Thus the word 'quorum' implies a meeting, and the action must be group action, not merely action of a particular number of members as individuals." [Emphasis added]

Section 4.1(30) of the Code provides: "A quorum of a public body is a majority of the number of members fixed by statute." See also, 67 C.J.S. *Officers* §109 (1951); 67 C.J.S. *Parliamentary Law* §5b (1951); and, 1970 O.A.G. 42, 44. Thus, if a board consists of seven members, a majority (four) must be present to transact business. We interpret this to mean that a meeting could not be conducted without a quorum since meetings usually are held to transact business.

June 16, 1976

MOTOR VEHICLES: Implied Consent—Section 321B.3, Code of Iowa, 1975. Where motorist, who is arrested for operating a motor vehicle while under the influence of an alcoholic beverage, refuses to submit to a chemical test, such refusal is final when made and fact that motorist later requests a chemical test within two hours after his arrest does not prevent revocation of motorist's license under Implied Consent Law. An arrested motorist is not entitled to consult with an attorney prior to consenting or refusing a chemical test and is not entitled to a chemical test after consulting an attorney if a refusal has previously been made. (Szymczuk to Readinger, State Representative, 6-16-76) #76-6-9

Honorable David M. Readinger, State Representative: This letter is written in response to your request of April 21, 1976, for an opinion interpreting Section 321B.3, Code of Iowa, 1975. The crux of the problem you raised concerns the point at which an arrested motorist's refusal to submit to a chemical test becomes final. In responding to this question you asked that we also address ourselves to two related questions: first, whether there is a time period during which the arresting officer must allow a chemical test to be administered should the arrested motorist change his mind after a prior refusal; second, whether the arresting officer must allow a test to be administered after the arrested motorist has refused a test but then consults an attorney who advises him to take the test.

Section 321B.3, Code of Iowa, 1975, provides in pertinent part as follows:

"Refusal to submit to a chemical test of urine, saliva or breath shall be deemed a refusal to submit, and the provisions of section 321B.7 shall apply. A refusal to submit to a chemical test of blood shall not be deemed a refusal to submit, but in that case, the peace officer shall then determine which one of the other three substances shall be tested. and

shall offer such test. If such peace officer fails to provide a test within two hours after such arrest, no test shall be required, and there shall be no revocation under the provisions of section 321B.7."

The Supreme Court of Iowa has decided several cases relating directly to the questions which you have raised. The fact situation in *Krueger v. Fulton*, 1969, 109 N.W.2d 875 (Iowa), concerned an arrested motorist who refused both blood and urine tests. After the implied consent proceedings had been concluded the motorist asked that his attorney be called and informed of his arrest. The attorney arrived at the jail, consulted with his client and requested a blood test within two hours of the arrest. This request was denied and the motorist's license was subsequently revoked. The motorist contended he had the right to withdraw his refusal at any time before the expiration of the two-hour period. The supreme court disagreed. It stated that the arresting officer had complied with all the requirements of Chapter 321B and that:

"To hold he was required to consider the refusal only conditional or subject to withdrawal during the two-hour period after arrest would require the patrolman to remain with or near the arrested person. This would mean when a patrolman makes such an arrest he would practically be out of service for two hours . . . Plaintiff had refused. He was not entitled in this administrative proceeding to defeat revocation of his driving privilege by showing he thereafter changed his mind."

It is clear from *Krueger* and subsequent Iowa Supreme Court decisions that the two-hour limitation defines the period during which the test must be given; it does not define a period during which at any time the arrested person may decide he is willing to take it. *Accord, Swenumsen v. Iowa Dept. of Public Safety*, 1973, 210 N.W.2d 660 (Iowa) and *Morgan v. Iowa Dept. of Public Safety*, 1975, 227 N.W.2d 155 (Iowa).

Krueger also refers to the principle previously established in *Gottschalk v. Sueppel*, 1966, 258 Iowa 1173, 140 N.W.2d 888, that the constitutional requirement that in all criminal prosecutions the accused shall have assistance of counsel is not applicable to administrative proceedings resulting in revocation of a driver's license under the Implied Consent law. A refusal to take a chemical test because of a desire to first consult counsel before consenting or refusing constitutes a refusal to take the test within the meaning of Section 321B.7. *Swenumsen v. Iowa Dept. of Public Safety, supra* at 662. Further, once the arrested driver has refused a chemical test, Chapter 321B does not require that an officer make a second request after the arrestee has consulted an attorney. *Morgan v. Iowa Dept. of Public Safety, supra* at 157.

It is our opinion that a refusal is final when made. The arresting officer is not required to make any additional requests for a chemical test once a refusal is made nor is he required to permit a chemical test should the arrested driver change his mind of his own volition or upon the advice of his attorney. One refusal is determinative. *Swenumsen v. Iowa Dept. of Public Safety, supra* at 662; *Krueger v. Fulton, supra* at 878-879.

June 29, 1976

STATE OFFICERS AND DEPARTMENTS: Agriculture Department; Licensing, Non-Packer Buyers. §172A.1(3), as amended by §1, Chapter 131, 66th G.A., First Session (1975). A non-packer buyer of livestock

is not a "dealer" or "broker" within the meaning of Chapter 172A and need not be licensed under that Chapter. (Haesemeyer to Lounsberry, Secretary of Agriculture, 6-29-76) #76-6-10

The Honorable Robert H. Lounsberry, Secretary of Agriculture: You have asked for an opinion of the Attorney General with respect to the applicability to a particular company of Chapter 172A, Code of Iowa, 1975, as amended by Chapter 131, 66th G.A., First Session (1975).

The company in question is a Delaware corporation with its principal place of business in Indiana. It purchases livestock for resale and in substantial volume, operating out of ninety-three locations in the United States. Six of these locations are in Iowa. The company is a dealer under the Federal Packers and Stockyards Act, 7 U.S.C.A., §181, et seq., and, like other nonpacker buyers, is bonded under the federal statute.

Section 172A.9(2), as amended, provides:

" * * *

"2. Payment to the seller shall be made by cash, check, or wire transfer of funds. If payment to the seller is by check, the check shall be drawn on a bank located in this state or on a bank located in an adjacent state and in the nearest city to Iowa in which a check processing center of a federal reserve bank district is located. For the purpose of this subsection, 'wire transfer' means any telephonic, telegraphic, electronic, or similar communication between the bank of the purchaser and the bank of the seller which results in the transfer of funds or credits of the purchaser to an account of the seller. * * * "

The company in question banks with an Indiana bank and finds this provision objectionable.

By way of background, it should be noted that the 1975 amendments to Chapter 172A represent a legislative response to the collapse of American Beef Packing Company in January, 1975. In the American Beef case, American Beef placed its cattle accounts in payor banks located on the periphery of the United States. The inherent delay in clearing American Beef checks drawn on these banks resulted in a 5-7 day "float". Many livestock producers sustained substantial losses when livestock was sold and worthless checks received while American Beef was insolvent.

Chapter 131 is aimed at preventing a reoccurrence of packer abuses present in American Beef. The statute provides that dealers and brokers (as defined) who are not required to have a P/S bond must obtain a bond under Iowa law. Dealers or brokers who are bonded under the P/S are exempt from Chapter 131. The statute also provides for licensing of dealers and brokers.

The company contends, among other things, that it is not a "dealer" or "broker" within the meaning of Chapter 172A and that therefore it is not subject to the chapter. We agree.

In an earlier opinion of the Attorney General, Haesemeyer to Lounsberry, Secretary of Agriculture, October 29, 1975, we had before us the question of the applicability of Chapter 172A to auction markets and commission firms. In that opinion we said:

"(Chapter 131) is 'An Act relating to persons engaged in the business of soliciting, purchasing, or receiving live animals for slaughter, and providing penalties.' It amends and substantially revises Chapter 172A, Code of Iowa, 1975, which relates to bonding of operators of slaughter houses. Section 172A.1(3), as amended by §1 of (Chapter 131) provides:

" ' "Dealer" or "broker" means any person, other than an agent, who is engaged in this state in the business soliciting live animals for slaughter, the meat products of which are directly or indirectly to be offered for resale or for public consumption.'

"Section 172A.1(4), as amended by §3 of House File 625 provides:

" ' "Agent" means a person engaged in the buying or soliciting in this state of livestock for slaughter exclusively on behalf of the dealer or broker.'

"Auction markets clearly do not 'engage in the business of slaughtering animals.' Neither are they engaged in the business of receiving or buying animals for the purpose of slaughter, nor do they constitute agents of dealers or brokers. Therefore, auction markets fall within the scope of the licensing requirements of Chapter 172A, if at all, only insofar as they engage in the business of 'soliciting live animals for slaughter, the meat products of which are directly or indirectly to be offered for resale or for public consumption.'

"That the market auctions live animals which in fact are brought by persons who intend to slaughter them is insufficient to bring the market within the scope of Chapter 172A's licensing requirements. . . ."

We then went on to conclude that since the operation of commission firms are essentially like those of auction markets, the same reasoning should apply to them.

We can see no significant difference between the operation of auction markets, commission firms and nonpacker buyers, although the latter do take title to the livestock while the former do not. The nonpacker buyer does not receive, buy or solicit live animals for slaughter. It buys them for resale much the same as a producer does, albeit on a larger scale.

By reason of the foregoing, it is our opinion that nonpacker buyers such as the one in question are not subject to the provisions of Chapter 172A, as amended.

June 24, 1976

MUNICIPALITIES: Low-Rent Housing — §§4.7, 4.8, 403A.5, 403A.6, 403A.7, 403A.10, and 403A.27, Code of Iowa, 1975; §6, H.F. 1590, Acts of the 66th G.A. (1976). Section 6 of H.F. 1590 supercedes §403A.27 of the Code in providing tax exempt status for low-rent housing projects, but only for those projects for the elderly and handicapped, and only until the original mortgage is paid in full or expires. In all other cases, and after the mortgages are paid or expire, §403A.27 controls. (Blumberg to Brunow, State Representative, 6-24-76) #76-6-11

Honorable John B. Brunow, State Representative: We have received your opinion request of June 7, 1976, regarding an amendment to Chapter 427 of the Code. You ask what effect the amendment will have on §§403A.10 and 403A.27, 1975 Code of Iowa.

In a prior opinion, Blumberg to Howe, #75-12-4, this office held that §403A.27, which mandates that at least ten percent of all rents and

supplemental rent aid of low-rent housing projects shall be paid as taxes, is controlling over §403A.10, which provides that low-rent housing property is exempt from taxes. In light of that opinion, the Legislature attempted to remedy the conflict, and adopted §6, H.F. 1590, 66th G.A. (1976). That section amends §427.1 by adding a new subsection so that it will read:

"The following classes of property shall not be taxed: * * *

"LOW-RENT HOUSING. The property owned and operated by a nonprofit organization providing low-rent housing for the elderly and the physically and mentally handicapped. The exemption granted under the provisions of this subsection shall apply only until the terms of the original low-rent housing development mortgage is paid in full or expires, subject to the provisions of subsections twenty-three (23) and twenty-four (24) of this section."

The issue is which of the above three sections now control.

Section 4.7 of the Code provides that if a general provision conflicts with a special or local one they should be construed to give effect to both. If that is not possible, the special controls. Section 4.8 of the Code provides that if statutes enacted at either the same or different sessions are irreconcilable, the one latest in date of enactment prevails. Our office has issued a lengthy and persuasive opinion on the interpretation and applicability of these sections. See, 1974 O.A.G. 119.

Chapter 403A provides for low-rent housing. This can be accomplished directly by a municipality (city or county) or by a low-rent housing agency created by the municipality, such agency being a public body corporate and politic. §403A.5. The first question to answer is whether the municipality or the low-rent housing agency it creates is a "nonprofit organization."

In *United States v. California State Automobile Ass'n.*, 385 F.Supp. 669 (E.D.Cal. 1974), the United States brought suit to recover medical expenses it had paid for two of its employees who were injured in a vehicular accident. Recovery was sought from the insurance carrier of the employees under the definition of "insured" which included "any other person or *organization*". The Court held (385 F.Supp. at 671): " 'Organization' is defined as a corporation, government or governmental subdivision, or agency. Ballentine's Law Dictionary 3d Ed. (1969). Clearly, the United States can be an 'organization' within the plain meaning of the policy . . . ." In *Farmers Insurance Exchange v. Jones*, 1973, 30 Utah 2d 211, 515 P.2d 1275, it was held that the United States was an organization within the meaning of a trust agreement. The Court in *Georgia Osteopathic Hospital, Inc. v. Strickland*, 1970, 123 Ga.App. 86, 179 S.E.2d 560, defined "nonprofit organization" to include those "devoted to religious, scientific, educational, literary and other purposes." Finally, in *John McShain, Inc. v. Comptroller*, 95 A.2d 473, 474 (Ct.App. Md. 1953), it was held that the "National Institute of Health, although an agency or arm of the Government, may fairly be described as 'operating a non-profit * * * or educational institution or organization . . . .' " It therefore appears that the term "nonprofit organization" as used within §6 of H.F. 1590 can apply to the low-rent housing agencies or muncipalities within Chapter 403A.

This does not mean that all such projects are exempt from taxation. Low-rent housing projects are for persons of low income. §403A.6. Some projects may be for such persons who are elderly or handicapped. §403A.7. However, there may be projects for persons who are not elderly or handicapped. If this is the case, then the amendment in H.F. 1590 may not cover all projects. Because §403A.27 is general in nature, in that it covers *all* such projects, and §6 of H.F. 1590 is special because it only applies to such projects for the elderly or handicapped, §6 of H.F. 1590 is controlling for those projects for the elderly and handicapped. In all other cases §403.27 applies.

Section 6 of H.F. 1590 only provides a tax exemption until the original mortgages are paid in full or expire. After that time the exemption is not applicable. At such a point in time §403A.27 becomes special in nature since it requires only ten percent of the rents and supplemental rent aid to be paid as taxes. Thus, it will control as of the time the mortgages are paid or expire.

In summary, §6 of H.F. 1590 will only provide (if signed by the Governor) a tax exemption for low-rent housing projects for the elderly or handicapped, and only until such time as the original mortgages are paid in full or expire. Thereafter, §403A.27 will control and at least ten percent of the rents and supplemental rent aids must be paid as taxes. Section 403A.27 will control in all other cases. In attempting to resolve the conflict between §§403A.10 and 403A.27, the Legislature created a conflict between §403A.27 and §6 of H.F. 1590. The original conflict could have been solved simply by repealing §403A.27, since §403A.10 gives the authority to make payments in lieu of taxes. If the intent was to provide a tax exemption for all low-rent housing projects it was not achieved. We suggest that the Legislature review the sections involved and determine whether §6 of H.F. 1590 achieves the result intended. We do not believe it did.

June 24, 1976

TAXATION: Motor Fuel Tax Audits — Payment of Audit Expenses — §§324.10, 324.55, Code of Iowa, 1975. Salary expenses of audit personnel are always paid by the State of Iowa and expenses of food, lodging and travel are always paid by the taxpayer being audited whenever records are located outside the state, but never paid by the taxpayer whenever records are located within the state unless the audit is done under the provisions of §324.55 and generates a tax liability of more than five hundred dollars. (Kuehn to Rankin, Director, Legislative Fiscal Bureau, 6-24-76) #76-6-12

Mr. Gerry D. Rankin, Director, Legislative Fiscal Bureau: We acknowledge receipt of your letter in which you have requested an opinion of the Attorney General. Your letter states:

"Section 324.55 of the 1975 Code of Iowa states as follows:

'Records. Every person operating within the purview of this division shall make and keep for a period of three years such records as may reasonably be required by the department of revenue for the administration of this division. If in the normal conduct of the business, the required records are maintained and kept at an office outside the state of Iowa, it shall be a sufficient compliance with this section if the records

are made available for audit and examination by the department of revenue at the office outside Iowa, but such audit and examination *shall be without expense to the state of Iowa.*

When as a result of such audit and examination, fuel taxes unpaid and due are found owing the state of Iowa in an amount exceeding five hundred dollars such audit and expenses *shall be without cost to the state of Iowa. . . .*'" (Italicizing provided)

Please forward an opinion to this office as to the meaning of the italicized words in both paragraphs and also advise on what basis the Department of Revenue should compute a billing to the business firm (taxpayer) that is being audited."

Since §324.55, Code of Iowa, 1975, is a part of Chapter 324, all statutory sections of the law that pertain to audit expenses and costs should be considered in pari materia and construed together. *Northern Natural Gas Company v. Forst,* 1973 Iowa, 205 N.W.2d 692.

The other section in Chapter 324, Code of Iowa, 1975, pertaining to audit expenses and costs is §324.10 which reads as follows:

"*Required distributor and special fuel distributor and dealer records.* Each motor fuel distributor and special fuel distributor shall maintain and keep for a period of three years, *such records of all transactions by which he receives, uses, sells, delivers or otherwise disposes of motor fuel within this state, together with invoices, bills of lading and other pertinent records and papers as may reasonably be required by the department of revenue for the administration of this division.*

If in the normal conduct of a distributor's business his records are maintained and kept at an office outside the state of Iowa, it shall be a sufficient compliance with this section if the records are made available for audit and examination by the department of revenue at the office outside Iowa, *but such audit and examination outside Iowa shall be without expense to the state.* (Italicizing added)

For the purpose of answering the questions you presented, §324.10 in its present form has always read the same and so has §324.55 except that the second paragraph of §324.55 was added by the 62nd General Assembly. Chapter 288, §15, Acts 62nd G.A.

Before determining what the addition to §324.55 means, it is necessary to determine what the word "expenses" includes. Before the addition or amendment to §324.55, both §§324.10 and 324.55 were silent with regard to audit costs and expenses in situations where the audit and examination were done within the State of Iowa. Therefore, Chapter 324 did not require that the taxpayer pay the expenses or costs of an audit in situations where records were maintained within Iowa. However, it was rather obvious that the legislature wanted the taxpayer to pay expenses and costs of travel, lodging and food when sending audit personnel outside the State of Iowa because of the additional expenses created. It was not so obvious that the legislature wanted the salaries of the audit personnel paid whenever the audit examination was done outside the State of Iowa because the salaries of audit personnel were always paid by the state when done within the state.

Janson v. Fulton, 1968 Iowa, 162 N.W.2d 438, discusses statutory construction as follows:

"The construction of any statute must be *reasonable* and must be *sensibly* and *fairly* made with a view of carrying out the obvious intention of the legislature enacting it.

"To put the matter differently, a *statute should be given . . . practical, workable and logical construction.*" (Italicizing added)

Furthermore, *Bruce v. Wookey*, 1967, 261 Iowa 231, 154 N.W.2d 93, states:

"In seeking the meaning of a law, the entire act should be considered. Each section must *be construed with the act as a whole and all parts of the act considered, compared and construed together.*" (Italicizing added)

Clearly, the requirement that taxpayers who kept records outside of Iowa must pay the expenses of food, lodging and travel of audit personnel was sensible, fair and practical since it relieved the state from the unavoidably increased costs of conducting an audit outside of Iowa. However, to have required the taxpayer who kept his records outside the state to pay the salary of the auditors when the taxpayer who kept his records within the state did not have to pay, would not have been sensible, fair and logical. Therefore, §§324.10 and 324.55 were construed by the Department of Revenue to mean that the expenses to be paid by taxpayers were limited to those expenses of audit personnel which result from food, lodging and travel expenses but did not include the salaries of audit personnel.

As stated earlier, §§324.10 and 324.55 read the same with regard to audit expenses until the legislature amended §324.55 to read:

"When, as a result of such audit and examination, fuel taxes unpaid and due are found owing the state of Iowa in an amount exceeding five hundred dollars such audit and expenses shall be without cost to the state of Iowa."

Obviously, the amendment to §324.55 did not change the law with regard to what the word "expenses" includes. Although the amendment used the word "cost", *Webster's New World Dictionary of the American Language*, Second College Edition, defines the word "expense" to include:

"financial cost . . . any cost . . . charges or costs met with in . . . doing one's work . . . ."

The amendment to §324.55 served to broaden the scope of those taxpayers undergoing a §324.55 audit who must pay the expenses of an audit to include those maintaining records within the State of Iowa whenever an audit generates a tax liability of more than $500. Prior to the amendment, this was true only with respect to those taxpayers who kept their records outside the State. Furthermore, taxpayers outside the state always pay the audit expenses because it makes no difference what the amount of the tax liability may be.

To reach any other result than that stated above would render superfluous and meaningless the other provisions of the same Code section. *Goergen v. State Tax Commission*, 1969 Iowa, 165 N.W.2d 782, discusses this aspect of statutory construction as follows:

"In the interpretation of a statute the legislature will be presumed to have inserted every part thereof for a purpose, and to have intended that every part of the statute should be carried into effect.

"It is often stated that in the construction of statutes courts start with the assumption that the legislature intended to enact an effective law

and . . . interpret the statute or the provisions thereof to give it efficient operation, and not to explain away or render *meaningless or inoperative any provision thereof.* * * *

"We said in Board of Directors of Menlo Consolidated School Dist. v. Blakesley, 240 Iowa 910, 918, 36 N.W.2d 751, 755; ' * * * *we should endeavor to construe our statutes so no part will be rendered superfluous* * * *' and did construe two statutes so as to give effect to every provision thereof." (Italicizing added)

The first sentence of §324.55 states:

"Every person (maintaining records outside and inside the state of Iowa) . . . shall . . . keep . . . records . . . ."

The second sentence states:

"If . . . records are . . . kept . . . outside the state of Iowa, it shall be . . . sufficient compliance . . . , but . . . audit and examination shall be without expenses to the state of Iowa."

When §324.55 ended with the above statement, it was clear that those taxpayers audited within the State of Iowa did not pay expenses or costs of audit. However, when the legislature amended §324.55 by adding the second paragraph it changed the law as follows:

"When, as a result of . . . audit . . . fuel taxes unpaid . . . are found owing the state . . . exceeding five hundred dollars . . . audit . . . shall be without cost to the state. . . ."

As a result of this amendment the legislature made it clear that those taxpayers audited within the state must also pay expenses or costs of audit if the audit generates a tax liability of more than five hundred dollars.

In brief conclusion, it is the opinion of the Attorney General that the terms "expense" and "cost" are synonymous, and those terms include food, lodging and travel, but not salaries, when used in §§324.10 and 324.55. Further, all motor fuel tax audits conducted outside of Iowa shall be at the taxpayer's expense, and any motor fuel tax audit conducted within Iowa shall be at the state's expense except when the audit is done under the provisions of §324.55 and generates a tax liability of more than five hundred dollars.

June 18, 1976

STATE OFFICERS AND DEPARTMENTS: Secretary of State; Service of Original Notice; Nonresident Defendants, Small Claims. §§617.3, 631.2 and 631.4, Code of Iowa, 1975. The procedure outlined in subsection 631.4(1)c, which requires filing of copies of the original notice with the Secretary of State, will be sufficient to confer jurisdiction in small claims actions involving nonresidents. (Haesemeyer to Schweiker, Deputy Secretary of State, 6-18-76) #76-6-13

Mr. J. Herman Schweiker, Deputy Secretary of State: This letter is in response to your request for an interpretation by the Attorney General's office of the provisions of §631.4(c) of the Code of Iowa, which relates to the filing of original notice and answer in small claims actions with the Secretary of State. Your letter reads in part:

"On cases filed in the small claims division of the District Court Section 631.4 is silent on automobile accident cases normally served on

the Director of Department of Transportation or on insurance contract cases normally served on the Insurance Commissioner or on cases involving foreign Savings and Loan Associations normally served on the Auditor of State.

"In order for our office to give proper and legal service to plaintiffs and also not to mislead them in thinking that they have obtained jurisdiction of the defendant in accepting service of original notices in cases referred to in the preceding paragraph, does service on the Secretary of State under 617.3 confer jurisdiction to all small claims cases or must the plaintiff still serve the Director of the Department of Transportation, the Insurance Commissioner or the Auditor of State as the case may be?"

Section 631.2 concerning jurisdiction and procedures of the District Court sitting in small claims provides in subsection (3):

"Statutes and rules relating to venue and jurisdiction shall apply to small claims, except that a provision of this chapter which is inconsistent therewith shall supercede the statute or rule."

Section 631.4, subsection 1(c) to which you have directed your inquiry, clearly states that if a defendant is a nonresident of the State of Iowa, and is subject to jurisdiction of the state pursuant to §617.3, service of original notice shall be made as provided in that section. It further states that the clerk of court shall cause duplicate copies of the original notice to be filed with the Secretary of State.

It is our opinion that the statutory language of §631.2 clearly evinces the legislature's intent that the venue and jurisdiction provisions of Chapter 631 (concerning small claims) will supercede other states and rules relating thereto. Therefore, the procedure outlined in subsection 631.4(1)c, which requires filing of copies of the original notice with the Secretary of State, will be sufficient to confer jurisdiction in small claims actions involving nonresidents.

June 25, 1976

SOCIAL SECURITY: Definition of "dependent child". §239.1(3), Code of Iowa, 1975; 42 U.S.C.A., §606; §406, Social Security Act. Iowa is required to follow the federal statutory definition of a "dependent child" to include a needy child who is under the age of 18 or under the age of 21 and a student. (Robinson to Burns, Commissioner, Department of Social Services, 6-25-76) #76-6-14

Kevin J. Burns, Esquire, Commissioner, Dept. of Social Services: This date you presented the following for our consideration:

"The Department is presently in the process of preparing a new state AFDC plan to be submitted to Social & Rehabilitation Service before the end of this month. We have encountered one major problem in being able to submit a plan that conforms with Federal requirements. The problem is the conflict between Section 239.1(3), 1975 Code of Iowa, and Section 406(a)(2) of the Social Security Act. The Iowa Code defines a 'dependent child' as one under age 16 regardless of school attendance or one under the age of 20 who is a student regularly attending school. The Social Security Act defines a 'dependent child' as one under the age of 18 regardless of school attendance or one under the age of 21 if a student regularly attending school. We have, some time ago, revised our 16 year old age limit up to 18 but the 20 year old age limit still holds.

"The State Plan we are about to submit will not be approvable with the current Iowa age limits. Non-approval will lead to a question of noncompliance and possible loss of federal match for the aid to dependent children program.

"I would appreciate an official Attorney General opinion concerning this matter."

Section 239.1(3), Code of Iowa, 1975, provides:

"A 'dependent child' means a needy child under the age of sixteen years, or under the age of twenty years who is a student . . ."

Section 406 of the Social Security Act, 42 U.S.C.A. §606, provides:

"(a) The term 'dependent child' means a needy child . . . (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student . . ."

In this instance, it is our opinion that Iowa is required to follow the federal statute. In *Kelley v. Iowa Department of Social Services*, 197 N.W.2d 192, 195 (Iowa 1972), we find:

"I. *Applicable Law.* Originally, Congress created a grant-in-aid program under which States could establish programs to aid needy families with children and obtain federal financial assistance in accordance with a prescribed formula. The States were not, of course, required to establish such programs, but if they did and desired federal cost-sharing, they had to follow guidelines set out in the federal statute and in the regulations promulgated thereunder by the United States Department of Health, Education, and Welfare (HEW). 42 U.S.C.A. §§601-610; 45 C.F.R. Part 203 et seq. The federal statute provides for termination of federal cost-sharing if a State does not abide by the guidelines. 42 U.S.C.A. §604."

The United States Supreme Court has interpreted §406 of the Social Security Act, as it related to an Illinois statute and regulation which attempted to limit the eligibility of a "dependent child" to those who attended high school or a vocational training school whereas the federal statute provided a much broader area in which the child could be a student. *Townsend v. Swank*, 404 U.S. 282 ,30 L.Ed. 2d 448, 92 S. Ct. 502 (1971). Pertaining to the question you ask, we find [404 U.S. 290, 291]:

"In sum, when application of AFDC was extended to a new age group — in 1939 to 16-17-year olds and in 1964 to 18-20-year olds — Congress took care to make explicit that the decision whether to participate was left to the individual States. However, when application of AFDC within the age group was enlarged — in 1956 to all 16-17-year olds and in 1965 to 18-20-year olds attending college or a university — the evidence, if not as clear, is that financial support of AFDC programs for the age group was to continue only in States that conformed their eligibility requirements to the new federal standards. . . ."

The Court held that the Illinois statute and regulation conflicted with §406 of the Social Security Act and for that reason they were invalid under the Supremacy Clause of the United States Constitution. Similarly, that portion of §239.1(3), Code of Iowa, 1975, is invalid and must conform to §406 of the Social Security Act.

June 30, 1976

GAMBLING: Contribution of Net Receipts: §99B.7, Code of Iowa, 1975, as amended. Chapter 99, Acts of the 66th General Assembly, 1975

Session; §§99B.1(10), 99B.1(6), Code of Iowa, 1975. A "veterans' organization" duly licensed for gambling is to be treated as any other qualified organization under §99B.7, Iowa Code, 1975, as amended, Chapter 99, Acts of the 66th General Assembly, 1975 Session. Net receipts of a game of skill, game of chance or raffle must be contributed pursuant to §99B.7, Iowa Code, 1975, as amended, Chapter 99, Acts of the 66th General Assembly, 1975 Session. Expenditures of a veterans' organization for operational expenses, capital improvements, or debt service are not legitimate contributions of net receipts from gambling games. (Turner to Fitzgerald, State Representative, 6-30-76) #76-6-15

The Honorable Jerome Fitzgerald, State Representative: You have requested an opinion of the attorney general as to how certain licensed veterans' organizations, such as the Amvets and Veterans of Foreign Wars (VFW), may use money raised from lawful gambling games, raffles and bingo, under the provisions of last year's new gambling law, Senate File 496 (now Ch. 99) 66th General Assembly, 1975. Specifically, you submit the following questions:

"(1) Under the current gambling laws, what is a 'patriotic organization'?

"(2) To what extent may a patriotic organization use funds raised through legal gambling activities for the operational expenses of their own organization, capital improvements to the organization's property, or debt service of the organization?

"(3) If there are limitations on the uses of funds raised through legal gambling activities, generally what is the extent of those limitations? For what general purposes may such funds be expended?"

Since your questions are interrelated and all turn upon construction of §99B.7(3)(a), Iowa Code, 1975, as amended by §9 of said Ch. 99, 66th G.A., 1975, they are answered together.

Section 99B.7, as amended, in general allows organizations to conduct games of skill, games of chance (such as bingo), and raffles if the requisite licensing procedures provided in the statute are followed and net receipts from such games are contributed pursuant to subsection (3)(b) therein. Reference is not made in this statute to a "patriotic organization" as designated in your letter. Rather, the term "patriotic" specifies a "use" to which net receipts must be contributed by an organization to conduct legal gambling acticities. In relevant part, §99B.7(3)(b) provides:

"b. A person or the agent of a person submitting application to conduct games pursuant to this section as a *qualified organization* shall certify as a part of that application that the net receipts of all games either shall be distributed as prizes to participants or shall be dedicated and distributed to educational, civic, public, charitable, *patriotic* or religious *uses* in this state." (Emphasis added.)

As a result, your term "patriotic organization" has no operative meaning in the current gambling laws. A patriotic organization is not distinguished from any other organization under the current gambling laws and is required to meet the same conditions as any other organization tc conduct legal gambling games.

Under the statutory scheme of Chapter 99B, what you call a "patriotic organization" such as the American Legion or V.F.W. may be able to

come within the definition of a "qualified organization" contained in Section 99B.1(10), Iowa Code, 1975:

" 'Qualified organization" means any licensed person who dedicates the net receipts of a game of skill, game of chance or raffle as provided in section 99B.7."

To become a "qualified organization" the statute requires a patriotic organization (or any other organization) to meet the conditions of Section 99B.7, as amended. Under the emphasized portions of §99B.7, subsection 3(b) above, "net receipts of all games either shall be distributed as prizes to participants or *shall be dedicated and distributed to educational, civic, public, charitable, patriotic or religious uses in this state.*" Such uses of funds received through gambling games conducted by qualified organizations are defined in relevant parts of that subsection as follows:

" 'Educational(civic, public, charitable, *patriotic*, or religious uses' *means* uses benefiting a society for the prevention of cruelty to animals or animal rescue league or *uses benefiting an indefinite number of persons either by bringing them under the influence of education or religion or relieving them from disease, suffering, or constraint, or by erecting or maintaining public buildings or works, or otherwise* lessening the *burden of government but do not include the erection, acquisition, improvement, maintenance, or repair of real, personal, or mixed property unless it is used exclusively for one or more of the uses* stated." (Emphasis added.)

We note that the above definition of "patriotic uses" is far more limited than that which is ordinarily considered patriotic. But the legislature is its own lexicographer and we are constrained to follow the definition it has applied to patriotic uses. "In construing statutes the Courts search for the legislative intent as shown by what the legislature said, rather than what it should or might have said." Rule 344(f)(13), Iowa Rules of Civil Procedure. Even so, no ordinary definition of "patriotic uses" would permit use of lawful gambling proceeds for most of the operational expenses of a veterans' organization as they are commonly incurred.

Lawful gambling proceeds raised by a qualified organization, patriotic or otherwise, must be dedicated and distributed in accordance with §99B.7(3)(b) as amended. Operational expenses of the patriotic organization, capital improvements to the organization's property, or debt service of the organization do not appear to fall within the limited legitimate contributions of net receipts prescribed in the above statute. Clearly, such expenditures do not "[benefit] an indefinite number of persons either by bringing them under the influence of education or religion or relieving them from disease, suffering, or constraint," nor do they "[lessen] the burden of government." Moreover, such expenditures by the organization do not constitute costs of "erecting or maintaining public buildings or works" because buildings or works of such organizations are not "public" in the sense the statute contemplates. 1974 OAG 684.

Veterans' organizations are not ordinarily open to an "indefinite number of persons" but only to those persons who can qualify for membership. They are not controlled by nor directly related to a governmental entity. Their facilities and services are not always open to an "indefinite number" of people without cost. While it may be true that the existence of these organizations and what they stand for are a positive good in a community, such incidental contribution to the community is not sufficient to constitute *public purpose*. This is illustrated in *Visina v. Freeman*, Minn. 1958, 89 N.W.2d 635 wherein the Court stated:

"It is equally well settled that, if the primary object is to promote some private end, the expenditure is illegal, although it may incidentally serve some public purpose also."

Finally, the statute expressly prohibits the use of net receipts for "the erection, acquisition, improvement, maintenance, or repair of real, personal or mixed property unless it is used *exclusively* for one or more of the uses stated." §99B.7(3)(b). (Emphasis added.) Expenditures for capital improvements or debt service of a patriotic organization fall within this express prohibition. Such organizations are not devoted *exclusively* for any of the stated uses in the statute.

A question is raised whether operational expenses, capital improvement costs or debt service charges may be deducted from receipts received through gambling activities under the definition of "net receipts." "Net receipts" are defined in §99B.1(6), Iowa Code, 1975, as "gross receipts less reasonable expenses, charges, fees and deductions allowed by the department of revenue." The Department of Revenue limits such expenses to those that are solely and exclusively derived from the operation of the gambling games themselves. While this is an unwritten policy of the Department of Revenue, it complies with the statutory language of §99B.1(6). Thus, a patriotic organization can deduct only "reasonable expenses, charges, fees and deductions" attributable to the operation of the gambling games conducted. Normal operational expenses of a veterans' organization, capital improvements to the organization's building, or debt service charges of the organization are not derived solely from operation of the games and may not be deducted.

To summarize, a "patriotic organization" is not mentioned in the current gambling laws of Iowa. Such must be treated as any other "qualified organization" and must meet the statutory requirements of §99B.7, as amended, to conduct legal gambling games. Section 99B.7 prescribes certain limited "uses" to which net receipts received from gambling activities must be dedicated and contributed. Expenditures by "patriotic organizations" for the operational expenses of the organization, capital improvements to the organization's property, or debt service of the organization do not appear to be legitimate expenditures to which net receipts of the organization can be attributed under §99B.7, as amended.

While a bill which does not pass has little or no bearing upon the construction of one which does, it is interesting to note that companion bills drafted and vigorously supported by the undersigned attorney general to correct the many problems of the gambling law were offered to the 66th General Assembly. Thus, Senator Rabedeaux, on February 9,

1976, filed Senate File 1103 and Representatives Wyckoff, Kreamer, Hansen and Miller of Buchanan, on February 10, 1976, filed House File 1250. While neither bill was ever taken up in either House, each of these bills provided:

"Sec. 11. *NEW SECTION.* PROFITS ALLOWED. In addition to the ordinary winnings allowed to players and participants from lawful gambling, the following persons and organizations may directly profit or raise funds from conducting, suffering or permitting those . . . games, including bingo, enumerated in . . . this Act: * * *

"2. *Any* bona fide nonprofit charitable, *bona fide nationally chartered* fraternal or military *veterans'* corporation or *organization* which was in existence and operating a clubroom, post, dining room or dance hall, as long as it continues to operate such and has a valid gambling license for the premises on which the gambling is conducted." (Emphasis added.)

Obviously, the foregoing language, from gambling bills repeatedly recommended to the legislature by the attorney general at every session for years, would have permitted legitimate veterans' organizations to directly profit or raise funds from lawfully conducted gambling games, including bingo. But, of course the General Assembly, not the attorney general, makes the laws of Iowa. And the General Assembly clearly did not allow veterans' organizations to use the proceeds of lawful gambling simply for its own purposes.

July 2, 1976

MUNICIPALITIES: Civil Service — §400.11, Code of Iowa, 1975. Where a tie exists for the tenth spot on a civil service eligibility list, under §400.11, both names may be certified. (Blumberg to Bina, State Representative, 7-2-76) #76-7-1

Honorable Robert F. Bina, State Representative: We have received your opinion request regarding civil service eligibility lists. Under your facts, at a recent examination two individuals tied for tenth spot on the list. You wish to know how this should be treated.

Section 400.11, 1975 Code of Iowa, provides that within ninety days following an examination a list of the ten persons who qualify with the highest standing as a result of the examination shall be certified to the city council. The problem exists because this section speaks of ten names or less, but not of more than ten names. If at least ten persons have high enough scores to qualify, you may not certify less than ten. If qualification for the list is based upon the examination scores, then, in effect, §400.11 requires that the top ten scores be put on the list. We do not see how the legislative intent can be hindered by having two names in the tenth spot.

Accordingly, we are of the opinion that where a tie exists for the tenth spot on a civil service list under §400.11, two names may be certified for that spot.

July 2, 1976

MUNICIPALITIES: Civil Service — §§4.5, 400.9 and 400.11, Code of Iowa, 1975; §§2 and 3, Ch. 200, Acts of the 66th G.A. (1975). Those individuals already on promotional lists on the effective date of the

amendments to §§400.9 and 400.11 shall retain their preference for a full two years following the date of their certification. (Blumberg to Poncy, State Representative, 7-2-76) #76-7-2

Honorable Charles N. Poncy, State Representative: We have your opinion request regarding civil service promotional lists. You ask whether the promotional lists in effect under §§400.9 and 400.11, 1975 Code of Iowa, remain in effect as stated in those sections, or whether the legislative changes to those sections control.

Section 400.9 of the Code provided that a civil service commission must have given promotional examinations every other April and could hold other such examinations as necessary. Section 400.11 provided that the commission shall certify such promotional lists to the city council. The third paragraph of that section provided that persons on such lists "shall hold preference for promotion until the beginning of a new examination, but in no case . . . longer than two years following the date of certification." Section 2, Ch. 200, 66th G.A. (1975) struck the two year requirement from §400.9. Thus, it is discretionary with the commission when to hold the promotional examinations. Section 400.11 was amended by §3, Ch. 200, 66th G.A. (1975) so that the pertinent part of the third paragraph now reads: "persons on the certified eligible list for promotion shall hold preference for promotion two years following date of certification, after which said lists shall be cancelled . . . ."

Under the original sections the commission was mandated to hold promotional examinations every other year and could hold them more often if necessary. The lists made up from the results of said examination lasted only until the next examination or the expiration of two years. Now, however, even though the commission may hold promotional examinations as often as it deems necessary, those on the promotional lists hold preference for promotion for a full two years. Your question then is whether those on promotional lists prior to the effective date of the amendments retain their preference until the next examination or the expiration of two years, whichever comes first (original sections), or whether they retain their preference for a full two years regardless of when the next examination is given.

Statutes are presumed to be prospective only unless expressly made retrospective. §4.5, 1975 Code of Iowa. There is nothing in the amendments which gives any hint of retrospectivity. The obvious intent is to permit each individual to stay on a promotional list for two years, regardless of the number of examinations. This result is not prevented by allowing those already on promotional lists to remain for two years.

Accordingly, we are of the opinion that those individuals already on promotional lists as of the effective date of the amendments to §§400.9 and 400.11, shall retain their preference for a full two years from the date of their certification.

July 2, 1976

ELECTIONS: Soil Conservation District Commissioners; Election Costs. Chapter 229, Acts, 66th G.A., First Session (1975). Soil conservation district commissioners are elected at the general election and the costs incurred in connection with their election are to be borne by the several counties. (Haesemeyer to Greiner, Director, Department of Soil Conservation, 7-2-76) #76-7-3

Mr. William H. Greiner, Director, Department of Soil Conservation: By your letter of June 24, 1976, you have asked for an opinion of the Attorney General on the question of who is responsible for paying the costs of conducting elections for the office of Soil Conservation District Commissioner on the general election ballot.

Chapter 229, 66th General Assembly, First Session (1975) amended Chapter 467A (relating to soil conservation districts) in a number of respects, including the manner of election of Soil Conservation District Commissioners. In addition, §5 of such Chapter added the following new section to Chapter 39 of the Code:

"*NEW SECTION.* GENERAL ELECTION — NONPARTISAN OFFICES. There shall be elected at each general election, on a nonpartisan basis, the following officers:

"1. Regional library trustees as required by section three hundred three B (303B) of the Code.

"2. County public hospital trustees as required by section three hundred forty-seven point twenty-five (347.25) of the Code.

"3. Soil conservation district commissioners as required by section four hundred sixty-seven A point five (467A.5) of the Code."

It is clear from the foregoing that the election of Soil Conservation District Commissioners is one of the matters which are to be submitted to the electorate at the general election. Section 47.3, Code of Iowa, 1975, provides in relevant part:

"Election expenses. The costs of conducting a special election called by the governor, general election, and the primary election held prior to the general election shall be paid by the county.

"The cost of conducting other elections shall be paid by the political subdivision for which the election is held. The costs shall include, but not be limited to, the printing of the ballots and the election register, publication of notices, printing of declaration of eligibility affidavits, compensation for precinct election boards, canvass materials, and the preparation and installation of voting machines. The county commissioner of elections shall certify to the county board of supervisors a statement of cost for an election. The cost shall be assessed by the county board of supervisors against the political subdivision for which the election was held.

" * * * "

The reference to "other elections" in the first sentence of the second paragraph of such §47.3 refers to elections other than those enumerated in the first paragraph. Thus, it is clear that the costs of conducting a general election are to be paid by the county. Since the election of Soil Conservation District Commissioners is part of the general election, the costs of electing such commissioners must be borne by the several counties.

In this connection, it is worth noting that §467A.5(3), as amended by §3 of Chapter 229, specifically requires that the nominating petition form for Soil Conservation District Commissioners is to be furnished by the county commissioner of elections.

July 12, 1976

MUNICIPALITIES: Utility Board Members — §§362.2(22) and 388.3, Code of Iowa, 1975. A member of a city council cannot also be a member of a utility board. (Blumberg to Stevens, Fremont County Attorney, 7-12-76) #76-7-4

G. Rawson Stevens, Fremont County Attorney: We have received your opinion request of June 7, 1976, where you asked whether a city council member may receive a salary for duties as a water commissioner. We assume that a water commissioner is a member of a utility board pursuant to Chapter 388, 1975 Code of Iowa.

Section 362.2(22), 1975 Code of Iowa, defines "utility" to include waterworks. Section 388.3 of the Code provides: "A public officer or a salaried employee of the city may not serve on a utility board." The reasons are obvious when such a board member is also a member of the council. The board must make reports to the council, and all matters concerning taxes, ordinances, resolutions, and bonds, as they relate to a utility, must be handled by the council. Since a council member cannot serve as a utility board member, there should be no question as to any future salary since a vacancy will exist.

However, there may be a question as to any salary earned in the past. Such a board memer could not have been a *de jure* board member, but at best one that was *de facto*. In an earlier opinion, Blumberg to Irvin, No. 76-2-2, a copy of which is enclosed we discussed *de facto* officers and their right to payment. We stated, citing to *Herkimer v. Keeler*, 1899, 109 Iowa 680, 638, 81 N.W. 178, 179:

"A *de facto* officer is one who, *colore officii*, claims and assumes to exercise official authority, is reputed to have it, and in whose acts the community acquiesces. *Hussey v. Smith*, 90 U.S. 20-25 (25 L.Ed. 314). He has been said to be one who exercises the duties of an office, claiming the right to do so under some commission or appointment. *Smith v. Cansler*, 83 Ky. 367; *Brown v. Lunt*, 37 Me. 425; *Attorney General v. Crocker*, 138 Mass. 218. As said in *Ex parte Strahl*, 16 Iowa, 369: 'An officer *de facto* is one who comes in by the forms of an election or appointment, and who thus acts under claim and color of right, but who, in consequence of some informality, omission, or want of qualification, could not hold his office if his right was tried in a direct proceeding by information in the nature of *quo warranto*'."

We also cited to *Buck v. Hawley & Hoops*, 1906, 129 Iowa 406, 408, 409, 105 N.W. 688, 689; *Board of Directors v. County Board (Education)*, 1964, 257 Iowa 106, 131 N.W.2d 802; *State v. Central States Elec. Co.*, 1947, 238 Iowa 801, 28 N.W.2d 457; and, *Davenport v. Teeters*, 315 S.W.2d 64 (Ct. App. Mo. 1958). *Petrone v. City of Newark*, 1941, 19 N.J. Misc. 318, 19 A.2d 450, 451 and *Gershon v. Kansas City*, 215 S.W.2d 771, 773-774 (Ct. App. Mo. 1948), which we also cited, stand for the proposition that where one is a *de facto* officer, he may be entitled to his salary.

Although we do not know whether this issue exists, we feel compelled to cite you the case law. You should determine from all existing facts, whether there is any question as to receipt of salary.

Accordingly, we are of the opinion that a member of a city council cannot also be a member of a utility board.

July 14, 1976

ALCOHOLISM; CITIES AND CITY OFFICERS; CONSTITUTIONAL LAW: Art. III, §31, Iowa Constitution; §§123.53(3), 125.13(1), 321.283 (3), 1975 Code of Iowa. A city may lawfully allocate to a private alcoholism facility funds distributed to the city by the State representing the city's share of state liquor sales. (Haskins to Voskans, Director, Division on Alcoholism, 7-14-76) #76-7-5

Jeff Voskans, Director, Division on Alcoholism: You ask our office whether a city may lawfully allocate to a private alcoholism facility funds distributed to the city by the state representing the city's share of state liquor sales.

§123.53(3), 1975 Code of Iowa, provides that the state treasurer shall distribute to cities a sum of money equal to ten percent of the gross sales of the state liquor stores and authorizes a city to allocate a portion of the funds it receives from the treasurer to a city commission or committee on alcoholism, which is permitted to use these funds for the treatment and rehabilitation of alcoholics. §123.53(3) states:

"*The treasurer of state shall semi-annually distribute a sum of money equal to ten percent of the gross sales made by the state liquor stores to the cities of the state.* Such amount shall be distributed to the cities of the state in proportion to the population that each incorporated city bears to the total population of all incorporated cities of the state as computed by the latest federal census. A city may have one special federal census taken each decade, and the population figure thus obtained shall be used in apportioning amounts under this subsection beginning the calendar year following the year in which the special census is certified by the secretary of state. Such apportionment shall be made semiannually as of July 1 and January 1 of each year. Warrants for the same shall be issued by the state comptroller upon certification of the treasurer of state and mailed to the city clerk of each incorporated city of the state and shall be made payable to such incorporated city and shall be subject to expenditure under the direction of the city council or other governing bodies of such incorporated city for any lawful municipal purpose. *It shall be a lawful municipal purpose for cities to allocate a portion of the above funds for the purpose of financing the activities of a city commission or committee on alcoholism, such commission or committee to be appointed by the mayor or by the council or both. The commission or committee may use any funds so allocated for the treatment, rehabilitation, and education of alcoholics in Iowa.* [Emphasis added]

We believe that the last sentence of the above section implicitly serves to empower a city, through a city commission or committee on alcoholism, to allocate to an alcoholism facility funds received from the state under the section.

It would be too narrow a construction of the section to say that it permits the use of these funds for the treatment of alcoholics only by the city itself, through a treatment facility operated directly by a city commission or committee on alcoholism, and not by a private alcoholism facility which performs the actual treatment services and is reimbursed for a portion of its costs by the city. However, is the exercise of the power constitutional under Art. III, §31, Iowa Constitution? That section states:

"No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract

entered into; nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, and *no public money or property shall be appropriated for local, or private purposes,* unless such appropriation, compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly." [Emphasis added]

The above provision applies to cities. *See Love v. City of Des Moines,* 210 Iowa 90, 230 N.W. 373 (1930). It is assumed here that an appropriation by a city may never be for "local or private purposes", regardless of whether it is "allowed" (whatever that may mean) by a vote of two-thirds of both houses of the General Assembly. *See Dickinson v. Porter,* 240 Iowa 393, 35 N.W.2d 66, 79 (1949). The issue then becomes whether allocating funds to an alcoholism facility would be an appropriation for "local or private purposes" so as to be invalid under the above provision. It is true that such facilities usually are private organizations. However, they must nevertheless be approved by the state Commission on Alcoholism under §125.13(1), 1975 Code of Iowa, in order to operate. And courts are authorized to commit alcoholics to their custody for treatment. *See* §321.283(3), 1975 Code of Iowa. Essentially, they serve the undisputed public purpose of treating alcoholics, a function which government itself would be otherwise required to perform.

Under the modern trend of the law, an appropriation will be deemed to have a public purpose and not a "private" one for purposes of the above constitutional provision if it serves the overall public interest, even though private persons receive the direct benefit of the appropriation. *See Graham v. Worthington,* 259 Iowa 845, 146 N.W.2d 626, 635 (1966); *Green v. City of Mt. Pleasant,* 151 Iowa 303, 131 N.W.2d 5, 17 (1964); *Dickinson v. Porter, supra,* 35 N.W.2d at 80; cf. *Richards v. City of Muscatine,* 237 N.W.2d 48, 60 (Iowa 1975). Here, the public interest in providing funds to facilities for the treatment of alcoholism is manifest. A fact which is of significance to the constitutionality of an appropriation of funds to a private alcoholism facility is that, as indicated, the facilities must be approved by the State Commission on Alcoholism in order to operate and are thus to some extent subject to the control of the State. *See generally State v. Damann,* 280 N.W. 698, 706 (Wis. 1938). While a city has no statutory obligation to fund an alcoholism facility, Art. III, §31, does not void the appropriation simply because it is not pursuant to a statutory duty, but only if it is for "local or private purposes", which an allocation by a city to an alcoholism facility, even though private in nature, is not. Grants to private hospitals by states have been upheld against attacks based on constitutional provisions of similar import to the one here, because of the obvious public interest served by the hospitals. *See Kentucky Bldg. Com'n. v. Effron,* 220 S.W.2d 836, 837 (Ky. 1949); *Craig v. Mercy Hospital,* 45 So.2d 809 (Miss. 1950). And so long as a city obtains legal guarantees that its own residents will receive treatment from the alcoholism facility to which it allocates funds, the public interest of the particular city will be deemed to be served.

In sum, a city may lawfully allocate to a private alcoholism facility funds distributed to the city by the State representing the city's share of state liquor sales.

July 14, 1976

ALCOHOLISM; STATE OFFICERS AND DEPARTMENTS: §§4.1(37)(a), 4.1(37)(c), 4.8, 125.2(2), 125.7(1), 125.7(2), 125.13, 125.13(1), 125.13(4), 125.27, 1975 Code of Iowa; H.F. 1277, §§3, 7, 12, Acts of the 66th G.A. §123B.4, 1973 Code of Iowa; Ch. 1131, §52, Acts of the 65th G.A. If an alcoholism treatment center fails to meet the standards or certain rules of the state Commission on Alcoholism, the Director of the state Division on Alcoholism can refuse to approve, and therefore contract with it. But even if the facility is approved by the Director, the question whether he must enter into a contract with it depends on the terms of the comprehensive alcoholism program developed by the Division and approved by the Commission. The Director is not obligated to enter into a contract with a facility merely because the Commission has approved the facility and allocated funds to it, unless the comprehensive alcoholism program provides funds for it. (Haskins to Voskans, Director, Division on Alcoholism, 7-14-76) #76-7-6

Jeff Voskans, Director, Division on Alcoholism: You ask our office what effect H.F. 1277, Acts of the 66th G.A., will have on the power of the Director of the state Division on Alcoholism to enter into contracts with alcoholism facilities. Specifically, you first ask whether the Director is compelled to contract with an alcoholism facility to provide treatment of alcoholics when the Director does not feel the facility has a comprehensive program. By "comprehensive program", I presume you may mean one that is adequate for all purposes for treatment of alcoholics.

H.F. 1277, §12, Acts of the 66th G.A., amends §125.27, 1975 Code of Iowa—the relevant section in this context—to have it provide in relevant part:

"The director [shall] *may, consistent with the comprehensive alcoholism program*, enter into written agreements with a facility as defined in section 125.2 to pay for seventy-five percent of the cost of the care, maintenance and treatment of an alcoholic. Such contracts shall be for a period of no more than one year. The commission shall review and evaluate at least once each year all such agreements and determine whether or not they shall be continued."

[The bracketed word and italicizing show the changes made in the section]. The key to your first question is the word "facility" in the above amended section. It is defined in §125.2(2), 1975 Code of Iowa, as follows:

"For purposes of this chapter, unless the context clearly indicates otherwise:

2. '*Facility*' means a hospital, institution, detoxification center, or installation providing care, maintenance and treatment for alcoholics and *approved by the director under section 125.13*." [Emphasis added]

Basically then, a "facility" with which the Director is authorized to contract with under §125.27, as amended, is a treatment center approved by the Director under §125.13, 1975 Code of Iowa. §125.13(4), 1975 Code of Iowa, states:

"*The director may* grant or, after holding a hearing, may suspend, revoke, limit or restrict an approval, or *refuse to grant an approval, for failure to meet the standards of the commission.*" [Emphasis added]

As can be seen, a treatment center must meet the standards of the state Commission on Alcoholism before the Director is required to approve it. The permissible scope of the standards of the Commission is set out in §125.13(1), 1975 Code of Iowa, as follows:

"1. The commission shall establish standards for treatment programs and facilities. The standards may concern only the health standards to be met and minimum standards of treatment to be afforded patients. A person shall not operate a public or private alcoholism treatment facility or program until it is approved by the commission, except as provided in section 125.14."

Certainly, if a treatment center fails to meet the allowable standards of the Commission for the minimum standard of treatment, the Director may refuse to approve it so that it does not become a "facility" within the meaning of §125.27, as amended, and hence is not eligible for funding under that section. H.F. 1277, §7, Acts of the 66th G.A., gives the same effect to certain rules of the Commission when it adds the following subsection to §125.13:

"The commission shall establish rules pursuant to chapter seventeen A (17A) of the Code requiring facilities to use reasonable accounting and reimbursement systems which recognize relevant cost-related factors for alcoholism patients. *No facility shall be approved* nor shall any payment be made under this chapter to a facility *which fails to comply with those rules* or which does not permit inspection by the division, and an examination of all records, including financial records, methods of administration, general and special dietary programs, the disbursement of drugs and methods of supply, and any other records the division deems relevant to the establishment of such a system. However, rules issued pursuant to this paragraph shall not apply to any facility referred to in sections one hundred twenty-five point twenty-six (125.26) of the Code." [Emphasis added]

Thus, if a treatment center fails to meet the allowable standards or certain rules of the Commission, the Director can refuse to approve, and thus contract with, it.

However, suppose a facility meets the allowable standards or certain rules of the Commission, and the Director therefore approves it under §125.13(4). You ask in effect whether the Director must enter into a contract with it to pay 75% of the costs of treating an alcoholic at the facility? The question revolves around the change in the language in §125.27. If the words "not inconsistent with the comprehensive alcoholism program" did not appear in that section, we would not hesitate to conclude that the section granted the Director broad discretion as to whom to contract with and for how much.[1] This would be because the

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[1] The section which was the predecessor to the amended §125.27, §123B.4, 1973 Code of Iowa, provided:

"The commission *may* enter into written agreements with any qualified facility to pay for one-half of the cost of the care, maintenance, and treatment of an alcoholic confined as a voluntary patient within that county." [Emphasis added]

Our office interpreted this section to grant discretion to the old Commission on Alcoholism as to what facilities to contract with and for how much. *See* 1974 O.A.G., p. 497.

word "shall" imposes a duty, *see* §4.1(36)(a), 1975 Code of Iowa, and the word "may" confers a power, *see* §4.1(36)(c), 1975 Code of Iowa, and a shift from "shall" to "may" indicates clear legislative intent of a grant of discretion. *See* 2A Sands, *Sutherland Statutory Construction* §57.05, at 419. However, the discretion which the Director would otherwise have under the amended §125.27 is limited by the comprehensive alcoholism program. It should be noted that this program and the funding therefor is developed by the Division and approved by the Commission on Alcoholism. *See* §125.27(2), 1975 Code of Iowa, as amended by H.F. 1277, §3, Acts of the 66th G.A. If the comprehensive alcoholism program provides funding for a facility at a certain level, the Director must enter into a contract with the facility to provide funding at that level and not below or above that level. The word "may" in this instance carries a mandatory meaning, which is not usual but which can nonetheless be the case. *See Iowa Nat. Indus. Loan Co. v. Iowa Dept. of Rev.*, 224 N.W.2d 437, 440 (Iowa 1974). Thus, the comprehensive alcoholism program serves to limit and restrict the broad discretion of the Director as to whom to contract with and for how much. Whether the Director must enter into a contract with even an approved facility, and if so, for how much, depends on the terms of the comprehensive alcoholism program. Of course, if the comprehensive alcoholism program is silent on a particular facility, then the discretion which the Director would otherwise have comes into play and may be exercised by him.

You next ask whether the Director is obligated to enter into a contract with a facility merely because the Commission on Alcoholism has approved the facility and allocated funds for it. First, we believe that the mere approval by the Commission of the facility does not so obligate the Director. This is because under §125.13(1), quoted above, the Commission's approval is necessary merely in order for a facility to operate—with or without funds—and is not sufficient for funding. By reason of the definition of "facility" within the meaning of §125.27, it is the Director's approval which is necessary for funding. But the fact that the Commission allocates funds for the facility complicates the issue. This is because of §125.7(1), 1975 Code of Iowa, which states:

"The commission shall:

1. Act as the *sole agency* to allocate state, federal, and private funds which are appropriated or granted to, or solicited by the division." [Emphasis added]

If the Commission is the "sole agency" to allocate funds belonging to the Division, then presumably it would have the power to bind the Director to enter into a contract with the facility. But such a power conflicts with the discretion, subject to the comprehensive alcoholism program, granted the Director by the amended §125.27. To the extent that there is actually an instance where §124.7(1) and the amended §125.27 conflict —as when the Division allocates funds to a facility, but the Director does not wish to enter into a contract with the facility and the comprehensive alcoholism program does not require the Director to enter into a contract —the amended §125.27, and thus the power of the Director, must prevail over §125.7(1), and the power of the Commission, because the amended

§125.27 is the latest enacted statute[2] and is listed last in Ch. 125. *See* §4.8, 1976 Code of Iowa. Thus, the Director is not obligated to enter into a contract with a facility merely because the Commission on Alcoholism has approved the facility and allocated funds to it, unless the comprehensive alcoholism program provides funding for the facility. In the latter event, as our discussion in the above paragraph indicates, the Director would be obligated to enter into a contract with the facility to provide the funding.

In sum, if an alcoholism treatment center fails to meet the standards or certain rules of the state Commission on Alcoholism, the Director of the state Division on Alcoholism can refuse to approve, and therefore contract with, it. But even if the facility is approved by the Director, the question whether he must enter into a contract with it depends on the terms of the comprehensive alcoholism program developed by the Division and approved by the Commission. The Director is not obligated to enter into a contract with a facility merely because the Commission has approved the facility and allocated funds to it, unless the comprehensive alcoholism program provides funds for it.

July 14, 1976

TOWNSHIPS: Compensation of Township Clerks — §§359.38 and 359.47, Code of Iowa, 1975. Pursuant to §359.47(2) of the Code, township clerks receive as compensation one percent of all money coming into their hands. This compensation should be paid out of that money and not from the county. (Blumberg to Kelso, Supervisor of County Audits, State Auditor's Office, 7-14-76) #76-7-7

William E. Kelso, Supervisor of County Audits, Office of State Auditor: We have received your opinion request regarding the compensation of township clerks. You ask whether such compensation under §359.47(2), 1975 Code of Iowa, comes from the county or from township funds.

Section 359.47 provides that the township clerk shall receive:

"1. For each day of eight hours necessarily engaged in official business, where no other compensation or mode of payment is provided, to be paid from the county treasury, eight dollars.

"2. For all money coming into his hands by virtue of his office, except from his predecessor in office, unless otherwise provided by law, one percent.

"3. For making out and certifying the papers in any appeal taken from an assessment by the trustees of damages done by trespassing animals, such additional compensation as the board of supervisors may allow."

Our office has issued several opinions on §359.47(2), which has remained virtually the same for many years. In 1909 O.A.G. 52, we held that the township clerk was entitled to his percentage *for* all money coming into his hands. In 1920 O.A.G. 679, we held that a township

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[2] The amendment to §125.27—which is the crucial grant of discretion, albeit limited, to the Director—was effective July 1, 1976, while §125.7(1) (and the remainder of the original Ch. 125) was effective July 1, 1974, *see* Ch. 1131, §52, Acts of the 65th G.A.

clerk was entitled to a percentage *for* all money coming into his hands, including loans. In 1922 O.A.G. 281, we held that the allowed percentage, now found in §359.47(2), must be paid by the county. However, in 1942 O.A.G. 149, we held that this percentage should come from township funds. The 1922 opinion was based upon wording similar to §359.47(1) wherein it was stated that the compensation for the eight hour days came from the county where no other compensation or mode of payment is provided. Because the section containing the percentage was void of any language regarding the mode of payment, we held that it came from the county. In 1942 we took the opposite stand on the basis that subsections one and three specifically mentioned the county whereas two did not. Thus, we held that the percentage in subsection two came from township funds. The last opinion made no reference to any of the previous ones.

The confusion is obvious. Should we adhere to the earlier opinion on the basis that the Legislature intended all compensation to be from the county, or should we adhere to the last opinion which ostensibly has been followed for the past thirty-four years. Section 359.47(2) is ambiguous as evidenced by the prior opinions. We cannot state unequivocally what was intended. However, we believe that the latest opinion is the better one. First, we adopt the reasoning of that opinion. Second, the other sections of Chapter 359 which speak of funds or taxes for the various specified purposes do not limit those monies only to those purposes. It can also be said that use of the funds to pay the clerk is a necessary cost of doing business. Finally, §359.38 empowers the township trustees to appoint watchmen. These watchmen are obviously paid out of some funds. So too are the individuals who take care of the township cemeteries and the like. If these individuals can be paid out of those monies then the township clerk should not be prohibited from receiving compensation from the same sources.

Accordingly, we are of the opinion that township clerks are entitled to one percent *of* all money coming into his hands. This opinion supercedes the one found at 1922 O.A.G. 281.

July 14, 1976

COUNTIES — Incompatibility — The positions of county attorney and city attorney are incompatible. (Blumberg to Locher, Jones County Attorney, 7-14-76) #76-7-8

Mr. Stephen E. Locher, Jones County Attorney: We have your opinion request of June 5, 1976, regarding a possible incompatibility of positions. Pursuant to your facts, you have been appointed as an assistant city attorney for the sole purpose of prosecuting misdemeanor cases when the city attorney is unable to do so. You will not be filing charges but will only be trying the cases. You specifically asked:

"1. Is it possible for me to act as Assistant City Attorney as set out above while holding the office of County Attorney?

"2. Is it necessary for the defendant or the defendants through their counsel to object to my prosecution of this city matter, in order to prevent me from so prosecuting?

"3. If the defendant or his counsel would expressly waive any irregu-

larity would it be possible for me to prosecute the city matters while holding the office of County Attorney?"

The case of State ex rel. *Crawford v. Anderson*, 1912, 155 Iowa 271, 273, 136 N.W. 128, sets forth the criteria for incompatibility of offices:

"The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' State v. Bus, 135 Mo. 338, 36 S.W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra, [112 Mich. 145, 70 N.W. 450, 37 L.R.A. 211]; State v. Goff, 15 R.I. 505, 9 A. 226, 2 Am.St.Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both'."

See also, *State ex rel. LeBuhn v. White*, 1965, 257 Iowa 660, 133 N.W.2d 903.

In a prior opinion 1940 O.A.G. 162, this office held that the positions of city attorney and county attorney were incompatible. Although there was no discussion of any reasoning for the holding, sound reasons do exist. Many offenses, primarily traffic, encompass both local and state charges. How much money from the fines and court costs and where that money goes depends upon which charge the violator is convicted of. A county attorney represents the State whereas a city attorney represents the city. A possibility of divided loyalties exists. In addition, there are many instances where cities and counties are at odds over a variety of situations, many times resulting in discussions and cases involving city and county attorneys. A person in both positions would be serving two such masters at the same time. Although we are not saying that you personally have done anything wrong, for the very fact that you requested this opinion indicates your desire to comply with the law, we believe that the possibility of the above problems exists. It is the possibility of impropriety that the law desires to avoid. *Wilson v. Iowa City*, 165 N.W.2d 813 (Iowa 1969). Accordingly, we feel that the positions of county attorney and city attorney are incompatible.

We need not answer your other questions since the finding of incompatibility should mean that those situations will not arise.

July 14, 1976

MUNICIPALITIES: Emergency Assistance by Volunteer Firemen — §§321.17, 321.19, 321.37, and 613.17, Code of Iowa, 1975. A person who renders emergency service or assistance for compensation is not covered by the "Good Samaritan Law." City owned vehicles used for official business must display license plates, but a fee may not be charged for them. A city need not purchase insurance for an ambulance. (Blumberg to Hutchins, State Representative, 7-14-76) #76-7-9

Honorable C. W. Hutchins, State Representative: We have your opinion request regarding ambulances and attendants. You asked:

"1. Are volunteer firemen who are certified by the State Department of Health as emergency medically trained persons still covered by the Good Samaritan law if they receive compensation for each ambulance call they answer?

"2. Is a city obligated to license and insure a vehicle used as an ambulance manned by personnel who are also volunteer firemen and who receive compensation for answering calls when that vehicle is used as the ambulance?"

Section 613.17, 1975 Code of Iowa, known as the "Good Samaritan Law" provides:

"Any person, who in good faith renders emergency care or assistance *without compensation* at the place of an emergency or accident, shall not be liable for any civil damages for acts or omissions unless such acts or omissions constitute recklessness." [Emphasis added]

Since the persons in question receive compensation for rendering such assistance they would not fall within the purview of that section.

Section 321.19 of the Code provides that all vehicles owned by political subdivisions and used in the transaction of official business are exempted from the payment of fees provided in Chapter 321. The department of transportation shall, upon application, and without charge, furnish distinguishing plates for such vehicles. This section exempts such vehicles only from the payment of fees for licenses, but not from the penalties of the chapter or any other section requiring the display of plates. See, §§321.17 and 321.37. Thus, such vehicles must display plates, but need not pay a fee for them. There is nothing in the Code which mandates a city to insure ambulances, although this may be advisable.

Accordingly, we are of the opinion that persons who render emergency services for compensation do not fall within the "Good Samaritan Law." City owned vehicles that are used for official business must display plates. A city need not purchase insurance for such vehicles.

July 14, 1976

STATE OFFICERS AND DEPARTMENTS: Iowa Public Employment Relations Act; §20.1, 20.3(3), and 20.4, 1975 Code of Iowa. Police officers as public employees may join unions and bargain collectively with public employers. All public employees are prohibited from engaging in strike activity. (Beamer to Millen, House Minority Leader, 7-14-76) #76-7-10

Honorable Floyd H. Millen, House Minority Leader, House of Representatives: By your letter of June 29, 1976, you have requested an attorney general's opinion with respect to the following question:

"A recent United States Supreme Court Ruling upheld a Missouri law excluding police from collective bargaining; it is my understanding that the Missouri law grants the right of bargaining to most classes of public employees, withholding it only from teachers and policemen, and that all public employees are prohibited from striking.

"I respectfully request an Attorney General's Opinion as to how this Court Ruling affects the Iowa collective bargaining law and, also, if the word 'police' refers to all types of law enforcement officers or only to those peace officers we commonly call 'policemen'."

The cases you refer to are *Vorbeck v. McNeal, Sahm v. Nations*, 407 F. Supp. 733 (E.D.Mo., 1976). In August 1974, a panel of three other federal judges upheld all sections of the Missouri state labor relations law including its prohibition on officers joining labor organizations. The U.S. Supreme Court ordered a new hearing and these cases were returned to another three judge panel.

In the above cases, actions were brought challenging the constitutionality of Missouri statutes and police board rule which precluded police officers from joining labor organizations and from collective bargaining.

Missouri's public sector bargaining law allows public employees the right to join labor organizations. It further grants exclusive bargaining representatives the right to meet and confer with public employees on salaries and other terms of employment. However, in this statutory authority the employees covered by the Missouri statute are as follows:

"Employees, except police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, all teachers of all Missouri schools, colleges and universities, of any public body shall have the right to form and join labor organizations . . ." §105.510, R.S.Mo., 1969.

Also at issue was Police Board Rule 8.621 for the City of St. Louis which forbade policemen from participating without Board authorization in the organization of any association, meeting, or union other than those duly authorized to perform certain and necessary functions.

The police departmental rule prohibiting policemen from participating in these activities was declared unconstitutional on its face by reason of infringing on officers' First Amendment rights of freedom of association, *Vorbeck v. McNeal*, supra at 737. Section 105.510 of the Missouri collective bargaining law was ruled unconstitutional insofar as it prohibited police officers from forming or joining labor organizations. However, that portion of Section 105.510 excluding police officers from the bargaining procedures set forth in Section 105.520 of the Missouri statute was upheld as constitutional as having rational relation to the legitimate objectives of the state which did not abridge any of the officers constitutional rights. In so ruling the Court said:

"The exclusion of policemen from the provisions of Section 105.520 which regulates the limited bargaining of public employees in Missouri raises the possibility of an irrational classification in violation of the fourteenth amendment. However, since as we have, there is no constitutional right to collective bargaining, the issue is whether the classification has a rational relation to a legitimate governmental interest. See Prostrollo v. University of South Dakota, 507 F.2d 775, 780 (8th Cir. 1974).

"Police officers occupy such a unique place in society that it cannot be said no rational basis exists for the classification in Section 105.520. Melton v. City of Atlanta, supra at 319. The determination of bargaining procedures for policemen is a decision properly reserved to the Missouri legislature." *Vorbeck v. McNeal*, supra at 739.

The Iowa Public Employment Relations Act, Chapter 20, 1975 Code of Iowa, contains several provisions which are relevant to your question. Section 20.1 permits public employees to organize and bargain collectively. Section 20.3(3) defines public employees as follows:

" 'Public employee' means any individual employed by a public employer, except individuals exempted under the provisions of section 20.4."

Under Section 20.4, 1975 Code, "Exclusions," neither teachers nor police officers are exempted from the broad definition of public employee. These provisions are in sharp contrast to the Missouri statute which was construed in *Vorbeck v. McNeal,* supra. Inasmuch as all public employees except those excluded under Section 20.4 are permitted to organize and bargain collectively, any distinction that might exist between types of law enforcement officers does not appear relevant to this opinion. There are no exclusions for any public employees in a law enforcement status per se unless they would fall in a supervisory capacity or a category which is exempted for a reason other than the law enforcement category.

Section 20.12 of the Code prohibits public employees or employee organizations, directly or indirectly, to engage in strike activity. A like provision exists in the Missouri statute Section 105.530, R.S. Mo., 1969. In *Vorbeck v. McNeal,* supra, the Court stated at page 738:

"It must be made clear, however, that the state may properly prohibit police officers, whether or not union members, from engaging in work slowdowns, strikes, sick-ins, and other related activities. . . . The prospect of a city or community being forced to operate without police services would constitute such a 'clear and present danger' that strike activities would not be entitled to constitutional protections."

In conclusion, the *Vorbeck v. McNeal,* supra, decision does not affect the Iowa collective bargaining law because of the difference in statutory language. Under the Missouri statute policemen are excluded from collective bargaining whereas in Iowa no exclusions are made. Strikes are prohibited in both states by public employees.

July 14, 1976

MUNICIPALITIES: Donation of City Funds — Article III, section 31, Iowa Constitution; §§28E.2, 28E.4, and 392.6, Code of Iowa, 1975. Although a city hospital may not, at all times, be allowed to contribute funds to a private corporation for the education of medical practitioners in the county and establishment of a clinic in another city, it may enter into a Chapter 28E agreement with the corporation for joint or cooperative actions. However, the city should receive some benefits from the agreement. (Blumberg to Hansen, State Senator, 7-14-76) #76-7-11

Honorable Willard R. Hansen, State Senator: We have received your opinion request regarding a possible donation of municipal funds. Under your facts, a non-profit corporation is being or has been established pursuant to Chapter 504A, 1975 Code of Iowa. The incorporator is a private individual. Article III of the Articles of Incorporation states the following purposes of the corporation:

"The purposes of the corporation are to facilitate the establishment and coordination of graduate and continuing medical education in the Black Hawk County area, including the providing of appropriate assistance to, or cooperation with, the graudate medical education programs with which Sartori Memorial Hospital, Allen Memorial Hospital, St. Francis Hospital and Schoitz Memorial Hospital and their medical staffs may become associated, in order to improve the quality of medical services. In furtherance thereof, the corporation shall provide for the development of a family practice center."

Article II of the By-Laws provides that the members of the corporation shall be non-profit and public hospital corporations in the county, which contribute financially to the corporation. Each hospital selects three directors. The hospital in question is city-owned. You ask whether that hospital may contribute funds generated from patient services and/or tax sources to the corporation.

City hospitals are provided for in §392.6 of the Code. Nowhere in that chapter is there any mention of contributing funds for the purposes mentioned above. Article III, section 31 of the Iowa Constitution provides, in pertinent part:

"[N]o public money or property shall be appropriated for local, or private purposes unless such appropriation, compensation or claim be allowed by two-thirds of the [Legislature]."

Pursuant to this provision our office has previously held that: A city could not make a donation to a recreation center operated and funded by private citizens, 1972 O.A.G. 395; A city could not donate funds to another city to pay off the other city's debt for fire fighting equipment, 1972 O.A.G. 403; and that municipal utility trustees could not donate city funds to a hospital and clinic, Blumberg to Casjens, #75-2-2.

We are also aware of cases discussing "private" versus "public" purposes. In *Carroll v. City of Cedar Falls*, 1936, 221 Iowa 277, 261 N.W. 655, one issue was whether the sale of electricity by one city to another violative of Article III, section 31 of the Iowa Constitution. In a lengthy discussion of that issue, the Court stated that the Constitution does not define "private" or "public" purpose, and no inflexible definition had been adopted. Therefore, the Court was free to determine what those terms meant within the meaning of the law. Considering the statute in question permitting such a sale of electricity, and the applicable laws dealing with eminent domain for public utilities, the Court held that such a sale was for a public purpose. In *Dickinson v. Porter*, 1949, 240 Iowa 393, 35 N.W.2d 66, concerning a tax exemption and appropriation by the Legislature, the Court held that an act cannot be said to be for a private purpose where some principle of public policy underlies its passage. Thus, the act was not held to be in violation of Article III, section 31 of the Iowa Constitution. Finally, in *Abolt v. City of Fort Madison*, 1961, 252 Iowa 626, 108 N.W.2d 263, the issue was whether a lease by the city to an individual to construct and operate a public dock and public warehouse on public property was a public or private purpose. The Court held this to be a public purpose, and stated that public use is not synonymous with public benefit, since many private uses benefit the public. That case, however, does not indicate whether public use or benefit is the same as public purpose.

The primary purpose of the corporation in question appears to be educational for practitioners in the county. The letter from the city hospital administrator indicates that the corporation's services could not be initially provided to all hospitals, the city hospital being one of those not getting practitioners at the start. Also, the corporate center would be located in another city where the clinic would be established.

There is no doubt that the public would receive a benefit from this

program and that there is a general public policy in this state regarding education and health care. The public benefit should accrue to the city expending the funds, and as indicated by the facts that will not be possible at this time. Nor, as stated in the above cases, does the fact that a private purpose may benefit the public automatically make that purpose public. However, a solution may exist.

Chapter 28E of the Code provides for joint exercise of governmental powers. Section 28E.2 defines a public agency to include a municipality and a private agency to include an individual and any form of business organization authorized by law. Section 28E.4 provides that any public agency may enter into an agreement with a private agency for joint or cooperative action pursuant to that chapter. Thus, if there is a true joint or cooperative action, the city in question could enter into a Chapter 28E agreement with the corporation. However, the city should have a hand in the management of the action and should receive some benefit from it.

July 14, 1976

IOWA CONSUMER CREDIT CODE: Illegal Discrimination, §537.3311, Code of Iowa, 1975. A creditor may not refuse to grant credit solely because a consumer has taken bandruptcy at sometime prior to applying for credit, but a creditor may take into consideration the prior credit history of the consumer, including those factors which might have led the consumer to file for bankruptcy. (Garrett to Karn, Federal Project Director, Iowa Civil Rights Commission, 7-14-76) #76-7-12

Mr. Leo H. Karn, Federal Project Director, Iowa Civil Rights Commission: You have requested an Attorney General's Opinion interpreting a provision of the Iowa Consumer Credit Code. You ask whether it is an act of discrimination within the provisions of §537.3311, Code of Iowa, 1975, for a creditor to refuse credit because the consumer has taken bankruptcy at sometime prior to applying for credit.

Section 537.3311 provides that:

"A creditor shall not refuse to enter into a consumer credit transaction or impose finance charges or other terms or conditions more onerous than those extended by that creditor to consumers of similar economic backgrounds . . . because of the exercise by the consumer of rights pursuant to this chapter or other provisions of law."

As you point out, the federal bankruptcy acts are provisions of law.

When a creditor extends credit, he must obtain a finance charge sufficient to cover his costs and to provide him with a reasonable profit. One of the creditor's main concerns is that the consumer will abide by his contract and repay the loan on schedule. It is never possible to be absolutely certain which consumer will repay a loan as scheduled and which consumer will not. A creditor takes a number of factors into consideration in determining whether or not to extend credit to a particular person and in deciding upon what terms that credit will be extended.

Laws have been passed, however, which set some limits on the kinds of things a creditor can consider in making these decisions.

The Iowa Legislature has by statute determined that there are certain factors which have no reasonable bearing on a consumer's credit worthiness. Among these are such things as age, race, religion, sex, and so forth. However, discrimination based on factors which have a reasonable bearing on a consumer's credit worthiness is not prohibited and in fact that kind of discrimination based on economic considerations is essential. If a creditor extended credit to anyone who applied, not only would he not stay in business very long but an unbearable burden would be placed on his customers who made their payments on time according to their contracts. It is obvious that ultimately those consumers must make up the losses caused by consumers who do not fulfill their agreements. It is therefore in the best interest of not only the creditor, but also of most of his customers that some discretion be employed so long as it is reasonably related to the credit worthiness of the customer.

In answering the specific question you pose, it is helpful to consider a hypothetical situation where two consumers, "A" and "B", apply for credit from the same creditor. We will assume that because of poor management both "A" and "B" have had financial problems and have not been able to meet their obligations as they became due. However, let us assume that Consumer "A" filed for bankruptcy and Consumer "B" decided not to file for bankruptcy and somehow was able to get his debts down to a manageable size. We will assume that except for the filing of the bankruptcy, "A" and "B" have similar credit records.

In looking at "A" and "B", a creditor will find that they have not managed their financial affairs very well. However, it is highly unfair to Consumer "B" to say that since Consumer "A" had filed for bankruptcy that no consideration could be given to his prior problems whereas, Consumer "B's" prior problems could be considered. It would not be reasonable to conclude that Consumer "A" is a better credit risk than Consumer "B" and give him credit while denying credit to Consumer "B" assuming that other things were equal except for the fact that Consumer "A" had taken bankruptcy sometime in the past.

A situation somewhat analogous to this was presented in a New York case in 1970. In that case, the plaintiff had applied to the defendant medical college in late 1968 for admission as a medical student. Her application showed that she had been a voluntary patient in a mental hospital for over a year in 1966 and 1967. Plaintiff had an excellent scholastic record. However, the defendant school denied plaintiff admission because of her mental history, which indicated she might have problems with the pressures of medical school and the demands made upon one in the medical profession.

Section 70(5) of the New York Mental Hygiene Law provided that:

"Notwithstanding any other provision of law to the contrary, no person admitted to a hospital by voluntary or informal admission shall be deprived of any civil right solely by reason of such admission . . . ."

In this case, *Glassman v. New York Medical College*, (1970) 315 N.Y.S.2d 1, 64 Misc.2d 466, the Court stated at 315 N.Y.S.2d, page 3:

"Plaintiff, in effect, contends that the above section of the mental hygiene law prohibits the admission committee from considering her

prior mental illness or past mental history for any purpose whatsoever. This contention is without merit. Such is not the word nor intent of the legislature. This section does not prohibit consideration of the illness which necessitated, or was the reason for, the admission to a mental hospital. It prohibits rejection of an applicant *solely* by reason of such admission."

In 315 N.Y.S.2d, page 4, the Court went on to say:

"To accept plaintiff's interpretation of section 70(5) of the Mental Hygiene Law, would result in discrimination against all applicants who had not been patients in a mental hospital. A high academic rating and prior admission to a mental hospital would mandate automatic admission to the medical college."

This Court's reasoning can be applied to the question under consideration here. While §537.3311 prohibits a creditor from refusing to enter into a consumer credit transaction with a consumer *solely* because that consumer has in the past filed for bankruptcy, there is no prohibition against a creditor considering the past credit history of the consumer including the factors that might have led to the filing of the bankruptcy. In fact, if those factors could not be considered, the ceditor would be forced to discriminate against those who had financial difficulties but who did not take bankruptcy. The law does not require this.

The answer to your question then is that a creditor may not refuse credit solely because a consumer has taken bankruptcy at sometime prior to applying for credit, but a creditor may take into consideration the prior credit history of the consumer, including those factors which might have led the consumer to file for bankruptcy.

July 14, 1976

STATE OFFICERS AND DEPARTMENTS: Board of Psychology — §§147.1, 147.3, 147.4, 154B.1, and 154B.6, Code of Iowa, 1975. The scope of practice of associate psychologists is not defined in Chapter 154B, nor is the Board of Psychology empowered to define said scope by rule. The grandfather clause applies to associate psychologists and has no time limit for licensure. The board may not decide to disregard all predoctoral experience as a qualification for licensure, nor may it require endorsements that are not character references as part of the application as a requirement for licensure. (Blumberg to Menne, Chairperson, Board of Psychology Examiners, 7-14-76) #76-7-13

Mr. John W. Menne, Ph.D., Chairman, Board of Psychology Examiners: We have received your opinion request regarding Chapter 154B, Code of Iowa, 1975, and the authority of the Board of Psychology Examiners. You specifically asked:

"1. As the law does not define the practice of an associate psychologist, is it the responsibility of the Board to define this practice? If so, could we state that an associate psychologist license is granted to one who has a master's degree in psychology or an equivalent from an institution approved by the Board, has passed an examination administered by the Board (154B.6, Paragraphs 2 & 3), and is practicing psychology as defined in 154B.1 except that such practice must be under the supervision of another licensed psychologist with the quality and quantity of such supervision to be further defined by the Board?

"2. Does the 'grandfathering' provision apply to the associate psychologist so that we would be required to grant the associate psychologist

license to anyone who had received the master's degree prior to July 1, 1975?

"3. When will the grandfathering provisions of the law cease to be operational? Can a person wait two, three, or more years and still apply under the grandfathering provision? Or does the last Paragraph of 154B.6, Section 4 mean that those who qualify for 'grandfathering' by July 1, 1975 have until July 1, 1976 to apply?

"4. Does a person holding a certificate from the Board of Examiners of the Iowa Psychological Association on July 1, 1974 have to meet the requirements of Paragraphs 1 and 2 in Section 154B.6?

"5. Paragraphs 1 and 2 of Section 154B.6 mention a degree in psychology 'or its equivalent.' Can we accept an appropriate score on a written examination as evidence that a degree which is not precisely labeled in psychology is the equivalent? Thus, we would be asking applicants to take a written examination not to meet the requirements of Paragraph 3 from which they may be exempted by the grandfathering provision but to provide evidence to us that they meet the requirements of Paragraph 1.

"6. Paragraph 1 of Section 154B.6 allows the Board to accept 'pre-doctoral experience as may be acceptable to the Board.' Can we, as an operational policy of the Board, decide not to consider pre-doctoral experience (it is extremely difficult to evaluate pre-doctoral experience, and we questioned whether it is appropriate to have a person fully licensed to practice independently immediately upon completion of a training program)?

"7. The last phrase in Paragraph 1 of Section 154B.6 states 'at least five years of professional experience, at least two of which shall have been under the supervision of a licensed psychologist as may be acceptable to the Board.' Does 'acceptable to the Board' mean that the quantity and quality of supervision is to be operationally defined by the Board, or does it mean that we have the option of accepting supervision from other than a licensed psychologist? Can or should we accept supervision by other than a licensed psychologist, for example by a school psychologist certified by the Department of Public Instruction? Can we accept this alternative only for those applying under the grandfathering provision and require that the supervision be by a licensed psychologist for future applicants?

"8. As part of the application procedure, we are asking for an endorsement of the professional competency by three peers of the applicant. The Board has decided that two of these peers must be licensed psychologists and the third peer can be from a 'relevant' profession such as psychiatry. Can we deny a license to an applicant otherwise meeting all the requirements of 154B.6 but has received negative endorsements from two or three of the peers? Further, can we refuse a license in the same situation to the applicant who cannot get peers to even fill out an endorsement form?"

Section 154B.1 generally defines "practice of psychology" to be the application of established principles of learning, motivation, thinking, perception, and the like to problems of behavior adjustment, group relations and the like by persons trained by psychology. This can be applied by counseling; measuring and testing such things as skills, aptitudes, and personality; teaching of such subject matter; and, research into human behavior problems. Section 154B.6 contains the requirements for certification. Subsection one requires that a certified psychologist have a doctoral degree in psychology or its equivalent and have one year of pre- or post-doctoral experience; or have a masters degree in psychology or its equivalent and have five years of experience,

two of which shall be under the supervision of a licensed psychologist. An associate psychologist shall have a masters degree in psychology or its equivalent.

Although the practice of psychology is defined, and it can be presumed that a certified psychologist may practice all that is included within §154B.1, nowhere is there any indication of the distinction between a psychologist and associate psychologist. We know that the Legislature intended there to be a distinction since both "psychologist" and "associate Psychologist" are listed in §147.1, and §154B.6. However, the scope of practice of an associate psychologist is not mentioned.

In your first question you ask whether your board may define, by rule, the scope of practice of an associate psychologist. Pursuant to *State v. Boston*, 1939, 226 Iowa 429, 278 N.W. 292, 284 N.W. 143, professionals other than physicians and surgeons may only practice what the legislature specifically permits. Thus, your board is a creation of the legislature and may only do what is specifically provided. There is nothing in your chapter which gives you the authority, either explicit or implied, to define the scope of practice of an associate psychologist. This presents a serious question whether associate psychologists should be licensed. If you license them now, there is nothing limiting their scope of practice. This presents a problem, which can best be termed a catch — 22. For example, if an associate psychologist is licensed, he is not limited in the scope of practice. However, if he practices he runs the risk of practicing psychology without a license since only a certified psychologist may practice psychology. Since there is no definition of associate psychology, he does not know what he may practice. Thus, he may, in effect, not be allowed to practice even though he is certified to practice. The argument is circular, but is the only one available because of the Legislature's failure to define associate psychology. This is not the only problem with Chapter 154B as evidenced in your other questions.

Section 154B.6 also contains a grandfather clause. It provides:

"Any person who within one year after July 1, 1974, meets the requirements specified in subsections 1 and 2 shall receive certification without having passed the examination required in subsection 3. Any person holding a certificate from the board of examiners of the Iowa psychological association on July 1, 1974, who applies for certification before July 1, 1975, shall receive certification."

There are actually two grandfather clauses within the above paragraph: (1) Those who, by July 1, 1975, have met the qualifications of §154B.6(1) or (2) may be certified without having passed an examination; (2) Those who on July 1, 1974, hold a certificate from the Iowa psychological association and make application for certification before July 1, 1975, shall be certified without examination. Since that paragraph makes specific reference to subsection two of that section, it is apparent that the grandfather clause applies to associate psychologists.

There is nothing in Chapter 154B which limits the time period for the applicability of the first grandfather provision. Thus, a person who qualifies as of July 1, 1975, may apply at any time in the future. However, the time period for the second grandfather provision expired

on July 1, 1975. Therefore, any person who was certified by the Iowa psychological association must now take an examination for certification, or attempt to qualify under the first grandfather provision, if an application was not made prior to July 1, 1975. However, a person who holds a certificate from the psychological association and made application prior to July 1, 1975, need not comply with the requirements of §154B.6(1), (2).

In response to your fifth question, you make reference to that part of §154B.6(1) which refers to doctoral and masters degrees in psychology or their equivalents. You wish to determine this equivalency by means of an examination. We believe that this is not a proper way to determine equivalency. Such a method does not afford an applicant or a future applicant any knowledge about what type of degree or curriculum is acceptable for certification. You should, by rule, set forth what those equivalents are.

Your next question is troublesome because the section in question is ambiguous. You wish to know whether your board may adopt a general rule that no pre-doctoral experience will be acceptable for licensure. We think not. The Legislature has decided that pre- or post-doctoral experience shall be a requisite for licensure. The phrase provides: "and shall have completed at least one year of supervised professional experience following the granting of the doctoral degree, or predoctoral experience as may be acceptable to the board." The ambiguity concerns whether "at least one year of supervised professional" modifies "predoctoral experience" as well as post-doctoral experience. Normally referential or qualifying words refer solely to the last antecedent. However, where the sense of the entire act requires that the referntial words apply to succeeding sections those words will not be restricted to their immediate antecedent. 2A D.Sands, Sutherland Statutory Construction §47.33 (4th ed. 1973). It seems logical that if at least one year of supervised professional experience is required for an applicant after the doctoral degree is granted that at least the same would be required for predoctoral experience. We cannot, however, state with any certainty that the Legislature intended this to be the case.

Although this portion is ambiguous and should be redrafted by the Legislature, discretion is given to the board to determine what type of experience is required. Thus, you may require the same experience for both, or a different type or length of experience for either one. We do not believe, however, that you may disqualify all predoctoral experience as a matter of course.

In question seven you ask what is meant by "as may be acceptable by the board" in §154B.6(1) regarding applicants with five years of experience. The phrase in question is set off by a comma. "The presence of a comma separating a modifying clause in a statute from the clause immediately preceding, is an indication that the modifying clause was intended to modify all the preceding clauses and not only the last antecedent one." 73 Am.Jur.2d *Statutes* §231 (1974). In *Service Inv. Co. v. Dorst*, 1939, 232 Wis. 574, 288 N.W. 169, 170, citing to *Greenough v. Phoenix Ins. Co. of Hartford*, 206 Mass. 247, 92 N.E. 447, 448, it was held that " 'punctuation, although often disregarded, may be resorted

to when it tends to throw light upon the meaning of the language'." See also the cumulative supplement to 2A D.Sands, Sutherland Statutory Construction §47.33, citing to *State v. Teare*, 1975, 135 N.J. Super 19, 342 A.2d 556: "Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedent by a comma." Therefore, the phrase in question refers to the five years of experience which includes two years of supervision under a licensed psychologist.

Your board has the discretion of approving or disapproving the experience qualifications of the applicants pursuant to any rules you may adopt on the subject. Such rules may involve the quantity and quality of the supervision. You may not, however, substitute supervision by anyone other than a licensed psychologist for either the applicants for examination or those applying under the grandfather clause. This does present a serious problem. Prior to this time there were no psychologists licensed by this state. Thus, it may be difficult for applicants to comply with this requirement since supervision by a practicing psychologist in this state may not be the same as supervision by a licensed psychologist.

Your last question asks whether you can require endorsements (not character references) as a requirement for licensure, and if so, whether you can deny licensure for no or negative endorsements. There is nothing in Chapter 154B that speaks to such endorsements. Section 147.3 provides, relative to qualification for licensure:

"An applicant for a license to practice a profession under this title shall not be ineligible because of age, citizenship, sex, race, religion, marital status or national origin, although the application form may require citizenship information. Any board may consider the past felony record of an applicant only if the felony conviction relates directly to the practice of . . . psychology . . . for which the applicant requests to be licensed. Character references may be required, but shall not be obtained from licensed members of the profession."

Section 147.4 provides that a license may be refused for any grounds for which a license may be revoked by the district court. We find nothing else in that Chapter referring to anything like an endorsement. Because there is no specific grant of authority to require such endorsements, we do not feel that you can require them for licensure.

In summary, we hold, in response to your several questions:

1. The scope of practice of an associate psychologist is not defined, nor is your board given any authority to so define it. Accordingly, we recommend that no licenses for associate psychologists be issued until the Legislature acts to remedy the omission.

2. The grandfather provision of §154B.6 applies to associate psychologists.

3. The grandfather provision is in two parts. The first, which allows licensure without examination for those who fulfilled the requirements of §154B.6(1), (2) by July 1, 1975, has no time limitation. The other part, which allows licensure without examination for those who were certified by the Iowa psychological association by July 1, 1974, and who applied for licensure by July 1, 1975, expired as of that date.

4. Those certified by the Iowa psychological association by July 1, 1974, who applied for licensure by July 1, 1975, need not meet the requirements of §154B.6(1), (2).

5. You may not give an examination to determine an equivalent education under §154B.6(1), (2). We suggest that you adopt rules detailing the equivalent educations.

6. You may not decide as a matter of course to disallow all predoctoral experience.

7. The phrase "as may be acceptable to the board" as found in §154B.6(1) refers to the total five years of experience which includes two years of supervision by a licensed psychologist, as applied to the holder of a masters degree. You may set forth by rule of what that experience and supervision shall consist. You may not allow said supervision by other than a licensed psychologist.

8. You may not require that endorsements, other than character references, be submitted with the application to determine competency or other qualifications for licensure.

Chapter 154B is not well written and needs substantial change. The Legislature would be wise to make changes in the wording of §154B.6(1), as shown above, relative to pre- and post-doctoral experience. In addition, the Legislature should understand that two years of supervision by a licensed psychologist for holders of masters degrees may be difficult to achieve initially since there have been no psychologists licensed by this state prior to this time. Finally, the Legislature must either define the scope of practice of an associate psychologist or delegate that authority to the board before associate psychologists are to be licensed.

July 15, 1976

CONSTITUTIONAL LAW: Abortion. §701, Code of Iowa, 1973. The State may not impose a blanket provision requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy. (Robinson to Burns, Commissioner, Department of Social Services, 7-15-76) #76-7-14

Mr. Kevin J. Burns, Commissioner, Dept. of Social Services: An Attorney General's Opinion has been requested concerning the following question:

The Iowa district court has given guardianship of a 17-year-old unmarried woman to the State under §232.2(14)(b), Code of Iowa. She is now pregnant, within the first 12 weeks, and desires to terminate her pregnancy by a medical abortion. May the State withhold consent for an abortion and what are our duties and responsibilities in this situation?

The State's consent to a medically approved abortion is not required.

Iowa's abortion statute, Chapter 701, Code of Iowa, 1973, which prohibited abortions except to save the life of the mother, was held unconstitutional by a three-judge United States District Court. *Doe v. Turner*, 361 F. Supp. 1288 (S.D. Iowa 1973), appeal to Circuit Court denied, 488 F.2d 1134. The district court based its decision on *Roe v. Wade*, 410

U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973).

The facts that you present are governed by opinions issued July 1, 1976, by the U.S. Supreme Court in *Planned Parenthood of Central Missouri v. Danforth*, U.S. , 44 L.W. 5197, and *Bellotti v. Baird*, U.S. , 44 L.W. 5221. In *Planned Parenthood*, supra, Mr. Justice Blackmun started his opinion by acknowledging that "[t]his case is a logical and anticipated corollary to" the prior abortion cases. 44 L.W. at 5198. Here the Court speaks directly to the issue of the woman's consent [44 L.W. at 5201], the spouse's consent [44 L.W. at 5201] and parental consent [44 L.W. at 5203], among other issues presented within the context of a Missouri statute.

Prior to submitting to an abortion under the Missouri Act, the woman must certify in writing her consent to the procedure and that her consent is informed and freely given and is not the result of coercion. The Court held this "is not in itself an unconstitutional requirement." [44 L.W. 5201] It should be noted that Iowa does not have a similar statute nor even formal departmental rules or policies on this subject matter. Nevertheless, it is our opinion that the written, certified consent used by the Department of Social Services heretofore would withstand a constitutional challenge. Care should be taken, however, to insure that this consent procedure does not become a device to thwart the free will of the woman.

Under the Missouri Act the written consent of the parent or person *in loco parentis* was required where the woman is unmarried and under the age of 18 years. This again has application to the facts you presented as the Department stands as a person *in loco parentis* by virtue of the guardianship given. At pp. 5203, 5204 of 44 L.W. we find:

"We agree with appellants and with the courts whose decisions have just been cited that the State may not impose a blanket provision, such as §3(4), requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy. Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. . . .

"We emphasize that our holding that §3(4) is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. See *Bellotti v. Baird*, post. The fault with §3(4) is that it imposes a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction. It violates the strictures of *Roe* and *Doe*."

Bellotti v. Baird, supra, involves a Massachusetts' statute which governed the type of consent, including parental consent, required before

an abortion may be performed on an unmarried woman under age 18. Action was brought claiming the statute unconstitutional. The Supreme Court held that the District Court should have abstained from deciding the constitutional issue and should have certified to the Massachusetts Supreme Judicial Court appropriate questions concerning the meaning of the statute and the procedure it imposes. At pp. 5225, 5226 of 44 L.W. we find:

"In *Planned Parenthood of Missouri v. Danforth, ante,* we today struck down a statute that created a parental veto. (Slip op., at .) At the same time, however, we held that a requirement of written consent on the part of a pregnant adult is not unconstitutional unless it unduly burdens the right to seek an abortion. In this case, we are concerned with a statute directed towards minors, as to whom there are unquestionably greater risks of inability to give an informed consent. Without holding that a requirement of a court hearing would not unduly burden the rgihts of a mature adult, cf. *Doe v. Rampton,* 366 F. Supp. 189 (Utah 1973), we think it clear that in the instant case adoption of appellants' interpretation would 'at least materially change the nature of the problem' that appellants claim is presented. *Harrington v. NAACP,* 360 U.S. at 177.

"Whether the Supreme Judicial Court will so interpret the statute, or whether it will interpret the statute to require consideration of factors not mentioned above, impose burdens more serious than those suggested, or create some unanticipated interference with the doctor-patient relationship, we cannot now determine. Nor need we determine what factors are impermissible or at what point review of consent and good cause in the case of a minor becomes unduly burdensome. It is sufficient that the statute is susceptible to the interpretation offered by appellants, and we so find, and that such an interpretation would avoid or substantially modify the federal constitutional challenge to the statute, as it clearly would. Indeed, in the absence of an authoritative construction, it is impossible to define precisely the constitutional question presented.

"Appellees also raise, however, a claim of impermissible distinction between the consent procedures applicable to minors in the area of abortion, and the consent required in regard to other medical procedures. This issue has come to the fore through the advent of a Massachusetts statute, enacted subsequent to the decision of the District Court, dealing with consent by minors to medical procedures other than abortion and sterilization. As we hold today in *Planned Parenthood,* however, not all distinction between abortion and other procedures is forbidden. *Ante,* at . The constitutionality of such distinction will depend upon its degree and the justification for it. The constitutional issue cannot now be defined, however, for the degree of distinction between the consent procedure for abortions and the consent procedures for other medical procedures cannot be established until the nature of the consent required for abortions is established. In these circumstances, the federal court should stay its hand to the same extent as in a challenge directly to the burdens created by the statute."

Again Iowa does not have a similar statute nor departmental rules or policies on this subject matter. It is clear, however, that the normal steps may be taken to insure that the minor's consent is an informed consent. Neither her natural parent nor the State acting *in loco parentis* may veto the decision of the physician and the patient to terminate the patient's pregnancy. That is, the parents may not substitute their decision for that of their child. Once her informed consent is given, that is sufficient in the first 12 weeks of pregnancy to terminate.

July 19, 1976

STATE OFFICERS AND DEPARTMENTS: Transportation, Department of; Railroad Division, Railroad Assistance Program. §307.26, Code of Iowa, 1975; §§2 and 90, H.F. 1480, 66th G.A.; §501(1) and 502(b), P.L. 94-210, Laws of the 94th Congress 2nd Session. Department of Transportation not authorized by statutes cited to acquire ownership interest in railroad branch lines in Iowa. Statutory Construction §4.2, 1975 Code of Iowa. (Tangeman to Krause, State Representative, 7-19-76) #76-7-15

The Honorable Robert A. Krause, State Representative: Reference is made to your letter of July 1, 1976, in which you request an opinion of the Attorney General. Your inquiry is quoted herewith.

"The General Assembly recently passed H.F. 1480, which, among other things broadened the language of the railroad assistance fund so that monies in that fund may be used for the 'restoration, conservation, and improvement of railroad branch lines' (H.F. 1480, §90).

"This language is considerably broader than the original language as it was written in Acts of the Sixty-sixth General Assembly, 1975 session, chapter two hundred thirty-one (231), section one (1).

"My question is this: Can the department of transportation under the broadened language, enter into rail assistance agreements whereby a portion of the agreement may include transferring a portion or all of the ownership of a railroad branchline to the state of Iowa?"

The basic question is does the statute, §1, Chapter 231, Acts of the 66th G.A. as amended by §90, H.F. 1480 66th G.A. authorize the Iowa Department of Transportation to acquire for the State of Iowa a portion or all of the ownership of a railroad branchline in the State of Iowa.

The word upgrading is of a semi-vernacular character. An abridged dictionary reference defines upgrade as an upward incline or direction. Webster's unabridged dictionary is only slightly more comprehensive. It defines upgrade as an upward grade or slope as of a road hence an ascent toward a better state. It is the latter definition that was obviously intended to apply to the railroad branch line program. However the terms "restoration, conservation and improvement" add little to the former definition. "Conservation" is defined as "to preserve in its existing state from change or destruction, maintain the existing condition." *Minn. Research Group v. Butz*, 1973, 385 F. Supp. 584. "Restoration" is defined as "to bring back to a former, original, normal or unimpaired condition." 37A Words and Phrases, p. 69. "Improvement" is defined as "changes in the condition of property by which its value is increased." *Builder Land Co. v. Martens*, 1963, 122 NW2d 189.

As between the three new substitute words and the one word being replaced, restoration and improvement seem to be quite consistent with the meaning of upgrading. Conservation, although referring to a holding action, implies the same as upgrading because conservation requires patch up work from time to time which is actually an improvement as to the part worked on. In fact there seems to be little change in the meaning of the statute despite the different words being used.

Neither the old nor the new words imply any intention of the legislature to acquire ownership in railroads. The general thrust of the

statutes is toward giving *"assistance"* to the railroads to improve a branch line. Purchase of the branch line would not be assisting in restoration, conservation or improvement but would totally remove the railroad from the matter rather than assisting it.

In interpreting the statute the following citations are appropriate to our consideration.

Rule 344(f)13 of the Iowa Rules of Civil Procedure provides:

"In construing statutes the courts search for the legislative intent as shown by what the legislature said, rather than what it should or might have said."

In *Everding v. Board of Education*, 1956, 76 NW2d 205 it was stated:

"It is fundamental that in arriving at the correct interpretation of any particular provisions of the act and the intention of the legislature as expressed therein, courts should consider the entire act and, insofar as possible, interpret its various provisions in the light of their relation to the whole."

Section 4.1(2), 1975 Code of Iowa (Construction of statutes) provides:

"Words and Phrases. Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning."

In view of the rules of statutory construction stated above and the definitions of the several new words added to the statute, it seems clear that the new language was not intended to alter the effect or purpose of the railroad assistance fund but was intended to clarify the method of application of the fund. It is my opinion that the Department of Transportation has no authority under the amendment to enter into an agreement that would result in the State acquiring ownership of all or a portion of a railroad branch line. Ownership is not within the meaning of the words which have been added to the statute. If the occasion should arise, it will be a simple matter for the legislature to use appropriate words to indicate to the Department of Transportation, in clear and unequivocal terms, the legislative intention that the Department shall have authority to acquire ownership.

It should further be observed that another section of said H.F. 1480, i.e., §2 amends §307.26, 1975 Code of Iowa, describing the duties and responsibilities of the administrator of the Railroad Division of the Department of Transportation by adding a new subsection as follows:

"Enter the role of 'applicant' pursuant to the Railroad Revitalization and Regulatory Reform Act of 1976, United States Public Law Ninety-four dash seven hundred eighty-one (94-781), and take such actions as are necessary to accomplish this role."

(Note the Railroad Revitalization and Regulatory Reform Act of 1976 (hereafter called R.R.R.A.) is U.S. Public Law 94-210 rather than 94-781.)

Applicant is defined in Title V of the said act as follows:

" 'Applicant' means any railroad, or other person (including a govern-

ment entity) which submits an application to the Secretary for the guarantee of an obligation under which it is an obligor or for a commitment to guarantee such an obligation."

"Government entity" includes the State of Iowa Department of Transportation Railroad Division referred to in the said amendment to §307.26, 1975 Code of Iowa.

An "applicant" however does not have the right to acquire a railroad. §502 of the R.R.R.A. provides:

"(b) Purpose. The purpose of the fund is to provide capital which is necessary to furnish financial assistance to railroads to the extend [sic] of appropriated funds, for facilities maintenance, rehabilitation, improvements, and acquisitions, and such other financial needs as the Secretary approves, in accordance with this title."

That provision clearly indicates that the fund is to be used to assist the *railroads* in performing the several functions stated there including "acquisitions" but there is no authorization for an "applicant" (State of Iowa) to do so.

July 22, 1976

SCHOOLS: Supplemental Aid. §442.13, Code of Iowa, 1975. School budget review committee is authorized under the general provisions of §442.13(6) to make a grant in aid to a school district showing "unusual circumstances creating unusual need for additional funds" occasioned by an increase in the number of school busses needed to transport eligible pupils. (Nolan to Benton, Chairman, School Budget Review Committee, 7-22-76) #76-7-16

Robert D. Benton, Ed.D., Chairman, School Budget Review Committee, Department of Public Instruction: This will acknowledge receipt of your letter requesting an opinion on the meaning of §442.13, subsection 6, paragraph 1, Code of Iowa, 1975, as amended. Your letter states:

"Some of Iowa's school districts with heavy nonpublic school populations transport large numbers of children to nonpublic schools. They must, therefore, operate and maintain many school buses. It is necessary that such buses be serviced on a regular basis and that repairs are made when necessary. This necessitates a physical facility which can accommodate such things as greasing, oil changing, tire change and repair, and general automotive maintenance and repair.

"Our question is:

"May the School Budget Review Committee grant supplemental aid to a school district, under the provisions of Section 442.13(6), to erect a school bus facility which is to be used for the servicing and maintenance of school buses used to furnish transportation to nonpublic school pupils?"

The provisions of §442.13(6)(1) authorize the School Budget Review Committee to grant supplemental aid to a district from any funds appropriated to the Department of Public Instruction for the use of the School Budget Review Committee for "transportation equipment needs which become necessary because of the furnishing of transportation to nonpublic school pupils under Chapter 285". It is the opinion of this office that the language of this subsection refers to the acquisition of equipment and does not authorize supplemental grant for the construction of a building in which to service the increased fleet of school buses. The

provisions of subsection (6)(1) are not applicable in this instance because under rules of statutory construction set out in §4.1(2), Code of Iowa, 1975, words are to be construed according to the context and the approved usage of the language. The term "equipment" has not been specifically defined in the appropriation. Therefore, we must use the common definition of the word "equipment" which is articles or fixed assets other than land or buildings. See Webster's 7th New Collegiate Dictionary.

Although the provisions of §442.13(6)(1) do not apply, the possibility of a grant-in-aid is not necessarily limited to such subsection as the general provisions of §442.13(6) state that a grant-in-aid may be made to a school district which "has unusual circumstances, creating an unusual need for additional funds, including but not limited to the following circumstances . . .". Accordingly, if the school district can make an appropriate showing of "unusual circumstances, creating an unusual need for additional funds", the grant may be made.

July 22, 1976

SCHOOLS: Schoolhouse Fund. S.F. 74, Acts, 66th G.A., 1976 Session. Schoolhouse funds levied prior to July 1, 1976 and remaining unincumbered may be utilized for the improvement of purchased sites pursuant to S.F. 74, Acts, 66th G.A., 1976 Session. (Nolan to Redmond, State Senator, 7-22-76) #76-7-17

The Honorable James M. Redmond, State Senator: You requested an opinion which you state may affect school district budgeting for the coming fiscal year. According to your letter, the following is to be considered:

"Senate File 74 is an act relating to the use of tax money for purchase and improvement of schoolhouse sites. Senate File 74 expands section 297.5 of the Code so that tax money collected under that section may be used to improve as well as to purchase school house sites.

"The question which is posed is whether under the provisions of Senate File 74 as passed by the Second Session of the Sixty-Sixth General Assembly a school district may use funds collected during the fiscal year July 1, 1976 through June 30, 1977, for the additional expanded purposes set out in detail in Senate File 74."

The pertinent language of Senate File 74 is as follows:

"297.5 TAX. The directors in any high school district maintaining a program kindergarten through grade twelve may, by February first of each year certify an amount not exceeding twenty-seven cents per thousand dollars of assessed value to the board of supervisors, who shall levy the amount so certified, and the tax so levied shall be placed in the schoolhouse fund and used only for the purchase and improvement of sites in and for said school district as specified by the directors.

"For the purpose of this section, 'improvement of sites' includes: grading, landscaping, seeding and planting of shrubs and trees; constructing new sidewalks, roadways, retaining walls, sewers and storm drains, and installing hydrants; original surfacing and soil treatment of athletic fields and tennis courts; furnishing and installing for the first time, flagpoles, gateways, fences and underground storage tanks which are not parts of building service systems; demolition work; and special assessments against the school district for capital improvements such as streets, curbs and drains.

"For the purpose of this section, 'purchase of sites' includes legal costs relating to the site acquisition, costs of survey of the sites, costs of relocating assistance under state and federal law, and other costs incidental to the site acquisition.

"Sec. 2. Notwithstanding the provisions of section two hundred ninety-one point thirteen (291.13) of the Code, unencumbered funds collected from the levy authorized in section two hundred ninety-seven point five (297.5) of the Code prior to July 1, 1976 may be expended for the purposes listed in section one (1) of this Act."

The provisions of §2, *supra*, specifically authorize the use of unencumbered funds collected under a tax levy made prior to the effective date of this act for the expanded purposes of improvement of purchased sites. Accordingly, your question is answered affirmatively.

July 23, 1976

ELECTIONS: Nominations by Petition, Presidential Electors. §§43.80, 45.1, 54.1, 54.2, 54.7, Code of Iowa, 1975. A non-party political organization or group of petitioners may nominate a full slate of presidential electors by a nominating petition signed by 1,000 eligible electors of the state. A contrary opinion, OAG Haesemeyer to Synhorst, May 28, 1976, is withdrawn. (Haesemeyer to Synhorst, Secretary of State, 7-23-76) #76-7-18

The Honorable Melvin D. Synhorst, Secretary of State: On May 28, 1976, we furnished you with an opinion of the Attorney General regarding the selection of candidates for presidential elector by non-party political organizations under the provisions of Chapters 44 and 45, Code of Iowa, 1975. In that opinion, we concluded that where presidential electors are nominated by petition pursuant to §45.1, the two electors at large could be nominated by a petition signed by 1,000 eligible electors of the state but the six electors from the state's six congressional districts could only be nominated by petitions signed by eligible electors residing in the respective districts and equal in number to at least 2% of the total vote received in the district by all candidates for president of the United States at the last preceding general election. We arrived at this conclusion because we determined that the presidential electors from the congressional districts were not state officers but were instead district officers.

Since that opinion was issued, we have had occasion to re-examine this question and now conclude that the opinion was in error, that all presidential electors, including those nominated from the congressional districts, are state officers and that therefore, under §45.1, a full slate of presidential electors may be nominated by a petition signed by 1,000 eligible electors of the state. Section 45.1 provides:

"Nomination by petition. Nominations for candidates for state offices may be made by nomination papers signed by not less than 1,000 eligible electors of the state; for candidates for offices filled by the voters of a county, district or other division by such papers signed by eligible electors residing in the county, district or division equal in number to at least two percent of the total vote received by all candidates for president of the United States or governor, as the case may be, at the last preceding general election in such county, district or division; and for township, city or ward, by such papers signed by not less than 25 eligible electors, residents of such township, city or ward."

Sections 54.1 and 54.2, provide respectively:

"54.1. Time of election—qualifications. At the general election in the years of the presidential election, or at such other times as the Congress of the United States may direct, there shall be elected *by the voters of the state* one person from each congressional district into which the state is divided, and two from the state at large, as electors of president and vice-president, no one of whom shall be a person holding the office of senator or representative in Congress, or any office of trust or profit under the United States." (Emphasis added)

"54.2. How elected. A vote for the candidates of any political party, or group of petitioners, for president and vice-president of the United States, shall be conclusively deemed to be a vote for each candidate nominated in each district and in the state at large by said party, or group of petitioners, for presidential electors and shall be so counted and recorded for such electors."

It is clear from the foregoing that although six of the presidential electors are "from each congressional district", they are elected by all the voters of the state and not just the voters of the various congressional districts. Such statewide election is consistent with the concept that presidential electors are state officers. It is worth noting too that under §43.80 where nominations are to be made by political parties, "vacancies in nominations of presidential electors shall be filled by the party central committee for the state." If presidential electors from the congressional districts were district officers rather than state officers, it is reasonable to assume that vacancies in such offices would be filled in the same manner as vacancies in nominations for the office of United States Representative, i.e., by congressional district conventions under the provisions of §43.78. Thus, §43.80 must be viewed as a legislative recognition that presidential electors are state officers rather than district officers. Beyond this, there are a number of cases from other jurisdictions holding that presidential electors are state officers. See 40 Words and Phrases, *State Officer*, pp. 93 and 94.

Presidential electors have always been elected by the voters of the state; their offices have never been filled by the voters of a county, district, or division. This has been the case since the first Iowa Code (1851) including the whole period when presidential electors were directly elected by the populace rather than through votes cast for the presidential ticket. Inasmuch as all nominee's names had to appear on the ballot, a voter could vote for any candidate from any district for presidential elector. Districts only needed to be represented by having the name of a candidate residing from each district and the number of that district appear on the official ballot. Section 302, Code of Iowa, 1851, states as follows:

"The names of all the electors to be chosen shall be written on each ballot, and each ballot shall contain the name of at least one inhabitant of each congressional district into which the state may be divided, and against the name of each person shall be designed the number of the congressional district to which he belongs."

During this period, and to date, the returns were ultimately canvassed at the state level. Sections 272 and 302, Code of Iowa, 1851. Since only those persons having the greatest number of votes were declared to be elected (§307, Code of Iowa, 1851), there was no requirement that a candidate from each of the respective districts be elected. Moreover, early provision for filling vacancies also suggests that presidential elec-

tors were, from the earliest times, likened to state-wide officers. Section 309, Code of Iowa, 1851, states in part:

". . . in case of the absence of any elector chosen, or if the proper number of electors shall for any cause be deficient those (presidential electors) present shall forthwith elect from the *citizens of the state* so many persons as will supply the deficiency." (Emphasis added)

In sum, the early history of the Iowa laws relating to presidential electors supports the argument that presidential electors are statewide officers—the candidates' names appeared on the ballot statewide no matter in which district they resided; the voters of the entire state voted for them; their vote tallies were subject to official canvass at the state level; those elected to be Iowa's state presidential electors could come from one or all of the districts; and any vacancies, for whatever reason, were to be filled from the citizens of the state without regard to their residences.

Unfortunately, the Code revision of 1897 initiated a controversy over presidential electors the reverberations of which are still felt notwithstanding that the provisions giving rise to the controversy were repealed and rewritten with the abandonment of direct election of presidential electors in 1919. The 1897 revision required, for the first time, that a presidential elector "shall be elected . . . from each congressional district . . ." Section 1173, Code of Iowa, 1897. Instead of one candidate from each district required merely to appear on the ballot (§302, Code of Iowa, 1851) while the election was decided solely on the basis of who garnered the most votes, those elected after 1897 not only had to be among the top vote-getters of the state, but also had to win their respective districts (unless elected at large). For the first time, presidential electors took on some "district officer" attributes and in a manner of speaking might have been actually elected on a district by district basis because of an ambiguity left in the revision except for an amendment of the law in 1900. Prior to the next scheduled presidential election, the legislature amended the Code of 1897, clarifying its intent by qualifying the word "elected" with the addition of the words "by the electors of the state." §1, Chapter 38, 28th G.A. (1900). Although the amendment clearly was an attempt to conform the revison of 1897 to previous Iowa practice, it appears that presidential electors continued to be subject to residential requirements whether or not another elector received a greater number of votes.

As an indication of the continued confusion, an opinion of the Attorney General, (1912 OAG, p. 775) attempted to clarify the status of presidential electors. The opinion bifurcated each slate of electors into two classes: those electors representing the state at large (state officers) and those representing congressional districts (district officers). It should be noted that the 1912 language creating classes of offices for purposes of nomination by petition was significantly different from its modern counterpart. Instead of "offices filled by the voters of a county, district or other division" §45.1, Code of Iowa, 1975, the applicable provision in 1912 merely made general reference to officers "for county, district or other division not less than a county" (§1100, Code of Iowa, 1897). In addition, the scheme in 1912 for nominating presidential electors by petition contemplated significantly fewer signatures for "district"

candidates than for the at large ones. If the bifurcated system survives to date, each "district" nominee would require approximately 3,000 signatures compared to 1,000 needed for at large candidates. These circumstances suggest that the addition of the specific language "filled by the voters" in §45.1 is purposeful and would allow presidential electors to be nominated with an amount of effort not inconsistent with the effort required by the former scheme.

Even more indicative of the legislative intent are the repeal and extensive renovation of the Iowa election laws in 1919. The General Assembly not only abolished the direct election of presidential electors (§21, Chapter 86, 38th G.A. (1919)), but also initiated the direct election of United State Senators (§9, Chapter 86, 38th G.A. (1919)) and provided for a separate ballot for women for presidential elections (Chapter 353, 38th G.A. (1919)). Significantly, the names of the nominees for presidential elector were specifically excluded from appearing on the ballot (§2, Chapter 86, 38th G.A. (1919)) and their election was secured by the popular vote cast for the respective presidential ticket nominated by the same party or group of petitioners. (§6, Chapter 86, 38th G.A. (1919)). Of even greater import is the fact that this latter section was completely new to the Code in 1919 and the author of the 1912 opinion of the Attorney General, supra, did not have its benefit in classifying presidential electors for purposes of nominating by petition. Section 54.2 of the current code is even more definitive than its 1919 precursor. Where the 1919 enactment only provided that candidates for presidential electors "shall receive the combined vote" polled by the respective presidential candidates, the modern code states that votes for a given presidential ticket are "conclusively deemed" to be cast for the respective slate of presidential electors. Consequently, since 1919 all winning presidential electors receive an identical number of votes reflecting the number polled by the victorious presidential candidate. Moreover, no presidential elector can be elected singly—the entire slate is either elected or defeated. Therefore, no individual candidate for presidential elector runs against any other single candidate.

What results is a statewide *de facto* direct election of president and vice-president. A voter at the polls is unaware of the local beneficiaries of his ballot; he knows neither the names nor the residences of the candidates for presidential elector. Nor does he probably care. When voters directly elected presidential electors and their names appeared on the ballot, a district characterization played some role. Now that candidates for presidential elector are anonymous and elected only derivatively, such a characterization loses any function. The relevant aspects of the office of presidential elector that survive emphasize "state office" attributes. Presidential electors are elected by the voters of th state as a whole. Although speaking in the context of political party nominations, an opinion of the Attorney General emphasized this aspect in 1928 when it said presidential electors are "in effect in the same category and position as state officers." 1928 OAG, p. 411. The law does not make any district by district distinctions in tallying vote. Presidential electors meet and perform their duties at the state level. Section 54.7, Code of Iowa, 1975; United States Constitution, Article II, §1, ¶3. Any vacancies are filled from the citizens of the state. These circumstances attest to

the appropriateness of characterizing all eight of the presidential electors as state officers. Indeed such a construction is more reasonable than one which characterizes the office of presidential elector as an "office filled by the voters of a county, district or other division" when, in fact, it is filled by the electors of the state as a whole.

By reason of the foregoing, it is our opinion that all presidential electors are state officers, and that nominations by petition for such offices may be made by nomination papers signed by not less than 1,000 eligible electors of the state. Our opinion of May 28, 1976, to the extent that it is contrary to the foregoing, is withdrawn.

The question of whether a nominating petition containing only 1,000 signatures would suffice to field a full slate of presidential electors or only the two at large electors is probably academic anyway since if only two were nominated and then elected, they would have a duty to elect additional electors to the full number to which the state is entitled. The Constitution of the United States, Article II, §1, ¶2, states:

"Each state shall appoint, in such a manner as the Legislature thereof may direct, a Number of Electors, equal to the whole number of Senators and Representatives to which the state may be entitled in Congress."

Thus, the Constitution of the United States imposes a duty on the State of Iowa to appoint the full number of electors to which it is entitled.

If §45.1 is construed in such a manner that petitioners to nominate candidates for presidential elector could only nominate a partial slate of presidential electors, either by fulfilling only the requirements for nominating presidential electors at large or by failing to get sufficient signatures to nominate a candidate for presidential elector in every congressional district, should their candidates for president and vice-president receive a plurality of the votes cast by the voters of the State of Iowa for those offices, the number of presidential electors elected would be less than the number required to be appointed by the Constitution. In such an event, it would be necessary to select additional presidential electors.

Theoretically, and absent contrary statutory provisions, if presidential electors are district officers, the additional number of electors could conceivably be elected by choosing among the candidates for presidential electors nominated in districts where the candidates for president and vice-president who receive the plurality of votes cast by the voters of the state for those offices had been unable to nominate presidential electors, (presumably, those candidates for presidential elector of the candidates for president and vice-president who received the second largest number of votes cast for those offices by the voters of the state). Thus, the possibility is created that the pair of candidates for president and vice-president who received a plurality or even majority at the polls could, because of a failure to place any candidates for presidential elector in nomination in the congressional districts, lose the electoral vote of the State of Iowa, winning only the two at large electors while losing the remaining six to another presidential ticket.

Fortunately, Iowa law provides a means of averting this kind of outcome. If the number of presidential electors for a pair of candidates

for president and vice-president who receive a plurality of the votes cast for those offices is less than the number of presidential electors to which the State of Iowa is entitled and required to appoint by the Constitution of the United States, those presidential electors chosen may select from the cititzens of the state substitute electors to make up the number of electors required by law. Section 54.7 provides:

"The presidential electors shall meet in the capital, at the seat of government on the first Monday after the second Wednesday in December next following their election. If, at the time of such meeting, any elector for any cause is absent, those present shall at once proceed to elect, from the citizens of the state, a substitute elector or electors, and certify the choice so made to the governor, and he shall certify the person or persons so selected to be notified thereof."

It is highly significant that the language "for any cause is absent" is not qualified. The intent of the legislature, not providing for inquiry into the circumstances of an elector's absence, must have been to prevent interference by persons who would seek to delay or obstruct the election of a president and vice-president by whatever means.

The language "for any cause is absent" is a short statement of the earlier language "in case of the absence of any elector chosen, or if the proper number of electors shall for any cause deficient" which clearly emphasized the legislature's intent that the meeting of the electors not be delayed. See Iowa Code §309, Code of Iowa, 1851, §1, Chapter 50, 22nd G.A. (1888).

Thus, it appears that if petitioners to nominate candidates for presidential elector were, by a bifurcated construction of the procedure for nominating presidential electors, precluded from nominating presidential electors in every congressional district and only allowed to nominate "as state officers" the two electors at large, those two presidential electors at large would be authorized by law to select substitute electors from the citizens of the state to make up the whole number of electors required to be appointed by the state by the United States Constitution (should their candidates for president and vice-president receive a plurality of the votes cast by the voters of the state for those offices.)

Consequently, for candidates receiving a plurality of the votes for president and vice-president, it is immaterial, as a matter of law, to the outcome of the selection of electors for president and vice-president, whether the petitioners to nominate electors nominate only two electors at large (because of a bifurcated construction requiring a much larger number of signatures to nominate an entire slate of electors) or whether an entire slate is placed in nomination.

July 23, 1976

CONSTITUTIONAL LAW: Residency Requirements; Iowa Veterans Home. Iowa Code §219.2 (1975), and Ch. 137, §2, Acts of the 66th G.A., 1st Session, *amending* Iowa Code §219.5 (1975). The durational residency requirements for admission to the Iowa Veterans Home are unconstitutional since, without a compelling state interest, they substantially penalize an individual exercising the fundamental right to travel by denying that person a significant governmental benefit. (Foudree to Burns, Commissioner, Iowa Department of Social Services, 7-23-76) #76-7-19

Mr. Kevin J. Burns, Commissioner, Department of Social Services: In response to your request for an Attorney General's Opinion regarding the constitutionality of the residency requirements for admission to the Iowa Veterans Home, Iowa law provides:

"All persons named in section 219.1 who do not have sufficient means for their own support, or who are disabled by disease, wounds, old age or otherwise, or who are unable to earn a livelihood, and who have been residents and cititzens of the state of Iowa for the three years immediately preceding the date of the application and who are residents of the state of Iowa at the time of the application, may be admitted . . ." Iowa Code §219.2 (1975).

"If any deceased veteran, who would be entitled to admission to the home if the deceased veteran were living, has left a surviving spouse, such spouse shall be entitled to admission to the home with the same rights, privileges and benefits as though the veteran were living and a member of the home, provided, however, that such spouse has been married to said veteran for at least one year immediately prior to the veteran's death, and has reached the age of fifty years or is found by the commandant to be totally and permanently disabled and the spouse does not have sufficient means or does not possess sufficient funds for support and maintenance, and provided further that the surviving spouse has been for the three years preceding the date of application, a resident of the state of Iowa, and has not married at any time since the death of the veteran spouse except to a member of the home." Ch. 137, §2, Acts of the 66th G.A., 1st Session, *amending* Iowa Code §219.5 (1975).

It is the constitutionality of the three year residency requirement to which the opinion speaks. We are of the opinion that, under recent decisions by federal courts including the Supreme Court, the durational residency requirements in Chapter 219 are unconstitutional.

State statutes containing durational residency requirements have usually been struck down whenever a fundamental right has been involved and states have failed to demonstrate a compelling governmental interest for enacting such requirements. Under the traditional equal protection standard a statutory classification must be reasonable and related to a legitimate state interest. But in *Shapiro v. Thompson*, 394 U.S. 618 (1969) the Supreme Court set forth a more stringent standard to be applied in determining the validity of statutory classifications including classification on the basis of residency: if a fundamental right is involved, a state must then demonstrate a classification is necessary to promote a *compelling* governmental interest. Examples are where durational residency requirements operate to penalize an individual's ability to exercise a fundamental right such as the right to travel, *Shapiro*, to vote, *Dunn v. Blumstein*, 405 U.S. 330 (1972), and to receive medical care, *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). However, it also is necessary to ask the degree to which the residency requirement penalizes the constitutional right. Not all apparent penalties on interstate travel implicate the constitutionally guaranteed right to travel, and the extent to which the right to travel is penalized determines whether the compelling state interest standard will be applied. *Shenfield v. Prather*, 387 F. Supp. 676, 684-85 (N.D. Miss. 1974). Further, as the court in *Shenfield* noted, the significance of the governmental benefit denied, such as "a fundamental political right", *Dunn*, or "necessities of life", *Shapiro*, is important in measuring the extent an individual is

penalized in exercising a fundamental right. Regarding this point, the Supreme Court has stated: "[G]overnmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 259 (1974). Thus, the general rule which has developed from numerous federal decisions is that durational residency requirements will be upheld in cases where no fundamental right has been penalized and a legitimate state interest exists; but where a fundamental right is present and an individual is either significantly penalized in exercising it or no compelling state interest can be demonstrated, the residency requirement is unconstitutional.

Two decisions of Iowa origin are pertinent; both follow the guidelines above. In *Sosna v. Iowa*, 95 S. Ct. 553 (1975), the Supreme Court upheld an Iowa one-year residency requirement for divorce because the state had a legitimate interest in requiring those who seek a divorce from its courts to be genuinely attached to the state ("a nexus between person and place") and in insulating divorce decrees from the likelihood of collateral attack. No fundamental constitutional right was found. However, in *Sheard v. Department of Social Welfare*, 310 F. Supp. 544 (N.D. Iowa 1969) the court held that an Iowa statute requiring a recipient of old-age assistance to be a resident of Iowa for at least nine years was invalid since it infringed the constitutional right to travel.

To conclude, the key test of a durational residency requirement's validity when a fundamental right is involved is whether it substantially penalizes an individual exercising that right. We believe that Iowa law, by requiring three years of residency in the state prior to admission to the Iowa Veterans Home, places an unacceptable penalty on the fundamental right of a citizen to travel by denying him a significant governmental benefit to which he would otherwise be entitled had he not traveled. Surely the type of governmental benefit provided here falls within the category of "necessary to basic sustenance" for those envisioned by the Iowa law who do not have a sufficient means of support, are disabled, or have no way of earning a livelihood. We do not see any compelling state interest in exacting such a residency requirement. We therefore are of the opinion the Iowa law is unconstitutional.

This is not to say, however, that Iowa cannot constitutionally require a reasonable "waiting period" for the purpose of verifying that a person is in fact a resident. *See Hawk v. Fenner*, 396 F. Supp. 1, 6-7 (D. S.D. 1975). Iowa may still require that an applicant be a bona fide resident before being admitted to the Veterans Home.

July 27, 1976

SCHOOLS: Bussing. §285.1(3), Code of Iowa, 1975, as amended by House File 628, Acts, 66th G.A. (1976). Under House File 628, school bus routes may be extended to transport students to designated schools of attendance in contiguous school districts. Where parents transport students to designated schools of attendance outside the school district of residence the contiguous districts limitation does not apply and they may be reimbursed in accordance with §285.1(3), Code of Iowa, 1975, as amended by House File 628. (Nolan to Benton, State Superintendent of Public Instruction, 7-27-76) #76-7-20

The Honorable Robert D. Benton, State Superintendent, Department of Public Instruction: This is written in response to your question about House File 628, enacted by the 66th General Assembly, 1976 Session, and particularly sections 1 and 4 thereof, set out below, which became effective upon publication on May 30th, 1976. The sections in question provide as follows:

"Section 1. Section two hundred eighty-five point one (285.1), subsection three (3), Code 1975, is amended to read as follows:

"3. In any district where transportation by school bus is impracticable or where school bus service is not available, the board may require the parents or guardian to transport their children to the school designated for attendance. The parent or guardian shall be reimbursed for such transportation service for elementary pupils by the board of resident district for the distance one way from the pupil's residence to the school designated for attendance at the rate of fifty-six cents per mile per day irrespective of number of children transported. For high school pupils, the parent or guardian shall be reimbursed eighty dollars per pupil per year for such service, provided however no family shall receive more than one hundred sixty dollars per year for transporting the members of the family who attend high school. The provisions of this section shall apply to eligible nonpublic school pupils as well as to eligible public school pupils. However, reimbursement for nonpublic school pupils shall not exceed eighty dollars per pupil per year.

"The provisions of this subsection shall be effective for transportation of children commencing with the second semester of the school year beginning July 1, 1975. * * *

"Sec. 4. Section two hundred eighty-five point two (285.2), unnumbered paragraph four (4), Code 1975, is amended by striking the paragraph and inserting in lieu thereof the following:

"Claims for reimbursement shall be made to the department of public instruction by the public school district providing transportation or transportation reimbursement during a school year on a form prescribed by the department, and the claim shall state the services provided and the actual costs incurred. A claim shall not exceed the average transportation costs of the district per pupil transported. Claims shall be accompanied by an affidavit of an officer of the public school district affirming the accuracy of the claim. By February first and by June fifteenth of each year the department shall certify to the state comptroller the amounts of approved claims to be paid, and the state comptroller shall draw warrants payable to school districts which have established claims. Claims shall be allowed where practical, and at the option of the public school district of the pupil's residence, subject to approval by the area education agency of the pupil's residence, under the provisions of subsection three (3) of section two hundred eighty-five point nine (285.9) of the Code, the public school district of the pupil's residence may transport any pupil to a school located in a contiguous public school district outside the boundary of the public school district of the pupil's residence. The public school district of the pupil's residence may contract with the contiguous public school district or with a private contractor under the provisions of section two hundred eighty-five point five (285.5) of the Code to transport the pupils to the school of attendance within the boundary lines of the contiguous public school district. The public school district in which the pupil resides may contract with the contiguous public school district or with a private contractor under the provisions of section two hundred eighty-five point five (285.5) of the Code to transport the pupil from the pupil's residence or from designated school bus collection locations to the school located within the boundary lines of the contiguous public school district, subject to the approval of the area education agency of the pupil's residence. The public school

district of the pupil's residence may utilize the reimbursement provisions of section two hundred eighty-five point one (285.1), subsection three (3) of the Code."

You have asked:

"1. Does the last sentence of section 4 of reference to section 285.1(3), Code 1975, dealing only with parent reimbursement for transportation, as amended by section 1 to be '. . . effective for transportation of children commencing with the second semester of the school year beginning July 1, 1975,' make reimbursement possible for *any* transportation authorized by section 285.1(17), Code 1975, that crossed school district boundary lines?

"2. If the answer to question one is in the affirmative, may the Department reimburse school districts which had contracts with private operators during the second semester and provided transportation during this period for resident nonpublic school pupils attending a nonpublic school located in a district which was not contiguous to the resident district? It appears this Act restricts providing transportation service between contiguous school districts only.

"3. May the Department provide reimbursement of parent transportation if the nonpublic school of attendance is located in a district which is not contiguous to the resident district?

"4. If the answers to questions two (2) and three (3) are in the negative, are transportation arrangements that go beyond the boundary lines of contiguous districts prohibited by this Act or is the Department required to prorate reimbursement claims in proportion only to travel distances involved in contiguous districts?"

I

It is the opinion of this office that your first question is stated so broadly that it must be answered in the negative. The Federal District Court in *Americans United v. Benton*, U.S.D.C., Southern District of Iowa, decided December, 1975, determined that transportation of nonpublic school children outside the school district of their residence was not authorized under Iowa law. House File 628 was clearly enacted as a remedial statute to authorize the transportation of pupils from the district of their residence to contiguous districts. Accordingly, it is not proper to say that *any* transportation is authorized thereby. Clearly, any form of transportation authorized by §285.1(17) that crossed school district boundary lines to a contiguous district is brought within the purview of the amending legislation. In the opinion issued by this office on December 27, 1974 (1974 O.A.G. 770), it was pointed out that there are three options available to a school district: transportation on a school bus operated by the public school district; contracting with private parties to provide school bus transportation; and reimbursement to the parents who transport their eligible children in districts where transportation by school bus is impracticable or the service is not available. Accordingly, within the limitations of the amending statutory authorization, claims for reimbursement which are pending before the Department and which were not processed prior to the effective date of the amending legislation, may be paid. Procedural and remedial legislation may have a retroactive effect. 42 C.J.S. Statutes, §§416, 421 and 430.

II

We believe that your conclusion is correct, that reimbursement for transportation across school district lines by contract carrier is author-

ized only where the transportation service is between contiguous school districts. Accordingly, claims for reimbursement based on contracts where the transportation is between contiguous school districts may be paid.

III

We answer your third question afirmatively. The department may provide reimbursement to districts where parents or guardians transport their children to the designated school of attendance "where transportation by school bus is impracticable or where school bus service is not available", even though such transportation goes beyond contiguous school district boundaries. In addition to the authority to extend school bus routes under §285.5 to contiguous school districts, §4 of House File 628 makes express reference to utilization of the reimbursement provision of §285.1(3) of the Code. As amended by House File 628, §285.1 became "effective for the transportation of children commencing with the second semester of the school year beginning July 1, 1975". The section provides an absolute monetary limit on parental reimbursement in lieu of any restrictions pertaining to the geographical territory of operation.

IV

Bus transportation arrangements provided by school districts that go beyond the boundary lines of contiguous districts are not authorized by House File 628. Since they are not authorized, such contracts are not subject to the payment of reimbursement in proportion to the traveled distances involved in contiguous districts. However, as discussed in the preceding paragraph, when the local district does not furnish transportation for a child attending a designated school in a noncontiguous school district, the parent can arrange for transportation by a third party and obtain reimbursement under §285.1(3), even when reimbursement for the school district itself does not qualify for such reimbursement under the amending legislation.

July 27, 1976

STATE OFFICERS AND DEPARTMENTS: NATIONAL GUARD; ARREST; PRIVILEGE; MOTOR VEHICLES. Sections 29A.41 and 321.281, Code of Iowa, 1975. A member of the Iowa National Guard operating a motor vehicle while under the influence of an alcoholic beverage is not exempt from immediate arrest unless in the actual performance of duties. (Linge to Morrissey, Assistant Jefferson County Attorney, 7-27-76) #76-7-21

Mr. John A. Morrissey, Assistant Jefferson County Attorney: You requested an opinion of the Attorney General whether a uniformed member of the Iowa National Guard is exempt from immediate arrest for operating a motor vehicle while under the influence of an alcoholic beverage.

Section 29A.41, Code of Iowa, 1975, provides in part:

"No member of the national guard shall be arrested, or served with any summons, order, warrant or other civil process after having been ordered to any duty, or while going to, attending, or returning from, any place to which the officer or enlisted person is required to go for

military duty. Nothing herein shall prevent the officer's or enlisted person's arrest by order of a military officer or for a felony or breach of the peace committed while not in the actual performance of the officer's or enlisted person's duty."

Section 321.281, Code of Iowa, 1975, provides in part:

"Whoever operates a motor vehicle upon the public highways of this state while under the influence of an alcoholic beverage . . . shall, upon conviction or a plea of guilty, be punished . . . ."

A recent opinion of the attorney general, Turner to Senator Norpel, July 18, 1975, establishes that a traffic law violation is a breach of the peace. The violation of section 321.281 may also be a felony.

However, section 29A.41 allows an arrest *only* for a criminal law offense committed while not in the "actual performance of the officer's or enlisted person's duty".

Actual performance of duty differs from on duty as defined in section 29A.1(7), Code of Iowa, 1975:

"'On duty' shall mean and include drill periods, all other training, and service which may be required under state or federal law, regulations, or orders, and the necessary travel of an officer or enlisted person to the place of performance of such duty and return home after performance of such duty, but shall not include federal service."

Actual performance of duty also differs from the language quoted above from section 29A.41 that exempts members from "civil arrest".

It is readily apparent that the General Assembly intended a different standard to apply to the criminal arrest exemption by selecting more specific terminology. The statute is clear, the exemption is not for anyone merely on duty, which includes travel to the place of performance of such duty, nor to one going to, attending, or returning from any place for military duty. It only applies during the actual performance of duty.

Verification with an officer of the National Guard would be appropriate if the member were to claim to be in the actual performance of duties. It is understood a duty officer is continually available at Camp Dodge.

If an officer of the National Guard so orders, the member could be arrested immediately even if in the actual performance of duties.

A member of the National Guard committing a violation of section 321.281 would not be exempt from immediate arrest unless the member is in the actual performance of duty. Any part of 1968 O.A.G. 440 that is inconsistent with the foregoing is hereby withdrawn.

July 27, 1976

PUBLIC RECORDS: Law Enforcement; Intelligence Data. §68A.7 and Chapter 749B, Code of Iowa, 1975. If a police department collects or gathers intelligence data from sources that do not include other peace officer agencies, the dissemination of this information would be restricted by section 68A.7, not by Chapter 749B, although Chapter 749B would restrict its redissemination. (Linge to Shaw, State Senator, 7-27-76) #76-7-22

The Honorable Elizabeth Shaw, State Senator: You have requested an opinion of the Attorney General about the confidentiality of certain information in peace officer agencies. You ask if information defined as "intelligence data" in Chapter 749B, Code of Iowa, 1975, that has been collected by an Iowa police department is a "public record" as defined in Chapter 68A, Code of Iowa, 1975, and may be examined by the public.

Intelligence data is defined in section 749B.1 as follows:

"As used in this chapter, unless the context otherwise requires: * * *

11. 'Intelligence data' means information collected where there are reasonable grounds to suspect involvement or participation in criminal activity by any person."

Chapter 68A defines all records and documents of or belonging to any city as public records (section 68A.1). It further provides every citizen of Iowa with the right to examine and copy all public records unless some other Code provisions expressly requires such records to be confidential (section 68A.2).

Section 68A.7 provides, in part:

"The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information: * * *

5. Peace officers investigative reports, except where disclosure is authorized elsewhere in this Code."

Section 749B.18 provides:

"Nothing in this chapter shall prohibit the public from examining or copying the public records of any public body or agency as authorized by chapter 68A.

Criminal history data and intelligence data in the possession of the department or bureau or disseminated by the department or bureau, are not public records within the provisions of chapter 68A."

Section 749B.1 defines department and bureau as follows:

"As used in this chapter, unless the context otherwise requires:

1. 'Department' means the department of public safety.

2. 'Bureau' means the department of public safety, division of criminal investigation and bureau of identification."

Intelligence data in a police department that has been disseminated to it, directly or indirectly, by the department or the bureau is not a public record and cannot, therefore, be made available for public examination under Chapter 68A.

To determine if intelligence data in a police department that has been collected or obtained through the efforts of the police department's officers or employees is required by Chapter 749B to be kept confidential, an examination of the statutory scheme of Chapter 749B is necessary.

Although Chapter 749B refers to the dissemination of intelligence data by the department or bureau (section 749B.8), refers to intelligence data dissemination to a police department by the department or bureau (sec-

tion 749B.18) and restricts the redissemination of intelligence data by a police department that has been received from the department or bureau or from any other source (section 749B.3), this chapter does not refer to, nor expressly restrict, dissemination of intelligence data by a police department that is gathered or collected by that department.

The Attorney General has rendered opinions about Chapter 749B on several occasions. See 1974 OAG 254, 309, 376 and 653, and opinion of the Attorney General (Voorhees to Larson) of April 4, 1975. In 1974 OAG 254 at page 255, the Attorney General stated:

"§[749B.]7 prescribes severe fines and imprisonment in the penitentiary for up to two or three years and removal from office for unlawful communication of criminal history data and intelligence data. Being a criminal and penal statute as a consequence of the punishment it prescribes for its violation, S.F. 115 [Chapter 749B] must be strictly construed against the State and any doubt must be resolved in favor of the person charged with violating it, (even a public official or peace officer)." (Citations omitted)

Chapter 749B does not expressly prohibit the *dissemination* of intelligence data gathered or collected by a police department through its own efforts.

Redissemination of intelligence data by a police department is restricted by section 749B.3. It states, in part:

"A peace officer, criminal justice agency, or state or federal regulatory agency shall not redisseminate intelligence data, within or without the agency, received from the department or bureau or *from any other source*, except as provided in subsections 1 and 2." (Emphasis added)

Subsections 1 and 2 of section 749B.3 provide:

"1. The data is for official purposes in connection with prescribed duties of a criminal justice agency, and

2. The agency maintains a list of the persons receiving the data and the date and purpose of the dissemination . . . ."

It has been suggested that the phrase "from any other source" in section 749B.3 would include the intelligence data collected or obtained by the police department itself. In 1974 OAG 376 at page 378, the Attorney General stated:

"In a rhetorical sense, any communication of data, except the initial communication of the data from its original source, would be 'redissemination'. In other words, information must be 'disseminated' before it can be 'redisseminated'. * * *

Under the literal terms of section [749B.]3, the department or bureau could not *re*disseminate data it received from itself—a logical impossibility. Such data can't be *re*disseminated unless it was received from some other source. If it was not received from some other source, communication of the data would be dissemination, not redissemination."

Once a police department has collected or gathered intelligence data and disseminated such data to another police department or criminal justice agency, the *re*dissemination provisions of section 749B.3 would appear to apply to such other department or agency. If a police department collects or gathers intelligence data from sources that do not include other peace officer agencies, the dissemination of this information would be restricted by section 68A.7, not by Chapter 749B, although Chapter 749B would restrict its redissemination.

July 27, 1976

STATE OFFICERS AND DEPARTMENTS: Citizens' Aide; Public Records; Criminal History and Intelligence Data. §§601G.9 and 68A.7 and Chapter 749B, Code of Iowa, 1975. The Citizens' Aide may not examine a peace officer agency's confidential records unless such records can be and are released as the Code provides. (Linge to Cusack, State Representative, 7-27-76) #76-7-23

The Honorable Gregory D. Cusack, State Representative: You have requested an opinion of the Attorney General about the investigatory powers of Iowa's Citizens' Aide. You wish to know if the law prohibits the Citizens' Aide's access to reports and documents on file in Iowa peace officer agencies.

Chapter 601G of the Code of Iowa, 1975, contains the provisions regarding the Citizens' Aide. Section 601G.9 states, in part:

"The citizens' aide shall have the following powers: * * *

3. He may request and shall be given by each agency such assistance and information as may be necessary in the performance of his duties. He may examine the records and documents of all agencies *not specifically made confidential by law.* He may enter and inspect premises within any agency's control." (Emphasis added)

The files of Iowa peace officer agencies contain many kinds of records and documents. Some are specifically made confidential by statute. Section 68A.7, Code of Iowa, 1975, states, in part:

"The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information: * * *

5. Peace officers investigative reports, except where disclosure is authorized elsewhere in this Cade. * * *

9. Criminal identification files of law enforcement agencies. However, records of current and prior arrests shall be public records. * * *

11. Personal information in confidential personnel records of public bodies including but not limited to cities, boards of supervisors and school districts."

Chapter 749B, Code of Iowa, 1975, contains several provisions regarding the confidentiality of some peace officer agency records and documents. Section 749B.1 provides, in part:

"As used in this chapter, unless the context otherwise requires: * * *

3. 'Criminal history data' means any or all of the following information maintained by the department or bureau in a manual or automated data storage system and individually identified:

a. Arrest data.
b. Conviction data.
c. Disposition data.
d. Correctional data. * * *

11. 'Intelligence data' means information collected where there are reasonable grounds to suspect involvement or participation in criminal activity by any person."

Section 749B.18 provides:

"Nothing in this chapter shall prohibit the public from examining

or copying the public records of any public body or agency as authorized by chapter 68A.

Criminal history data and intelligence data in the possession of the department or bureau, or dissemination by the department or bureau, are not public records within the provisions of chapter 68A."

Section 749B.2 provides, in part:

"The department and bureau may provide copies or communicate information from criminal history data only to criminal justice agencies, or such other public agencies as are authorized by the confidential records council."

Section 749B.3 provides:

"A peace officer, criminal justice agency, or state or federal regulatory agency shall not redisseminate criminal history data, within or without the agency, received from the department or bureau, unless:

1. The data is for official purposes in connection with prescribed duties of a criminal justice agency, and

2. The agency maintains a list of the persons receiving the data and the date and purpose of the dissemination, and

3. The request for data is based upon name, fingerprints, or other individual identification characteristics.

A peace officer, criminal justice agency, or state or federal regulatory agency shall not redisseminate intelligence data, within or without the agency, received from the department or bureau or from any other source, except as provided in subsections 1 and 2."

Because the Citizens' Aide is prohibited from examining records and documents specifically made confidential by law and these statutes do make the described records and documents confidential, the Citizens' Aide would not have a right of access to such records and documents.

July 27, 1976

STATE OFFICERS AND DEPARTMENTS: Volunteer Employment — §25A.2, Code of Iowa, 1975; §§1, 2, 7, Ch. 80, Acts of the 66th G.A. (1975). One who performs services for the State, upon request of the State, upon request of the State, without compensation, may fall within the purview of Chapter 25A of the Code for purposes of employee defenses and indemnification. (Blumberg to Pawlewski, Commissioner, State Department of Health, 7-27-76) #76-7-24

Mr. Norman L. Pawlewski, Commissioner, State Department of Health:
We have received your opinion request of July 9, 1976, regarding Chapter 25A, 1975 Code of Iowa. Your department is planning a program for mass immunization of persons within the State for swine-like influenza. Because of the size of the program volunteers, consisting of doctors, nurses and lay persons, will be used. These individuals will provide medical supervision and administer the vaccine among other things. Most of these individuals will not be compensated and all are merely volunteers. You ask whether these individuals fall within the protection of Chapter 25A. We assume that you are referring to the recent amendments to that chapter.

Chapter 80, Acts of the 66th G.A. (1975), amended Chapter 25A of the Code to provide liability protection for state employees. Section

25A.2(3) of the Code, as amended by §1, Ch. 80 of the 66th G.A., provides, in pertinent part:

" 'Employee of the state' includes any one or more officers, agents, or employees of the state or any state agency and persons acting on behalf of the state or any state agency in any official capacity, temporarily or permanently in the service of the state of Iowa, whether with or without compensation."

Section 25A.2(5) of the Code, as amended by §2, Ch. 80, 66th G.A., defines "claim," in pertinent part:

"b. Any claim against an employee of the state for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission, except an act of malfeasance in office or willful and wanton conduct, of any employee of the state while acting within the scope of his office or employment."

Section 7, Ch. 80, 66th G.A., adds the following new section to Chapter 25A:

"*Officers and employees defended.* The state shall defend any employee of the state, whether elected or appointed and, except in cases of malfeasance in office, willful and unauthorized injury to persons or property, or willful and wanton conduct, shall save harmless and indemnify such employees of the state against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring within the scope of their employment or duties."

As can be seen from the above quoted sections, the State will defend, indemnify and hold harmless employees who are sued for their acts or omissions while in the course of their employment. Pursuant to the definition of "Employees," it matters not whether an individual receives compensation for his or her services on behalf of the State. Thus, one who provides services on behalf of the State, per the request of the State, without compensation may still fall within the definition of "Employees" for purposes of Chapter 25A.

Accordingly, we are of the opinion that, in all probability, those individuals who volunteer their time and services to the State to provide medical and other assistance to those participating in your department's immunization programs, would fall within the protection of Chapter 25A of the Code. We must emphasize, however, that this is a general statement and any of those individuals may not fall within Chapter 25A, dependent, of course, on the existing facts.

July 25, 1976

COUNTIES: Fairground fund — Chapter 174, Code of Iowa, 1975. Where more than one fair society exists in a county, the Supervisors should make appropriations from the fairground fund in accordance with the budget estimates certified to the board by each society. (Nolan to Hullinger, State Representative, 7-27-76) #76-7-25

Mr. Arlo Hullinger, State Representative: This will acknowledge receipt of your request for an opinion regarding the application of Chapter 174, Code of Iowa, 1975. Your letter states:

". . . I would like to know when two or more organizations qualify under Sec. 174.1 to hold agricultural exposition or fair, how are the funds collected under Sec. 174.13 and 174.14 to be distributed? Is it mandatory that they be divided equally or does the Board of Supervisors have the authority to allocate it on some other basis? If it is possible to divide it on another basis, what would the basis be?"

The board of supervisors of a county in which a county fair society is located has the power to levy a tax not to exceed six and three-fourths cents per thousand on the assessed value of taxable property in the county for the fairground fund. Iowa Code §174.13 provides in part:

". . . The funds realized therefrom to be known as the fairground fund, and to be used for the purpose of fitting up and purchasing fair grounds for the society, or for the purpose of aiding boys and girls 4-H work and payment of agricultural and livestock premiums in connection with said fair, provided such society shall be the owner in fee simple, or the lessee of at least ten acres of land for fairground purposes, and shall own or lease buildings and improvements thereon of at least eight thousand dollars in value."

Although §174.14 is entitled "Additional county aid", it does not provide for the collection of additional tax levies. There is such a provision in §174.17. However, the §174.17 tax applies only where the county (not the fair society) owns the fairground.

Depending upon ownership of the fairgrounds, a county board of supervisors may levy a tax under either or both of the above Code sections. Such opinion was previously stated in an Attorney General's opinion in 1938, 1938 O.A.G. 55.

There appears to be no specific Code section, however, which deals with the disposition of tax funds realized when there is more than one county fair society in any one county.

Code §174.11, which deals with the amount allowed as state aid, is significant in that it states, in part, after delineating the actual amounts allowed to societies as state aid:

". . . Provided, however, in counties having more than one fair entitled to state aid, except in counties where there are two definitely separate county extension offices, the state aid available for the county shall be prorated to said fairs which have been in existence for ten years or more, on the basis of cash premiums paid by said fairs."

The significance of the above statutory language is that there is a specific provision made for the proration of state aid on the basis of actual cash premiums paid.

The Iowa Code §332.3, which deals with the general powers of the board of supervisors of a county, provides in subsection six that the board shall have the power:

" * * *

"(6) To represent its county and have the care and management of the property and business thereof in all cases where no other provision is made."

This Code subsection when read in conjunction with other subsections

delineating the general powers of a county board, clearly indicates a legislative intent that the board of supervisors be clothed with broad powers in the conduct of county affairs.

The Iowa Supreme Court has held that the county board of supervisors has wide discretion in the exercise of powers conferred on it to conduct county affairs. *Sorenson v. Andrews*, 1936, 221 Iowa 44, 264 N.W. 562.

Should the board of supervisors determine that two societies exist and both are entitled to a portion of the fairground fund, the distribution can be made according to itemized budget estimates certified to the board in accordance with the procedures set out in Chapter 24 of the Code of Iowa.

July 27, 1976

STATUTORY CONSTRUCTION: Criminal Justice Agency; Law Enforcement Agency; Law Enforcement Communications Agreements. Chapters 749B, 28E, 750 and 80, Code of Iowa, 1975. Public agencies may create law enforcement communication commissions without the approval of the Iowa Department of Public Safety. Such commissions are not criminal justice agencies. (Linge to Larson, Commissioner of Public Safety and Way, Director of the Iowa Crime Commission, 7-27-76) #76-7-26

Charles W. Larson, Commissioner, Iowa Department of Public Safety; Allen R. Way, Director, Iowa Crime Commission: You have requested an opinion of the Attorney General about a county police communications commission.

Specifically referring to a submitted copy of an agreement creating the Buena Vista County Communications Commission, you wish to know if the agreement creating this commission is valid and if the Iowa Department of Public Safety should disseminate, to this commission, criminal history and intelligence data as defined in Chapter 749B, Code of Iowa, 1975. In your letter you ask a number of questions that are, herein, individually answered. First, you ask:

"Pursuant to section 28E.10, must the agreement be submitted to the Commissioner of Public Safety for approval or disapproval prior to its entry into force?"

Section 28E.10, Code of Iowa, 1975, provides:

"If an agreement made pursuant to this chapter shall deal in whole or in part with the provision of services or facilities with regard to which an officer or agency of the state has constitutional or statutory powers of control, the agreement shall, as a condition precedent to its entry into force, he submitted to the state officer or agency having such power of control and shall be approved or disapproved by him or it as to all matters within his or its jurisdiction."

The submitted agreement creating the Buena Vista County Communications Commission states:

"Article II—Legal Status

Section 1. Legal Status. This commission shall be a voluntary joint undertaking of the cities located in Buena Vista County, Iowa, the Buena Vista County Hospital, Buena Vista County Civil Defense, and also in conjunction with the Board of Supervisors representing Buena Vista

County, Iowa, all as authorized by Chapter 28E of the 1971 Code of Iowa, and all acts amendatory thereto."

It is clear this agreement is made pursuant to Chapter 28E. If this agreement was to deal, in whole or in part, with the provision of services over which the Commissioner of Public Safety or the Department of Public Safety has constitutional or statutory powers of control, it would require the Public Safety Commissioner's approval. To determine whether this agreement deals in whole or in part with the Commissioner's powers of control, the agreement itself must be examined. It provides, in pertinent part:

"Article V—Purpose

Section 1. Purpose. The purpose of this joint agreement is to create a county communications commission . . . . Said commission is being established for the purpose of assisting and serving all of the people within Buena Vista County, Iowa, with uniform law enforcement and emergency communications for the protection of the rights and property and for the assistance of all peoples within said county, including said cities therein. Further, the purpose thereof shall be to provide more efficient law enforcement and also to provide a centralized communications system for the purposes hereinabove set forth."

The Iowa Department of Public Safety provides law enforcement and communications services to the State of Iowa. Chapter 80, Code of Iowa, 1975, grants to the Department the authority to provide law enforcement services but does not grant to the Department any powers of control over the provision of law enforcement services by counties and cities. Section 80.9(2)(e) and Chapter 750, Code of Iowa, 1975, grant to the Department the authority to provide communications services to the State but do not grant to the Department any power of control over the provision of communications services by counties or cities.

Because this agreement does not invade any of the provinces of the Department of Public Safety and does not in any manner deal with the Commissioner's powers or control, it need not be submitted to the Commissioner for approval.

Your second question asks the following:

"If this commission is 'legally created' pursuant to chapter 28E, does it have the authority to operate a law enforcement communication center pursuant to sections 750.4, 750.5 and 750.6 of the Code?"

This agreement has been compared with the requirements of Chapter 28E and appears to comply with those requirements. Inasmuch as the Commission appears to be "legally created" pursuant to Chapter 28E, the question then becomes whether it has the authority to operate a law enforcement communications center. Sections 750.4, 750.5 and 750.6 that you cite provide:

"750.4 It shall then be the duty of the board of supervisors of each county to install in the office of the sheriff, such a radio receiving set and a set in at least one motor vehicle used by the sheriff, for use in connection with said state radio broadcasting system. The board of supervisors of any county may install as many additional such radio receiving sets as may be deemed necessary. The cost of such radio receiving sets and the cost of installation thereof shall be paid from the general fund of the county.

750.5 The council of each city of two thousand or more population may install at least one radio receiving set for use in law enforcement and police work.

750.6 The board of supervisors of any county shall have in addition to the foregoing the discretionary authority:

1. To purchase, lease, own, and maintain additional radio, electronic communications and telecommunications systems as may be deemed necessary by said agency for the efficient operation of the law enforcement agencies under its jurisdiction, and to pay the cost thereof from the general fund of said county.

2. To enter into lease or contract arrangements for the joint ownership, maintenance, acquisition or leasing of said equipment with any other county and may jointly operate the same with such co-operating agency for the mutual economy and efficiency of both."

These sections grant to county boards of supervisors and city councils the authority to obtain police radios. They also grant to the county boards the ability to maintain communications systems. In 1970 OAG 92 at page 98, the Attorney General stated:

"Section 28E.12 authorizes not only the joint exercise of mutually possessed powers, but also the exercise by one agency of the power of the other in accordance with the contract."

This provision makes it clear that county boards of supervisors and city councils may delegate to a county communications commission their powers to obtain police radios and maintain law enforcement communications systems.

Your third question asks the following:

"If this commission is 'legally created', is it a criminal justice agency;

(a) As defined in section 749B.1(10), Code of Iowa?

(b) As defined by section 20.3(c), Title 28, Chapter 1, Part 20, of the Code of Federal Regulations? (attached is a copy of section 20.3(c), C.F.R.)"

Section 749B.1(10) defines criminal justice agency as follows:

" 'Criminal justice agency' means any agency or department of any level of government which performs as its principle function the apprehension, prosecution, adjudication, incarceration, or rehabilitation of crimnal offenders."

The purpose of this agreement is set forth in Article V and is quoted, in part, above. It is designed to establish a commission to assist and serve the people of Buena Vista County with uniform law enforcement and emergency communications. It is also intended to provide more efficient law enforcement and a centralized communications system for this area. The submitted agreement does not indicate that the commission or any of its officers or employees will perform the apprehension, et cetera, of criminal offenders. Furthermore, none of the contracting government units have delegated to the commission any authority to perform the apprehension, et cetera, of criminal offenders that those government units may possess. Since this commission is not authorized by the submitted agreement to perform as its principle function the

apprehension, et cetera, of criminal offenders it is, therefore, not a criminal justice agency as defined in Chapter 749B.

This finding renders academic the question of whether this commission could be considered a criminal justice agency under the Code of Federal Regulations cited, however, based on the copy of that Code submitted with your request it would appear the commission might be so considered.

Your last question asks the following:

"If, in your opinion, the commission is not a criminal justice agency in answer to 3a and b above, may the commission establish overall operating policy and then delegate the day-to-day operation of a center to a criminal justice agency? If so, does that qualify this center to have access to criminal history and intelligence data?"

Chapter 28E grants broad authority to an agency such as this commission to contract with another agency, such as a criminal justice agency, and to delegate powers to such second agency. Chapter 749B allows the dissemination of criminal history and intelligence data to criminal justice agencies with certain restrictions. If this commission was to execute a contract with a criminal justice agency in which the criminal justice agency agreed to operate the communications system or "center" as a part of the criminal justice agency, criminal history and intelligence data would, of course, continue to be made available to the criminal justice agency for processing by its communications subunit provided that the other relevant requirements of Chapter 749B are met. Because the commission would still not be a criminal justice agency, it could not have access to such data maintained or processed by the system or "center".

July 27, 1976

STATUTORY CONSTRUCTION: Criminal Justice Agency; Civil Service Commissions; County Boards of Supervisors; City Councils; Mayors and City Managers. §§749B.1(10), 372.8 and 372.13 and Chapters 331, 341, 372 and 400, Code of Iowa, 1975. An agency must, as its principal function, perform the apprehension, prosecution, adjudication, incarceration or rehabilitation of criminal offenders to be a criminal justice agency. (Linge to Larson, Commissioner of Public Safety, 7-27-76) #76-7-27

Mr. Charles W. Larson, Commissioner, Iowa Department of Public Safety: This opinion is in response to your recent letter in which you stated:

"The Bureau of Criminal Investigation has recently received several inquiries requesting an interpretation of the definition for 'criminal justice agencies' as defined in Iowa Code, Chapter 749B.1(10). Bureau policy has been to not furnish criminal history or intelligence data to certain city and county agencies since they were not considered to be 'criminal justice agencies'.

Your opinion is respectfully requested on this definition: Are the following positions or agencies 'criminal justice agencies'?

1) City and County Civil Service Commissions
2) County Boards of Supervisors
3) City Councils
4) City Mayors
5) City Managers"

A criminal justice agency is defined in section 749B.1 of the Code of Iowa, 1975, as follows:

"As used in this chapter, unless the context otherwise required: * * *

10. 'Criminal justice agency' means any agency or department of any level of government which *performs as its principal function* the apprehension, prosecution, adjudication, incarceration, or rehabilitation of criminal offenders." (emphasis added)

The question posed is, does a city civil service commission or any of these other agencies listed perform the apprehension, prosecution, adjudication, incarceration, or rehabilitation of criminal offenders and, if so, is this the prinicpal function of this agency.

City and county civil service commissions are created by Chapters 400 and 341, respectively, of the Code of Iowa, 1975. The apparent functions of these commissions, as imposed by these chapters, include establishing and maintaining certain procedures for the personnel selection and employment systems of cities and counties. These commissions are not required nor authorized by the Code to perform as their principal function the apprehension, et cetera, of criminal offenders and are, therefore, not criminal justice agencies as defined in Chapter 749B.

County boards of supervisors are created by Chapter 331 of the Code of Iowa, 1975. The apparent functions of these boards, as imposed by this chapter, include overseeing and approving the county budgetary processes. They are not required nor authorized by the Code to perform as their principal function the apprehension, et cetera, of criminal offenders and are, therefore, not criminal justice agencies as defined in Chapter 749B.

City councils are created by Chapter 372, Code of Iowa, 1975. One of the apparent functions of city councils, as indicated by section 372.13, is governing a city as a legislative body. They are not required nor authorized by the Code to perform as their principal function the apprehension, et cetera, of criminal offenders and are, therefore, not criminal justice agencies as defined in Chapter 749B.

The office of mayor of a city is created by Chapter 372 of the Code of Iowa, 1975. The apparent functions of a mayor, as imposed by this chapter, include supervising the city's government, if there is no city manager, and presiding over the city council. A mayor is not required nor authorized by the Code to perform as its principal function the apprehension, et cetera, of criminal offenders and is, therefore, not a criminal justice agency as defined in Chapter 749B.

The office of city manager is created by Chapter 372 of the Code of Iowa, 1975. The apparent function of a city manager, as imposed by section 372.8, is being the chief supervisor of the city. Section 372.8 provides that the city manager is to "take active control of the police" department. It would appear that, although the city manager has control of this criminal justice agency, the office of city manager is not required nor authorized by the Code to perform as its principal function the apprehension, et cetera, of criminal offenders and would, therefore, not be a criminal justice agency as defined in Chapter 749B.

Whether these agencies may have access to criminal history and intelligence data from sources other than the Department of Public Safety in order to discharge specfic duties is not considered.

July 27, 1976

MUNICIPALITIES: Suspension of Officers — §§372.4 and 372.13(4), Code of Iowa, 1975; §§23, 24, Ch. 203, 66th G.A. (1975). City officers and employees may only be removed by the officer or body making the appointment, unless provision is otherwise made by state or city law. (Blumberg to Rodenburg, Pottawattamie County Attorney, 7-27-76) #76-7-28

Mr. Lyle A. Rodenburg, Pottawattamie County Attorney: We have received your opinion request of June 30, 1976, regarding the suspension of a volunteer fire chief. The pertinent city ordinances provide that the city council shall appoint the fire chief for a one year term, and that thereafter the chief shall be selected by the fire department members with council approval. You ask whether the mayor has the authority to suspend the fire chief.

Section 372.4, 1975 Code of Iowa, provides that the mayor shall appoint a marshal or chief of police. It makes no mention of a fire chief. Section 372.13(4), as amended by §23, Ch. 203, 66th G.A. (1975), provides that unless otherwise provided by state law or city ordinance, the council may appoint city officers and employees. Section 24, of Ch. 203 provides that all persons appointed to city office may be removed by the officer or body making the appointment. If the mayor did not appoint the fire chief, the mayor may not suspend him, unless a city ordinance provides otherwise.

July 27, 1976

STATE OFFICERS AND DEPARTMENTS: Board of Nursing—Licenses for Foreign Applicants—§§147.3, 147.4, 147.55, Code of Iowa, 1975; §§7, 9, H.F. 1503, 66th G.A. (1976). The fact that a foreign applicant is not permitted by the Immigration and Naturalization Service to work in this country is not, in and of itself, a sufficient reason to deny a license or temporary license, unless there is fraud in the procurement of the license. (Blumberg to Lobas, Associate Director, Nursing Practice, Iowa Board of Nursing, 7-27-76) #76-7-29

Ms. Helen Lobas, R.N., Associate Director, Nursing Practice, Iowa Board of Nursing: We have received your opinion request of June 21, 1976, regarding licensure of foreign applicants. Under your facts, the Immigration and Naturalization Service may advise your board that a foreign applicant for licensure is not eligible for a working visa; has not applied for a working visa; or, is an illegal alien. You ask:

"If the Office of the Iowa Board of Nursing has on file in formation from the Immigration and Naturalization Service that a foreign nurse applicant does not have an appropriate visa, may either a *license* or a *work permit* to practice nursing in the State of Iowa be issued?"

Section 147.3, 1975 Code of Iowa, provides, in pertinent part:

"An applicant for a license to practice a profession under this title shall not be ineligible because of age, *citizenship*, sex, race, religion, marital status or national origin, although the application form may require citizenship information." [Emphasis added]

Section 147.4 of the Code provides that your board may refuse to grant a license to a person otherwise qualified upon any of the grounds for which a license may be revoked by the district court, such grounds being found in §147.55.

Section 7 of H.F. 1503, 66th G.A. (1976) sets forth the following qualifications for licensure:

"In addition to the provisions of section one hundred forty-seven point three (147.3) of the Code, an applicant to be licensed for the practice of nursing shall have the following qualifications:

"1. Be a graduate of an accredited high school or the equivalent.

"2. Pass an examination as prescribed by the board.

"3. If to practice as a registered nurse, holds a diploma or degree resulting from the completion of a course of study in a program approved pursuant to paragraph c of subsection one (1) of section five (5) of this Act.

"4. If to practice as a licensed practical nurse, holds a diploma resulting from the completion of a course of study in a program approved pursuant to paragraph d of subsection one (1) of section five (5) of this Act or has successfully completed at least one academic year of a course of study in a program approved pursuant to paragraph c of subsection one (1) of section five (5) of this Act and has successfully completed all theoretical and clinical training as is required for a licensed practical nurse."

You make reference to work permits in your question. Section 147.107 provided for such permits. However, §9 of H.F. 1503 has replaced that section and now provides:

"TEMPORARY LICENSE. The board may issue a temporary license to a natural person who has completed the requirements of and applied for licensure, either by examination or endorsement. A temporary license shall not remain effective longer than the time between application and the next issuance of licenses. A temporary license issued to a person not holding a foreign license to practice nursing shall be valid only when the temporary licensee is under the supervision of a registered nurse."

The requirements for licensure do not contain a provision mandating citizenship. In fact, §147.3 specifically prohibits citizenship as a basis for denial of a license. Nor is there any requirement that an applicant have proper credentials for working. As long as the applicant meets the qualifications for licensure, and does not fall within any of the provisions of §147.55 (revocation or suspension), a license shall be issued. However, if the applicant commits fraud in the procurement of the license (e.g. falsely indicating citizenship) the license may be denied.

The issuance of a license or temporary license does not guarantee a job for the licensee nor does it supercede any applicable federal law. The license merely provides that if the person is eligible to work, such work may be as a licensed nurse. It is the individual's responsibility to comply with all other laws. The same can be said of an illegal alien. Although such an individual may not legally be in this country, that has no bearing on the qualifications for licensure, unless, of course, the individual commits fraud in the procurement of the license.

Accordingly, we are of the opinion that the fact a foreign applicant is not permitted to work in this country, is not, in and of itself, a sufficient reason to deny the granting of a license or temporary license.

July 27, 1976

COUNTIES: Compensation Board. Chapter 191, Acts, 66th G.A., 1975 Session. Fact that assistant county attorney is associated with law firm of a member of the county compensation board does not create a conflict of interest for such member or void the board's recommendations. (Nolan to Schlue, Benton County Attorney, 7-27-76) #76-7-30

Mr. Larry D. Schlue, Benton County Attorney: Your letter of July 12, 1976, has been received and your request for an opinion on the following:

1. Whether or not a conflict of interest exists when a member of the compensation board, which makes a recommendation as to the county attorney's salary, is a partner in a law firm which employs, as an associate, the assistant county attorney.

2. If a conflict does exist, would that conflict void the recommendation as to the county attorney's salary made by the compensation board, and would it nullify or make void the recommendations made by the compensation board as to the salaries of the other county elective officers where no conflict would exist.

It is the opinion of this office that both of your questions may be answered in the negative. Under §6 of Chapter 191, Laws of the 66th General Assembly, 1975 Session, the county compensation board is responsible for making recommendations to the board of supervisors on the basis of study, and public hearing. The compensation board is required to prepare a schedule for the compensation of all of the elected county officers, but the final determination is, by statute, placed in the hands of the board of supervisors, which may reduce but may not exceed the recommended compensation amount. With respect to the county attorney's salary, §11 of the Act, supra, which amends §340.9, Code of Iowa, 1975, provides that the salary shall be determined in the same manner as that of the other county elected officers.

The prerogative of the fixing the salary for his first assistant remains with the county attorney under §340.10, Code of Iowa, 1975, which was not amended. The salaries of the other assistants also provided for in §340.10(2), and the responsibility for fixing these, is given to the board of supervisors. Accordingly, there appears to be no act or benefit creating a conflict of interest in the circumstances you have described.

July 27, 1976

COUNTIES: Landfill. §§332.32, 332.44 and 455B.81, Code of Iowa, 1975. Supervisors may establish a user rate as well as levying a tax for landfills. (Nolan to Schlue, Benton County Attorney, 7-27-76) #76-7-31

Mr. Larry D. Schlue, Benton County Attorney: Your letter requesting an opinion concerning the Benton County Landfill has been received. In that letter you state:

"Benton County, Iowa, has established a County Landfill and for the support of that landfill has imposed a tax upon rural residents of the County and each of the cities contributes $3.00 per head towards the landfill.

"The Board of Supervisors has determined that additional monies are necessary for the support of the landfill and has set a fee schedule for fees to be charged against commercial establishments located within the cities and rural areas of Benton County. A bill has been sent to each commercial establishment located within the County and the rates charged thereon were determined by the Board of Supervisors in accordance with their determination as to the use of the landfill by the particular establishment. The bills were also sent to encompass the period of July 1, 1975, to July 1, 1976.

"A few questions have arisen:

"1. Can the County in addition to the tax imposed upon the rural area and the sums paid by the cities within the County, also assess commercial establishments at a rate established by the Board of Supervisors.

"2. Can this charge, if it is legal, be made retroactive to July 1, 1975.

"Your opinion as to these matters would be appreciated."

Under §332.32 of the 1975 Code of Iowa, the board of supervisors is authorized to levy a tax of not to exceed six and three-fourths cents per thousand dollars of assessed value of all the property outside of a city for the purpose of acquiring and maintaining public disposal grounds. The fund created by this tax is known as the township dump fund. A similar provision appears in §455B.81 of the Code, authorizing the use of such money for the purpose of planning a sanitary disposal project or of paying the interest and principal on bonds issued for sanitary disposal projects for the final disposal of solid waste. Where such sanitary disposal projects were constructed and comply also with the provisions of §332.44 of the Iowa Code, it is permissible for the governing body to establish just and equitable rates or charges for the use of and services rendered by such work, to be paid by the users. Therefore, it is important to distinguish between the user charge and the tax levy prescribed by §455B.81 of the Code. With such distinction in mind, your first question is answered affirmatively.

Your second question as to whether the user charge may be made retroactive to July 1, 1975, must, in the opinion of this office, be given a negative response. The rates established by the governing body of the county are legislative in character. Legislation is presumed to be prospective if not expressly made retroactive. Further, under §332.44(6), where applicable, the following appears:

". . . All such rates or charges if not paid as by the ordinance or resolution provided, when due, shall constitute a lien upon the premises served by the sanitary disposal project or works, and shall be collected in the same manner as taxes."

An assessment based on past use does not appear to be appropriate in the circumstances you have described. However, the supervisors would not be prohibited from establishing a user rate on a per cubic yard basis or some other reasonable measure. Such rate should be established by ordinance, §332.44(2), and should be prospective.

July 27, 1976

COUNTY ATTORNEY: Township trustees—§§336.2(7), 359.18, 359.19, Code of Iowa, 1975. One of the county attorney's duties is to provide advice to township trustees and, where necessary in counties of less than 25,000 population, to represent the trustees in litigation which is not adverse to the county interest. Trustees in larger counties are

authorized to employ counsel and levy a tax to defray expenses of litigation. (Nolan to Gilloon, State Representative, 7-27-76) #76-7-32

The Honorable Thomas J. Gilloon, State Representative: We have your letter presenting questions concerning the matter of counsel for township trustees. Your letter states two specific questions of concern:

"1) Can the trustees request and expect legal counsel and services regarding contracts, services, and legal obligations as a matter of course.

"2) Are those trustees entitled to defense by the County Attorney as defendants in civil or criminal litigations."

In recent years responsibilities of township trustees have received little note. However, from time to time questions such as you have presented have re-appeared. Section 336.2(7) of the 1975 Code of Iowa requires the county attorney to:

". . . give advice or his opinion in writing without compensation, to the board of supervisors . . . and township officers, when requested to do so by such board or officer, upon all matters in which the state, county, . . . or township is interested, or relating to the duty of the board or officer in which the state, county, . . . or township may have an interest . . ."

In opinions previously issued by this office and found at 1932 O.A.G. 614, 1940 O.A.G. 327 and 1942 O.A.G. 197, the recipients were advised that township trustees are entitled to the services of the county attorney. Accordingly, your first question is answered affirmatively.

Under §359.18, Code of Iowa, 1975, township trustees in counties having a population of less than 25,000 are entitled to be represented by the county attorney in litigation unless the interests of the county are adverse to those of the trustees. In instances where §359.18 does not apply, the trustees may employ counsel and levy a tax to defray the expense of litigation. §359.19.

July 27, 1976

STATE LIBRARIES: Regional System — Senate File 1191 — §303B.9, Code of Iowa, 1975, as amended requires local financial support for libraries and provides for uniform tax levy of six and three-fourths cents per thousand dollars assessed valuation. Funds so derived go to the public library providing services within the taxing jurisdiction and does not preclude establishment of new libraries where there are none presently. (Nolan to Porter, State Library Commission, 7-27-76) #76-7-33

Mr. Barry Porter, Iowa State Library Commission: On June 15, 1976, you requested an opinion on the following questions submitted to you by the Iowa Library Association:

1. Does Section 303B of the 1975 Code of Iowa, as amended by Senate File 1191, Acts of the 66th General Assembly, 1976 Session, make local support of public libraries mandatory for all cities and counties, or is this requirement contingent upon the cities and counties receiving regional library services?

2. Does the phrase in §2 of Senate File 1191, which states "for the purpose of providing financial support to the public library which provides library services within the respective jurisdictions" mean that

after July 1, 1977, no new public libraries may be established and that the money raised must go for a public library and cannot go directly to a regional library system?

Code §303B.9, as now amended by Senate File 1191, provides:

"Local financial support. A regional board shall have the authority to require as a condition for receiving services under section 303B.6 that a governmental subdivision maintain any tax levy for library maintenance purposes that is in effect on July 1, 1973. Commencing July 1, 1977, each city within its corporate boundaries and each county within the unincorporated area of the county shall levy a tax of at least six and three-fourths cents per thousand dollars of assessed value on the taxable property, or at least the monetary equivalent of six and three-fourths cents per thousand dollars of assessed value when all or a portion of the funds are obtained from a source other than taxation, for the purposes of providing financial support to the public library which provides library services within the respective jurisdictions."

I

Prior to the recent amendment of §303B.9, the statute clearly provided that the regional library board has authority to require as a condition for receiving regional library services that the local governmental subdivisions fund a public library receiving services by a quarter-mill levy or the monetary equivalent thereof. The language of this section as now amended is set forth above and there appears to be a legislative intent that a tax of six cents per thousand dollars assessed valuation be uniformly levied in all cities and unincorporated areas within the state for the support of local library services. With respect to unincorporated areas, it is our opinion that the legislature has mandated the imposition of such tax and that no county can opt not to support a local public library. With respect to cities, it is the opinion of this office that the constitutional provision for home rule in cities permits a city to opt not to levy the tax for the support of a local public library in spite of the so-called directive contained in the amending statute. Further, we observe that the statute provides apparently redundant language with reference to the six and three-fourths cents per thousand dollars monetary equivalent since the preceding clause clearly requires that a tax be levied. Although the presence of such language creates an ambiguity, it is our opinion that the legislature intended to mandate local support of public libraries, regardless of whether or not the local public library receives regional library services.

II

In answer to your second question, we interpret the phrase "for the purpose of providing financial support to the public library which provides library services within their respective jurisdictions" to apply to those public libraries which are in existence, but we do not interpret the phrase to preclude the establishment of new public libraries, either in a county or any city after July 1, 1977. We further interpret this phrase to refer to the local public library as opposed to the regional library system because of the language of §303B.1 which is as follows:

"There is established a regional library system for the purpose of providing supportive library services to existing public libraries and to individuals with no other access to public library service and *to encourage local financial support of public library service in those localities where it is presently inadequate or nonexistent.*" [emphasis ours]

Had the legislature intended that the tax raise by the levy provided for in §303B.9 as amended go directly to the regional library system providing supportive services for the local libraries, the statute could easily have so provided.

July 27, 1976

TAXATION: Chapter 422. Neither §422.20 nor §422.72 prohibit disclosure by the Department of Revenue of whether a particular taxpayer has filed a tax return. (Thompson to Bair, Department of Revenue Director, 7-27-76) #76-7-34

Mr. G. D. Bair, Director, Department of Revenue: You have requested an Opinion of the Attorney General regarding the scope of §§422.20 and 422.72, The Code, 1975. These statutes prohibit the disclosure by employees of the Department of Revenue of tax returns or of information obtained through an investigation of a taxpayer by the Department. Specifically, you have asked if the Department is prohibited from revealing "whether a particular taxpayer has filed or failed to file an Iowa corporation income, individual income, sales, use or franchise tax return." In relevant part the statutes read as follows:

"It shall be unlawful for any officer or employee of the state of Iowa to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return . . ." §422.20, The Code, 1975.

"It shall be unlawful for the director, or any person having an administrative duty under this chapter, to divulge or to make known in any manner whatever, the business affairs, operations, or information obtained by an investigation of records and equipment of any person or corporation visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; . . ." §422.72, The Code, 1975.

It is the opinion of this office that disclosure that a named taxpayer has filed a return without revealing the content thereof is not proscribed by either of the statutes. Such disclosure is prohibited by neither the express language nor the purpose of these confidentiality statutes.

Giving effect to the intention of the legislature is the primary rule to follow in construing any statute. *Iowa National Indus. Loan Co. v. Department of Revenue*, 1974, Iowa, 224 N.W.2d 437, 439. The primary purpose of a confidentiality statute is to promote accurate and complete reporting of information to the agency by insuring to the taxpayer that the agency will not disclose any secrets. *Samish v. Superior Court*, supra; *Peden v. Peden's Administrator*, supra; *Rowell v. Pratt*, [1937] A.C. 110, 3 All E.R. 660. This rationale has been explained in 8 Wigmore, Evidence 761 (3d ed. 1940):

"The policy underlying the principle . . . is that where the government needs information for the conduct of its functions, and the persons possessing the information need the encouragement of privacy in order to be induced freely to make full disclosures, the protection of a privilege should be accorded."

The goal the legislature wished to achieve in enacting §§422.20 and 422.72, as indicated above, will not be inhibited by disclosure of filing status. Making such information available is more likely to induce taxpayers to file tax returns than to discourage them from filing. Since none of the information on the return would be disclosed, taxpayers' willingness to file comprehensive returns should be unaffected.

Although such disclosure would not violate the purpose of the confidentiality statutes, the more important inquiry is the express language used by the legislature. The exact language is important because the scope of confidentiality statutes will not be extended by the courts to cover situations not within the statutes' express language. *Peden v. Peden's Administrator*, 1917, 121 Va. 147, 92 S.E.984, 988; *Samish v. Superior Court*, 1938, 28 Ca. App. 685, 83 P.2d 305, 310; see generally, 165 A.L.R. 1302, 1331 et seq. This rule has been explained as follows:

"At common law tax returns were open to public inspection. Wigmore on Evidence, Section 2374. It therefore follows that any legislation restricting the right of inspection is not to be enlarged beyond the plain import of the language used by the General Assembly." *In re Herrnstein*, 1941, 20 Ohio Ops. 405, 413.

First, with regard to the statutes' express language, you have suggested that revealing that a taxpayer has filed, or has failed to file, may divulge the taxpayer's "business affairs, operations or information." You indicate that a return may be part of a taxpayer's records and that the usual processing and office audit procedures may be an "investigation" within the meaning of §422.72.

In construing a statute, effect must be given to every clause and to every word. *Mallory v. Paradise*, 1969, Iowa, 173 N.W.2d 264, 267. And all parts of the statute must be considered and compared. *Webster Realty Co. v. City of Fort Dodge*, 1970, Iowa, 174 N.W.2d 413, 418.

With these rules in mind, it is imperative to note that §422.72 governs disclosure of information from two sources: tax returns and departmental investigations. The clear import of the statute is that the term "investigation" refers to an examination of records other than the tax return. In another clause, §422.72 specifically governs disclosure of certain information set forth on tax returns. It expressly proscribes disclosure of the "amount or source of income, profits, losses, expenditures or any particular thereof" set forth in any return. Although the general phrase "investigation of records" could include an examination of a tax return, the above noted rules of statutory construction require a different interpretation:

"However inclusive may be the general language of the statute, it will not be held to apply or prevail over matters specifically dealth(sic) with in another part of the same enactment." (Citation omitted) *In re Brown*, 1971, 329 F.Supp. 422 (S.D. Iowa).

Second, you opine that another reason for nondisclosure is §422.5, The

Code, 1975. This section exempts from income taxation those individuals with an income of $4,000 or less. You suggest that divulgence of filing status would indicate whether the taxpayer's income was above or below the minmum level of §422.5.

However, divulgence of such information does not contravene §§422.20 or 422.72. First, these sections prohibit only disclosures of the "amount or source of income, . . ." Revealing filing status does not expressly reveal the amount of income. Second, and relatedly, due to withholding taxes many persons with incomes less than $4,000 regularly file returns in order to obtain a refund. Also, a person with a larger income may fail to file for a myriad of reasons. For example, he may not be subject to Iowa income tax because he is a domiciliary of another state and derives no income from sources in Iowa. Or he may have no reason for the failure to file, i.e., he may be breaking the law. Disclosure of filing status allows many plausible inferences.

In summary, disclosing that a taxpayer has not filed a return is not precluded by the express language of §§422.20 and 422.72. The department is prohibited from divulging the source or the amount of income, profits, losses, expenditures or other particulars disclosed on a return. Revealing that a person has filed a return makes known none of the specifically mentioned information. *U.S. v. Liebert*, 1974, 383 F.Supp. 1060, 1061 (E.D.Pa.) Under the doctrine ejusdem generis, the general phrase "or other particular" must be read to imply only information of the same genus as the specific examples after which those words follow. *State v. Cusack*, 1957, 248 Iowa 1168, 1171, 84 N.W.2d 554.

Having concluded that filing or not filing is not within the express language or purpose of the confidentiality statutes, it is obvious that the department may disclose such information. This result was reached in an *Opinion of the Justices*, 1973, 113 N.H. 141, 303 A.2d 752, which construed a confidentiality statute, R.S.A. 77-A:16, similar in effect to §§422.20 and 422.72.

In conclusion, nothing in §§422.20 or 422.72 prohibits disclosure by the Department of Revenue of whether a particular taxpayer has filed a tax return. Neither the purpose nor the express language of the statute makes such information confidential.

July 30, 1976

CITIES AND TOWNS: Home Rule Charter—§§364.1, 364.3, 372.10, 372.13, 376.3 and 376.4, Code of Iowa, 1975; §§22, 23, 25, Ch. 203, Acts of the 66th G.A. (1975). A Home Rule Charter must contain provisions on the four areas set forth in §372.10, but is not necessarily limited to those provisions. However, any provision within such a charter must not be inconsistent with state law. (Blumberg to Thatcher, Webster County Attorney, 7-30-76) #76-7-35

William J. Thatcher, Webster County Attorney: We have received your opinion request of March 25, 1976, regarding a proposed Home Rule Charter. You specifically asked:

"Does the proposed Home Rule Charter . . . conform to the requirements of Sec. 372.10, 1975 Code of Iowa, as amended?

"Is Art. VI of the proposed Charter inconsistent with the election laws of the State of Iowa?

"Are the compensation provisions of Art. II of the Charter inconsistent with the provisions of the City Code of Iowa relating to compensation of elected city officials?"

The proposed charter contains seven articles and a definition section. Article I states the general powers of the city. Article II provides for the city council, including the number of members, division of the city into wards, length of terms, and the like. Section 2.06 sets the compensation of council members. Article III details candidacy and elections for elected positions. Article IV sets forth general duties of the city with regard to boards and commissions. Article V mandates that the council sets limits on the amount and disclosure of campaign finances, and set penalties for violations. Article VI concerns the ability to have elections on the adoption, amendment or repeal of ordinances. Article VII sets forth the manner for amending the charter.

Section 372.10, 1975 Code, as amended by §22, Ch. 203, Acts of the 66th G.A. (1975) provides:

"A home rule charter must contain provisions for:

1. A council of an odd number of members, not less than five.

2. A mayor, who may be one of those council members.

3. Two-year or staggered four-year terms of office for the mayor and council members.

4. The powers and duties of the mayor and the council, consistent with the provisions of the city code."

The original section limited the charter to these four areas. It is now apparent that the charter may contain provisions in addition to those set forth above. If we were limited in our review to §372.10, we could state that the charter in question was acceptable. However, as will be shown below, there are limitations on charters.

Article VI provides the most obvious problem with the charter. Through some seven sections, encompassing ten pages, specific provisions for the adoption, amendment or repeal of ordinances by the electorate are set forth. In addition, there are provisions for review by a district court. These provisions include the time within which an appeal may be taken, upon whom the appeal is filed, and the effect of the court decision. In two prior opinions of this office we have held that the type of election the charter proposes is not allowed by law, and that Home Rule does not give cities such authority. See, 1972 OAG 263 and 520. We can find no provision in the city code, nor in the election laws allowing this type of election. Accordingly, a charter may not include these kind of provisions. In addition, the proposed charter attempts to confer jurisdiction upon a district court and attempts to set forth the scope and effect of review. It is beyond the power of a city or a charter commission to set forth laws regarding the jurisdiction and scope of review of a district court. That is a function of the Legislature.

Regarding that part of Article V which sets the compensation of the mayor and council members, §372.13(8) is controlling. That section, as

amended by §23, Ch. 203, Acts of the 66th G.A. (1975) provides that the council, *by ordinance, shall prescribe* the compensation of the mayor and all elected officers. Anything in a proposed charter which would set the compensation outside of an ordinance by the council is inconsistent with the Code of Iowa and therefore void. See, §364.1.

Section 376.4, as amended by §25, Ch. 203, Acts of the 66th G.A. (1975) provides that an eligible person may become a candidate for an elective city office by filing a petition with the city clerk not more than sixty-five nor less than forty days before the election. The petition must be signed by eligible persons equal in number to at least two percent of those who voted for that position at the last regular city election. Section 376.3 provides that nominations may also be made pursuant to Chapters 44 or 45 of the Code if the council so provides by ordinance. Any provisions in Article III of the charter that are inconsistent with §§376.3 or 376.4 are void.

Section 364.3(3) provides that a city may set standards which are higher or more stringent than those imposed by state law. Thus, with regard to Article V on campaign finances, a city could establish more stringent requirements than those set forth in Chapter 56 of the Code since that Chapter does not prohibit a city from so doing. A city may, under §364.3(2), set forth penalties for violations of ordinances. Although Article V is not, on its face, inconsistent with state law, the possibility of an inconsistency exists, dependent, of course, upon what the council does.

In summary, a home rule charter is not limited to the four subsections of §372.10. However, whatever is placed in such a charter cannot contradict or be in conflict with the constitution or a statute.

July 29, 1976

STATE OFFICERS AND DEPARTMENTS: Agriculture Department. Goat Milk Products Regulations. Chapters 189, 190, 191 and 192, Code of Iowa, 1975. Goat milk, goat milk cheese, goat milk butter as well as mixtures of such products with cows' milk products may be processed and sold in Iowa provided they meet the standards set for cows' milk and are properly labelled. (Haesemeyer to Lounsberry, Secretary of Agriculture, 7-29-76) #76-7-36

The Honorable Robert H. Lounsberry, Secretary of Agriculture: This is in reply to your letter of July 14, 1976, wherein you requested a review by this office of your analysis of the laws concerning the sale of dairy goat products. Portions of your analysis are as follows:

"Section 190.1 subparts 38 and 40 define cow milk and goat milk as two separate entities. The sentence in subpart 40 to which you have referred, 'The word "milk" shall be interpreted to include goat milk' was so stated, according to U.S. Public Health Officials, to eliminate the need for printing two codes. Should you interpret these two sections as permitting a mixing or commingling of the two milks, labeling for mixtures would be necessary under Section 189.11. This would require the processor to use an ingredient statement in the product label, i.e. butter, milk powder and grade 'A' milk and milk products, listing the ingredients in their order of diminishing prominence when sold in Iowa.

"The use of goat milk for the manufacture of butter and nonfat powder is prohibited by federal law. These products are defined by acts

of Congress and therefor regulated when transported in interstate commerce. A federal standard defines milk as the lacteal secretion . . ., obtained by the complete milking of one or more healthy cows, thereby limiting the use of the word milk. . . .

"The two most acceptable alternatives for the use of goat milk is in certain cheeses or as Grade 'A' pasteurized bottled goat milk and milk products."

You seem to conclude that goat milk and certain goat milk cheeses may be sold in Iowa, but butter and nonfat dry milk must come from cow's milk, to be sold in our state. Further, your letter says that any dairy goat product must be labelled as such, and any product made from mixtures of cow and goat milk must identify the proportions used in its manufacture.

I would agree that goat milk may be processed and sold in Iowa, and that when sold to the final consumer, it must meet Grade "A" standards. The word "milk" in Chapter 190, Code of Iowa, 1975, "shall be interpreted to include goat milk," §190.1(40), so generally any of the milk products defined in that chapter may be made from goat as well as cow milk. That goat milk may be sold is confirmed by §192.8(6), where a "dairy farm" is defined as any place or location where one or more cows *or goats* are kept. As with cow milk, goat milk must be of Grade "A" quality to be sold to the final consumer, since this is required by §192.11.

Cheese and cheese products may also be made from goat milk and sold in Iowa, since "cheese" is defined in §190.1(4) of the Code as being the product described in Part 19, Title 21 of the Federal Food, Drug and Cosmetic Act, as amended to December 31, 1972 (See 21 U.S.C., §301, et. seq.) In the implementing regulations for this Act, found in 21 C.F.R., §19.499, et. seq. (1975), certain cheeses are allowed to contain goat milk. See, for example, §19.567 (gorgonzoia), §19.591 (caciocavallo siciliano), and §19.610 (romano). These cheeses and others may be made from goat or cow milk, or mixtures of the two, under the regulations in C.F.R.

The Code of Iowa, in §190.1(56), defines dry milk products as milk products which have been manufactured under the provisions of "Grade 'A' Dry Milk Products-Recommended Sanitation Ordinances and Code for Dry Milk Products Used in Grade 'A' Pasteurized Milk Products (1959), "a book issued by the United States Public Health Service. In that book, in Part II, §1(A), "milk" is restricted by definition to cow milk, so dry milk products may only be made from cow milk, both according to Federal and State regulations, since the Federal laws are a part of Iowa law by reference.

Butter is defined in our Code only as a "milk" product, §190.1(1), so because "milk" is to be defined to include goat milk, §190.1(40), goat milk butter may clearly be produced and sold within Iowa, but of course it will have to meet the same standards that cow milk butter must meet, unless a standard is clearly unapplicable.

I can find no authority to confirm your statement that "(t)he use of goat milk for the manufacture of butter . . . is prohibited by federal

law." The definitions found in the Food, Drug and Cosmetic Act, 21 U.S.C., §§321a and 321c, limit butter to cows milk, but this Act is not a complete limitation on what can be sold. "Milk" is limited to cow's milk in this Act, §321c, yet federal regulations allow the production and sale of goat's milk. See, Grade "A" Pasteurized Milk Ordinance-1965 Recommendations of the United States Public Health Service, Part I, §1 (A and A-1).

The question arises as to whether the above products may be made from mixtures of cow and goat milk, and if they may, what labelling standards are required by the Code. Although there is no express allowance for a mixing of the two fluids, except in the case of cheeses, neither is there an express prohibition.

The familiar rules of statutory interpretation may well be applied here, since the problems presented are basically questions of determining the applicability of various Code sections. The ultimate goal of statutory construction is to give the statute a reasonable construction which will accomplish, rather than defeat its purpose. *Domain Industries, Inc. v. First Security Bank & Trust Co.*, 230 N.W.2d 165, 169 (Iowa 1975). In interpreting statutes, one should look to the object to be accomplished and the evils sought to be remedied, to determine a reasonable construction which will best effect the law's purpose. *State, ex rel. Highway Commission v. City of Davenport*, 219 N.W.2d 503, 507 (Iowa 1974); *State v. Holt*, 156 N.W.2d 884, 890 (Iowa 1968).

The definitions found in Chapter 190 seem to have been deemed determinative in the past as to what products may be sold in Iowa, see *Lever Brothers Co. v. Erbe*, 249 Iowa 454, 87 N.W.2d 469 (1958), so they should not be subject to extremely broad interpretations. Here, however, we feel that the intent of these statutes would best be followed by interpreting "milk" to include a mixture of the two types of milk which are specifically allowed in Chapter 190. Laws such as these were not passed to strictly limit the variety of goods which may be sold to the public; they exist primarily to insure that the consumer receives a safe and wholesome product when he makes food purchases. Since both dairy goat and dairy cow products may be sold, there is no reason why mixtures of the two may not also be allowed.

The next issue which must be examined is what labelling requirements must be met. All bottles, containers, and packages enclosing milk or milk products as defined in §190.1, subsections 6 and 38 to 57, shall be conspicuously labelled or marked with the name of the contents as given in the definitions of this chapter and chapters 190 and 192. Section 191.2(5)(a), Code of Iowa, 1975. All mixtures must be labelled as such and ingredients must be listed, beginning with the one present in the largest proportion. Id. §189.11.

Although §190.1(40) says that the word "milk" shall be interpreted to include goat milk, it is our opinion that for labelling purposes the word "milk" alone would be insufficient for any dairy goat product. The "name" required in §191.2(5)(a) generally refers to the subsection headings found in the specified subsections of §190.1. Where exceptions to §191.2(5)(a) exist, they are mentioned separately, as in §191.2(5)(j)(3), where the specific name of a product may be substituted for the

generic heading term of "concentrated milk products" found at §190.1 (45). Accordingly, goat milk must clearly be labelled as such, and any mixture of goat and cow milk must be labelled as a mixture and must specify the ingredients used in its production.

A careful reading of §191.2(5), shows that butter is not within its scope, since this section is applicable only to subsection 6 and subsections 38 to 57 in §190.1, but butter is defined in subsection 2 of §190.1. Butter made from goat milk or from a combination of goat and cow milk must meet the labelling requirements of §191.1, which says that the standards found in §189.9 to §189.12, inclusive, are to be applied unless otherwise provided in Chapter 191. Section 189.9 requires that the "true name, brand, or trade-mark of the article" be shown on the label, so a 100% goat milk butter would have to be clearly labelled as a dairy goat product, since in our opinion the "true name" is "goat milk butter" or "goat butter", not merely "butter", which is commonly understood to mean a cow's milk product. A trade name could be used as long as the ingredients were listed, and, as stated earlier, any mixture would have to be labelled as such, and the ingredients would have to be given in a list of proportions.

This review is not necessarily definitive as to what dairy goat products may be produced and sold in Iowa. This is only an analysis of the statutes pertaining to those products deemed permissible by the Iowa Department of Agriculture, as set forth at the beginning of this opinion, but any other dairy goat products should be produced and sold in light of the conclusions arrived at here.

July 30, 1976

ELECTIONS: Registration by mail. §48.3, Code of Iowa, 1975, as amended by §47, Chapter 81, 66th G.A., 1st Session (1975) and §1, House File 1010, Acts, 66th G.A., 2nd Session (1976). A practice of the AFL/CIO whereby by postcard registration forms are sent to its members with the request that they be completed and returned to the AFL/CIO rather than sent directly to the appropriate county commissioner of registration is contrary to the tsatute. (Haesemeyer to Elliott, Director of Voter Registration, 7-30-76) #76-7-37

Ms. Dorothy Elliott, Director of Voter Registration: By your letter of July 29, 1976, you ask if a procedure being used by the AFL/CIO to register its members and the families of its members is legal. From the materials enclosed with your letter, it appears that the Iowa Committee on Political Education, AFL/CIO, is sending a letter to AFL/CIO members urging them to register to vote and enclosing with the letter three postcard registration forms, together with a prepaid envelope. A portion of the letter states:

* * *

"We are enclosing three registration cards and a prepaid envelope for your conveinence. It is very important that you and your family fill out these forms immediately and use the enclosed envelope to mail them. * * * "

The postcard registration is the standard form and one one side contains the following:

"County Auditor—Commissioner of Elections

"Courthouse

"

City (County Seat)

"IOWA

Zip Code"

The postcard form is not postage prepaid. The envelope on the other hand is postage prepaid and instead of being addressed to the county auditor-commissioner of elections, it is addressed to: Iowa State AFL-CIO Voter Registration FFund, 2000 Walker Street, Suite A, Des Moines, Iowa 50317. It is not clear why the AFL/CIO wants the voter registration forms returned to it rather than to the county auditor, but one might speculate that it wants to save its members the postage which they would otherwise be required to affix to the voter registration postcard form and/or that it wants to have some way of determining which members do not return the forms so that some form of followup may be undertaken.

Your question arises because of the language of §48.3, Code of Iowa, 1975, as amended by §47, Chapter 81, 66th G.A., 1st Session (1975) and §1, House File 1010, Acts, 66th G.A., 2nd Session (1976), which provides:

"Registration by mail. As an alternative to the method of registration prescribed by section 48.2, any person entitled to register under that section may submit a completed voter registration form to the commissioner of registration in the person's county of residence by postage paid United States mail. A registration form or the envelope containing one or more registration forms for the use of individual registrants who are related to each other within the first degree of consanguinity or affinity and who reside at the same address shall be postmarked by the twenty-fifth day prior to an election or the registration will not take effect for that election. A separate registration form shall be signed by each individual registrant. Within five working days after receiving a registration by mail, the commissioner shall send the registrant a receipt of the registration by first class mail marked 'do not forward'. If the receipt is returned by the postal service the commissioner shall treat the registration as prescribed by section 48.31, subsection 8. An improperly addressed or delivered registration form shall be forwarded to the appropriate county commissioner of registration within two working days after it is received by any other official."

It is to be observed that under the language of the first sentence of such §48.3, as amended, it is only "any person entitled to register" who may submit a completed voter registration form to the commissioner of registration by postage paid United States mail. The statute does not authorize third persons or entities to submit other persons' voter registration forms. In other words, the statute infers at least that the voter registration form is supposed to be personally submitted by mail to the commissioner of registration and not by some agent or intermediary acting on his behalf. This is consistent with §48.2, which provides in the first sentence thereof:

"Who may register. Any person who is an eligible elector may register to vote by *personally* submitting a completed voter registration form to the commissioner of registration or a deputy commissioner of registration in the elector's county of residence. . . ." (Emphasis added)

Such a construction is also consistent with the second sentence of §48.3, which must be given some meaning. In other words, if third persons could submit voter registration forms in bulk to the commissioner of registration, it would not have been necessary to specifically authorize the submission of more than one registration form in an envelope under very limited conditions, viz., that the forms be for the use of individual registrants who are related to each other within the first degree of consanguinity or affinity and reside at the same address. Accordingly, it is our opinion that the practice of the AFL/CIO having forms returned to them and then submitting them in bulk to the commissioner of elections is not a practice contemplated by §48.3. This is not to say that the AFL/CIO could not send its members postage paid postcard registration forms, but the forms should be sent by the individual members directly to the commissioner of elections.

We do not believe that this problem is sufficiently serious to warrant invalidating registrations already received from the AFL/CIO or to require the AFL/CIO to return any cards to its members which it presently has on hand. However, any cards presently on hand should have postage affixed and be individually mailed to the appropriate commissioner of registration.

July 30, 1976

BOARD OF OPTOMETRY EXAMINERS: Licensing optometrists: Examinations: §§147.21 and 147.133, Code of Iowa, 1975. Public members of the State Board of Optometry Examiners are not permitted to vote on whether a particular applicant should be granted a license to practice optometry after the applicants have taken the examination therefor because §§147.21 and 147.133 prohibit public members of the board from participating in administering or grading any portion of an examination. (Turner to Nichols, 7-30-76) #76-7-38

Dr. Claude E. Nichols, Chairman, Board of Optometry Examiners: On behalf of the State Board of Optometry Examiners, you have requested an opinion of the attorney general as to whether public members of the State Board of Optometry Examiners are lawfully entitled to vote as to whether or not a particular applicant should be granted a license to practice optometry after examinations have been taken by the new applicants.

The answer is no. §§147.21 and 147.133, Code of Iowa, 1975 (enacted in 65th G.A., Ch. 1086, §§78 and 105, 2nd Session, 1974) both contain the following identical language:

"The public members of the board shall not participate in administering or grading any portion of an examination."

Perhaps, by repeating the foregoing language from §147.21 later in the same Act, the legislature merely intended to say "And by golly we mean it!" In any case, public members of the Board of Optometry Examiners permitted to vote on whether a particular applicant should be granted a license would be doing indirectly that which they are forbidden to do: participating in administering or grading the examination.

Of course, your question and this opinion assume that the applicant has already been permitted to take the examination.

August 2, 1976

STATE OFFICERS AND DEPARTMENTS: Department of Agriculture — Dairy Trade Practices. Chapter 192A, Section 192A.13, the Code. Processors and distributors of dairy products may not provide free advertising allowances to retailers in connection with the sale of dairy products. (Swanson to Lounsberry, Secretary of Agriculture, 8-2-76) #76-8-1

Mr. R. H. Lounsberry, Secretary of Agriculture: You have requested an Opinion from the Attorney General regarding the effect of Section 192A.13, Code of Iowa, and department rules and regulations promulgated thereunder, on certain practices of a company engaged in the business of manufacturing, processing, or packaging dairy products, as well as engaged in the business of selling a dairy product at wholesale.

You describe a situation wherein a company would establish a program with retailers offering advertising paid for by a dairy product processor to retailer customers purchasing a given quantity of ice cream or other dairy products. You describe the concept as a "sales promotion program," wherein the retailer will earn radio commercials which will sell the dairy products and which would be "devoted to any message about the retail store and its services, its private label products, its special sales, its work in the community, anything that is not competitive to the dairy product." You state that the more gallons the retailers purchase, the more commercials they "earn." The retailer selects the week to feature the products at a price the retailer chooses and in the variety the retailer prefers.

Section 192A.13, the Code, provides as follows:

"No processor or distributor shall give, offer to give, furnish, finance, or otherwise make available any free goods to any person, directly or indirectly, in connection with the sale of dairy products or to any other person doing business with such person, or give, offer to give, furnish, finance, or otherwise make available any payments, gifts, or grants of anything of value to any retailer . . . ."

Certain transactions with retailers are exempt from the prohibitions of the statute. Among the exemptions are transactions which involve:

* * *

"3. The advertising by a processor or distributor of products through any advertising media the processor or distributor selects which does not involve allowances, payments, or the furnishing of other property to persons purchasing such products in a manner prohibited by this section. [and]

"4. Advertising allowances which do no more than reimburse a retailer for costs in advertising dairy products of the processor or distributor." Section 192A.13, The Code.

The terms "processor" and "distributor" are defined by Section 192A.1 of the Chapter, and would appear to include the companies described.

Section 192A.16, the Code, further provides that:

"It shall be unlawful for any retailer to receive, directly or indirectly, from or through a processor, distributor, or broker, any discount, rebate,

allowance, service, price discrimination, advertising material, loan, equipment, payment, or any other thing of value all as prohibited by this chapter."

The Iowa Departmental Rules promulgated under Chapter 192A of the Code provide, among other things, that the general effect of sections 192A.13, 192A.14, and 192A.15 is to prohibit processors and distributors from extending payments and gifts that may buy or retain accounts. Processors and distributors are prohibited from running contests among their retail accounts and giving prizes to retailers for increases in volume of sales. Rule 16.6(2), Agriculture — Dairy Trade Practices, Iowa Departmental Rules.

The Rules provide that certain transactions involving advertising allowances are allowed by the statute. Among these is the advertising by a wholesaler of his own products through any advertising media he selects which does not involve allowances, payment for furnishing of other property to persons purchasing such products in a manner prohibited. Examples would be newspapers, radio or television advertising and printed material such as flyers, which only advertise the dairy and does not identify any retailer. Rule 16.6(2), supra.

Among other transactions allowed is the providing of advertising allowances which does no more than reimburse a retailer for his cost in advertising the wholesaler's selected dairy products. For example, a dairy may pay a retailer for only that portion which advertises the dairy's products. Rule 16.6(2), supra.

Although we have found no appellate decisions interpreting the provisions of Chapter 192A, the Code, the language of the statute, and Departmental Rules promulgated thereunder, appear to clearly prohibit certain activities which you describe.

The practice of the company in providing free radio commercials "devoted to any message about the retail store and its services, its private label products, its special sales, and its work in the community" is a practice which does not fall within any exemption listed in Section 192A.13, the Code, nor does it constitute conduct allowed under Rule 16. Iowa Departmental Rules.

Accordingly, it is our opinion that the practice of providing free radio commercials described above would constitute a grant of a thing of value in connection with the sale of dairy products, and would be prohibited by Section 192A.13, the Code.

August 2, 1976

ELECTIONS: Absentee Ballots. §§53.1, 53.7, 53.35, Code of Iowa, 1975. It is not unlawful for third persons to solicit absentee ballots except that employees of the state or a public subdivision (except elected officials) may not do so. As long as he expects to be unable to vote in person because of the reasons allowed under §53.1, a voter may use an absentee ballot, even if he later is not absent or otherwise physically unable to go to the polls on election day. Willful failure to return an absentee ballot is a violation of §53.5. (Haesemeyer to Gentleman, State Representative, 8-2-76) #76-8-2

The Honorable Julia B. Gentleman, State Representative: This is in reply to your letter of July 20, 1976, in which you requested this office to review the Iowa statutes pertaining to absentee ballots. More specifically, you said:

"The area of concern appears to be what limitations, if any, there are on third parties soliciting absentee ballots and requests also an opinion about the voter's right to an absentee ballot when he/she will not be absent or disabled on election day."

The only prohibition against soliciting absentee ballots, against requesting or encouraging others to vote absentee, lies in §53.7, Code of Iowa, 1975, where any employee of the state or political subdivision thereof, except an elected official, is forbidden "to solicit any application or request for application for an absentee ballot, or to take an affidavit in connection with any absentee ballot." Anyone else may solicit absentee ballots, but I would point out that no one may endeavor to procure the vote of any elector by means of violence, threats of violance, or threats of withdrawing custom or dealing in business or trade, or enforcing the payment of debts, or bringing any civil or criminal action, or any other threat of injury to be inflicted by him or by his means. Section 738.15, Code of Iowa, 1975. Any person who violates §738.15 shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year. Id.

Any qualified elector may vote by using an absentee ballot when he meets at least one of the two provisions of §53.1 of the Code:

"1. When he expects to be absent or election day during the time the polls are open from the precinct in which he is a qualified elector.

"2. When, through illness or physical disability, he expects to be prevented from going to the polls and voting on election day."

Thus, as long as he expects to be unable to vote in person because of the reasons allowed under §53.1, a voter may use an absentee ballot, even if he later is not absent or otherwise physically unable to go to the polls on election day. In answer to your question, a voter has no "right" to an absentee ballot when he or she does not expect to be absent or disabled on election day, but as a practical matter, that a person did not have such expectations when the absentee ballot was requested may be difficult to prove. The voter need not contemplate a lengthy journey to be eligible to receive an absentee ballot, as he need only expect to be absent *from his precinct*, during the hours the polls are open on election day.

This method of voting should be used only when really needed, for once the voter procures the ballot, he faces serious consequences should he fail to return it, such consequences being set forth in §53.35:

"Refusal to return ballot. Any person who, having procurred an official ballot or ballots, shall willfully neglect or refuse to cast or return the same in the manner provided, *or who shall willfully violate any provision of this chapter*, shall unless otherwise provided, be fined not to exceed one hundred dollars, or imprisoned in the county jail not to exceed thirty days . . . ." (Emphasis added)

Further, one who procures an absentee ballot knowing he does not fit

either category under §53.1, could be held subject to the sanctions of §53.35, but there exists the problem of proof mentioned here earlier which may make conviction difficult.

August 2, 1976

ELECTIONS: Electronic Voting System. §§49.30, 52.26, 52.28 and 52.30, Code of Iowa, 1975. The Gyrex MTB-1 Voting System appears to meet the requirements of the Iowa Election Laws. The requirement that the names of all candidates appear on one ballot is applicable to electronic voting systems only to the extent that it is possible within the constraints of the system. The system in question does prevent the voter from casting more than one vote for any office or on any question. The system in question is not a voting punch device and therefore §52.26(7) does not apply. (Haesemeyer to Voelker, Board of Examiners of Voting Machines, 9-2-76) #76-8-3

Mr. Roy E. Voelker, Board of Examiners of Voting Machines: You have requested an opinion of the Attorney General with respect to the Gyrex MTB-1 Voting System and whether such Gyrex System meets the requirements of the Iowa election laws.

In your letter you have asked three specific questions, the first of which deals with the provisions of §49.30, Code of Iowa, 1975, which requires that the names of all candidates be printed on one ballot. Your first question reads as follows:

"1. Section 52.28(2) provides for the types of ballot cards and ballot labels and voting punch device, but is silent as to the requirements set forth in Section 49.30 regarding the names of all candidates to be voted for in each election precinct being printed on one ballot, and the exceptions thereto. The Gyrex MTB system utilizes cardboard cards (samples enclosed) which are marked by the voter and fed into a counter."

Section 52.28(1), provides:

"Electronic voting system ballot forms.

"1. The commissioner of each county in which the use of an electronic voting system in one or more precincts has been authorized shall determine the arrangement of candidates names and public questions upon the ballot or ballots used with the system. The ballot information, whether placed on the special paper ballot, the ballot card or the ballot label, shall be arranged as required by chapters 43 and 49, and by any relevant provisions of any statutes which specify the form of ballots for special elections, *so far as possible within the constraints of the physical characteristics of the electronic voting system in use in that county.* The state commissioner may adopt rules requiring a reasonable degree of uniformity among counties in arrangement of electronic voting system ballots." (Emphasis added)

Section 49.30, provides:

"All candidates on one ballot—exception. The names of all candidates to be voted for in each election precinct, other than presidential electors, shall be printed on one ballot, except as otherwise required by section 46.22 and except that at any election where voting machines are used, and it is impossible to place the names of all candidates on the machine ballot, the commissioner may provide a separate printed ballot for the candidates for judge of district court and the township ticket, or either, candidates for judge of district court and the township ticket, or either; one of each of said printed ballots to be furnished each qualified voter."

We believe that the requirements of §49.30 that the names of all candi-

dates be placed on one ballot are aimed at paper ballots of the conventional and more traditional type rather than cardboard strips such as those utilized in the Gyrex System. This construction is consistent with the requirements of §52.28 quoted above, which it is to be observed require that, "the ballot information whether placed on the special paper ballot, the ballot card or the ballot label shall be arranged as required by chapters 43 and 49, and by any relevant provisions of any statutes which specify the form of ballots for special elections, so far as possible within the constraints of the physical characteristics of the electronic voting system in use in that county." Thus, the requirements of Chapter 49, including §49.30, would apply only so far as they are within the constraints of the physical characteristics of the Gyrex System.

Your second question is stated as follows:

"2. Paragraph 2 of Section 52.26 provides that an electronic voting system shall 'permit each voter to vote at any election for any candidate for each office and upon each public question with respect to which the voter is entitled by law to vote, *while preventing the voter from voting* more than once upon any public question or casting more votes for any office than there are persons to be elected to that office.' (emphasis supplied)"

A feature of the Gyrex System is that the machine into which the ballots are placed does not record any vote whatsoever when a voter marks his ballot for both candidates running for a particular office.

Section 52.26, a portion of which you have quoted in your question, is clear in its intent that an "Authorized electronic voting system" permit each voter to vote "at any election for any candidate for each office and upon lack of public question on which he is entitled to vote with the caveat that such voter be prevented from voting" more than once on any public question or casting more votes for any office than there are candidates to be elected to that office. Section 49.93 provides that no voter shall vote for more than one candidate for the same office. Section 49.98 entitled "Counting Ballots", further provides in part that ". . . if, for any reason it is impossible to determine from a ballot, as marked, the choice of the voter for any office, such ballot shall not be counted for such office."

From the above, an election official while counting paper ballots would be required to disregard and not count the ballot for any office for which a voter had voted for more than one candidate. The feature of the Gyrex System which accomplishes this same purpose is no less legal than if such purpose were accomplished manually.

Your final question asks:

"Would the Gyrex System come within the purview of paragraph 7 of §52.26?"

The section you have noted reads in part:

"The voting punch device shall be so constructed and designed so if an elector makes an error in marking the ballot, the machine shall indicate the error and permit the elector to make the correction . . . ."

Section 52.26, subsection 7, does not apply to the Gyrex machine since it refers to the design of a "voting punch device." The Gyrex System

does, however, conform to the intent of the subsection in that it utilizes a ballot to be marked in pencil and erasure is therefore possible to correct any mistakes.

Beyond this, a voter who makes an error in marking his ballot may obtain a new ballot under the provisions of §52.30, which provides in part:

"The provisions of this section shall apply to any precinct for those elections at which votes are to be received on ballot cards in that precinct. * * *

"4. A voter who spoils or defaces a ballot card or marks it erroneously shall return the card to the precinct election officials with stub folded so as not to disclose any choices made. The precinct election officials shall deliver to the voter another ballot card, but no voter may receive more than three ballot cards including the one originally delivered to the voter. Upon return of a defective ballot card, a precinct election official shall cancel it by writing in ink on the back the word 'spoiled'. The canceled ballot card shall be placed, without detaching the ballot stub, with spoiled ballots to be returned to the commissioner. * * *"

August 6, 1976

TAXATION: PROPERTY TAX: County-wide Mass Appraisal Revaluations: H.F. 1564, Acts of 66th G.A., Second Session; §441.21, Code of Iowa, 1975, as amended by Ch. 205, Acts of 66th G.A., First Session. A county-wide thorough and detailed mass appraisal revaluation of realty can be made effective as of January 1, 1979, but the assessor must also reassess realty as of January 1, 1978, and, in doing so, must implement the proper equalization orders, if any, issued by the Director of Revenue. Where such revaluation is made effective as of January 1, 1979, the ultimate burden of proof as to a change in value in individual assessments from the prior reassessment year does not shift to the assessor. The dates pertaining to even-numbered years in §13 of H.F. 1564 are not applicable in the event the revaluation is effective in an odd-numbered year. (Murray to Fenton, Polk County Attorney, 8-6-76) #76-8-4

Mr. Ray A. Fenton, Polk County Attorney: You have requested the opinion of the Attorney General on a series of questions involving a situation where the Polk County assessing jurisdiction is contemplating a revaluation of realty therein, for property tax purposes, with a completion date for values to be effective January 1, 1979, which, under §428.4, Code of Iowa, 1975, would have been the beginning of a Quadrennial assessment period. Specifically, you are concerned with the effect which H.F. 1564, Acts of 66th G.A., Second Session, will have on such revaluation and the duties of the Polk county assessor.

Section 428.4, as amended by §1 of H.F. 1564, provides in relevant part:

"Real estate shall be listed and *assessed in 1978* and every *two* years thereafter. *The assessment of real estate shall be the value of the real estate as of January first of the year of the assessment. The year 1978 and each even-numbered year thereafter shall be a reassessment year.* In any year, after the year in which an assessment has been made of all the real estate in any assessing jurisdiction, it shall be the duty of the assessor to value and assess or revalue and reassess, as the case may require, any real estate that *the assessor* finds was incorrectly valued or assessed, or was not listed, valued and assessed, in the real estate assess-

ment year immediately preceding, also any real estate *the assessor* finds has changed in value subsequent to January *first* of the preceding real estate assessment year. The assessor shall determine the actual value and compute the taxable value thereof *as of January first of the year of the revaluation and reassessment.*" (emphasis supplied on amendment language in H.F. 1564).

You first inquire whether the above quoted statutory provisions require the revaluation to be completed and effective for valuation as of January 1, 1978, rather than January 1, 1979. A county-wide thorough and detailed revaluation of realty in Polk County, particularly if the county is assisted by a professional mass appraisal firm pursuant to §441.50, Code of Iowa, 1975, would take several years to complete. However, §428.4, as amended, requires the Polk County assessor to assess realty in Polk County by fixing valuations as of January 1, 1978, and in doing so, §13 of H.F. 1564 requires the assessor to implement any equalization orders issued in 1977 by the Director of Revenue to be effective in 1978. If the revaluation is thereafter totally completed and can go into effect as of January 1, 1979, the assessor can utilize it in the performance of his duties set forth in §428.4, as amended, pertaining to determination of realty valuations in a nonreassessment year. It should further be noted that the Director of Revenue has broad powers with reference to supervision of assessments and assessors, and the equalization of aggregate valuations of classes of properties. *Hougen v. George*, 1963, 254 Iowa 1055, 120 N.W.2d 497; *State v. Local Board*, 1939, 225 Iowa 855, 283 N.W.87; 1966 O.A.G. 456; §421.17, Code of Iowa, 1975; §§441.47-441.49, Code of Iowa, 1975, as amended by §§11-13 of H.F. 1564. In short, an assessing jurisdiction can put into effect a complete revaluation in a nonreassessment (odd-numbered) year, but for the year 1978, the assessor will have to reassess realty and consider the equalization adjustments, if any, issued by the Director of Revenue in 1977 to be implemented by the assessor in 1978 in making the 1978 assessments, for §441.49, as amended by §13 of S.F. 1564, provides in relevant part:

"The assessor shall prior to May fifteenth of the year following, in completing the reassessment of real estate as provided in section four hundred twenty-eight point four (428.4) take into consideration the final equalization order of the director to the end that the aggregate actual valuation for each class of property affected by the order will be the amount determined by the director. In making the adjustments the assessor shall see to it that in no case shall the assessed value of an individual property exceed one hundred percent of its actual value determined in accordance with section four hundred forty-one point twenty-one (441.21) of the Code. Not later than May twentieth, the assessor shall submit to the director of revenue, on forms prescribed by the director, a report of all actions he has taken to comply with the equalization order issued to him in October of the preceding year."

Whether the Director will find that equalization adjustments are necessary for the Polk County assessing jurisdiction to be effective as of January 1, 1978, is a matter for the Director to determine in the exercise of his sound discretion. *Hougen v. George*, supra.

Your next question is whether the legality and validity of a county-wide revaluation of realty depends upon the securing of written permission or orders from the Director of Revenue. Certainly, the Director could order or grant permission to an assessing jurisdiction to make a complete revaluation of all realty within the assessor's jurisdiction and

prescribe the year in which said revaluation would be completed and take effect. 1966 O.A.G. 456; §421.17(2) and (10), Code of Iowa, 1975. However, without the permission of or an order by the Director, the assessing jurisdiction can make a complete revaluation, either by the assessor only or with the aid of appraisers and technical help. 1962 O.A.G. 85. And, the assessing jurisdiction can initially decide when the revaluation is to be completed i.e. January 1, 1979. However, again, the assessor should establish assessed valuations as of January 1, 1978 and implement any ordered equalization adjustments properly determined by the Director of Revenue. Based upon the completed revaluation, the assessor can then perform the duties heretofore set forth imposed upon him for a nonreassessment year.

You then inquire as follows:

"If orders or permission are not required for a re-appraisal in an odd-numbered year, and the assessor acts under a further provision of 428.4 which states in part, 'In any year, *after the year* in which an assessment has been made of all real estate in any assessing jurisdiction, it shall be the duty of the assessor to value and assess . . . *Also any real estate the assessor finds has changed in value* subsequent to January first . . .' then would not the exercise of this provision shift the 'burden of proof' of a change in value upon the assessor." (italicizing yours).

The answer is No. Section 441.21, Code of Iowa, 1975, as amended by Chapter 205, Acts of 66th G.A., first session, provides in relevant part:

"*The burden of proof shall be upon any complainant attacking such valuation as excessive, inadequate, inequitable or capricious;* however, in protest or appeal proceedings when the complainant offers competent evidence by at least two disinterested witnesses that the market value of the property is less than the market value determined by the assessor, the burden of proof thereafter shall be upon the officials or persons seeking to uphold such valuation to be assessed." (emphasis supplied).

When there is an increase or decrease in the valuation of property the person assessed is so notified by the assessor. Section 441.23, as amended by §3 of H.F. 1564. Thereafter, the aggrieved taxpayer may appeal to the local board of review and then to the district court. See §§441.37 as amended by §9 of H.F. 1564 and 441.38, Code of Iowa, 1975. Also, appeals can be made under the circumstances set forth in §§441.42 and 441.43, Code of Iowa, 1975. Consequently, when the assessor makes individual reassessments in a year succeeding the even numbered reassessment year on the basis of a finding of a change in value, the Iowa statutes pertaining to protest or appeal proceedings attacking such valuations clearly place the burden of proof upon the one attacking the individual assessed valuations and in the event at least two disinterested witnesses testify pursuant to the aforementioned provisions of §441.21, the taxing authority has the burden of persuasion shifted to it to present evidence to uphold the valuation as made. *Milroy v. Board of Review of County of Benton*, 1975, Iowa 226 N.W.2d 814.

Next you state that in the event the revaluation is set for completion as of January 1, 1979, how would the assessor make the 1978 assessments in the event that the Director of Revenue issued to said assessor an equalization order, pursuant to §§11-13 of H.F. 1564, to be implemented

by the assessor for the year 1978. The mechanics of making property tax assessments are not appropriate matters to be considered in an opinion of the Attorney General. O.A.G. Griger to Bordwell, January 5, 1976. It should be noted, however, if the assessor does not comply with the equalization adjustments, if any, ordered by the Director of Revenue to be effective in 1978, §13 of H.F. 1564 states in relevant part:

"If the director of revenue determines that the assessor has not complied with the equalization order by making the necessary adjustments in valuation, he shall on or about June first reconvene the local board of review in special session. During this special session, the board of review shall, by resolution, make the adjustments necessary to comply with the equalization order."

Moreover, a refusal to carry out the equalization order of the Director of Revenue could subject the appropriate assessing officials to mandamus. *G. D. Bair, Director of Revenue v. Decatur County Board of Review*, 1973, CE 2-1095, Polk County District Court (unpublished opinion by Judge Missildine); 1966 O.A.G. 456. And the legislative mandate of §1 of H.F. 1564 clearly requires the assessor to attempt, in good faith, to find the actual value of individual parcels of realty in the assessing jurisdiction as of January 1, 1978. The mere fact that the assessor could demonstrate that a complete revaluation to be effective in 1979 would contain more accurate values than said assessor could establish in 1978 based upon data available to him is no ground for refusal to implement a proper equalization order of the Director. Indeed, a refusal to implement a proper equalization order of the Director would not improve existing inequities in individual assessed valuations and could amount to a discriminatory shift of the property tax burden from the class of property valuations ordered adjusted to other classes which would then bear more than their fair share of the property tax burden. But mere undervaluation or overvaluation of individual properties by taxing officials acting in good faith has been held not to be an illegal systematic discrimination violating constitutional rights. *Sunday Lake Iron Company v. Township of Wakefield*, 1918, 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154. Also those taxpayers who are dissatisfied with the 1978 values fixed by assessing officials can, as previously pointed out, appeal to the local board of review.

Finally, you inquire whether the provisions of §13 of H.F. 1564 applicable for even-numbered years, regarding such matters as board of review sessions, dates for mailing assessment notices, completion dates for assessments, and dates for filing protests with the board of review apply in the event a revaluation is completed and becomes effective in an odd-numbered year i.e. January 1, 1979. A reading of said §13 of H.F. 1564 clearly states that there are separate time periods and dates for nonreassessment years (odd-numbered years) and reassessment years (even-numbered years). The completion of a revaluation in an odd-numbered year does not change this condition. Therefore, your last question is answered in the negative.

August 6, 1976

COURTS: COURT COSTS: COUNTIES AND COUNTY OFFICERS: CITIES AND TOWNS: CRIMINAL LAW: Assessment of Fees and Costs between Municipalities and Counties in Criminal Actions brought

by Municipalities — Chapter 625, Code of Iowa, 1975; §§337.12, 364.1, 364.3(2), 366.1, 602.55, 602.63, 606.15, 622.63-622.68, 622.71, 622.73, 625.1, 625.11, 625.14, Code of Iowa, 1975; §337.11, 1975 Code of Iowa, as amended by Ch. 101, Acts, 66th G.A., 1975 Session; §622.69, 1975 Code of Iowa, as amended by Ch. 246, Acts, 66th G.A., 1975 Session; §622.72, 1975 Code of Iowa, as amended by Ch. 248, Acts, 66th G.A., 1975 Session; §622.73, 1973 Code of Iowa; Ch. 16, 1897 Code of Iowa. When a municipality brings a criminal action under one of its ordinances and that action is either dismissed or the defendant is acquitted, the city is responsible for the payment of the witness fees and mileage; the county is responsible for payment of the sheriff's fees for serving subpoenas, and the city must pay the court costs of the case. (Coleman to Kopecky, Linn County Attorney, 8-6-76) #76-8-5

Mr. Eugene J. Kopecky, Linn County Attorney: You have requested an Attorney General's Opinion on the following:

"A question has arisen concerning the payment of witness fees, Sheriff's Fees for mileage, and Court costs in misdemeanor cases filed by the City of Cedar Rapids and which are either dismissed by the City or in which the Defendant is found not guilty. We are specifically requesting an opinion as to whether the City or the County is responsible to pay the following:

"1. Witness fees and mileage;

"2. Sheriff's Fees for serving subpoenas;

"3. Court costs

"when the defendant is found not guilty or the case is dismissed."

I

The question of the division of witness fees and mileage costs between a county and a city, is addressed in Section 622.73, Code of Iowa, 1975, which provides:

"For attending before the trial jury or court in criminal cases where the defendant is adjudged not guilty or the action is dismissed, *the fees above provided for attending court* shall be paid as follows:

"1. In actions based on a violation of a state statute, by the county, upon a written statement of the clerk or a judicial officer showing the amount due.

"2. In actions based on a violation of a city ordinance, by the city, upon a written statement of the clerk or a judicial officer showing the amount due." (emphasis added).

The language of this section directs that notice of preceding sections be taken in order that the fees set out therein might be properly divided and paid. With regard to witness fees and mileage, therefore, §622.69, Code of Iowa, 1975, as amended by Chapter 246, Acts of the 66th G.A., 1975 Session, which precedes §622.73, states:

"Witnesses shall receive ten dollars for each full day's attendance, and five dollars for each attendance less than a full day, and mileage expenses at the rate of fifteen cents per mile for each mile actually traveled."

It is our opinion that §622.73 directs that the witness fees and mileage expenses provided for in §622.69 will be paid by the entity (municipality or county) that has brought the charge. Thus, where the charge is based upon a violation of city ordinance, the city pays the witness fees

and mileage, and where the charge is based upon a state statute, the county pays the witness fees and mileage. Furthermore, it would seem apparent that the same division and responsibility for payment of fees is applicable to §622.71, Code of Iowa, 1975, which deals with fees paid to peace officers who are called as witnesses when not on duty, and to §622.72, Code of Iowa, 1975, as amended by Chapter 248, Acts of the 66th G.A., 1975 Session, which deals with fees paid to expert witnesses.

II

The second question, concerning sheriff's fees for serving subpoenas, does not so easily fit within the enumerations of §622.73, supra, as to division of costs. Determination must be made as to whether the costs of serving subpoenas come within the ambit of "fees for attending court" as contained in §622.73, supra, and, assuming that they do, whether such would be in conflict with other portions of the Code, so as to render those portions nugatory.

Just as in the answer to the first question, §622.73, supra, contains language which directs that attention be given to sections that precede it, ("the fees above provided"). Some of those sections, particularly §§622.63 through 622.68, Code of Iowa, 1975, deal with subpoenas. An examination of each of these sections reveals that arguments could be advanced that subpoenas are within the category of items for division between a municipality and a county. Two factors are responsible for this. First, subpoenas of their nature require "attendance" to a court or official body, and as set forth previously, §622.73, supra, speaks in terms of "fees . . . for attending court." Second, §622.73, Code of Iowa, *1973*, required the county alone to pay the fees for attending court where the prosecution was dismissed or the defendant acquitted. Thus, it could be argued that when the legislature amended §622.73, in the 1975 Code, to make municipalities responsible for the payment of costs, that it sought to make municipalities and counties joint partners, as it were.

We would agree that this is what the legslature intended, *had* they amended §337.12, Code of Iowa, 1975, which directs:

"*In all criminal cases where the prosecution fails*, or where the money cannot be made from the person liable to pay the same, the facts being certified by the clerk or judicial magistrate as far as their knowledge extends, and verified by the affidavit of the sheriff, *the fees allowed by law in such cases shall be audited by the county auditor and paid out of the county treasury*. The board of supervisors may pay same out of the general fund or the court fund." (Emphasis added)

The underlined language of Section 337.12, supra, in our opinion makes it clear that the county is responsible for payment of the sheriff's fees for serving subpoenas. This is because it immediately follows §337.11, Code of Iowa, 1975, as amended by Chapter 101, Acts of the 66th G.A., 1975 Session, which deals with sheriff's fees, and was discussed as long ago as 1881 by the Iowa Supreme Court in *Red v. Polk County*, 1881, 56 Iowa 98, 9 N.W. 106. In that case the Court stated:

"The plaintiff relies upon section 3790 of the Code, which is in these words: 'In all criminal causes where the prosecution fails, or where the money cannot be made from the person liable to pay the same, the facts being certified by the clerk or justice as far as their knowledge extends,

and verified by the affidavit of the sheriff, the fees allowed by law in such cases shall be audited by the county auditor, and paid out of the county treasury.' But in our opinion the foregoing was designed to provide only for the payment of sheriffs' fees. It is true the language of the provision does not necessarily show such limitation; but the section is found under the heading of 'Compensation of Sheriffs,' and the section itself provides that the facts upon which the claim for the fees, as against the county, rests, shall be verified by the affidavit of the sheriff. As he could not be supposed to be cognizant of the facts pertaining to other fees than his own, the plain inference is that the fees contemplated in the section are his fees. *Furthermore, as evidence that the statute was not designed to have a general application, fees other than sheriffs' fees are provided for elsewhere.*" (emphasis added).

Moreover, when Section 3790 was in existence, as referred to in *Red*, supra, §§622.63 through 622.68, Code of Iowa, 1975, were also in existence, but, of course, under different section numbers. See footnotes §§622.63 - 622.68, Code of Iowa, 1975.

As a result of the foregoing, we believe that the phrase "In all criminal cases where the prosecution fails," of §337.12, supra, is disjunctive and stands alone, thereby directing counties to pay sheriffs' fees for serving subpoenas whenever a criminal prosecution fails, i.e., dismissal or acquittal. Section 622.69, supra, on the other hand, speaks only to fees for attending court, but does not specifically direct that fees for subpoenas are included therein -- even though such can be argued. Consequently, with §337.12, supra, directing counties to pay in *all* cases where the prosecution fails, while §622.69, supra, purports to have municipalities pay their share where the prosecution fails, a conflict develops between the two. The Iowa Supreme Court has stated that where statutes relating to the same subject appear to be in conflict, that they must be harmonized where possible. *See, Egan v. Naylor*, 1973, 208 N.W.2d 915.

It is, therefore, our opinion that the sheriffs' fees for serving subpoenas should be borne by the county. We say this for three reasons. First, §337.12, supra, relates solely to sheriffs' fees, more pertinently, sheriffs' fees where the prosecution fails in a criminal case, and in the language of *Red v. Polk County*, supra, "fees other than sheriffs' are provided for elsewhere." Second, this allows §622.73, supra, to operate in conformity or harmony with §337.12, supra, in that a distinction is made between witness fees and costs for serving subpoenas. Third, as stated in 20 Am.Jur.2d 29, §34:

"Municipal corporations when acting as the arm or agency of the state, are liable for costs in actions to which they are parties only when the lawmaking power by statute has made them so. In the absence of statutory authorization a municipal corporation may not be held liable for costs in a proceeding to enforce an ordinance; nor may it be held liable for costs in an action to recover a penalty for violation of an ordinance."

We believe that the Iowa Legislature by not amending §337.12, supra, while amending §622.73 from its form in the 1973 Code has acted to maintain this concept with respect to the costs of serving subpoenas. Any other construction would appear to ignore the language of §337.12, supra, and would place the statutes in direct opposition.

III

The third question relates to responsibility for payment of court costs. Section 602.63, Code of Iowa, 1975, provides in pertinent part:

". . . All costs in criminal cases shall be assessed and distributed as in chapter 606, except that the cost of filing and docketing of a complaint or information for a nonindictable misdemeanor shall be five dollars which shall be distributed purusant to section 602.55. The five dollar cost for filing and docketing a complaint or information for a nonindictable misdemeanor shall not apply in cases of overtime parking . . . ."

As set out, the only exception to the Chapter 606, Code of Iowa, 1975, allotment of costs in a criminal case is in regard to nonindictable misdemeanors, and then only in conjunction with the filing and docketing of those charges and the distribution of those costs — not with their assessment. This has appropriate application to municipalities since municipal corporations are empowered to make ordinances providing for fines not exceeding $100.00, or imprisonment not exceeding 30 days. Section 366.1, Code of Iowa, 1975, and §§364.1; .3(2), Code of Iowa, 1975. Thus, a violation constitutes a nonindictable misdemeanor. *See: Kordick Plumbing & Heating Company v. Sarcone*, 1965, 257 Iowa 1231, 136 N.W.2d 249.

Looking then to §602.55, Code of Iowa, 1975, as directed by §602.63, supra, reference is found to cities and to counties in two distinct areas. First, with regard to cities it provides:

". . . The clerk shall remit ninety percent of all fines and forfeited bail received from a magistrate or district associate judge to the city that was the plaintiff in any action, and shall provide that city with a statement showing the total number of such cases, the total of all fines and forfeited bail collected and the total of all cases dismissed . . . ."

It should be noted that nowhere does this section direct to whom or how the costs will be paid or taxed, but only how they will be distributed.

Similarly, with regard to counties, §602.55, Code of Iowa, 1975, states:

"All fees and costs for the filing of a complaint or information or upon forfeiture of bail received from a magistrate shall be remitted monthly by the clerk as follows:

"2. Two-fifths to the county treasurer to be credited to the general fund of the county."

Once again no refernce is made to the taxation of costs. *Distribution of collected costs* is all that is addressed.

It can be seen, therefore, that Section 602.55 renders no aid in reaching a determination of *assessments* of costs. Thus, pursuant to §602.63, heretofore set out, we must proceed to Chapter 606, Code of Iowa, 1975.

Section 606.15, Code of Iowa, 1975, provides for the fees which are to be collected by the clerk of the district court in matters pending before the court. These fees are applicable to criminal proceedings as directed by §606.63, supra. Lastly, Chapter 625, Code of Iowa, 1975, entitled "Costs" provides for the final assessments of costs in criminal proceedings. Prior, however, to a determination of the proper assessment of those costs, a brief explanation of how Chapter 625, supra, becomes applicable to criminal matters is in order.

It will be noted that Chapter 625, Code of Iowa, 1975, is contained within Title XXXI, entitled "General Provisions Relating to Civil Practice and Procedure," yet the Supreme Court of Iowa has held that

Chapter 625, supra, applies to criminal as well as civil cases. In *Hayes v. Clinton County*, 1902, 118 Iowa 569, 92 N.W. 860, 861, the Court held

". . . That the provisions of the general chapter of the Code relating to costs and the taxation thereof, govern in criminal as well as civil cases, is conceded . . . ."

The above quoted language was referring to what was then Chapter 16 of Title XVIII, Code of Iowa, 1897, and is now Chapter 625, Code of Iowa, 1975. All that has fundamentally changed since the *Hayes* decision is the denomination of Chapter references in the Code.

Additionally,the Court made reference to Section 3853, now §625.1, Code of Iowa, 1975, relating to the taxation of costs and stated:

". . . costs shall be recovered by the successful against the losing party; and by section 3862 [now §625.14] it is made the duty of the clerk to tax in favor of the party recovering costs the allowance of his witness fees, the fees of officers, etc. These provisions of the statute are mandatory in character. No refusal to act in accordance therewith is allowable, and there can be no departure from the course plainly marked out by the statute . . . ."

Since Chapter 625, Code of Iowa, 1975, applies to criminal as well as civil matters, it appears clear that where a municipality initiates a prosecution under one of its ordinances and that prosecution is either dismissed or the defendant acquitted, the municipality (the losing party) must pay the costs assessed in the case. This is further borne out by §625.11, Code of Iowa, 1975, which provides:

"When a plaintiff [the municipality] dismisses the action or any part thereof . . . judgment for costs may be rendered against such plaintiff . . . ."

In summary, therefore, it is our opinion that where a municipality brings a criminal action under one of its ordinances and that action is either dismissed or the defendant is acquitted, the city is responsible for the witness fees and mileage; the county is responsible for the sheriff's fees for serving subpoenas, and the city must pay the court costs of the case.

August 6, 1976

STATE OFFICERS AND DEPARTMENTS: Members of the General Assembly, Iowa Public Officials Act. §68B.5, Code of Iowa, 1975. A member of the general assembly may legally accept reimbursement from LEAA funds for expenses of attendance at a workshop on juvenile justice sponsored by Legis 50/the Center for Legislative Improvement (formerly the Citizen Conference on State Legislation) where it does not appear that the conference is intended to have the effect of influencing legislative action. (Haesemeyer to Hill, State Senator, 8-6-76) #76-8-6

The Honorable Philip B. Hill, State Senator: You recently requested an opinion of this office as to the legality of your attendance at the Juvenile Justice Workshop to be held in Dearborn, Michigan, under the sponsorship of Legis 50, The Center for Legislative Improvement. This organization offered to pay all of your transportation and meal costs with funds which the group says were granted it by the Law Enforcement Assistance Administration (LEAA). In your letter you said:

"Although I am extremely interested in the subject matter of the workshop, I am concerned that acceptance of the offer contained in their July 16 letter would be a violation of Section 68B.5 of the Code of Iowa, 1975."

Section 68B.5, Code of Iowa, 1975, provides:

"No official, employee, member of the general assembly, or legislative employee shall, directly or indirectly, solicit, accept or receive any gift having a value of twenty-five (25) dollars or more whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form. No person shall, directly or indirectly, offer or make any such gift to any official, employee, member of the general assembly, or legislative employee which has a value in excess of twenty-five (25) dollars. Nothing herein shall preclude campaign contributions or gifts which are unrelated to legislative activities or to state employment."

Several past opinions of the Attorney General have been addressed to the application of this law; 1968 OAG 752, 1970 OAG 319, 1972 OAG 276, and 1974 OAG 437; so little of it remains to be interpreted. The dicta of these prior opinions may be applied here.

Upon examining the Act in its entirety, it is discernable that the manifest purpose of the Act was to prevent and inhibit the legislators and other state officers and employees from receiving gifts which might affect the independence of judgment which they ought to bring to bear in the performance of their official duties. Thus, insofar as members of the general assembly are concerned, it is not all gifts which are prohibited but only those which would be likely and intended to have the effect of influencing legislative action. 1968 OAG at 753.

Generally speaking, it is to be observed that the prohibitions contained in §5 quoted above are quite sweeping. Travel is specifically included as being among the prohibited gifts along with a great many other things. Of course, the argument can always be advanced that payment of travel and other trip expenses is really a gift to the state. The rationale for this position proceeds on the assumption that the employee would take the trip anyway and all the private donor is doing is saving the state some money. However, in our opinion, this suggestion would not in most instances amount to anything more than a transparent ruse to circumvent the manifest purpose and intent of §68B.5. 1970 OAG 320, accord, 1972 OAG 276, 1974 OAG 437.

It could be argued that the funds here are nothing more than a federal grant to the state by the LEAA through Legis 50, but §68B.5 makes no distinction as to the source of funds in its proscription against "gifts", and the money in this case goes directly to the legislators, rather than to the state itself.

From the materials submitted with your request for an opinion, it appears that the workshop in question is concerned generally with the subject of juvenile justice and the problems of status offenders, but is not designed to promote any particular legislation or influence legislators in any particular direction. The description of the project which you furnished us describes the project as follows:

"The Legis 50 project is designed to acquaint key legislators with the problems of status offenders, the alternatives to institutional confine-

ment, and the legislative responses which might be developed. Key to the success of the project will be an advisory group of concerned and knowledgeable legislators, media representatives, juvenile justice professionals, and active citizens. This body will help to shape, refine, and review the work throughout the project.

"In undertaking this effort, Legis 50 has devised a two-part approach. First, the project staff will develop narrative reports on four states where efforts have been made by the legislatures to deal with the problems of status offenders. These states are Florida, Alabama, New Mexico and Michigan. Professional staff familiar with and experienced in legislative operations will investigate and analyze the resources, procedures, staff work and committee operations which contributed to or hindered the development of new juvenile justice policies.

"Based on these reports, Legis 50 will conduct intensive, consultative workshops designed to share with other legislators the experiences, methods, difficulties, and successes of these four states. The workshops will be presented throughout the country with four to seven different states invited to attend each session. The format will allow for a wide distribution of the study information to states which because of size and other demographic features may share similar problems and concerns. Using a variety of formats, the workshops will attempt to mix the relevant resources and key participants, including legislators from the model states, to produce an informative and productive atmosphere.

"The Status Offender Project will illustrate not only how policy was or was not made in the demonstration state legislatures, but it will also provide the means for transferring this valuable information to others interested in the subject matter. This approach will benefit the juvenile justice system and the youth who is a part of that system."

Thus, while legislators who attend the meeting may very well return with a better understanding of the problem and ideas for legislation, we do not think that receiving travel and expenses from LEAA would affect their independence of judgment nor does it appear that the conference is intended to have the affect of influencing legislative action.

August 6, 1976

ELECTION: School Treasurer in cities — provision for election repealed, §§134 and 154, Chapter 81, 66th G.A., First Session, 1975, §62, House File 1011, Acts, 66th G.A., Second Session, 1976. Section 134 of Chapter 81 is constitutional when construed in the light of §154 of Chapter 81 and school treasurer in districts composed in whole or in part of a city should be appointed. (Turner to Synhorst, Secretary of State, 8-6-76) #76-8-7

The Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your letter of July 29, 1976, in which you request an opinion of the Attorney General and state:

"Nomination petitions are currently being circulated within the various school districts for those candidates whose names will appear on the ballot for the regular school election to be held on September 14, 1976.

"Section 277.26, 1975 Code of Iowa, which provided for the election of school treasurers in districts composed in whole or in part of cities, was repealed by sec. 154, ch. 81, Acts of the 66th G.A.

"Section 134 of chapter 81, Acts of the 66th G.A., amended sec. 279.3, 1975 Code of Iowa, by deleting the words 'except in districts composed in whole or in part of a city', thereby making it possible to appoint school treasurers in all school districts. An OAG dated October 16, 1975, stated that section 134 of chapter 81, Acts of the 66th G.A., was unconstitutional.

"The problem now arises of whether to appoint or elect treasurers in school districts which extend into cities. It appears that neither method is authorized by the Code.

"Since nominating petitions for candidates whose names will appear on the regular school election ballot must be filed no later than August 9, 1976, your prompt opinion regarding the method to be used will be appreciated."

The earlier opinion of the Attorney General to which you make reference, OAG Turner to Lipsky, State Representative, October 16, 1975, was issued in response to a request for an opinion on the constitutionality of seventeen specifically designated sections of Chapter 81, 66th G.A., First Session (1975). In that opinion, we concluded that all of the sections of Chapter 81 to which our attention was directed were constitutional except §134. Chapter 81 is entitled:

"An Act relating to procedures for preparing for, giving notice of, conducting and canvassing elections, to the election of presidential electors, and to the registration of voters, and prescribing penalties."

Section 134 of Chapter 81 provides:

"Sec. 134. Section two hundred seventy-nine point three (279.3), Code 1975, is amended to read as follows:

"279.3 APPOINTMENT OF SECRETARY AND TREASURER. At the meeting of the board the first secular day after the seventh day in July the board shall appoint a secretary who shall not be a teacher or other employee of the board. It shall also [except in districts composed in whole or in part of a city,] appoint a treasurer. [Such] These officers shall be appointed from outside the membership of the board for terms of one year beginning with the first secular day after the seventh day in July which appointment and qualification shall be entered of record in the minutes of the secretary. They shall qualify within ten days following [their] appointment by taking the oath of office in the manner required by section 277.28 and filing a bond as required by section 291.2 and shall hold office until their successors are appointed and qualified." [Words in brackets denote deletion.]

Since §134 on its face appears to relate to the appointment of a secretary and treasurer by school boards, we concluded that it did not relate to elections and therefore was unconstitutional under Article III, §29, Constitution of Iowa, which provides:

"Every Act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

At the time we issued the October 16, 1975, opinion, our attention was not directed to, nor were we aware of §154 of Chapter 81, which repealed §277.26 of the Code which then provided:

"TREASURER. In districts composed in whole or in part of cities a treasurer shall be chosen at the regular election. He shall serve without pay and his term shall begin on the first secular day of July following his election and continue for two years and until his successor is elected or appointed and qualified."

Viewing these two sections in *pari materia* as we must, it is now clear that the two sections taken together do relate to elections in that they

dispense with the requirement that a treasurer be elected in school districts composed in whole or in part of a city and we accordingly now conclude that §134 is constitutional. Our opinion of October 16, 1975, to the extent that it is inconsistent with this conclusion is withdrawn.

It is noteworthy too that the second session of the 66th G.A. enacted §62 of House File 1011, which repealed §277.28 of the Code, which provided:

"The treasurer elected at a regular election in city districts shall qualify by taking the oath of office in the manner herein required and filing a bond as required by section 291.2 within 10 days after the first secular day of July following his election."

This further manifests the legislative intent that all school treasurers now be appointed.

August 9, 1976

STATE OFFICERS AND DEPARTMENTS: Merit Employment Department, Overtime Pay. Chapter 17A, §19A.9, Code of Iowa, 1975. An overtime policy and procedure statement issued by the director of employment relations has not been promulgated as required by §19A.9 (2) where no public hearing thereon was held by the merit employment commission. (Turner to Doderer, State Senator, 8-9-76) #76-8-8

The Honorable Minnette F. Doderer, State Senator: You have requested an opinion of the attorney general as to whether the overtime policy and procedure statement of Director of Employment Relations Gene Vernon, dated July 27, 1976, and effective on August 6, 1976, has been made in compliance with §19A.9(2), Code of Iowa, 1975, if no public hearing was held by the Merit Employment Commission.

Apparently, Mr. Vernon, by memorandum to all appointing authorities and contrary to Rule 4.6 of the Rules of the Iowa Merit System, is attempting to establish a new policy for overtime for state employees who work over 80 hours in a 14 day period. Rule 4.6 was duly adopted in accordance with the provisions of Chapters 19A and 17A and is the only current authority for payment of overtime. (IAC 570-4.6 (19A))

Section 19A.9 provides in pertinent part as follows:

"The merit employment commission shall adopt and may amend rules for the administration and implementation of this chapter in accordance with chapter 17A. The director shall prepare and submit proposed rules to the commission. The rules shall provide: * * *

"2. For a pay plan within the purview of an appropriation made by the general assembly and not otherwise provided by law for all employees in the merit system, after consultation with appointing authorities with due regard to the results of a collective bargaining agreement negotiated under the provisions of chapter 20 and after a public hearing held by the commission. Such pay plan shall become effective only after it has been approved by the executive council after submission from the commission. Review of the pay plan for revisions shall be made in the same manner at the discretion of the director, but not less than annually. . . ."

Wallace Keating, not Mr. Vernon, is director of the state merit system and it is the director of the state merit system (not the director of

employment relations), who is authorized and directed by §19A.9 to take action concerning pay plans. The director of employment relations' involvement and input into pay plans for public employees relates to his status as negotiator for the employer in collective bargaining under Chapter 20. Presently overtime pay provisions are not the result of collective bargaining procedures.

If Mr. Keating has not proposed this policy to the commission, and the commission has not approved it after a public hearing held by the commission, it has no force or effect. It is insufficient that the matter may have been considered and approved by some other body at a meeting open to the public.

While it is true that §19A.9 requires the merit employment commission to adopt a rule pursuant to Chapter 17A which provides for a pay plan it does not require that the pay plan itself be adopted pursuant to Chapter 17A. *State of Iowa Employees' Association, SIEA-AFSCME, Local 363 -vs- State of Iowa, et al.*, Polk County District Court No. CE-4-2050, decided August 14, 1975. A rule describing in general terms the factors to be included in a pay plan was adopted pursuant to Chapter 17A, IAC 570-4.1 (19A). The pay plan and amendments thereto were not and need not have been adopted pursuant to Chapter 17A. Unfortunately, current provisions relating to overtime pay were adopted by a separate rule under Chapter 17A rather than as a part of a pay plan and the only way that rule can be revoked or amended is by following Chapter 17A procedures. Thus, in order to accomplish what Mr. Vernon proposes, it would be necessary to amend Rule 4.6 to make provision for overtime pay along the lines of the policy statement, and that amendment would be subject to approval of the Legislative Rules Review Committee under the provisions of Chapter 17A, Code of Iowa, 1975, or to rescind Rule 4.6 subject to Rules Review Committee approval and then adopt overtime pay provisions as part of the pay plan in accordance with §19A.9(2).

August 20, 1976

ACCESSIBILITY TO BUILDINGS BY HANDICAPPED. The Building Code Commissioner does not have authority to waive the requirements of Chapter 104A; but certain structures are exempt therefrom under the meaning and intent of Section 104A.1. (Conlin to McCausland, Director, Department of General Services, 8-20-76) #76-8-9

Mr. Stanley L. McCausland, Director, Department of General Services: On August 11, 1976, you requested an Attorney General's opinion on the following questions:

1. Whether this structure [described fully below] can be considered as something other than a building for use by the general public and thus exempted from the requirement of having to be accessible to the handicapped,

2. Does the Building Code Commissioner have the jurisdiction to consider a waiver?

For convenience, the questions will be taken in reverse order. Under Section 103A.7(5), Code of Iowa, 1975, the Building Code Commissioner may issue regulations specifying the requirements for accessibility for

persons with physical handicaps. Section 103A.15 establishes a Board of Review which considers appeals from actions of the Building Code Commissioner. Section 103A.16 provides as follows:

"Any aggrieved person may appeal to the board for:

1. A reversal, modification, or annulment of any ruling, direction, determination, or order of any state agency or local building department affecting or relating to the construction of any building or structure, the construction of which is pursuant or purports to be pursuant to the provisions of the state building code.

2. Review of the disapproval or failure to approve within sixty days after submission of:

a. An application for permission to construct pursuant to the code, or

b. Plans or specifications for construction pursuant to the code."

The section provides a remedy for private individuals and businesses who are aggrieved by actions of the Building Code Commissioner. It does not, however, apply to this controversy. Section 679.19, Code of Iowa, 1975, prohibits litigation between state agencies and requires that disputes be submitted to binding arbitration.

Nowhere in either Chapter 103A or Chapter 104A is there statutory language which would authorize or permit the Building Code Commissioner to grant a waiver from compliance with either Chapter 104A or with rules promulgated under and pursuant to Section 103A.7(5).

The answer to the accessibility question is substantially more complex. There is a dearth of case authority or other legal interpretation in the area of physical disability. Chapter 104A is at the present time the only authority governing accessibility to buildings and facilities by persons with physical disabilities. So, in answering your question, we must look to the words of the statute exclusively and be governed by the rule of common sense in interpreting those words.

Section 104A.1 provides as follows:

"It is the intent of this chapter that standards and specifications are followed in the construction of public and private buildings and facilities which are intended for use by the general public to ensure that these buildings and facilities are accessible to and functional for the physically handicapped."

You indicate that the structure in question is a service entranceway into an existing utility tunnel. It would provide state employees assigned to distant parking lots protection from inclement weather and security at night. The entrance will be under card lock control and only those state employees who are assigned to the adjacent lots will be issued cards. Handicapped employees and visitors will have designated parking spaces as close as possible to all office buildings.

It is well to bear in mind certain basic principles of statutory construction which have been laid down by the Iowa Supreme Court and which will guide us in our efforts to answer this question. It is so well settled as to be axiomatic that the court will examine both the language used

and the purpose for which legislation is enacted. Each part of the act is to be construed with the act as a whole so that all parts are interpreted together. The subject matter, reason, consequence and spirit are to be considered as well as the words used. The statute is to be accorded a sensible, practical, workable and logical construction. *Matter of Estate of Bliven, Iowa* 1975, 236 N.W.2d 366, 369; *Northern Natural Gas Co. v. Forst*, Iowa 1973, 205 N.W.2d 692, 295. The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense which may be uncovered by ingenuity and study of an acute and powerful intellect. *Dingman v. City of Council Bluffs*, 1958, 249 Iowa 1121, 90 N.W.2d 742. With these principles in mind, it is appropriate to turn to your specific question.

It would be possible to argue that the entranceway is not a building within the meaning of Section 104A.2. It would also be possible to assert that because it is card-controlled and available to a limited, selected group of state employees that it is not "intended for the use of the general public" under and pursuant to Section 104A.1. However, the most persuasive and conclusive argument and the one on which we base our opinion is the purpose of the statute and its intended result.

The statute addresses and attempts to correct the serious problems of those wtih mobility limitations. The statute is designed to require that buildings used by the general public be available to and functional for those who have physical disabilities. It is particularly important for all citizens to have full access to the buildings wherein the business of government is being conducted.

However, the business of government is not going to be conducted in the structure you describe. That structure is intended for the use of completely ambulatory state employees. It carries them to public buildings some 700 feet away. Handicapped employees and visitors, on the other hand, are provided with designated parking spaces immediately adjacent to those public buildings. It is indeed absurd to suggest that handicapped persons would choose to travel 700 feet through a tunnel when they have available parking spaces next to the terminus of that same tunnel.

It is therefore the opinion of the attorney general that Chapter 104A, Code of Iowa, 1975, does not require that the structure you describe be constructed so that it is accessible to those with physical handicaps.

August 30, 1976

STATE OFFICERS & DEPARTMENTS: Board of Architectural Service — §25A.2, Code of Iowa, 1975; §§1, 2, 7, Chapter 80, Acts of the 66th G.A. (1975 Session). A member of the State of Iowa Board of Architectural Services while performing services for the state, upon request of the state, with or without compensation, falls within the purview of Chapter 25A of the Code for purposes of defense and indemnification in the event of claims or litigation. Insurance at state expense is not recommended. (Beamer to Lynch, President, Board of Architectural Examiners, 8-30-76) #76-8-10

Mr. James A. Lynch, President, Board of Architectural Examiners: We are in receipt of your opinion request of August 3, 1976, in which you furnished the following information:

"As required by law, this board recently held its annual meeting. The subject of personal as well as board liability due to actions taken as a part of our official duties was discussed. We understand that an informal request was made of your office for an opinion as to our liabilities. This letter is to place that request in a formal manner and ask that a written Attorney General's opinion be given our board as soon as possible.

"Parenthetically, it appears to us that if we, in fact, have personal and/or board liabilities that are not covered by existing state law and if, in fact, the Attorney General's office would have no obligation to defend the board, insurance covering such liabilities would seem to be in order.

"Under such an instance, we believe that all other boards in the state would probably find themselves in a similar position and such insurance might well be carried as a group policy through the state rather than in 28 small packages for each of the boards."

Chapter 80, Acts of the 66th G.A. (1975), amended Chapter 25A of the Code, the "State Tort Claims Act", to provide liability protection for state employees. Section 25A.2(3) of the Code, as amended by §1, Chapter 80 of the 66th G.A., provides, in pertinent part:

"'Employee of the state' includes any one or more officers, agents, or employees of the state or any *state agency and persons acting on behalf of the state or any state agency in any official capacity, temporarily or permanently in the service of the state of Iowa, whether with or without compensation.*" (emphasis added)

Section 25A.2(5) of the Code, as amended by §2, Chapter 80, 66th G.A., defines "claims" in relevant part as follows:

" * * *

"b. Any claim against an employee of the state for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligence or wrongful act or omission, except an act of malfeasance in office or willful and wanton conduct, of any employee of the state while acting within the scope of his office or employment."

Section 7, Chapter 80, 66th G.A., amends Chapter 25A of the Code as follows:

"*Officers and employees defended.* The state shall defend any employee of the state, whether elected or appointed and, except in cases of malfeasance in office, willful and unauthorized injury to persons or property, or willful and wanton conduct, shall save harmless and indemnify such employees of the state against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring within the scope of their employment or duties."

It is evident from the above sections of the Code that the state will defend, indemnify and hold harmless employees who are sued while acting within the scope of their employment. The definition of employees is sufficiently broad to protect individuals performing services for the state even though they may not be employees for other purposes. One who provides services on behalf of the state, at the request of the state, without compensation, may still fall within the definition of "employees" for purposes of defense and indemnification in tort litigation. See Blumberg to Pawlewski, O.A.G. #76-7-24.

Accordingly, we are of the opinion that members of the State of Iowa Board of Architectural Examiners fall within the protection of Chapter 25A of the Code as amended, as well as other board members in similar positions. The purpose of Chapter 80 was to provide protection for all employees or individuals on various state boards and avoid insurance coverage. Although individual board members may still desire to purchase liability insurance, it is not recommended the premiums be paid by the state.

August 30, 1976

STATE HOSPITAL—SCHOOLS: Assessment of liability of parents of mentally retarded children for foster care. §§222.78, 234.39, Code of Iowa, 1975; §§770—41.1(4), 770—137.3, Iowa Administrative Code. Proposed statement addition to Department of Social Services' foster care manual is consistent with requirement of the Iowa Code that the maximum liability limitation used in the Aid to Dependent Children Program under §222.78, The Code, applies in assessing liability of parents of mentally retarded children placed in foster homes under §234.39, The Code. (Robinson to Burns, Commissioner, IDSS, 8-30-76) #76-8-11

Mr. Kevin J. Burns, Commissioner, Dept. of Social Services: You have asked for our consultation by way of an Opinion of the Attorney General concerning:

"Following is a proposed addition to the foster care Manual:

"The same procedure will be used for assessing the liability of parents of mentally retarded children in placement. However, under the provision of §222.78, The Code, the maximum assessment currently will be $71.50, which is the present personal allowance standard under the Aid to Dependent Children Program."

We agree that the proposed addition to the manual will bring the Department of Social Services into compliance with §222.78, The Code, and the limitations of that section which are made applicable to foster care by §234.39, The Code. In some areas this represents a substantial change in practice, and, thus, great emphasis should be placed upon this paragraph to insure that the legislature's intent is carried out. Perhaps the Iowa Administrative Code, §770—137.3, should also be amended to reflect this.

Section 222.78 provides:

222.78 Parents and others liable for support. The father and mother of any person admitted or committed to a hospital-school or to a special unit, as either an inpatient or an outpatient, and any person, firm, or corporation bound by contract hereafter made for support of such person shall be and remain liable for the support of such person. Such person and those legally bound for the support of the person shall be liable to the county for all sums advanced by the county to the state under the provisions of sections 222.60 and 222.77. The liability of any person, other than the patient, who is legally bound for the support of any patient under eighteen years of age in a hospital-school or a special unit shall in no instance exceed the average minimum cost of the care of a normally intelligent, nonhandicapped minor of the same age and sex as such minor patient. The state director shall establish the scale for this purpose but *the scale shall not exceed the standards for personal allowances established by the state division under the aid to dependent children program.* Provided further that the father or mother of such

person shall not be liable for the support of such person after such person attains the age of eighteen years and that the father or mother shall incur liability only during any period when the father or mother either individually or jointly receive a net income from whatever source, commensurate with that upon which they would be liable to make an income tax payment to this state. Nothing in this section shall be construed to prevent a relative or other person from voluntarily paying the full actual cost as established by the state director for caring for such mentally retarded person. [Emphasis added.]

Much of the confusion and inconsistent practice stems from the belief that §222.78 applies only to the parents and others liable for support of those persons in the hospital-schools such as those at Woodward and Glenwood. Indeed, this was the original intent. In 1965 the 61st General Assembly [Ch. 207, §79, Acts of the 61st G.A.] directed the then Board of Control to establish a scale that did not exceed the standards of personal allowances established by the then department of social welfare under the aid to dependent children program. In a memorandum dated July 7, 1965, by Dr. J. O. Cromwell, Director of the Division of Mental Health, Board of Control, the scale was set out as follows:

Age of Person Admitted or Committed to the Hospital-School for the Mentally Retarded	*Monthly Limit on Liability*
Birth through 3 years	$20.00
4 through 6 years	$30.00
7 through 9 years	$35.00
10 through 12 years	$40.00
13 through 20 years	$45.00

In 1974 the 65th General Assembly [Ch. 1161 §5, Acts of the 65th G.A., Second Session] added to Chapter 234, The Code, major provisions pertaining to foster care placements. In what is now §234.39, The Code, the legislature provided:

234.39 Responsibility for cost of services. It is the intent of this chapter that individuals served by the department of social services, and their respective parents or guardians, shall have primary responsibility for paying the cost of care and services provided by the department, to the extent consistent with their incomes and resources. The department shall establish a schedule of charges to be made for care and services provided, on a graduated scale related to the income and resources of the person responsible for payment, by rules adopted pursuant to chapter 17A. *The schedule of charges established and adopted under this section shall not be inconsistent with the limitations on legal liability established under sections 222.78* and 230.15, and by any other statute *limiting legal liability which may be imposed on any person for the cost of care and services provided by the department of social services.*. [Emphasis added.]

The schedule of charges referred to in §222.78 is found in §770—41.1 (4), IAC, where it is called a "schedule of living cost" and page VIII-6-34 of the Department of Social Services' Employees' Manual under the heading "Public Assistance Standards". According to this scale, a certain "net monthly amount" or "net annual amount" is subtracted from the parents' net income. 10% of this remainder then constitutes the responsibility for cost of services to the parent. This is consistent with the *general* provisions of §234.39, The Code.

The last sentence of §234.39, The Code, however, provides a specific exception for foster care expenses, to-wit:

"The schedule of charges established and adopted under this section shall not be inconsistent with the *limitations* on legal liability established under sections 222.78 and 230.15, . . ." [Emphasis added.]

The specific exception takes precedent over the general provision. *Northern Natural Gas Co .v. Forst*, 205 N.W.2d 692 (Iowa 1973); *Shriver v. City of Jefferson*, 190 N.W.2d 838 (Iowa 1971). As we have previously pointed out, §222.78, The Code, limited the parents' liability only while a person was admitted to a state hospital-school. This is no longer the case. When the legislature later added this exception to foster care expenses, the parental liability limitation was extended to persons outside the hospital-school who were in foster care. The limitation still applies, of course, to persons who are patients of the hospital-school. Section 234.39 did not change §222.78. It merely applied the maximum limitation of §222.78 to foster care. It is clear to us that this was the intent of the legislature when this change occurred. The Iowa Supreme Court has repeatedly held when construing statutes, the "polestar" is legislative intent. *Iowa Dept. of Rev. v. Iowa Merit Employ. Com'm.*, 243 N.W.2d 610, 614 (Iowa 1976).

Presently the maximum liability is $45.00 as shown in the Cromwell memorandum above, but which will soon be changed to $71.50. To insist, as the Manual does, that §222.78 does not limit parents' liability for a child placed outside the hospital-school or mental health institute completely ignores the special exception found in the last sentence of §234.39, The Code, and is wrong. Construction given a statute should be sensible, practical, workable, and such as will avoid absurd results. *State v. Monroe*, 236 N.W.2d 24 (Iowa 1975). The "Note" in the Employees' Manual, p. VIII-6-34, following the "Public Assistance Standards" should be stricken. Not all parents of mentally retarded children will be charged $71.50 per month. The prohibition is that the amount shall not exceed $71.50. Some whose income is low will pay less in accord with §222.78, The Code. The $71.50 figure is the maximum limitation.

The new $71.50 maximum assessment is based on the sum of personal allowance factors of the aid to dependent children program for food, $39.00; clothing, $11.25; personal care and supplies, $6.75; medicine cabinet supplies, $1.50; and communications, $13.00; as expressed in the Chart for Determining Income in Kind — ADC, found in V-Appendix-14 of the Employees' Manual of the Department of Social Services.

It should be pointed out also, that the limitations of §222.78, The Code, do not apply to the patient. Thus, if he has assets, he is responsible to pay for his total cost of care. Finally, nothing we have said shall be construed to prevent a relative or other person from voluntarily paying the full or any part of the actual cost of the services provided.

August 30, 1976

COUNTIES: Sale of Property — §569.8, Code of Iowa, 1975. Where the county has not complied with statutory requirements regarding notice of public sale, but has sold the real estate and received the proceeds and attempted to convey good title, the matter appears to be an appropriate subject for legalizing legislation. (Nolan to Birdwell, Wayne County Attorney, 8-30-76) #76-8-12

Mr. John W. Birdwell, Wayne County Attorney: This is written in response to your letter requesting the following:

"It has come to my attention that our Board of Supervisors has consistently failed to comply with the notice requirement of Section 569.8 of the Code of Iowa with respect to the sale of property that the county has acquired pursuant to the public bidder law. The procedure our Board has followed has been to advertise the property on Thursday (publication date of the local papers) of one week for sale the next week, which is to say that the property is sold upon less than the ten (10) days notice mandated by the 1967 amendment to Section 569.8.

"It is my own opinion that the notice requirement is jurisdictional and that the County has created serious title problems for those individuals who have purchased these properties. My initial question then is twofold: First, is a sale held pursuant to Section 569.8 upon less than ten (10) days notice void? Secondly, assuming that the sale is void or at least the procedures cast a cloud on the purchaser's title, what duty, if any, does the County owe the purchaser?

"There is no doubt in my mind but what our Board has acted entirely in good faith. They were simply unaware of the statutory requirement, and they were proceeding on the assumption that the sale should be held close enough in time to the date it was advertised that it would be fresh in the minds of potential bidders. In fact, the sales in question have been well attended. Consequently, a final question comes to mind. Assuming that I did not initially err in assessing the seriousness of failure to comply with the notice requirement in question and further assuming I have not overlooked any curative legislation of a general nature that could be relied upon either now or upon the passage of a reasonably short period of time to render the titles in question merchantable, would this be an appropriate subject on which to seek the passage of a special, legalizing act?"

The language of §569.8, Code of Iowa, 1975, to which you referred, provides as follows:

". . . Real property sold under this section shall be sold at public auction and not by use of sealed bids, but only after notice thereof has been published once in a newspaper of general circulation in the county wherein the property is located, stating the description of the property to be sold and the date, place and time of such sale, at least ten days, but not more than fifteen days prior to the date of such sale . . ."

This statute was subsequently amended by Chapter 138, §49, Laws of the 66th General Assembly, 1975 Session, so that it now requires publication of the notice twice, on different dates, in a newspaper or newspapers of general circulation in the county, not more than fifteen days prior to the date of such sale. However, there is no longer a requirement that such publication be made at least ten days before the sale. Further, where the board of supervisors is transferring title to real estate to a city, city agency or to the Iowa Housing Finance Authority, it need not comply with such provisions.

The board of supervisors has broad powers in disposing of property, provided it meets the statutory requirements. 1942 O.A.G. 22. Code §569.8, as amended, is mandatory and governs the manner in which property acquired under tax deeds shall be sold by the county. 1938 O.A.G. 2. Accordingly, where the county has not complied with the requirements of the statute, but has received the proceeds of the sale, and has attempted to convey good title to the purchaser, the matter becomes an appropriate subject for legalizing legislation.

August 30, 1976

COUNTIES: Secondary Road Fund — §§309.18, 309.67, 309.95. Workman's compensation for employees of the county engineer's office may be paid from secondary road fund budgeted for the operation of that office. (Nolan to King, Assistant Polk County Attorney, 8-30-76) #76-8-13

Mr. John H. King, Assistant County Attorney, Polk County Attorney's Office: We have your letter asking for an opinion on behalf of the Polk County Board of Supervisors on the following questions:

"1. May the County Board of Supervisors legally pay the premium on workmen's compensation insurance out of funds other than the county general fund?

"2. May the County Board of Supervisors, in the instance where the County does not purchase insurance but is its own insuror, pay claims arising under workmen's compensation out of funds other than the County general fund?"

Your letter states that your meaning of the words "other than the County general fund" includes a fund set up for a specific purpose, such as the road fund. You further state that you are aware of an Attorney General's Opinion of May 4, 1928, stating this could not be done, but feel the intervening years have made some changes necessary.

The opinion you cited, 1928 O.A.G. 353, reasons that workman's compensation premiums cannot be paid from the road and bridge fund, first, because such funds are created by special levies for specified purposes; and second because care of an injured person is a general obligation of the county since the county is the employer.

We agree with your conclusion that later developments in the secondary road law indicate that the contributions to the workmen's compensation fund as well as to employee's retirement and other sick leave and disability payments should be made from the fund which is budgeted for the payment of salaries and maintenance of such employee. Section 309.18, Code 1975, specifically authorizes the supervisors to pay the county engineer from either the general fund or the secondary road fund. Under §309.67 the supervisors are "charged with the duty of establishing policies and providing adequate funds to properly maintain the secondary road system".

This office has previously advised that it is within the authority of the board of supervisors to authorize the payment of items from any county office which are reasonably necessary for proper and efficient conduct of the office. 1940 O.A.G. 495. Code §85.2 designates both elected and appointed officials to be "employees" for purposes of workmen's compensation. The supervisors control the appropriation of funds for the county engineer's office. 1942 O.A.G. 88.

Accordingly, it is the opinion of this office that regardless of whether the county purchases workmen's compensation insurance or acts as its own insurer, the cost of coverage for injuries to county employees incurred in the proper maintenance of the secondary roads may be charged to the secondary road fund appropriation budgeted for the county engineer's office. However, we believed the better practice would be to continue to make such expenditures from the general fund since any amendment to the secondary road budget involves not only the procedures

required by Chapter 24 of the Code, but also the review and approval of the department of transportation as provided for in §309.95.

August 30, 1976

MUNICIPALITIES: Civil Service—§400.13, Code of Iowa, 1975; §3, S.F. 1086, 66th G.A. (1976). Police and fire chiefs under civil service must pass an original examination to be placed on the civil service eligible list from which they shall be appointed. (Blumberg to Nealson, State Representative, 8-30-76) #76-8-14

Honorable Otto H. Nealson, State Representative: We have received your opinion request of August 11, 1976, regarding appointments of police and fire chiefs. You asked:

"1. Does a person appointed fire chief have to take a written examination ot qualify?

"2. Does a person appointed chief of police have to take a written examination to qualify?

"3. Does a person have to take a written examination to be placed on a list of eligible applicants for fire chief or chief of police?"

We assume you are referring to a city operating under civil service.

Section 400.13, as amended by §3, S.F. 1086, 66th G.A. (1976), reads in part:

"*The chief of the fire department and the chief of the police department shall be appointed from the chiefs' civil service eligible lists. Such lists shall be determined by original examination open to all persons applying,* whether or not members of the employing city. The chief of a fire department shall have a minimum of five years' experience in a fire department, or three years' experience in a fire department and two years of comparable experience or educational training. The chief of a police department shall have had a minimum of five years experience in a public law enforcement agency, or three years experience in a public law enforcement agency and two years of comparable experience or educational training."

As can readily be seen from this section, chiefs of police and fire must be appointed from their respective civil service eligible lists. To be placed on the lists a person must take an original examination.

Accordingly, we are of the opinion that chiefs of police and fire under civil service must take an original examination to be placed on civil service eligible lists from which they shall be appointed.

August 30, 1976

MUNICIPALITIES: Civil Service — §§400.7, 400.8 and 400.11, Code of Iowa, 1975; §§1, 3, Chapter 200, 66th G.A. (1975). When individuals are on a certified promotional list at the time a new position is created which is immediately below the position for which they are on such a list, they shall remain on said list for two years. The civil service commission has discretion whether to provide for permanent status of an employee occupying a position when such position is placed in the classified service. (Blumberg to Oakley, State Representative, 8-30-76) #76-8-15

The Honorable Brice C. Oakley, State Representative: We have received your opinion request regarding civil service classifications. You

indicated that a city under civil service has created a new position in its classifications and promotional steps. Specifically, the steps went from first class fireman to lieutenant. The fire chief, at various times, appointed first class firemen to the unofficial position of engineer with a pay increase. Not all such firemen became engineers, nor did they need to do so to be eligible for promotion to lieutenant. Recently, the engineer's position was made a formal one. All first class firemen were required to take an examination for the engineers' position, including those on the lieutenant's eligibility list. You ask:

"1. Can first-class firemen who have passed the lieutenant's examination be taken off the eligibility list for lieutenants because of the creation of an engineer's position and examination?

"2. Can firemen who have been paid and worked as engineers be required to take the engineer's examination when that category becomes an official Civil Service position and an official part of the promotional ladder?"

Section 400.11, 1975 Code, as amended by §3, Chapter 200, 66th G.A. (1975), provides in part that persons on certified eligible lists for promotion shall hold preference for promotion two years following the date of certification. Thus, those firemen on the lieutenant's eligible list shall remain on said list for at least two years. Once the list expires, those remaining on it are in the same position as they were before they were placed on the list. If the engineer's position is now a promotional step preceding the lieutenant's position, those individuals would have to follow the regular promotional system.

A more difficult problem exists with those already in the engineer's position. Are those individuals automatically "covered-in" by operation of law? The only reference within Chapter 400 regarding covering-in employees is found in §400.7, which provides for the retention of positions by those holding positions on the effective date of the act, or for those holding positions when a city adopts civil service. *Romine v. Civil Service Comm'n. of City of Urbandale,* 181 N.W.2d 431 (Iowa 1970). There is nothing in that chapter which speaks to covering-in employees upon the reclassification of a department or the creation of a new promotional step.

In 3 E. McQuillen, Municipal Corporations, §12.134 (3rd Ed. 1973), it is stated:

"Reclassification of various offices and employments in the municipal government is frequently made, as where positions not formerly subject to civil service are classified within the civil service, or positions in a noncompetitive class are placed within the competitive class. Reclassification is also proper to conform positions, particularly in the higher or unlimited grades, to the actual assignments of duties being performed by particular incumbents and simply provides for the establishment of more precise new titles, new job descriptions and adjustments in salary, provided it does not embrace an attempted validation of an existing invalid practice.

"An incumbent may lose the status he enjoyed before reclassification took effect. However, reclassification does not necessarily create vacancies in positions held at the time of reclassification, and the incumbents may be entitled to remain in their positions, on occasion with permanent status. Incumbents whose positions were not changed in any material

respect by the reorganization of their department have been denied the right to compel their reclassification into a higher grade.

"Present incumbents may or may not be required to submit to examination in order to qualify for continuance in their employment, depending upon the terms of the law or the rules promulgated by the commission. Provision frequently is made for the blanketing into the civil service, without examination, of persons employed prior to the enactment of a civil service law. Even where examinations are required of them, considerable credit may be allowed on the ground of experience.

"The action of a civil service commission with respect to reclassification will not be disturbed by the courts where it did not act legally or arbitrarily, but will be disturbed where such action was arbitrary and unreasonable.

"Reclassification of positions by merely establishing a title and moving individuals into positions to fill such a title in order to establish a differential in pay is not enough. It should be shown that there is a substantial difference in the work performed and that the reclassification accords with realities."

In H. E. Kaplan, The Law of Civil Service 56-57 (1958) it is stated:

"4. Covering-in of Employees—Whether incumbents of positions may be retained in service without examination when a civil service merit system is first established, or an existing personnel system reorganized, or the service subjected to a general reclassification, is basically a matter of legislative policy. In jurisdictions where there is no constitutional requirement for appointments or promotions on a basis of merit or fitness after a competitive examination, such as, for example, in New York, New Jersey, California and Ohio, the problem is relatively simple. The extent to which incumbents of positions may be continued with permanent status in the civil service, whether after competitive examinations, qualifying examinations, or dispensing with examinations entirely, is within unlimited control of the legislature. Where, however, the constitution restricts the authority of the legislature to except positions from examination, the legal issues involved become complex, depending on the objectives sought and circumstances under which the incumbents are sought to be 'covered in' without examination.

"Occasionally, the status of incumbents under a revision of the civil service system is not too clearly set forth in the statute, in which case the court is often called on to construe the intent of the statute. The determination of the court in resolving ambiguous legislation often has a far-reaching effect on the civil service status of incumbent employees."

The vast majority of the cases under the above quotes deal with the discharge of an individual when his position came under civil service, or actions to prevent individuals from occupying certain civil service positions. In all of these cases, there was either a constitutional provision for civil service, or a state statute or local government resolution or ordinance regarding "covering-in" of employees. For example, in *Mandle v. Brown*, 1958, 5 N.Y.2d 51, 152 N.E.2d 511, plaintiff sought to prevent several attorneys from occupying new positions on the basis that they had been promoted without examination in violation of the New York Constitution. There had been a general reworking of the civil service in New York, and attorneys under the old system were reclassified under different titles and pay scales in the new system. The commission declared that all persons permanently employed in the old legal classes were eligible for reclassification without examination. The court held that the commission had such authority and that it was not in violation of the constitutional provision that promotions be made only upon exami-

nation. This general reclassfication generated a multitude of cases over the years. See, e.g., *Weber v. Long*, 1962, 11 N.Y.2d 997, 183 N.E.2d 758. *Targio v. Kaplan*, 1965, 46 Misc.2d 784, 260 N.Y.S.2d 858; *Application of Weber*, 1960, 210 N.Y.S.2d 452; *Roche v. Wagner*, 1962, 34 Misc.2d 920, 229 N.Y.S.2d 594. In each of these cases the issue revolved around the reclassification of employees which either meant a discharge of an employee or a classification into another position. In the *Weber* and *Roche* cases there were specific provisions for covering in permanent employees. In *Targio*, there was a statute that provided for the covering-in of employees with a mandatory examination within one year of reclassification.

The facts of *Cook v. Kern*, 1938, 278 N.Y. 195, 15 N.E.2d 575, are similar to your facts. For several years prior to 1936 there existed a position of "Stationary Engineer in Charge" but it appeared that no such formal position had ever been created by law. Prior to May 27, 1936, the civil service commission created a new classification known as "Stationary Engineer in Charge" and directed that a promotional examination be held for that position. In August, 1936, the commission adopted a resolution that those permanently employed would retain their positions, and that the promotional examination was only to fill vacancies. The court held (15 N.E.2d at 576):

"Five months subsequent to the adoption of this resolution, and while it remained in effect, the examination for Stationary Engineer in Charge was held January 20, 1937. The eligible list, upon which these petitioners' names appear, was not promulgated until July 7, 1937. On the dates of the adoption of the resolution, of the examination and of the promulgation of the eligible list, no vacancies existed among the Stationary Engineers in Charge in the Department of Sanitation. All the present incumbents had obtained valid original appointments as stationary engineers, and when, prior to May, 1936, additional duties were imposed and increased emoluments conferred upon them under their departmental designation as Stationary Engineers in Charge, there were no promotion examinations to be taken and no eligible lists from which appointments could be made. Having received original valid appointments, they have the right to remain in their positions, even though a new classification has been effected and new requirements exacted. Fornara v. Schroeder, 261 N.Y. 363, 368, 185 N.E. 498; Sandford v. Finegan, 276 N.Y. 70, 73, 11 N.E.2d 356. No new position has been created, no vacancy has occurred, and the sole purpose of the promotion examination was for filling vacancies."

This case does not seem to answer your questions, however. There is no indication what the result would be if there was no covering-in resolution. It seems to hinge on the fact that because the original appointments were valid, the retention of the positions under the reclassification was assured, citing to the *Fornara* and *Sanford* decisions. In those cases, and the cases upon which they rely, there existed either a resolution or a statute covering-in employees.

In another case with somewhat similar circumstances, *Carolan v. Schechter*, 1957, 5 Misc.2d 753, 166 N.Y.S.2d 348, certain employees brought an action to review the validity of assignments and designation of duties to other employees as a result of a reclassification. It was alleged that certain employees had exercised duties beyond their job description before the reclassification. Therefore, any covering-in by the reclassification should only have allowed them status for their origi-

nal job descriptions and salaries since a new status encompassing the extra duties and salaries would amount to a promotion without an examination. The court held that the duties under the reclassification, although the same duties exercised originally, were beyond the scope of the original jobs and constituted an illegal promotion. Those individuals were reduced in status to their proper level. This case may be analogous if the duties of an engineer exceed the job description of a first class fireman. What is the continuing problem between all the cases and your facts—a resolution or statute specifically covering-in employees—also existed in this case.

In *People v. Hurley*, 1951, 343 Ill. App. 413, 99 N.E.2d 355, the plaintiffs were plumbers who had temporarily occupied the position of plumbing inspector prior to their positions being included within civil service. Upon reclassification, the plaintiffs were placed in a grade one step below plumbing inspector, and promotional examinations were called for the position of plumbing inspector. The Court held that since plumbers were not the same as plumbing inspectors, that the plaintiffs had been placed in the proper grade.

Melchionne v. City of Newark, 1960, 60 N.J. Super. 104, 158 A.2d 411, Aff'd. 1961, 34 N.J. 16, 166 A.2d 761, is another reclassification case. There, the plaintiffs had been employed since the 1920's as park maintenance laborers. In 1948, the city created the position of foreman-laborer to which the plaintiffs were employed. In 1951, pursuant to an independent study of the civil service system, the plaintiffs were informed that their titles were being changed to Park and Tree Foreman with an increase in the salary range. The duties of the new title were the same as the old. In 1952 an ordinance was passed creating permanent positions in various classifications, including that of the plaintiffs. The maximum salary was again increased and the plaintiffs were appointed. The commission then declared that the plaintiffs could keep their positions and salaries, but would not be eligible for promotion until they had passed an original entrance examination. In 1957, the city reduced the plaintiffs to their previous position. The Superior Court held that the plaintiffs had a permanent status by action of the city. It also upheld the right of the commission to set requirements for permanency and promotion by stating (158 A.2d at 419):

"It would seem obvious that it is within the Commission's discretion to determine that examination is unnecessary where the dutes under the new title are the same and are being competently performed. So, also, is it within the discretion of the Commission to determine that where the 'promotion' is resultant from a new classification into the competitive class of a job previously assigned to the labor class the transfer should not carry promotional rights within the competitive class for those so transferred. See 3 McQuillin, Municipal Corporations (3d ed. 1949), §12.134, p. 478."

The Supreme Court took a somewhat different approach in its affirmance (166 A.2d at 762-763):

"It is clear that the positions as thus revised were deemed to be in the competitive class. Plaintiffs did not obtain permanency in the new positions by their appointments in 1953 if they had none in the predecessor positions. It was not the purpose of the Messick study to determine the legality or status of incumbency in existing positions. Rather

it was concerned with the structure of municipal employments. Reclassification could not confer permanency where none existed. The requirement of the Civil Service Act had still to be met. Hence, it seems to us that if plaintiffs were but temporary appointees in their former positions, they remained such in their new ones. On the other hand, if they were permanent incumbents in the earlier positions, they were not deprived of their status by the reclassification, albeit their promotional rights could be appropriately qualified by reason of the circumstance that the original positions were not in the competitive class."

Again there was a Commission resolution prescribing permanency. However, there is nothing in any of the above cases which indicates either a requirement that such a statute or resolution be passed or that permanency attaches regardless of any statute or resolution. What does appear from these cases and the other authorities is that in the absence of a statute, the commission is clothed with discretion whether to require an examination for a new or reclassified position. Of course, underlying all of this is the statement in several cases allowing permanency if the original appointment was valid. You must also keep in mind that the new position should be one that is truly different from the others. See McQuillen, supra.

The only other issue that could have applicability here would be whether the original appointments to the engineer's position were temporary appointments. Section 400.8, as amended by §1, Chapter 200, 66th G.A. (1975), contains provisions for temporary appointments. It also provides that continuance in the position after the expiration of the probationary period shall constitute a permanent appointment. That section, however, appears to apply only to original appointments, not promotions. Temporary appointments for promotion are indicated in §400.11 to apply where there is no list, and only until such list is certified. Thus, in your situation, the commission may temporarily appoint individuals to the newly created position until a preference list is certified.

Accordingly, we are of the opinion that those individuals who were on a preference list for lieutenant at the time of the new position shall remain on that list for two years. After the list expires they will be in the same position as they originally were, and may be required to follow the regular promotional ladder. The commission has discretion as to the permanency of those occupying the new position at the time it was added as a promotional step.

August 31, 1976

ENVIRONMENTAL PROTECTION — Sewage Treatment Permits Issued By Predecessor Agency — Section 455B.74, 1975 Code of Iowa as amended by House File 1477, Acts of the 66th General Assembly, Second Session; Section 19.3(11) Rules of the Department of Environmental Quality; Permits issued prior to January 1, 1973, which were exempted from operation of Rule 19.3(11) by Section 455B.74 before amendment, may now be rescinded or modified by the Executive Director. (Davis to Powell, Hearings Officer, Dept. of Environmental Quality, 8-31-76) #76-8-16

Mr. Dean Powell, Hearings Officer, Iowa Department of Environmental Quality: You have requested an opinion of the Attorney General regarding interpretation of §455B.74, 1975 Code of Iowa, vis-a-vis §19.3

(11) of the Rules of the Department of Environmental Quality. Section 455B.74, as amended by House File 1477, Acts of the 66th General Assembly, Second Session, states:

"455B.74 Prior rules. Any rule adopted or order issued under chapters 136A*, 455B* and 455C* of prior Codes, by the Iowa water pollution control commission or by the state department of health, shall remain effective until modified or rescinded by action of the water quality commission unless such rule is inconsistent or contrary to this division. Any permit issued under chapter four hundred fifty-five B (455B) of prior Codes shall remain effective until modified or revoked by the executive director."

The 1976 amendment, House File 1477, deleted commission authority to modify or rescind pre-existing permits and added the last sentence above, leaving only a bare skeleton of §455B.74 shorn of any exceptions it may have contained prior thereto.

Rule 19.3(11), filed August 21, 1973, states as follows:

"The executive director may modify, suspend or revoke in whole or in part any operation permit for cause. Cause for modification, suspension or revocation of a permit includes the following:

a. Violation of any term or condition of the permit.

b. Obtaining a permit by misrepresentation of fact or failure to disclose fully all material facts.

c. A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

d. Failure to submit such records and information as the executive director shall require both generally and as a condition of the operation permit in order to assure compliance with the discharge conditions specified in the permit."

Insofar as Rule 19.3(11), or any rule of the department, or those sections of Division III of Chapter 455B, which such rules implement, conflict with prior permits and thereby with code §455B.74, those rules and laws are ineffective and must yield to that code section or be interpreted in light of its provisions.

This conclusion is based on the clear, explicit language used in §455B.74. The intention of the legislature is to be obtained primarily from the language used in the statute. *Young v. O'Keefe*, 1957, 248 Iowa 751, 82 N.W.2d 111; *Sinclair Refining Co. v. Burch*, 1944, 235 Iowa 594, 16 N.W.2d 359; *Smith v. Sioux City Stock Yard Co.*, 1935, 219 Ia. 1142, 260 N.W. 531; *Drazich v. Hollowill*, 1929, 207 Iowa 427, 223 N.W. 253.

Any ambiguity created by the language of the statute is resolved by looking to the legislative intent as expressed in other sections of the statute, legislative debate and similar material. In enacting House File 1477 the Second Session of the 66th General Assembly was explicit in declaring its intention.

Section One of the Act is a "Declaration of Policy" and Paragraph 1 thereof states:

"1. The general assembly finds and declares that because the Federal Water Pollution Control Act amendments of 1972, Public Law ninety-

two dash five hundred (92-500), provide for a permit system to regulate the discharge of pollutants into the waters of the United States and provide that permits may be issued by states which are authorized to implement the provisions of that Act, it is in the interest of the people of Iowa to enact the provisions of this Act in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act amendments of 1972 and Acts amendatory or supplementary thereto, and federal regulations and guidelines issued pursuant to that Act."

Constitutionally, such language may be overly broad, however, it clearly establishes the ofttimes ephemeral "legislative intent".

Regarding those provisions of permits which were issued prior to the establishment of the Department of Environmental Quality, the Executive Director may only modify or rescind such permits for good cause shown and under Iowa Administrative Procedure Act procedures reasonably calculated to assure full consideration of the individual issues involved, regarding the holders of the permits to be modified or rescinded.

Permits issued under 1973 and prior Codes may not be suspended under Rule 19.3(11) as the plain language of the statute allows only modification or rescission and the legislative intent cannot alter the plain language of the statute.

If a permit is rescinded by the Executive Director under the provisions of §455B.74, then any operation of a sewage treatment facility by the former permittee must be under a permit newly issued under the provisions of §455B.45 and rules promulgated for the implementation thereof.

A permit modified under the provisions of §455B.74 would remain subject to the provisions of that code section since the permit was issued prior to the issuance of the 1975 Code of Iowa. However, in light of the intent of the legislature in amending §455B.74, a pre-existing permit may be modified by the addition of an expiration date thereto.

September 1, 1976

SCHOOLS: Athletic fields — S.F. 74, Acts of the 66th G.A., 1976 Session. Statute authorizing use of the school site fund for original surfacing and soil treatment on athletic fields is available for application where a track for foot races is to be constructed and other requirements of the statute are met. (Nolan to Briles, State Senator, 9-1-76) #76-9-1

The Honorable James Briles, State Senator: This letter is in reply to your request of May 20, 1976, when you asked for an opinion of the Attorney General as to whether a track for footraces would be within the language of the recently enacted Senate File 74.

This act recently passed by the 66th General Assembly, 1975 Session, amends §297.5 of the Iowa Code to allow certain high school districts to levy an assessment "for the purchase and improvement of sites in and for said school district as specified by the directors". The statute continues:

". . . For the purpose of this section, 'improvement of sites' includes: grading, landscaping, seeding and planting of shrubs and trees; constructing new sidewalks, roadways, retaining walls, sewers and storm drains, and installing hydrants; original surfacing and soil treatment of athletic fields and tennis courts; furnishing and installing for the first time, flagpoles, gateways, fences . . .; demolition work; and special

assessments . . . for capital improvements such as streets, curbs and drains."

The term "athletic field" is obviously used as a broad reference to an outdoor sports area requiring a solid surface and not marked off as a tennis court. Accordingly, where "original surfacing and soil treatment" are required for the establishment of an outdoor track on a purchased school site, funds collected pursuant to the levy authorized by §297.5 may be used to defray the cost of such site improvement.

September 1, 1976

LOCAL GOVERNMENT: Public funds. Public funds may not be spent to support voluntary programs provided by nonprofit private agencies. However, the services provided by such agencies may be obtained under Chapter 28E agreements where joint exercise of governmental power is warranted. (Nolan to Hansen, State Representative, 9-1-76) #76-9-2

The Honorable Ingwer L. Hansen, State Representative: This is written in response to your request for an opinion on the question of whether the Iowa Great Lakes' Voluntary Action Center can legally receive public monies for the operation of their program.

Under the provisions of Chapter 28E, Code of Iowa, 1975, a public agency, through its governing body, may enter into a contract with either public agencies or private agencies for the purpose of obtaining authorized government services of mutual benefit to both agencies which are parties to such contract. Thus, while tax money or other public funds may not be given away or granted to support private organizations, appropriate services furnished by such organization may be purchased with state and local funds.

We note that the letter which prompted your inquiry makes reference to providing financial support for a Voluntary Action Center through the use of revenue sharing. This opinion does not attempt to investigate the availability at this time for federal funding of community action programs.

September 2, 1976

MUNICIPALITIES: City Utility Property — §§28A.3, 364.7 and 388.4(2), Code of Iowa, 1975. Title to city utility property must be held by the city, although the utility has the power and authority to sell said property. Such a sale must be done pursuant to §364.7 of the Code. (Blumberg to Nealson, State Representative, 9-2-76) #76-9-3

The Honorable Otto H. Nealson, State Representative: We have received your opinion request of July 22, 1976, regarding municipal utilities. You ask:

"1. May a city in September, 1974, by resolution decide to transfer title to real property owned by the city (Central Fire Station) to a muncipal board created to manage the city's muncipal water and electric plants effective July 1, 1976.

"2. Can the City Council in its resolution designate or control the ultimate purchaser of the real estate from the municipal water and electric plants?

"3. May this be done when the muncipal water and electric plants have no use for the real estate, but the conveyance is part of an over-all plan to permit the board to convey the real property to Stanley Consultants, Inc., without going through the procedures for sale of real estate by a city?

"4. Is it proper for a city council to hold an executive session meeting with a representative of the water and electric board before adopting the resolution?

"5. Is title to real property held for the use of a municipal water and electric plant in the city, or is it in the board created to manage the municipal water and electric plant?

"6. Does a board created to manage a municipal water and electric plant have the authority to sell real estate no longer needed for the purposes of the municipal water and electric plants? In 1974? In 1976?

"7. Assuming the board does have authority to sell such real property, can the real property be sold to a private corporation without following the statutory procedure prescribed for a city in the sale of real estate?"

In answer to your first and fifth questions, §388.4(2), 1975 Code of Iowa, provides that the "title to all property of a city utility or combined utility system must be held in the name of the city . . .". Since title was to transfer on July 1, 1976, one year after the effective date of this section, the title could not be held in the name of the utility or its board. Thus, as of July 1, 1976, and all times thereafter, the title must be held by the city.

Section 388.4(2) also provides that the "utility board has all the powers and authorities of the city with respect to the . . . lease, sale, or other disposition of such property . . . subject to the requirements, terms, covenants, conditions, and provisions of any resolutions authorizing the issuance of revenue bonds [and the like]". Pursuant to §364.7, as amended by §38, Chapter 138, 66th G.A. (1975), a city may dispose of real property, but only if it does so by resolution, publishes notice of the resolution and of a public hearing, and holds a public hearing on the matter. Thus, if a utility board has the powers and authorities of a city regarding disposal of property, it has such powers subject to the provisions of §364.7. Since the sale of property by a city under these circumstances is subject only to the provisions of §364.7, the sale of such property by a utility board is only pursuant to said provisions. We do not believe that the legislature would have indicated its desire to give utility boards the *sole* power to dispose of their property, and at the same time permit the city council to restrict such a disposal.

We are not sure of your facts relative to your fourth question. Meetings of public bodies are open to the public. See, Chapter 28A of the Code. The only exceptions to this are where the employment of an individual is under consideration, to prevent premature disclosure of information on real estate, or for some other reason so compelling as to override public policy. In addition, the meeting may only be closed upon a two-thirds vote of the council. §28A.3. Thus, your meeting could only be closed to the public if it fit within any of the above three exceptions to the open meetings law.

Accordingly, we are of the opinion that the title to property of a city utility must be held by the city, but a utility board has the same powers

as a city regarding the sale of such property. Such a sale by either the city or the utility board must be done pursuant to §364.7 of the Code.

September 1, 1976

HIGHER EDUCATION: Subvention—§§11, 15, Senate File 1261. Statute providing for payment of funds to college of osteopathic medicine and surgery subject to submission or most recent audit for review by statutory committee does not require that such review be completed before funds are paid nor that committee can withhold funds based on its findings. (Nolan to Wolff, Executive Director, Higher Education Facilities Commission, 9-1-76) #76-9-4

Mrs. Willis Ann Wolff, Executive Director, Higher Education Facilities Commission: This is written in response to your letter dated August 16, 1976, which you requested an Attorney General's opinion on the following:

"The Higher Education Facilities Commission has received an appropriation of $1,200,000 for subvention payment to the College of Osteopathic Medicine and Surgery in Fiscal Year 1977 under Sections 11 and 15 of Senate File 1261. Section 15 sets forth certain conditions for receipt of funds under this program.

"We would appreciate your legal interpretation of Section 15, including the extent of the Commission's responsibility to ensure that the conditions of this section have been met prior to payment of the subvention funds. In particular, we would like your interpretation of the phrase 'submit to a review by the visitation committee on education.' Does this phrase indicate that payment shall be withheld subject to completion of such a review by the visitation committee or does it mean that receipt of funds shall be conditional upon the College of Osteopathic Medicine and Surgery agreeing to such a review by the visitation committee?

"In addition, may we request your considered opinion on whether the statute could be interpreted to mean that the visitation committee has authority to withhold any portion of the funds, based upon the findings of its review."

Section 15 of Senate File 1261, Acts of the 66th General Assembly, 1976 Session, provides in pertinent part as follows:

"It shall be a condition of receipt of funds appropriated in sections eleven (11) . . . of this Act that any college or school receiving funds submit one copy of its most recent annual audit conducted by an independent third party when the audit becomes available to the legislative fiscal committee and the legislative council and submit to a review by the visitation committee on education established in section two point fifty-one (2.51) of the Code . . . If the members of the expanded visitation committee deem it necessary to review the audit, the effected school or college is subject to review by the expanded visitation committee."

Section 11 of the Act cited provides for the appropriation of the sum of $1,200,000 to be paid as a subvention program for "the admission and education of not more than thirty percent of each of the three classes of students in the college of osteopathic medicine and surgery for the fiscal year beginning July 1, 1976, and ending June 30, 1977".

The statutory provisions set out above clearly show a legislative intent to continue the governmental subsidy for the training of doctors in the State of Iowa. The College of Osteopathic Medicine and Surgery is a

nonprofit corporation which has been specifically designated by the legislature to receive a subsidy for the training of doctors. Under common law a visitorial power attaches as a necessary incident to the grant of charity and permits the state to inquire into and correct all irregularities and abuses which may arise in connection with the operation of corporations organized for charitable purposes. If the state is the only donor, then the power to appoint visitors and the visitorial power rests in the state. The visitorial power is not a power to revoke the gift or divest the right of parties entitled to the bounty. 14 *C.J.S.* Charities §54. A school was held to be authorized to function and receive gifts subject to visitation where an express provision required annual visits by the visitation committee even though the visitation could not be completed by the time specified. *Trustees of Andover Theological Seminary v. Visitors of Theological Institute in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256.

The language in §15 of Senate File 1261 pertaining to the submission by the College of Osteopathic Medicine and Surgery to a visitation by the legislative fiscal subcommittee provided for in §2.51, Code of Iowa, 1975, and four additional members consisting of "two doctors selected from a list of ten doctors of osteopathic medicine and surgery not on the faculty, staff, or board of the college or its clinics and submitted by the Iowa society of osteopathic physicians and surgeons, . . . appointed by the legislative fiscal committee with the approval of the legislative council" merely requires the college to submit its most recent annual audit for review at the pleasure of the designated committee. It is not necessary that the visitation committee complete its review prior to the payment of appropriated funds to the college in accordance with the subvention program. By furnishing the lists of resident students in each of the three classes of the college, in accordance with the provisions of §11 of the Act, and furnishing a copy of its most recent audit as required, the college has met the requirements of the statute.

Accordingly, it is the opinion of this office that completion of the audit review is not a condition precedent to the allocation and payment of the funds appropriated and the audit committee would not have power to withhold funds based upon its findings.

September 3, 1976

STATE OFFICERS AND DEPARTMENTS: Board of Nursing. §147.55, Code of Iowa, 1975; §§1 and 10, House File 1503, 66th G.A. (1976). Although the Board of Nursing may, in its discretion, name by rule those medical and nursing organizations from which it will receive information upon which to base its definition of nursing, the intent of the Act would be better served if the board did not so limit the input. Section 10(2)(b)(c) of House File 1503 controls over §147.55(5), (10) of the Code when the board revokes or suspends a license. When the district court revokes or suspends, §147.55 controls. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 9-3-76) #76-9-5

Lynne M. Illes, R.N., Executive Director, Iowa Board of Nursing: We have received your opinion request of August 2, 1976, regarding the new Nurses Practice Act of the 1976 Legislature. You wish to know whether your board may define by rule those groups who are to define nursing practice for submission to the board, and whether §147.55(5) or the

similar provision in the new Act controls for revocation or suspension of a license.

Section 1 (2) and (3) of House File 1503, 66th G.A. (1976), define the practice of nursing as a registered and licensed practical nurse as follows:

"2. The 'practice of the profession of a registered nurse' means the practice of a natural person who is licensed by the board to do all of the following:

"a. Formulate nursing diagnosis and conduct nursing treatment of human responses to actual or potential health problems through services, such as case finding, referral, health teaching, health counseling, and care under the supervision of a registered nurse or a physician.

"b. Execute regimen prescribed by a physician.

"c. Supervise and teach other personnel in the performance of activities relating to nursing care.

"d. Perform additional acts or nursing specialties which require education and training under emergency or other conditions which are recognized by the medical and nursing professions and are approved by the board as being proper to be performed by a registered nurse.

"e. Apply to the abilities enumerated in paragraphs a through d of this subsection scientific principles, including the principles of nursing skills and of biological, physical, and psychological sciences.

"3. The 'practice of a licensed practical nurse' means the practice of a natural person who is licensed by the board to do all of the following:

"a. Perform services in the provision of supportive or restorative care under the supervision of a registered nurse or aphysician.

"b. Perform additional acts under emergency or other conditions which require education and training and which are recognized by the medical and nursing professions and are approved by the board, as being proper to be performed by a licensed practical nurse."

Your first question is directed to parts of the above-quoted section which refer to "acts . . . which are recognized by the medical and nursing professions . . ." and whether you may define "medical and nursing professions" in your rules by naming specific organizations or groups.

There is nothing in that section or in any other provision of the Act which makes refernce to any specific medical or nursing groups. Your board has the ultimate authority to further define nursing, and the Legislature apparently wants you to receive input from the medical and nursing professions. However, there is nothing mandatory that you specifically name those organizations from which you will allow input. Since you have the duty to define nursing based upon input from others, it is entirely possible that the Legislature was intending to allow you to pick certain organizations, although it certainly did not so state. However, we deem such a move unwise, not in a purely legal sense, but because the greatest amount and variety of input should give you a better base from which to define nursing. Also, by specifically limiting such information to certain groups, the board may be binding itself for the future and may only be able to receive additional information by amendment of the rules. Your board also appears to be under the impression that

medical or nursing organizations must define the practice of nursing and submit such definition to you for approval. We do not see anything in the Act which will lead to that conclusion. Again, the Legislature is giving you the opportunity to receive a great amount of input from the medical and nursing associations that will enable *you* to define nursing. In short, your board may, in its discretion, name those groups or organizations from which it will receive information in order for it to further define nursing. However, from the language of the Act, it appears that the Legislature wanted you to consider those acts recognized by the medical and nursing professions in general, not just limited to a few.

Regarding your final question, §10(2)(c) of House File 1503 provides that a license may be revoked or suspended for the following reasons in addition to the provisions of §147.55 of the 1975 Code:

"Conviction for a felony in the courts of this state or another state, territory, or country *if the felony relates to the practice of nursing.* Conviction shall include only a conviction for an offense which if committed in this state would be deemed a felony without regard to its designation elsewhere. A certified copy of the final order or judgment of conviction or plea of guilty in this state or in another jurisdiction shall be conclusive evidence of conviction." (Emphasis added)

Section 147.55(5) provides that a license may be revoked or suspended for the "conviction of a felony". Section 10(2) of the new Act is somewhat confusing since it provides for revocation or suspension for acts in addition to those found in §147.55, yet it contains some provisions either similar to or in conflict with §147.55. The parts of both sections in question are in conflict. Section 147.55(5) allows for revocation or suspension for the conviction of any felony while the new Act only permits revocation or suspension for conviction of a felony that relates to the practice of nursing. Section 147.55(5) is general, in that it applies to all professions listed within that chapter. Section 10(2) of House File 1503 is special since it only relates to nursing. Therefore, pursuant to §4.7 of the Code, the special one controls.

A similar problem exists between §147.55(10) and §10(2)(b) of House File 1503. Pursuant to the above discussion, §10(2) of House File 1503 would prevail. It should be noted that §10(2) of House File 1503 applies only to subsection one of that section. That is, the board may revoke or suspend a license for the grounds listed in §147.55 that are not inconsistent with House File 1503, and for those listed in House File 1503. However, if an action is brought in the district court to revoke or suspend a license, the court may only look to the grounds listed in §147.55. We do not understand why the Legislature did not allow the district court the same bases for revocation and suspension as the board.

Accordingly, we are of the opinion that although your board may specifically name those organizations from which it will receive information in order to formulate a definition of nursing, it would be wise and more consistent with legislative intent not to so limit the information. Sections 10(2)(b) and (c) of House File 1503 prevail over §147.55(5) and (10), but only when the board itself revokes or suspends a license. When the district court revokes or suspends a license, §147.55 prevails.

September 7, 1976

MUNICIPALITIES: Vacancies in Elective Offices—§§4.6, 69.2(3), 69.12 and 372.13(2), Code of Iowa, 1976. §§58, 59 and 69, H.F. 1011, 66th G.A. (1976). If a city council member elected from a ward moves out of that ward a vacancy is immediately created, and there is no need for a formal resignation. The council must fill the vacancy within thirty days for the remainder of the unexpired term, unless a special election is requested. (Blumberg to Harvey, State Representative, 9-7-76) #76-9-6

The Honorable Vern R. Harvey, State Representative: We have your opinion request of August 24, 1976, regarding vacancies in city councils. You asked:

"In the case of a ward councilman (as opposed to councilman at large) when that councilman moves from the ward, but remains in the city, when does the vacancy occur and is a formal resignation necessary to declare that vacancy?

"If that seat must be declared vacant, when must the council appoint a successor, assuming the vacancy occurs more than seventy days to the next general election and the unexpired term is more than thirteen months until the next municipal election?"

Section 69.2(3), 1975 Code of Iowa, provides that every civil office *shall* be vacant upon the happening of:

"3. The *incumbent ceasing to be a resident of the state,* district, county, township, *city or ward* by or for which he was elected or appointed, or in which the duties of his office are to be exercised." [Emphasis added].

In *Independent School Dist. of Manning v. Miller,* 1920, 189 Iowa 123, 178 N.W. 323, the school district treasurer moved out of the district. The then section 1266 of the Code was the same as §69.2(3). The court held (189 Iowa at 129-130) that §1266 "should be accorded the meaning its language purports . . . and that the office of school treasurer becomes vacant whenever that officer ceases to be a resident of the district." The court also held (189 Iowa at 132) that if it was a mere temporary absence it would not be sufficient to create a vacancy. "It is sufficient if he remove from the district where the duties of his office are to be exercised, permanently, without the intention of returning." Even if he had left the district without intending to return and yet had not taken up his permanent abode elsewhere, the court held, the office would be vacant, for all that is necessary, in order to render the office vacant, is that the incumbent cease to be a resident of his district." It should be noted that the officer had not filed a formal resignation.

Our office, over the years, has also considered this issue. We have held that an incumbent who removes himself from the political subdivision in and for which he was elected to perform his duties, such removal, without more is a resignation of the office. 1906 OAG 355. Where a township assessor removed from the district a vacancy in that office results, 1938 OAG 136; and where a county supervisor moved from the district in which he was elected to another district in the county a vacancy was created. 1920 OAG 637. In 1972 OAG 18, we held that a district director, by moving to another district in the same school district, was ineligible to retain his position as director. In none of these instances was a formal resignation necessary.

Section 69.12 of the Code provides generally the filling of vacancies. As amended by §§58 and 59 of H.F. 1011, 66th G.A. (1976) it reads, in pertinent part:

"When a vacancy occurs in any nonpartisan elective office of a political subdivision of this state, the vacancy shall be filled pursuant to this section. As used in this section, "pending election" means any election at which there will be on the ballot either the office in which the vacancy exists, or any other office to be filled or any public question to be decided by the voters of the same political subdivision.

"1. If the unexpired term in which the vacancy occurs has more than seventy days to run after the date of the next pending election, the vacancy shall be filled in accordance with this subsection. The fact that absentee ballots were distributed or voted before the vacancy occurred or was declared shall not invalidate the election.

a. A vacancy shall be filled at the next pending election if it occurs:

(1) Sixty or more days prior to the election, if it is general or primary election.

(2) Forty-five or more days prior to the election, if it is a regularly scheduled school or city election.

(3) Forty or more days prior to the election, if it is a regularly scheduled school or city election.

b. Nomination papers on behalf of candidates for a vacant office to be filled pursuant to paragraph a of this subsection shall be filed, in the form and manner prescribed by applicable law, by five o'clock p.m. on:

(1) The fifty-fifth day prior to a general or primary election.

(2) The fortieth day prior to a regularly scheduled school or city election.

(3) The twenty-fifth day prior to a special election.

c. A vacancy which occurs at a time when paragraph a of this subsection does not permit it to be filled at the next pending election shall be filled by appointment as provided by law until the succeeding pending election."

We interpret the terms "pending election" and "next pending election" to mean that election which fills an office or propounds an issue involving that political subdivision. For example, if a vacancy on a city council exists, the election to fill it, other than a special election, would have to be an election deciding some city matter, and not merely a county, state or national election. See, opinion of March 5, 1976, #76-3-4. This, however, does not answer your question.

Section 372.13(2) of the Code was amended by §69 of H.F. 1011 to read:

"A vacancy in an elective city office during a term of office shall be filled by the council, within thirty days after the vacancy occurs, for the balance of the unexpired term unless a special election is sooner held to fill the office for the remaining balance of the unexpired term. Such an election shall be called if the council is presented with a petition so requesting, signed by eligible electors entitled to vote to fill the office in question. The petition must bear signatures equal in number to two percent of those who voted for candidates for the office at the last preceding election at which the office was on the ballot, but in no case fewer than ten signatures. If the petition so requests and is timely filed, the special election may be held concurrently with any pending

election as provided by section sixty-nine point twelve (69.12) of the Code. Otherwise, a special election to fill the office shall be called at the earliest practicable time after the petition is presented to the council."

Pursuant to this section, vacancies in city elective offices shall be filled by the council within thirty days *for the balance of the unexpired term* unless a special election is requested by electors. This section appears to be in conflict with §69.12, as amended, which required an election. However, by operation of §4.6 of the Code, §372.13(2) is determined to be special in nature, and therefore controls over §69.12, which is general.

Accordingly, we are of the opinion that if an individual elected from a ward to a city council moves out of that ward, a vacancy immediately exists which does not require a formal resignation. The council must fill the vacancy within thirty days for the balance of the unexpired term, unless a special election is requested.

September 7, 1976

MUNICIPALITIES: Filling Vacancies—§§372.13(1), 372.13(2) and 380.4, Code of Iowa, 1975; §69, H.F. 1011, 66th G.A. (1976). In the absence of a statute prescribing the number of votes necessary to fill a vacancy, a majority of a quorum is sufficient. (Blumberg to Anderson, State Representative, 9-7-76) #76-9-7

Honorable Robert T. Anderson ,State Representative: We have received your opinion request of August 26, 1976, regarding the filling of a vacancy on a city council. You indicated that the vacancy was filled with only three of the five council members present by a vote of 2-1. You ask whether this vote was sufficient.

Section 69 of H.F. 1011, 66th G.A. (1976) amended §372.13(2), 1975 Code of Iowa, to read in part:

"A vacancy in an elective city office during a term of office shall be filled by the council, within thirty days after the vacancy occurs, for the balance of the unexpired term unless a special election is sooner held . . . ."

Section 372.13(1) provides that a majority of all council members is a quorum. Section 380.4 requires that the passage of an ordinance, amendment or resolution be by an affirmative vote of not less than a majority of the council members.

In a prior opinion, July 7, 1975, No. 75-7-4, attached hereto, we discussed §380.4 as it related to an ordinance or resolution. We held there that §380.4 required a majority of all members to which a council is entitled. Thus, if the matter to which you are speaking was an ordinance, amendment or resolution, the 2-1 vote would not have been sufficient. We are assuming here that your council is entitled to five members.

The common-law rule is that in the absence of any statutory provision, a majority of a quorum is all that is necessary for the adoption or passage of any resolution or order of a public body. *Thurston v. Huston*, 1904, 123 Iowa 157, 98 N.W. 637; *Cowles v. Independent School Dist.*, 1927, 204 Iowa 689, 216 N.W. 83; 1970 OAG 42. In *City of Nevada v. Slemmons*, 1953, 244 Iowa 1068, 59 N.W.2d 793, the issue concerned the

requirements of a majority vote to fill a vacancy. The applicable statute at that time required that a vacancy on a city council be filled upon a majority of the *whole number of members* of the council. The court reasoned that this phrase meant a majority of the remaining members rather than a majority of the members to which the council was entitled. It distinguished filling a vacancy from legislative action by a council on the basis that if a majority of the members to which a council was entitled was required, it could mean the inability of a council to fill more than one vacancy, and thereby effectively prevent a council from conducting business. That court cited, with approval, to *State v. Hoppe*, 1935, 194 Minn. 186, 260 N.W. 215, which had a similar ruling.

In *Prezlak v. Padrone*, 1961, 67 N.J. Super. 95, 169 A. 2d 852, the court was again faced with the issue of what majority was needed to fill a vacancy. In the city in question the allegedly applicable provisions provided for a majority of the entire council to constitute a quorum; the council had the authority to fill a vacancy but, like §372.13(2), no mention of the required affirmative votes was made; and, no corporate action could be taken except by a majority of the entire council. The court held that filling a vacancy was not a corporate action in that it was not legislative in character. It relates to an act calculated to keep the governing body intact, and not for the general objects for which the city was created. Therefore, in the absence of any statute or ordinance prescribing the number of votes necessary to fill a vacancy, the court held that the common law rule of a majority of the quorum was sufficient. The court cited to cases from New York, Delaware, Iowa and Indiana in support of its decision.

In *Cowles v. Independent School Dist. supra*, the Iowa court held that in the absence of any statute which requires a majority of an entire body to fill a vacancy, such an action can be accomplished with a majority of the quorum. We know of no other case in Iowa, under your facts, which holds otherwise.

Accordingly, we are of the opinion that in the absence of a statute prescribing the number of votes necessary to fill a vacancy, a majority of a quorum is sufficient.

September 7, 1976

STATE OFFICERS AND DEPARTMENTS: Mobile Homes—§135D.1(1), Code of Iowa, 1975. Non-motorized vehicles used or constructed as conveyances upon the public streets and highways and built for human habitation, and motorized vehicles not registered as motor vehicles so used or constructed are mobile homes. (Blumberg to Monroe, State Representative, 9-7-76) #76-9-8

The Honorable W. R. Monroe, State Representative: We have received your opinion request of August 13, 1976, regarding Chapter 135D of the 1975 Code of Iowa. You ask, on behalf of the Administrative Rules Review Committee, whether travel trailers are included within the definition of mobile homes in §135D.1. You make reference to an opinion of October 30, 1963.

The 1963 opinion, #63-10-7, was based upon the following provision of §135D.1(1), 1962 Code of Iowa:

" 'Mobile home' shall mean any vehicle so constructed as to permit its being used as a conveyance upon the public streets or highways and duly licensable as such, and shall include self-propelled and nonself-propelled vehicles, so designed, constructed, reconstructed or added to by means of an enclosed addition or room in such manner as will permit the occupancy thereof as a dwelling or sleeping place for one or more persons, having no permanent foundation and supported by wheels, jacks, or similar supports."

Thus, 1) units containing living and sleeping quarters that are attached to and mounted on motor vehicles, such as a small truck chassis; 2) wheeled vehicles containing enclosures of wood, metal, canvas, or similar material, designed so that they can be folded out or opened such that the interior body of the vehicle may be entered and used for occupancy, at least as a sleeping place; and, 3) wheeled vehicles containing enclosures designed such that they must be removed from the vehicle and erected alongside or apart from the vehicle for occupancy which harbored persons were mobile homes within that definition. You wish to know whether, because of the changes in §135D.1(1), a similar result would now be reached. We do not know whether the travel trailers you are referring to are the same as those mentioned in the prior opinion or are all types of travel trailers found today, including those that are self-propelled.

Section 135D.1(1), 1975 Code, provides:

" 'Mobile home' means any vehicle without motive power used or so manufactured or construted as to permit its being used as a conveyance upon the public streets and highways and so designed, constructed, or reconstructed as will permit the vehicle to be used as a place for human habitation by one or more persons; but shall also include any such vehicle with motive power not registered as a motor vehicle in Iowa."

This section now excludes all vehicles with motive power except those not registered as a motor vehicle. In other words, all vehicles without motive power used or constructed to be used as a conveyance upon the road and built so as to permit human habitation, and those vehicles with motive power that are not registered as a motor vehicle and are conveyances and built for human habitation are mobile homes.

Not being advised of all facts regarding the various types of travel trailers, both self, and non-self propelled, portable or fixed, that now exist, we cannot state which specific ones fall within the definition of mobile home. We think the definition is specific enough to make an appropriate determination based upon a given set of facts. We can state that those travel trailers without motive power probably fall within the definition. Any of those that are motorized and registered as motor vehicles would not fall within the definition.

September 7, 1976

MUNICIPALITIES: Road Use Tax Money—Iowa Constitution, Article VII, §8; §§312.2 and 312.6, Code of Iowa, 1975; §312.6, Code of Iowa, 1973; §312.6, Code of Iowa, 1958; §255, Chapter 1088, 64th G.A. (1972). Road use tax money may be used by a city for traffic signals, traffic signs, and street painting and marking. (Blumberg to Monroe, State Representative, 9-7-76) #76-9-9

The Honorable William R. Monroe, Jr., State Representative: We have received your opinion request of June 18, 1976, regarding a city's use of

road use tax money for traffic signals, street painting and marking and traffic signs. You make reference to shifting the funding of those from the general fund to the road use fund, which we assume is where the road use tax money is deposited.

Section 312.2, 1975 Code of Iowa, provides that the state treasurer shall allocate fifteen percent of all road use tax money to the street construction fund of the cities. We do not interpret the words "street construction fund" to mean a specifically named fund of a city, but rather any city fund that is used either in whole or in part for street construction. Section 312.6, Code of Iowa 1975, provides:

"Funds received by municipal corporations from the road use tax fund shall be used for *any purpose* relating to the construction, maintenance, and *supervision* of public streets." [emphasis added]

Section 8, Article VII of the Iowa Constitution provides:

"All motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, except cost of administration, shall be used exclusively for the construction, maintenance and supervision of the public highways exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds."

Chapter 312 of the Code and the above quote constitutional provision have been interpreted several times by this office and the Supreme Court. See, 1962 O.A.G. 251; 1968 O.A.G. 494; 1970 O.A.G. 181 and 508; *Edge v. Brice*, 1962, 253 Iowa 710, 113 N.W.2d 755; *Slapnicka v. City of Cedar Rapids*, 1965, 258 Iowa 382, 139 N.W.2d 179. Suffice it to say that both the constitutional and statutory provisions here involved are to be construed broadly and liberally in favor of the acknowledged purpose of the provisions, which is to:

"assure adequate highways and . . . a source of funds . . . for that purpose; and at the same time to limit the use of the funds, not to maintain the status quo of highway construction, but to keep such fees and taxes at reasonable rate and not allow the same to become a general revenue measure to be used per governmental purposes totally foreign to highways."

Edge v. Brice, supra, 113 N.W.2d at 759. Accordingly, we have held that: cities could use road use tax money to pay off bonds for street construction, and to do street maintenance, to pay salaries and expenses for engineering services, but not for alleys, traffic signals, street lighting, parking or sidewalks, 1962 O.A.G. 251; cities could use road use tax money to construct a garage to maintain and house road equipment and machinery, 1970 O.A.G. 181; and, cities could use road use tax money for sidewalks, but only if connected to road construction, repair or maintenance, 1970 O.A.G. 508. The opinions differ slightly because of statutory changes between their issuance.

At the time of the first opinion, §312.6 provided in the 1958 Code, in pertinent part:

"Funds received by municipal corporations from the road use tax fund shall be used *solely* for the construction; reconstruction; repair, and maintenance of roads and streets . . ." [emphasis added]

Section 312.6 in the 1966 through 1973 Codes provided:

"Funds received by municipal corporations from the road use tax fund shall be used:

"1. For the purposes for which street fund money may be used, with the exception of parking facilities as provided in subsection 5 of section 404.7.

"2. For the acquisition and installation of traffic control signals and devices required as part of a street construction or reconstruction project.

"3. For sidewalk expenditures required as part of a street construction or reconstruction project.

"4. For payment of principal and interest on bonds issued for street, bridge and viaduct purposes.

"5. For the construction of storm sewers and other drains for controlling and providing adequate drainage for surface waters originating within or flowing upon the right of ways of newly constructed or reconstructed streets, and for the payment of principal and interest on bonds issued to finance such construction.

"Such funds shall not be used for the purpose of machinery or equipment, except as provided in subsection 12 of section 404.7."

This section was again amended by §255, Chapter 1088, 64th G.A. (1972) to read as it does today. The change in the language is significant. Initially, in the 1958 Code, §312.6 only allowed the road use tax money to be used solely for construction, reconstruction, repair and maintenance of streets. Any use not associated with those items was prohibited. The 1966 Code widened the use of the road use tax money, but still limited it in subsection two to traffic control signals and devices as part of a street construction or reconstruction project. Street marking was permitted under subsection one by reference to the then existing §404.7.

The section as it now exists is more in line with the constitutional provision and the previously mentioned decisions. It allows for expenditure of road use tax money for *any purpose* relating to construction, maintenance or supervision of public streets, which is very broad in scope. In addition, the prohibitions of the past statutes providing that such money shall be used solely for construction, reconstruction, repair and maintenance, and the specific prohibition for traffic control signals and devices, no longer appear. Thus, we can say that in the true spirit of home rule, the legislature, although not permitting use of the money for other than road purposes, has intended to broaden the use of such money at the discretion of each city. As long as the expenditure is reasonably essential and necessarily inferable from the construction, maintenance, and supervision of public streets, such an expenditure is proper. We do not see how traffic signals, devices, street markings and street painting is any less a part of this than rest areas along a highway. See, 1968 O.A.G. 494.

Accordingly, we are of the opinion that road use tax money may be used by a city for traffic signals and devices, traffic signs, and street painting and marking.

September 7, 1976

DEPARTMENT OF SOCIAL SERVICES: Division of Community Services. §231.14, Code of Iowa, 1975; Article V, §6 Constitution of the

State of Iowa; §238.33, Code of Iowa, 1975; §770-142.2(2), IAC; §770-143.2(2), IAC; §238.39, Code of Iowa, 1975; §§232.34(3), 232.34(5), as amended by §22, Ch. 67, Acts of the 66th G.A., 1st Session; §602.1, Code of Iowa, 1975; §238.37, Code of Iowa, 1975. Iowa juvenile courts can transfer juveniles described in the Interstate Juvenile Compact, §231.14, Code of Iowa, 1975, between states only by means of the Interstate Juvenile Compact, except that delinquent juveniles can also be placed in foreign state institutions pursuant to §238.39, Code of Iowa, 1975. Iowa juvenile courts can, but need not, proceed through the appropriate compact administrator in the courts' use of said compacts. (O'Meara to Burns, Commissioner, 9-7-76) #76-9-10

Mr. Kevin J. Burns, Commissioner: You have requested an Opinion of the Attorney General concerning the following questions:

"1. Can a court in a state other than Iowa transfer jurisdiction over a juvenile matter before said court across state boundaries to an Iowa court? Conversely, can an Iowa court transfer such jurisdiction to a court in a state other than Iowa?

"2. Can a court in a state other than Iowa directly commit a juvenile over whom it has jurisdiction across state boundaries to the Iowa Department of Social Services? Conversely, can an Iowa court directly commit a juvenile over whom it has jurisdiction, across state boundaries to an agency in a state other than Iowa?

"3. Is the Juvenile Compact, §231.14, Code of Iowa, 1975, the exclusive means of transferring juveniles described in said act, between Iowa and another state or jurisdiction?"

In essence, you seek an opinion regarding two questions: 1) Is the Juvenile Compact the exclusive means by which an Iowa Court can transfer the juveniles described therein, between states, and 2) What is the role of the courts in transferring said juveniles between states, from court to court from court to agency? Your concerns are expressly limited to those juveniles described in the Juvenile Compact, §231.14, Code of Iowa, 1975 (hereafter referred to as the Juvenile Compact). Those juveniles are: juveniles who have not been adjudicated delinquent but who have run away from the parent, guardian, person or agency entitled to legal custody (Article IV, Juvenile Compact); delinquent juveniles who have absconded from the person or authority having parole or probation supervision over said juvenile or escaped from the institution having custody of said juvenile (Article V, Juvenile Compact); delinquent juveniles who are placed out of the state in which they were adjudicated delinquent, for the purpose of parole or probation supervision in such other state (Article VII, Juvenile Compact); delinquent juveniles who are placed out of the state in which they were adjudicated delinquent, for the purpose of institutionalization in such other state (Article X and Out-of-State Confinement Amendment, Juvenile Compact).

In answer to your concern as to whether or not the Juvenile Compact is the exclusive method of transferring said juveniles, it is the opinion of this office that, except for the confinement of delinquent juveniles in foreign state institutions, the Juvenile Compact, §231.14, Code, is the exclusive means of transfer.

It appears well settled that a court cannot, of its own authority, transfer such juveniles to another state, or assume jurisdiction over a juvenile

in another state. See *Pelton v. Halverson*, 240 Iowa 148, 35 N.W.2d 759 (1949); Article V, §6, Constitution of the State of Iowa; *Oakman v. Small*, 282 Ill. 360, 118 N.E. 775 (1918); *Stewart v. Eaton*, 287 Mich. 466, 283 N.W. 65 (1939).

Interpretative material for the Interstate Compact on the Placement of Children, §238.33, Code of Iowa, 1975, (hereafter referred to as the Children's Compact), states the situation rather succinctly:

"The Compact is a jurisdictional instrument which has the effect of making it possible to operate across state lines much as one would operate within a single state." *Compact Administrators' Manual*, The Interstate Compact on the Placement of Children, p. 2.5.

The manual states further:

". . . the courts and administrative agencies of a state are territorially limited in their jurisdictional authority to the state of which they are instrumentalities." *Compact Administrators' Manual*, supra at p. 3.8, Secretariat Opinion, January 28, 1974.

Unless a court can act through such an interstate compact, the court's actions are limited to matters within its territorial jurisdiction. Iowa is a member of both the Juvenile Compact and the Children's Compact. Transfers of juveniles must, as appropriate, be made through one, the other, or both of these compacts.

It is the opinion of this office that, in considering the juveniles to whom this opinion is applicable, transfer of juveniles between Iowa and another state is exclusively controlled by the Juvenile Compact, §231.14, Code, except that the transfer of delinquent juveniles for the purpose of institutionalization in another state is controlled by both the Juvenile Compact and the Children's Compact.

Interpretative material for the Children's Compact states:

"In a state which has enacted one or both of these compacts [Juvenile Compact, Children's Compact] (there presently being no other lawful arrangements sufficient to maintain jurisdiction over an adjudicated delinquent on an interstate basis), a juvenile under adjudication of delinquency cannot lawfully be placed out-of-state, except in accordance with one or the other of these two compacts." *Compact Administrators' Manual*, supra, at p. 3.8.

Placement of delinquent juveniles out-of-state for the purpose of institutionalization is provided for in Article X and the Out-of-State Confinement Amendment of the Juvenile Compact. Such placement is also provided for in Article VI of the Children's Compact. Neither compact is dependent upon the other in implementing the procedures of either (Article II, Juvenile Compact; Article VIII (b), Children's Compact).

It is apparent that a Court of Iowa, involved in transferring such a juvenile between states must follow these compacts as designated. Having determined this, you are secondly concerned with the role of the Iowa courts in the functioning of these compacts. This concern essentially deals with the role of the courts vis-a-vis that of the compact administrator within the Iowa Department of Social Services.

§770-142.2(2), Iowa Administrative Code, referring to the Children's Compact, states:

"The compact administrator shall be responsible for the administration of the compact between such compact administrator's state and other contracting states."

The language of §770-143.2(2), referring to the Juvenile Compact, is identical.

One possible interpretation of these rules is that all matters involving either compact must be routed through the designated compact administrator. However, it is the opinion of this office that such an interpretation, although it may arguably be administratively preferable, does not comport with relevant Iowa statutes.

§238.39, Code of Iowa, 1975, states:

"Any court having jurisdiction to place delinquent children may place such a child in an institution of or in another state pursuant to Article VI of the interstate compact on the placement of children and shall retain jurisdiction as provided in Article V thereof."

It is clear that Iowa juvenile courts have the requisite authority called for in §238.39. See §§232.34(3), 232.34(5), as amended by §22, Ch. 67, Acts of the 66th G.A., 1st Session; §602.1, Code of Iowa, 1975.

It is also apparent that the Children's Compact, itself, contemplates courts serving as sending agencies under the compact. See Article II (b) of the Children's Compact, which defines "sending agency" to include "a court of a party state".

It is noted that Article VI of the Children's Compact, to which §238.39, Code, makes reference, is limited to placement of delinquent juveniles into foreign state institutions. Hence, the grant of power under §238.39, Code, is so limited.

The interpretative material to the Children's Compact contains a suggested procedure for compact transfers which provides for all materials concerning the transfer to go through the compact administrator. However, this suggestion is specifically made optional, and would otherwise appear to be limited as set forth above by Iowa legislative intent. (For manual reference, see *Compact Administrators' Manual*, Interstate Compact on the Placement of Children, p. 1.12.)

Therefore, this office concludes that Iowa juvenile courts can place delinquent Iowa juveniles in foreign state institutions pursuant to the Children's Compact without going through the compact administrator. This, of course, does not conclude that a court may not go through the compact administrator. Nor does it conclude that the compact administrator may not be contacted for advice or other assistance. It further does not conclude that the compact administrator should not be kept informed of all compact activity. (See Article VII, Children's Compact.)

In considering the role of the courts in the functioning of the Juvenile Compact, it appears best to examine each separate class of juvenile referred to in the compact. Initially, Article IV of the Juvenile Compact deals with nondelinquent runaways. Article IV allows the court of the "demanding state" to present a written requisition to the court of the "responding state". This contemplates a court-to-court procedure. With

reference to the compact administrator, Article IV requires only the filing of a copy of the requisition with the compact administrator of the "demanding state".

Therefore, this office must conclude that the intent of the Iowa Legislature in adopting this language, without further expressly providing that all matters dealing with runaways must be processed between states through the compact administrator, is that it is not necessary for an Iowa juvenile court to proceed through the compact administrator. No language appears which would prohibit such a process; but it is not mandated.

Article V of the Juvenile Compact deals with delinquent juvenile absconders and escapees. This article presents a procedure equivalent to that in Article IV. Again, the only express requirement involving the compact administrator is for the filing of a copy of the requisition with the compact administrator.

Therefore, this office must conclude that the intent of the Iowa Legislature in adopting this language, to the exclusion of other possible language, is that it is not necessary for an Iowa juvenile court to proceed through the compact administrator. Again, there is no language which would prevent a court from proceeding through the compact administrator.

Article VII of the Juvenile Compact deals with co-operative supervision of probationers and parolees. This article provides for co-operative supervision as arranged between the judicial *and* administrative authorities of the states involved.

The grant of authority in Article VII is conjunctive, i.e., "and". However, there is no designation of specific involvement of the compact administrator. Nor is there, anywhere in the compact, a definition of "appropriate authorities", as used in this article.

Therefore, it is presumed that the grant of authority to the administration and the judiciary is conjunctive (i.e., concurrent), whereas the exercise of such authority can be disjunctive (i.e., independent). It is the opinion of this office that the Iowa juvenile courts need not proceed through the compact administrator in providing such supervision. Again, nothing prohibits proceeding through the compact administrator.

Article X deals with institutionalization of delinquent juveniles in foreign states. This article expressly limits its grant of authority to the administrative authorities of the party states. Therefore, Iowa juvenile courts could not act under this article.

However, the "Out-of-State Confinement Amendment" of the Juvenile Compact allows the judicial or administrative authorities in the sending state to direct institutionalization of a delinquent juvenile in a foreign state. There is no mention of the necessity of proceeding through the compact administrator. Therefore, this office concludes Iowa juvenile courts may make such institutional placements without proceeding through the compact administrator. (Reference is also made to §238.39, Code of Iowa, discussed above as an alternate procedure for such institutional placement.)

The association of compact administrators for the Juvenile Compact does provide rules and regulations for the use of the compact. §1 of the *Rules, Regulations and Forms Used Under the Compact*, states:

"Wherever practicable a single state agency shall represent the state in dealing with other states under the compact and all correspondence and communications relating to matters arising under the compact and under these rules and regulations shall be conducted with such agencies. Where there are several agencies having coordinate jurisdiction, respective agencies shall work out such methods of intercommunication and procedure as may be appropriate and convenient." *The Handbook on Interstate Crime Control*, by the Council of State Governments, 1966, at page 70.

The situation in Iowa would appear to fall at the threshold of the latter designation, i.e., several coordinate agencies needing organization of intercommunication and procedure. This office does not believe that §770-143.2(2), IAC, fulfills this purpose in light of the above interpretation of Iowa legislative intent concerning the role of the Iowa juvenile courts in the functioning of the compact.

A brief review of the role of the courts in the functioning of the Juvenile Compact is appropriate. Iowa juvenile courts may both "send" and "receive" runaways; the courts may "send" and "receive" absconders and escapees; the courts may "send" and "receive" delinquent juveniles into parole or probation supervision; the courts may send, only, delinquent juveniles into foreign state institutional placement. All of the above may be done by the courts without proceeding through the compact administrator. However, there is no prohibition against the courts proceeding through the compact administrator or seeking assistance therefrom. In addition there is, as designated, a requirement of filing copies of certain materials with the compact administrator.

It is appropriate to make reference to §238.37, Code of Iowa, 1975, which states:

"The officers and agencies of this state and its subdivisions having authority to place children are hereby empowered to enter into agreements with appropriate officers or agencies of or in other party states pursuant to paragraph "b" of article V of the interstate compact on the placement of children. Any such agreement which contains a financial commitment or imposes a financial obligation on this state or subdivision or agency thereof shall not be binding unless it has the approval in writing of the director of family and children's services in the state and the overseer of the poor in the case of a subdivision of the state."

Reference is also made to Article VIII (a) of the Juvenile Compact.

Based upon these sections of Iowa statute, it is the opinion of this office that whenever an Iowa juvenile court exercises its authority relative to the transfer of such juveniles into or out of Iowa, the court must have the written approval of the director of family and children's services of the state (see §234.1, Code of Iowa, 1975) in order to make the conditions of placement binding, and in order to receive state payment for the placement.

Finally, this office is of the opinion that the Iowa Legislature might well clarify these laws to more clearly define legislative intent concerning

the role of the courts and the role of the compact administrator in carrying out both compacts.

September 7, 1976

MUNICIPALITIES—TOWNSHIPS: Fire Protection Contracts—§§6, 7, Ch. 194, 66th G.A. (1975). Townships may levy taxes to pay for fire protection pursuant to contracts. Cities may include in the charge for the contract and townships may pay a portion of insurance costs the cities incur for providing fire protection. (Blumberg to Kelly, State Senator, 9-7-76) #76-9-11

Honorable E. Kevin Kelly, State Senator: We have received your opinion request regarding township fire protection. Under your facts, a township has entered into an agreement with a city for that city to provide fire protection to the township. Under the terms of the agreement the township shall pay an annual sum to the city plus a specified amount per fireman for each call. The city agrees to provide insurance for its vehicles and to cover the fire protection activities. You ask:

"One specific case, a town near my district, has entered into such a contract with the township trustees (I have enclosed a copy of the contract). They are interested to know whether or not the trustees have the power to levy a tax to pay for such fire protection services under the terms of the contract.

"The second question which needs to be answered is whether or not the trustees who make such a contract, or a fire district committee, should enter into such contract.

"I would also ask in addition, what is the liability of those furnishing such services (under a contract) if for some unforeseen reason they could not furnish the service at the time needed? Who is responsible for the Workmen's Compensation liability under such contract, and who has the responsibility for public liability or property damage liability when the Fire Department is acting in its capacity of furnishing its services under a contract?

"Finally, can the fire district levy for payment of insurance the city has on a prorated share to cover its actions while performing fire fighting services?"

Section 6 of Ch. 194, 66th G.A. (1975) amended §359.42 of the Code to read that township trustees shall provide fire protection for those parts of a township outside a benefited fire district. The trustees may contract with any public or private agency (which includes a city) pursuant to Chapter 28E of the Code in order to provide said fire protection. Section 7 of Ch. 194 amended §359.43 to provide that the township trustees may levy a tax up to forty and one-half cents per thousand dollars of assessed value on taxable property within the township outside of cities or benefited fire districts for the purpose of implementing §359.42, as amended; a tax up to fifty-four cents per thousand dollars assessed value of taxable property if an agreement with a special charter city exists; and, a tax not exceeding sixty-seven and one-half cents per thousand dollars of assessed value on taxable property if the township has a common boundary with a city of over two-hundred thousand population. Therefore, in answer to your first question, the township trustees have the authority to levy a tax for the purposes of providing fire protection through a contract with a city.

We are not in a position to answer your second question. From the above amendment to §359.42 it is apparent that a township may contract with a city for fire protection. It is not, however, mandatory. The wisdom of making such a contract is something that only the parties can decide.

In an earlier opinion to Hullinger, #76-2-11, we discussed the possible liability of those providing fire protection. In that opinion, a copy of which is enclosed, the question was one of liability for failure to provide adequate fire protection. We cited cases where governmental units and their fire departments were held liable for negligent acts. See, *Smith v. Ginther*, 1967, 379 Mich. 208, 150 N.W.2d 798 (negligence of firemen in operating the equipment); *City of Fairbanks v. Schaible*, 375 P.2d 201 (Alas. 1962) (negligence in fighting a fire); *Hall v. Youngstown*, 1967, 11 Ohio App. 2d 195, 229 N.E. 2d 660 (failure to provide water to fight a fire). We also cited to cases where the fire department was not held liable for failure to provide adequate protection. See, *Steinhardt v. Town of North Bay Village*, 132 So.2d 764 (Ct. App. Fla. 1961).

As stated in that prior opinion, the township trustees, fire district trustees or city council could be held liable for failing to provide fire protection to the township, fire district or city. However, each case must be determined on its own set of facts. The fact that the city furnishing the fire protection under the contract had all its fire equipment tied up at another fire at the time the township required its services may be a defense to an action for damages. We cannot say, though, that liability would or would not attach.

Assuming that the city hires the firemen and is the entity to whom the firemen are responsible, the city would probably be responsible for the workmen's compensation. *Smith v. Newell*, 1962, 254 Iowa 496, 117 N.W.2d 883, 886. Similarly, if the firemen are responsible to the city and other city employees while providing fire protection, it is probable that the city could be held liable for negligent acts of the firemen, while fighting a fire for a township or fire district, under Chapter 613A of the Code. However, we again must state that facts may exist that could also make the township or fire district liable.

In your last question, you are really asking whether a city under a contract with a township or fire district may charge the township or fire district a proportional share of the cost of insurance. We see no limitation on the amount or basis for a charge for a contract under §§359.42 or 357G.3 as amended by Chap. 194 of the 66th G.A. We assume that the charge for fire protection pursuant to a contract is to cover the costs of providing the protection. Insurance could be one of those costs.

Accordingly, we are of the opinion that township trustees have the power to levy a tax to provide for fire protection, including payment for such protection pursuant to contract. Part of this payment may include a portion of insurance costs. In all probability, the city providing the firemen and equipment would be responsible for Workmen's Compensation and the negligent acts of the firemen. However, facts may exist which would dictate otherwise.

September 7, 1976

SCHOOLS: Surtax and boundary changes — §§442.14, 274.13, 274.37, 274.42. 1) Local option surtax must be used for additional enrichment and may not be applied to school house fund. 2) Area Educational Agency is authorized to make boundary changes only in circumstances described in §274.13. (Nolan to Andersen, State Senator, 9-7-76) #76-9-12

The Honorable Leonard C. Andersen, State Senator: You have asked for an opinion from the Attorney General on two questions involving the Pierson-Kingsley School District:

"1. Can the local option income sur-tax be applied on the school house fund?

"2. Does the Area Educational Agency have the authority to change the school district boundaries in order to better distribute the pupils?"

The local option income surtax is authorized by §442.14 of the Code of Iowa, which was amended by Chapter 79, Laws of the 66th General Assembly, 1975 Session, to provide that the voters may authorize such surtax for "additional enrichment" beginning July 1, 1976. The statute, as amended, states that the funds for additional enrichment "may be used only for educational research, curriculum maintenance or development, or innovative programs". Accordingly, the answer to your first question is no.

Your second question must also be answered in the negative. The only authority for Area Education action with respect to the changing of school district boundaries is contained in §274.13 of the Iowa Code, where the agency is authorized "to attach land to one district from another where natural obstacles prevent inhabitance from attending their own district with reasonable facility". The school boards of two contiguous school districts may mutually change boundaries subject to the approval of the Area Education Agency Board, pursuant to §274.37 of the Code. And the State Board has limited authority under §274.42 where a federal project takes land to change the boundaries "so as to effectively provide for the schooling of children residing within all of said districts".

September 7, 1976

COUNTIES: Assessor—§441.17. Language of §441.17 precludes assessor from acting as a private appraiser or as a real estate broker or option agent in the county where he is assessor. (Nolan to Ridout, Emmet County Attorney, 9-7-76) #76-9-13

Mr. William B. Ridout, Emmet County Attorney: This is written in response to your request for an Attorney General's opinion on the following:

"Section 441.17(1) of the 1975 Code of Iowa is as follows:

"'*Duties of Assessor.* The assessor shall:

"'1. Devote his entire time to the duties of his office and shall not engage in any occupation or business interfering or inconsistent with such duties.'

"We would like to know if the following activities by a county assessor constitute an occupation or business interfering or inconsistent with said

county assessor's duty or in any way violate the provision that a county assessor shall devote his entire time to his duties:

"1. Acting as a private appraiser of real estate in the county where he is the county assessor.

"2. Acting as a licensed real estate broker in the county where he is the county assessor.

"3. Acting as an agent of a private individual for the purpose of negotiating an option to purchase real estate."

It is the opinion of this office that all of the questions you have presented should be answered affirmatively. The likelihood of a conflict of interest arising between a private appraiser of real estate and the factual determination of value of property for purposes of assessment is patently evident. Similarly, acting as a licensed real estate broker in a county where he is assessor is, we believe, inconsistent with the duties of the county assessor in that the duty to bring buyer and seller together could clearly represent an interest antagonistic to that of the county. The same result, we believe, would readily occur where the assessor acts as an agent for private individuals for the purpose of negotiating an option to purchase real estate in the county.

September 7, 1976

MUNICIPALITIES: Gifts and Donations—§384.3, Code of Iowa, 1975. A city may require that gifts and donations received by and for a fire department be given to the city clerk for deposit. Such moneys must be deposited in the general fund. (Blumberg to Schlue, Benton County Attorney, 9-7-76) #76-9-14

Mr. Larry Schlue, Benton County Attorney: We have received your opinion request of July 12, 1976, regarding monetary gifts and donations to a volunteer fire department. You ask whether a city ordinance, which prescribes that donations and gifts to the fire department must be received by the city clerk and deposited as revenue for the fire department, is contrary to the city code.

The ordinance in question reads: "To comply with the Code of Iowa, all monetary gifts and donations shall be received by the City Clerk as non-tax revenue for the Fire Department, and will be additional monies in the Firemen's Fund". Section 384.3, 1975 Code of Iowa, provides that all moneys "received for city government purposes from taxes and other sources must be credited to the general fund of the city" with certain listed exceptions. If your question is whether the city can require that such gifts to the fire department be given to the clerk for deposit with the city, the answer is yes, since the above section makes it a requirement.

If your question is whether the clerk may deposit the money in the fire department fund, if it is other than the general fund, the answer is no since a fire department fund is not one of those funds listed in the exception to §384.3.

Accordingly, we are of the opinion that a city may require gifts and donations received by and for the fire department, be given to the city clerk for deposit. Such moneys must be deposited in the general fund.

September 7, 1976

MOTOR VEHICLES: Reckless Driving. Sections 321.277 and 321.228, Code of Iowa, 1975. Nonconsent of a property owner is not an element of the crime of reckless driving. (Linge to Criswell, Warren County Attorney, 9-7-76) #76-9-15

Mr. John W. Criswell, Warren County Attorney: You recently requested an opinion of the Attorney General about the elements of the crime of reckless driving. Specifically, you stated that your research indicates that if this crime is committed on private property, it is unnecessary to show the nonconsent to such driving by the property owner to establish this crime. You then asked if we concur. We do.

Reckless driving is prohibited by section 321.277, Code of Iowa, 1975, that states, in part:

"Any person who drives any vehicle in such manner as to indicate either a willful or a wanton disregard for the safety of persons or property is guilty of reckless driving."

The Iowa Supreme Court restated the elements of this crime in *State v. Stewart*, 223 N.W.2d 250, 252 (Iowa 1974), wherein the Court stated, in part:

"There are three elements to the crime of reckless driving .. . . They are: (1) the conscious and intentional operation of a motor vehicle (2) in a manner which creates an unreasonable risk of harm to *others* (3) where such risk is or should be known to the driver." (Emphasis added)

Reckless driving on private property is prohibited by the application of the provisions of section 321.228, Code, 1975, which states, in part:

"The provisions of this chapter [321] relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways except: * * *

2. The provisions of sections 321.261 to 321.274, section 321.277 and sections 321.280 to 321.282 shall apply upon highways and *elsewhere throughout the state.*" (Emphasis added)

"Elsewhere throughout the state" means the offenses to which section 321.228 refers are not limited to operation on a public highway. *State v. Heisdorffer*, 171 N.W.2d 513 (Iowa 1969).

Section 321.228 includes section 321.281 which prohibits operating a motor vehicle while under the influence of an alcoholic beverage (OMVUI). The Iowa Supreme Court in *State v. Valeu*, 257 Iowa 867, 869, 134 N.W.2d 911, 913 (Iowa 1965) stated that the purpose of section 321.228 is to ". . . protect all against the real danger caused by drunken drivers whether on the highway, a parking lot or elsewhere within the state." The same reasoning is equally applicable to reckless driving. The reckless driving statute prohibits creating an unreasonable risk to others with a vehicle, the same protection afforded by the prohibition against OMVUI.

The Iowa Supreme Court has not required a showing of nonconsent of a property owner as an element of the crime of OMVUI on private property. *State v. Miller*, 204 N.W.2d 834 (Iowa 1973). Such nonconsent is not an element of reckless driving. Consent by a property owner, if given, would appear to be an agreement that this crime could be committed on his or her property but would not purge the act of its character as a public wrong.

September 7, 1976

ELECTIONS: Postcard Registration. §§48.2 and 48.3, Code of Iowa, 1975, as amended by Chapter 81, 66th G.A., 1st Session (1975) and House File 1010, Acts, 66th G.A., 2nd Session (1976). Postcard registration forms should be received and processed by the county commissioner of registration if they are sent through the mail singly,, with the exception of forms submitted by persons related to the first degree of consanguinity or affinity, even through the hands of some third party. (Haesemeyer to Nystrom, State Senator and Monroe, State Representative, 9-7-76) #76-9-16

The Honorable John N. Nystrom, State Senator, and The Honorable W. R. Monroe, State Representative: You have recently requested us to reconsider our opinion of July 30, 1976, to Dorothy Elliott, Director of Voter Registration, concerning postcard registration and specifically the procedure for submitting postcard registration forms to the county commissioners of elections. In your letter you state:

"Inasmuch as the specific words of section 48.3 established postcard registration as an alternate method of registration it would appear that the legislature did not intend for all the procedures of other methods of registration to apply to this alternate method.

"We therefore request you to reconsider the portion of your opinion of July 30, 1976, regarding the procedure for submitting postcard registrations to the county commissioners of elections."

In the July 30, 1976, opinion, we concluded that the practice of the AFL/CIO having postcard registration forms returned to them and then submitting them in bulk to the various commissioners of elections was not a practice contemplated by §48.3, Code of Iowa, 1975. We then went on to say:

" * * *

". . . This is not to say that the AFL/CIO could not send its members postage paid postcard registration forms, but the forms should be sent by the individual members directly to the commissioner of elections.

"We do not believe that this problem is sufficiently serious to warrant invalidating registrations already received from the AFL/CIO or to require the AFL/CIO to return any cards to its members which it presently has on hand. However, any cards presently on hand should have postage affixed and be individually mailed to the appropriate commissioner of registration."

As a result of this opinion, it appears that some county commissioners of elections are refusing to accept postcard registrations where they have reason to believe that they are being deposited in the mail by someone other than the elector seeking to be registered even though the postcard registration forms are coming in singly with the proper postage affixed.

Our earlier opinion rested in part at least on the language of §48.2, which speaks in terms of an eligible elector registering by "personally" submitting a completed voter registration form to the commissioner of registration. However, as you point out, §48.3, which deals with postcard registration, by the terms of such §48.3 is an alternative to the method of registration prescribed by §48.2.

If the procedures and regulations set forth in the statutes for other methods of registration were intended to apply to the method set forth

as an alternate method in §48.3 language such as "register according to the provisions of §48.27" would have been attached to §48.3 since the procedure for postcard registration provides extraordinary protection for the registrant, not provided with other methods of registration, by requiring the county commissioner of registration to send a receipt within 5 days to show proof that the applicant's form was properly received it would appear that adequate precautions have been specifically legislatively articulated and borrowing guidelines established from other methods of registration would be contrary to the legislative intent.

Furthermore, since it is impossible to determine who actually dropped the form in the mail box, it would appear that an interpretation which required only the applicant to drop the form in the mail box would be totally unenforceable.

It is therefore our opinion that registrations by the method prescribed in §48.3 should be received and processed by the county commissioner of registration if they are sent through the mail singly, with the exception of forms submitted by persons related to the first degree of consanguinity or affinity, even though such forms may pass through the hands of some third party.

September 7, 1976

TAXATION: Property Tax, Delinquency: §§445.4, 445.36, 445.37, The Code, 1975; House File 1564. If certification to county treasurer takes place after September 1, taxes are delinquent if not paid within 30 days; if certification takes place before September 1, taxes are delinquent if not paid by October 1. (Thompson to Representative West, 9-7-76) #76-9-17

The Honorable James C. West, State Representative: You have requested an Opinion of the Attorney General regarding the interpretation of "Senate File 1564". You state that §14 of this enactment changes the period of time in which a taxpayer may, without incurring a delinquency penalty, pay the first installment of property taxes due in the 1976-1977 fiscal year. Apparently, the statute to which you intended to refer is House File 1564. Section 14 reads as follows:

"Notwithstanding the provisions of section four hundred forty-five point thirty-seven (445.37) of the Code, if one-half of the property taxes due have not been paid for October 1, 1976, or thirty days from the date of the certification of the tax list to the county treasurer, whichever date occurs later, the amount due shall become delinquent and subject to the penalties provided in section four hundred forty-five point thirty-nine (445.39) and four hundred forty-five point forty (445.40) of the Code. The provisions of this section shall only be applicable to property taxes levied in 1976 and payable during the fiscal year beginning July 1, 1976, and ending June 30, 1977."

Specifically, you have hypothesized a situation in which a "taxpayer receives notice of taxes due after the delinquency date." You query whether, in such a situation, the "taxes are delinquent and subject to penalty."

Before responding to this question, it is imperative to note that the county treasurer is not required to notify any taxpayer of the amount, the maturity or the delinquency of any tax liability. Section 445.36, The Code, 1975, provides:

"No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the treasurer, at some time between the first Monday in August and September 1 following, and pay his taxes in full, or one-half thereof before September 1 succeeding the levy, and the remaining half before March 1 following."

Consequently, since the taxpayer does not receive any notice of property tax liability, your hypothetical situation is inapposite. Failure to receive notice will never excuse a taxpayer from a delinquency penalty.

However, as a variation on the theme that you have propounded, mention should be made of a very important change in the law. Certification of the property tax list by the county auditor to the county treasurer must be completed on or before June 30. §443.4, The Code, 1975. Taxes were delinquent if not paid before October 1. §445.37, The Code, 1975. The taxpayer, then, had from July 1 to October 1 to pay the taxes without incurring a delinquency penalty. Prior to the enactment of §14 of House File 1564, it was the opinion of this office that the specific dates set forth in §445.37 were inapplicable whenever the tax list was certified to the treasurer after June 30. Delinquency resulted if taxes were unpaid three months after certification whenever certification occurred after June 30. Delinquency resulted on October 1 if certification was made on or before June 30. Opinion of the Attorney General, (Capotosto to Kelso) 75-7-13; 1968 O.A.G. 416; 1962 O.A.G. 490; 1940 O.A.G. 493.

This rule has been changed by House File 1564. Under this statute, taxes are delinquent on October 1 or thirty days after certification, whichever is later. Therefore, when certification takes place after September 1, the taxpayer will have thirty days to pay taxes without a delinquency penalty. When certification takes place on or before September 1, the taxes become delinquent on October 1.

September 8, 1976

GENERAL ASSEMBLY; LEGISLATIVE COUNCIL; CONTRACTS; COMMITTEES. Art. III, §1, Const. of Ia., §§2.43, 2.12, 2.42 and 2.45, Code of Iowa, 1975. 1) The Legislative Council has no power to establish a computerized interactive budgeting and monitoring system consisting of "software" and services for the benefit of the Executive Department and the General Assembly after the project has been submitted to the General Assembly in the form of a bill for an appropriation for that purpose but which was not passed. Such a system is not "legislative equipment and supplies" reasonably necessary to properly carry out the functions of the General Assembly, which the Legislative Council is authorized to purchase from a standing appropriation for that purpose. A $473,000 contract for consulting services for the project is void. 2) Committees created by the Legislative Council to implement the program are **ultra vires** to the extent that they delegate executive functions and are not properly authorized by the General Assembly. (Turner to Selden, State Comptroller, 9-8-76) #76-9-18

Mr. Marvin R. Selden, Jr., State Comptroller: On August 31, 1976, you requested an opinion of the attorney general as to the validity of a $387,000 contract for consulting services to establish a computerized budget monitoring system, which contract was made and entered into on July 14, 1976, and executed by the Lieutenant Governor and Speaker of the House on behalf of the Iowa General Assembly, with Coopers &

Lybrand, the consultant. You have submitted a copy of the contract, together with your inquiry which states:

"It has come to our attention that the Legislative Council has entered into contract for certain professional services, referred to as Interactive Budgeting and Monitoring System. I assume that invoices will be presented to this office shortly for payment. Further, I understand you have had some conversations with the Legislative Fiscal Director concerning this contract.

As you are aware, a bill was introduced in the House during the last session, providing an appropriation of such services. The bill was not moved off the calendar. Subsequently, the Legislative Council approved the contract, and provided for payment under Section 2.12 of the Code, 1975.

Other circumstances surround this contract with which I believe you are familiar. My questions to you are as follows:

Is this a valid contract, and can payments be made as provided by the contract, and charged to the Code section as noted? Is this a proper Legislative expenditure, or does it conflict with the Administrative branch of Iowa government?"

The bill to which you refer, and which was not enacted, was House File 1591 filed on May 21, 1976, by the Committee on Appropriations of the 66th General Assembly, 2nd Session (1976) for "An Act making an appropriation for the purpose of providing for the development of an interactive computer system encompassing state budgeting and monitoring procedures." That bill would have made a specific appropriation of $387,000 for the purchase of a computer program (but not the computer itself) which would "provide for and encompass state budgeting and monitoring procedures relating to the appropriation and expenditure of funds on an interactive time sharing computer." It would also have appropriated an additional $86,000 for the "rental of an interactive time sharing computer on a temporary basis, for the purchase of additional computer time and terminal rental and line charges, for computer programming or software development, and for program costs for implementing the computer system," a total of $473,000.

The bill further provided that the appropriation not become effective until approved by the Legislative Council "after a review of available information which will aid in determining if the computer program and the manner of its implementation will be of value to the state." An explanation to the bill states that the system would provide "timely and sophisticated budget information and the ability to monitor budgets" and says "It is anticipated that *such information would be available to both the legislative and executive branches of government* and developing the data base and using it in the future *will require joint efforts by the two branches of government.*" (Emphasis added.) As you indicate, the bill did not pass. The General Assembly adjourned sine die on May 29, 1976.

The day before adjournment, Representative Hargrave also filed House Concurrent Resolution No. 161 pertaining to a "sophisticated computer system *for members of the General Assembly and the executive branch of government* in order that revenues may accurately, quickly, and efficiently be judged, determined, monitored." (Emphasis added.) HCR

161 was not adopted either but had it been the House and Senate would have resolved that the Legislative Council be requested to study the need for development of the computer system here under consideration and that upon determining the need that the program be implemented "pursuant to §2.12 of the Code." See House Journal May 28, 1976, (the 138th day of the Session) p. 3364.

The Hargrave resolution whereased that "it is not possible during the lateness of the present legislative session to provide such thorough and deliberate consideration of the merits of purchasing such a computer program as well as considering the expenditure of supporting costs." In other words, Representative Hargrave proposed that the General Assembly ask the Legislative Council to do that which the whole legislature did not have time to do. But no such request was actually made. Indeed, some legislators insist that no action was taken for political reasons: the leadership of the majority party did not want to exceed Governor Ray's recommended budget in an election year.

It appears from the minutes of the Iowa Legislative Council meeting of June 9, 1976, that the program was then discussed with Pat Charles of Coopers & Lybrand and Dr. Howard Dockery of the University of Iowa. In answer to questioning by Senator Doderer, Mr. Charles stated the current annual cost of the computer system in the State of Washington was approximately $100,000, but that when the program was integrated into the computer system of that state the cost would be approximately $45,000 per year. He estimated the cost of the Iowa computer system, using existing equipment, would be approximately $10,000 "after the initial cost of establishing the program is completed."

Representative Stromer questioned bypassing the appropriation process in "approving and expending approximately $357,000 to implement this system." Representative Stromer stated that the computer proposal was presented to the General Assembly during the final days of the session but that it was not acted upon. Representative Varley also expressed reservations "about spending this amount of money to purchase a computer program before the needs of the General Assembly are fully understood" and that he was reluctant to approve the purchase of a program designed for the state of Washington. Representative Millen expressed concern because Washington was the only state with experience and he was not certain such a system was justified in Iowa.

After hearing the advantages of the program to Iowa from Mrs. Marilyn Farr of the Legislative Fiscal Bureau, Senator Eugene M. Hill commented that the computer system is needed to improve the legislative process, "particularly the appropriations process" and would be well worth the expenditure. After further colloquy between Mr. Charles and Representatives Hargrave and Varley, Senator Hill moved that Coopers & Lybrand be employed as consultants to institute the program and the motion was seconded by Representative Dunton.

After further discussion between Senator Doderer, Mrs. Farr, Senator Palmer and Representative Stromer, Senator Hill's motion was adopted 11-5, with 2 other legislators voting "present."

On July 14, 1976, the Council took up the matter again, recognizing Senator Hill who presented two resolutions to implement the program. The first provided that the "Interactive Budgeting and Monitoring System will be a *cooperative system* relying on accurate and timely data from the executive agencies and authorizing full access to the common data base *to all cooperating agencies*." (Emphasis added.) This first resolution also specified that "all manuals, data dictionaries, and attendance at training courses will be available *to all cooperating agencies*" (emphasis added) and specified two new committees "empowered to implement the Legislative Council's function in making the Interactive Budgeting and Monitoring System operational:" 1) the "Information System Management Committee" and 2) the "Data Base Advisory Committee." "The system will be staffed by members of the Legislative Fiscal Bureau."

First year costs were estimated and authorized not to exceed sums from various sources totaling $86,000 and the resolution directed that a contract be drawn with Coopers & Lybrand "pursuant to Chapter 2.12 of the Code of Iowa."

Senator Hill's second resolution *created* the aforementioned "Information System Management Committee" charged with "general oversight of the system" and "specifying required output including the high level command language which can be used by all agencies to format output as desired" and "monitoring to assure that the system is accessible to users" and "determining the standards for privacy of data in conjunction with the Data Base Committee" and "assuring that details of costs, staffing, and contract obligations are properly documented; and reporting to the Legislative Council." The members of this Information System Management Committee were designated as follows:

Chairman, Senate Committee on Appropriations
Minority party ranking member, Senate Comm. on Appropriations
Chairman, House Committee on Appropriations
Minority party ranking member, House Comm. on Appropriations
Chairman, Senate Committee on Ways and Means
Minority party ranking member, Senate Comm. on Ways and Means
Chairman, House Committee on Ways and Means
Minority party ranking member, House Comm. on Ways and Means
Governor or designated representative, Ex Officio, nonvoting
Lieutenant Governor or designated repr., Ex Officio, nonvoting
Speaker of the House or designated repr., Ex Officio, nonvoting

Senator Hill's second resolution also created the "Data Base Advisory Committee" to coordinate "in the collection of data required by the system which shall be managed by a Data Base Manager who will be independent of the agencies from which the data comes, and who will be an employee of the Legislature responsible to the Legislative Council." Members of this committee were designated as follows:

Commissioner Social Services or a designee
Department of Transportation Director or a designee
Director of Revenue or a designee
Executive Secretary of the Board of Regents or a designee
Legislative Fiscal Director or a designee
State Comptroller or a designee
Treasurer of State or a designee

Representative Stromer questioned Senator Hill as to when, if ever, the proposed committees would be dissolved. Senator Hill estimated that the Information System Management Committee might not even be needed and would have to meet only four or five times a year if it was. In any case the committees could be dissolved "within a few years." Representative Stromer next questioned the propriety of "a proposal of such magnitude" which Senator Hill defended on the basis of §2.12 of the Code. Senator Hill disagreed with Representative Stromer's contention that the proposal had been referred to and was rejected by the House majority leadership; that "what happened was that the matter was on the calendar at the end of the session but was not taken up for lack of time." Representative Stromer insisted that failure to take the matter up "was in effect a rejection" but Senator Hill disagreed.

Lt. Gov. Neu also noted that he had earlier questioned the Council's authority under §2.12, stating that it had been his impression from a meeting of the Council on May 20, 1976, that the Council's final decision then "was to go the route of an appropriations bill, and that upon reviewing the minutes of the meeting in question he still believes that is the decision which was made." Lt. Gov. Neu asserted "that the proposed new system *will benefit executive branch agencies as well as the General Assembly*, and that section 2.12 of the Code is simply not broad enough to support that kind of expenditure." (Emphasis added.) Lt. Gov. Neu agreed with Representative Stromer that in any case the proposed expenditure "would establish a very bad precedent." He insisted that §2.12 is "specifically and solely for the benefit of the General Assembly."

After further debate, Senator Hill's motion to adopt the first resolution was seconded by Senator Van Gilst and eventually resulted in a defeat of Representative Millen's motion to defer action and another motion by Senator Doderer to wait until after the first meeting of the Information System Management Committee.

Lt. Gov. Neu, with reservation "over the precedent being established and his belief that the Council [was] not acting in accordance with the decision he believes was made at the May 20 meeting," agreed that if the Council acted favorably on Senator Hill's motion he would sign the proposed contract with Coopers & Lybrand in his capacity as President of the Senate. Senator Hill's motions to adopt both resolutions were then passed by voice votes.

The resulting contract here in question stated that it was understood the agreement "is being executed to provide the [General] *ASSEMBLY and the Governor* with an interactive budgeting, monitoring and forecasting system" as thereinafter described. (Emphasis added.) The Consultant agreed therein to perform 11 tasks set forth in the contract and to deliver various goods and services, dictionaries, systems, programs, modules, pre-programmed routines etc. to the General Assembly and "also deliver *to the Governor or his designee* one copy of each of the deliverables." (Emphasis added.)

The Legislative Council agreed to act on behalf of the General Assembly and that said Assembly would provide and deliver to the Consultant

for use in performance of the agreement "an interactive computer system with [certain] hardware and software capabilities" and the "equivalent of approximately 455 man-days of programmer/analyst support of a quality acceptable to both the ASSEMBLY and the CONSULTANT" as well as "graphic and alphanumeric computer terminals in sufficient quantity and with appropriate communication facilities in locations suitable for the development and operation of the interactive budgeting and monitoring system." The Assembly is also to furnish office facilities with adequate desks, tables, filing cabinets and telephones to support up to eight consultant personnel; administrative and clerical support not to exceed one-third full-time-equivalent over the duration of this agreement; printing, reproduction and other services readily available within the state at a cost to the consultant not exceeding that normally charged by the Assembly; and applicable data on timely basis.

In consideration of the work performed, the Legislative Council bound the General Assembly to pay the Consultants a sum not to exceed $387,000 upon approval of the work and monthly invoices submitted by the Consultant, until $348,300 has been paid. The remaining $38,700 is to be retained by the General Assembly pending acceptance of the system by the Legislative Council.

The contract consists of 10 letter-sized typewritten pages plus an addendum of 2 pages and, apparently, an "Exhibit A" which is not attached. None of these documents were submitted to the attorney general's office for approval as to form or legality prior to their execution.

I.

The services performed by the Consultant clearly appear to be for the benefit of the Governor or his designee, as well as the General Assembly, and the contract so provides. Moreover, the minutes of the Legislative Council meetings on June 9 and July 14, 1976, indicate that the legislative members intended the Computer System Services for executive departments and agencies as well.

§2.43, Code of Iowa, 1975, delegates to the Legislative Council in cooperation with the officers of the Senate and the House the duty and responsibility for preparing for each session of the General Assembly and among other things provides that the Legislative Council "may purchase supplies and equipment *deemed necessary* for the *proper functioning of the legislative branch* of government." (Emphasis added.) §2.43 further provides that the Legislative Council "may direct the director of the department of general services or other state employees to carry out its directive in regard to the *physical facilities* of the general assembly, *or may employ other personnel to carry out such functions.*" (Emphasis added.) It further provides that the costs of carrying out the provisions of §2.43 shall be paid pursuant to §2.12.

§2.12 provides, *inter alia*:

"There is hereby appropriated out of any funds in the state treasury not otherwise appropriated, such sums as may be necessary for the *renovation, remodeling, or preparations of the legislative chambers,* legislative offices, or other areas or facilities used or to be used by the

legislative branch of government, and *for the purchase of such legislative equipment and supplies deemed necessary* to properly carry out the functions of the general assembly. The state comptroller is hereby authorized and directed to issue warrants for such items of expense, whether incurred during or between sessions of the general assembly, upon requisition of the president and secretary of the senate for senate expense or the speaker and chief clerk of the house for house expense." (Emphasis added.)

Of course it is fundamental that the power to make the laws of Iowa is vested by the people in the General Assembly, not the Legislative Council. Art. III, §1 "Of the Distribution of Powers" and Art. III, §1 "Legislative Department," Constitution of Iowa. It is also fundamental that "No money shall be drawn from the treasury but in consequence of appropriations made by law." Art. III, §24.

§2.12 is an open-ended standing appropriation similar to other such which have been recognized as being in conformance with the requirements of Art. III, §24. *Frost v. State*, 172 N.W.2d 575, (1969 Iowa); 1968 OAG 477; *Graham v. Worthington*, 259 Iowa 845, 146 N.W.2d 626 (1966).

Here the Legislative Council is not directly attempting to appropriate money. Rather it is making purchases pursuant to authority it apparently claims derives from §2.43 from the standing appropriation provided by §2.12. But we think these purchases were not contemplated by that appropriation. In this case, the Legislative Council is, in effect, trying indirectly to make the law.

We assume, without deciding, that the Legislative Council may properly purchase from said appropriation "such legislative equipment and supplies deemed necessary to properly carry out the functions of the general assembly." But even so assuming, there are two defects fatal to the contractual arrangement here.

First, the contract in question is clearly for the benefit of the executive department as well as for the legislative branch. Thus, the purchases are not strictly for the legislature and do not fall within the limitations of §§2.43 and 2.12. The contract goes beyond a proper delegation of authority to perform a purely legislative function and aids the executive function. Art. III, §1; OAG Turner to Plymat 1-16-75; 1963 OAG 44.

Second, the contract is for the purchase of a computer system, not including the computer. The system consists of services and so-called "software" as well as possibly some hardware, rather than "legislative equipment and supplies."

§§2.43 and 2.12 are mere housekeeping statutes under which the Legislative Council, with officers of the House and Senate, the director of the department of general services and the capitol planning commission, prepare and make ready for each session of the general assembly. Thereunder, for example, "the renovation, remodeling and preparation of the physical facilities used or to be used by the general assembly" may be authorized. §2.43. The code editor has attached these catchwords to §2.43: "General supervision over legislative facilities, equipment, and arrangements."

The catchwords to §2.12 are "Expenses of general assembly." In three paragraphs §2.12 specifies standing appropriations "to pay for legislative printing and all current and miscellaneous expenses of the general assembly;" for "unpaid expense filed after adjournment of each annual session . . . or incurred in the interim between sessions . . . including, but not limited to salaries of members and expenses of standing and interim committees" as well as for the "renovation, remodeling, or preparations of the legislative chambers, legislative offices, or other areas or facilities used or to be used by the legislative branch of government, and for the purchase of such legislative equipment and supplies deemed necessary to properly carry out the functions of the general assembly."

Considered in *pari materia* and construed together with all parts of these sections and Chapter 2 of the Code relating to the General Assembly, there is little to suggest that extraordinary expenditures may be made for more than the usual costs of preparation, maintenance and operation. Renovation and remodeling of existing physical facilities is permitted and doubtless the appropriation would cover such capital expenditures as new heating or air conditioning equipment necessary for the comfort of the legislators. Indeed, in *Rex v. Sir R. F. Graham-Campbell*, 1 King's Bench 594 (1935), the Kitchen Committee of the House of Commons in the British Parliament was held to have the privilege of regulating its own internal affairs and procedure, including the sale, within the precinct of the House, of intoxicating liquor without a license, through its employees in the Refreshment Department of the House. The comfort and convenience of the members of a legislative body is an area which has always been liberally construed for their benefit, "without a murmur or a doubt." *Rex, supra.* See Art. III, §9 Constitution of Iowa and similar provisions in other state constitutions, and cases thereunder. But there are limits which we think the law must recognize.

We think there are limits implicit in the words "legislative equipment and supplies deemed necessary to properly carry out the functions of the general assembly." Not only must legislative equipment and supplies actually be such but they must be *reasonably* necessary to properly carry out legislative functions. And the supplies and equipment must be "*necessary*" and not merely desirable. While the Legislative Council has a broad discretion to determine what is reasonably necessary equipment and supplies, we simply don't believe it can be implied that the General Assembly intended to empower it to expend half a million dollars for a computer program presently operating in only one other state. Let's suppose further that the program cost $50 million instead of half a million. Surely there is a reasonable cost limit too.

It is our opinion that if the legislature desires such a sophisticated computer program it must accept responsibility for enacting an appropriation by a majority vote of the members of each house, subject to approval or veto of the Governor, as the Constitution contemplates. Art. III, §§24, 17 and 16. This action by the Legislative Council is no mere purchase of legislative equipment and supplies. It is instead a patent attempt to misuse the standing appropriation; to legislate and appropri-

ate for a purpose not suggested; and to invade the province of the executive department. Such attempts cannot be permitted to succeed if we are to maintain separation of governmental powers. These sections do not contemplate initiation of new programs or purchase of expensive new legislative tools, nor could they constitutionally do so.

We think it unnecessary to determine whether the delegations to the Legislative Council set forth in §§2.43 and 2.12 are proper delegations of authority with adequate guidelines, standards or safeguards. *Warren County v. Judges of the Fifth Judicial District*, decided by the Iowa Supreme Court June 30, 1976. But the *application* of these sections for the purpose of this contract is clearly unconstitutional. *In 1963 OAG 44*, Attorney General Hultman, in an opinion requested by Governor Hughes, found an appropriation of $2 million to the Budget and Financial Control Committee (then an interim committee of the legislature) to be expended by that committee for contingencies, was unconstitutional either as a delegation of legislative power to appropriate or authorization of an exercise of executive power to expend monies appropriated. See *16 C.J.S. 545*, Constitutional Law, §130 and other authorities cited in the opinion.

Finally, we find precedent in *Turner v. Ray*, No. CE4-1974 in the Polk County District Court (12-11-75). In that case, the Honorable Harry Perkins, Jr., Judge of the Fifth Judicial District, held that the attorney general's attempt to trade his department's old single engine airplane for a used twin-engine plane would violate the legislative intent manifested when the general assembly "twice said 'No' " to bills presented to two successive sessions for the purchase of a new aircraft for the attorney general's office. (In fact, however, there, as here, the bills for the purchase of an airplane for the attorney general's office had not been voted down in both houses. The legislature had merely failed to act upon them.) Judge Perkins said:

"After the legislature had turned down a specific request for the purchase of a *new* Cessna twin-engine aircraft by the plaintiff this Court does not believe that the plaintiff should be permitted to circumvent that intent by buying a *nearly new* used aircraft." (Emphasis added.)

In that case, the attorney general had attempted to expend $58,000, as boot for the trade, from monies appropriated to his department for, among other things, "equipment." The Comptroller and the Governor held up the warrant. The attorney general sued for mandamus, insisting that he and other departments were properly buying typewriters and other office equipment, some of which was very expensive, notwithstanding a prohibition against expending their appropriations for a "capital improvement." (The attorney general contended that a capital improvement involved only real estate and that an airplane was equipment: nothing more than a "large typewriter in the sky.") The Court found that the airplane was not merely equipment but in fact a capital improvement.

We feel constrained here to follow the Court's opinion in that case which was not pursued on appeal. Had the appropriation bill (HF 1591)

been enacted there would be no problem. But it wasn't. The General Assembly in effect said "no," and the computer program is more than "legislative equipment or supplies."

Perhaps our reasoning would be more clear if we supposed that a legislator introduced, but failed to get enacted, a bill to purchase one or more airplanes for the use of legislators and that the Legislative Council would then, during the interim, undertake to purchase such aircraft as "equipment deemed necessary to properly carry out the functions of the general assembly." Obviously, if it attempted to do so, it would run squarely afoul of the precedent established against the practice in *Turner v. Ray*. The same reasoning applies with equal force in this instance in which the Legislative Council is attempting to purchase a computer program.

In our opinion, the contract in question is void *ab initio*. The computer program contracted for may not be properly paid for from §2.12 as supplies and equipment. Until such time as the legislature acts, all further activity should cease and no part of the $387,000 may be expended.

Another $86,000 is proposed to be expended, in addition to the $387,000 for the consultant, for the state's performance of the contract and the duties, employees, 455 man-days of programmer/analyst support, etc., which the state is to provide on its own. No appropriation is made for that purpose and, for all the same reasons set forth above, no part of that $86,000 may be expended either.

II.

We also note that Senator Eugene Hill's resolution creates an "Information System Management Committee" and a "Data Base Advisory Committee" to be managed by a "Data Base Manager" who will be "independent of the agencies from which the data comes, and who will be an employee of the legislature responsible to the Legislative Council."

It appears that creation of both of these committees, if not also the office of Data Base Manager, may be *ultra vires*. The Legislative Council is created in §2.41 of the Code and its powers and duties are enumerated in §§2.42 to 2.45. *Expressio unius est exclusio alterius*. §2.45 provides that the Legislative Council be divided into committees "which shall include but not be limited to" a Legislative Service Committee, a Legislative Fiscal Committee and a Legislative Administration Committee. These committees are to be composed entirely of legislators, many of whom are members of the Legislative Council. But the Information System Management Committee and the Data Base Advisory Committee are not committees of legislators alone. The Governor or his designated representative is listed as an ex officio nonvoting member of the Information System Management Committee along with other legislative leaders who may or may not be members of the Legislative Council.

The Data Base Advisory Committee, whose function is "coordination in the collection of data required by the system," is composed of seven state officers or their designees, all of whom, with the exception of

the legislative fiscal director, are officers in the executive department not the legislative department.

It is unnecessary to consider whether the General Assembly could delegate to the Legislative Council power to create independent committees and offices with executive functions. Such creations are ordinarily made by the legislature itself. Moreover, mere ascertainment of facts is ancillary to legislation and within the law-making power. *Parker v. Riley*, 1941, 18 Cal.2d 57, 113 P.2d 87, 134 A.L.R. 1405. See also *OAG Turner to Plymat*, 1-16-75. Here, the general assembly does not appear to have attempted to delegate the power to create executive committees. But the Legislative Council nevertheless appears to have attempted to create such.

It is true that §2.42(4) empowers the Legislative Council to appoint members of the general assembly, and even non-legislative members, as well as members of the Legislative Council, to interim study committees. But in this instance, the Legislative Council is itself acting as the interim study committee and the members appointed by them to the Information System Management Committee and the Data Base Advisory Committee seem to be given some executive functions in connection with requiring executive agencies to submit data. If so, they are not merely interim study committees.

To the extent that these two committees, created by Senator Hill's resolutions for the purpose of implementing the Interactive Budgeting and Monitoring System, delegate executive functions, they are not properly authorized by the General Assembly.

September 9, 1976

ENVIRONMENTAL PROTECTION: Public Access to Air Quality Commission Records—Sections 68A.1, 68A.2, 68A.7, 68A.9, 455B.16, 1975 Code of Iowa, and Sections 400—51.1(2), 400—51.1(3), 400—52.3, 400—52.9, Iowa Administrative Code. Privileged communications which may not be disclosed to the public under §455B.16 and §68A.7 are limited to those types of communications which are traditionally protected from disclosure by the courts; words "other privileged communications" in §455B.16 do not create a broad exception to Chapter 68A but are limited to communications similar in kind to trade secrets; Department of Environmental Quality rules are consistent with federal rule 40 C.F.R. 60.9 as to the availability of information. (Dent to Crane, Executive Director, Department of Environmental Quality, 9-9-76) #76-9-19

Mr. Larry E. Crane, Executive Director, Iowa Department of Environmental Quality: This letter is in response to your letter of March 5, 1976, in which you requested an opinion from this office regarding public access to records of the Department of Environmental Quality [hereafter referred to as D.E.Q.].

Your letter indicates that D.E.Q., through the office of the Governor, has requested from the United States Environmental Protection Agency [hereafter referred to as E.P.A.] authority to implement and enforce federal new source performance standards and federal hazardous pollutant emission standards.

In response to Iowa's request for delegation of authority to implement and enforce federal new source performance standards and federal hazardous pollutant emission standards, E.P.A. has requested that you seek an Attorney General's Opinion on certain questions relating to public disclosure of information by D.E.Q.

In summary, these questions on which you have requested an opinion of this office are:

1. Whether or not "privileged communications" as they exist under Iowa Air Quality Commission rules are only those traditionally protected by law from disclosure, and

2. Whether or not the words "other privileged communications" in Section 455B.16 create a broad exception to Chapter 68A of the Code of Iowa and establish a category of information which may not be disclosed by D.E.Q., and

3. Whether or not there may be inconsistencies between the availability to the public of information under the Iowa provisions as compared to 40 CFR 60.9.

All three questions pertain to the general subject of the availability to the public of information in the possession of the D.E.Q. The extent to which information held by D.E.Q. will be available to the public at large is determined by reference to Chapter 68A and Chapter 455B of the Code of Iowa 1975, and the Rules of the D.E.Q.

Section 68A.2 of the Code of Iowa provides that,

"Every citizen of Iowa shall have the right to examine all public records and to copy such records and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential."

Public records is defined by 68A.1 to include,

"all records and documents of or belonging to this state, . . ., or any branch, department, board, bureau, commission, council, or committee, ..."

Division II of Chapter 455B of the Code of Iowa, pertaining to the Air Quality Commission, in addition to imposing broad duties on the Air Quality Commission to abate, control, and prevent air pollution in this state, also specifically mandates that the Executive Director [of the Department of Environmental Quality] shall "collect and disseminate information, and conduct educational and training programs, relating to air pollution and its abatement, prevention and control." Section 455B.13(8)

The rules of the D.E.Q. provide, similar to Chapter 68A of the Code, that,

"Except as provided in 51.1(3) all files, records, documents and other materials within the department's possession are available for public inspection." I.A.C. 400—51.1(2)

These sources establish beyond doubt that the general policy with respect to public access to information possessed by the Air Quality Commission of the D.E.Q. is one of availability.

Chapter 68A, Chapter 455B and the Rules of the D.E.Q. each contain limitations on the general policy of availability.

Section 68A.2, quoted above, states that citizens of this state shall have access to all public records, "unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential." As will be discussed later, §455B.16 provides one such express limitation.

Chapter 68A, itself, furnishes several express provisions requiring that certain public records shall be kept confidential. These express provisions are found in §68A.7 which states that:

"The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information.

1. Personal information in records regarding a student, prospective student, or former student of the school corporation or educational institution maintaining such records.

2. Hospital records and medical records of the condition, diagnosis, care, or treatment of a patient or former patient, including outpatient.

3. Trade secrets which are recognized and protected as such by law.

4. Records which represent and constitute the work product of an attorney, which are related to litigation or claim by or against a public body.

5. Peace officers investigative reports, except where disclosure is authorized elsewhere in this Code.

6. Reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose.

7. Appraisals or appraisal information concerning the purchase of real or personal property for public purposes, prior to public announcement of a project.

8. Iowa development commission information on an industrial prospect with which the commission is currently negotiating.

9. Criminal identification files of law enforcement agencies. However, records of current and prior arrests shall be public records.

10. Personal information in confidential personnel records of the military department of the state.

11. Personal information in confidential personnel records of public bodies including but not limited to cities, boards of supervisors and school districts."

Each of these eleven types of information is either of a type which has traditionally been protected from disclosure by the courts, i.e. attorneys work product, trade secrets, information privileged under physician-patient privilege, etc., or is of a type the disclosure of which might constitute an invasion of privacy, i.e. personal information in personnel files, student records, etc.

Having provided these express limitations on the public availability policy, §68A.9 provides that,

"If it is determined that any provision of this chapter would cause the denial of funds, services or essential information from the United

States government which would otherwise definitely be available to an agency of this state, such provision shall be suspended as to such agency, but only to the extent necessary to prevent denial of such funds, services, or essential information."

Delegation of enforcement authority to the D.E.Q. pursuant to the Clean Air Act might certainly be considered to fall under the provisions of 68A.9, so that should there be a conflict between any of the provisions of 68A.7 and the requirements for delegation, the offending provision of 68A.7 might be suspended as to the D.E.Q. at least to the extent necessary to prevent denial of delegation.

Section 455B.16 of the Code of Iowa 1975 also provides an express limitation on the policy of availability announced by §68A.2.

Section 455B.16, places limitations on disclosure of information by the Air Quality Commission or any employees of D.E.Q. concerning "trade secrets, secret industrial processes, or other privileged communications, except emission data . . . ." Trade secrets and secret industrial processes, are virtually synonomous terms. In fact, a trade secret is sometimes defined as a secret formula or process not patented, but known only to certain individuals . . . ." *Glucol Mfg. Co. v. Shulist*, 1927, 239 Mich. 70, 214 N.W. 152, 153. These two terms, trade secrets and secret industrial processes, are in reality specific enumerations of a general class of information. The general class of information indicated by these specific enumerations is information which is used in business to give one a competitive advantage. This class of information has long been regarded by the courts as privileged. In light of this, to determine the meaning of the more general phrase "other privileged communication" within the context of Section 455B.16, we must refer to some standard rules of statutory construction. The courts consider the entire statute and interpret its various provisions in light of their relation to the whole. *State v. Downing*, 1968, 261 Iowa 965, 155 N.W.2d 517, 520; *State v. Charlson*, 1967, 261 Iowa 497, 154 N.W.2d 829, 831. Under the rule of "ejusdem generis", where enumeration of specific things in a statute is followed by a more general word or phrase, such general word or phrase must take its meaning from the specific ones and is restricted to things of the same kind. *State v. Bishop*, 1965, 257 Iowa 336, 132 N.W.2d 455, 458; *State v. Cusick*, 1957, 248 Iowa 1168 84 N.W.2d 554, 556. In accordance with the above rules of statutory construction, it is our opinion that the term "other privileged communication" within the context of Section 455B.16 means secret information which may affect one's competitive position. This definition fits logically within the meaning of the statute as a whole, and restricts the phrase "other privileged communications" to that category of information specifically enumerated in Section 455B.16.

Emphasis must be made of the fact that emission data is expressly excepted from the protection of the non-disclosure provision of §455B.16. That is, the general rule of public availability will apply to emission data even if that emission data is part of a trade secret, secret industrial process or other privileged communication.

Obviously, in light of this construction, there is a certain redundancy between 68A.7(3) and 68A.7(6) and the specific nondisclosure require-

ments presented by the "trade secrets, secret industrial processes and other privileged communications" provision of Chapter 455B.16. However, neither 68A.7(3) nor 68A.7(6) accepts emission data from its express requirement for confidentiality. Section 455B.16 *does* accept emission data from confidentiality requirements. This then brings the otherwise redundant provisions of 68A.7 and 455B.16 into conflict.

The Iowa Supreme Court has held that when two statutes are in conflict, the specific statute prevails over the general statute. *Ritter v. Dagel*, 1968, 261 Iowa 870, 156 N.W.2d 318, 324; *State v. Halverson*, 1967, 261 Iowa 530, 155 N.W.2d 177, 181.

Iowa Code Section 68A.7 is a general statutory provision regarding confidentiality of public records. Iowa Code Section 455B.16 is a specific statute regarding confidentiality of information received by the Air Quality Commission or any employees of D.E.Q. It is our conclusion that all emission data received by D.E.Q. is available for public inspection regardless of whether or not such data is simultaneously a trade secret. Since "emission data" is *excepted* from the disclosure limitations on trade secrets within Section 455B.16 such data is also excepted from the disclosure limitations of Section 68A.7 via the rule of statutory construction that a specific statute prevails over a conflicting general statute. Section 68A.9 quoted above, also supports such a construction.

The limitations on the disclosure of information by the Air Quality Commission as found in the Rules of the D.E.Q. are only those limitations which are mandated by the provisions of 68A.7 or 455B.16.

Rule 400—51.1(3), which provides the only exceptions to the general public availability policy of Rule 400—51.1(2) previously quoted, states that:

"Any information classified as confidential business information pursuant to chapter 52 of these rules or exempted from disclosure by Section 455B.52(3) or chapter 68A of the Code shall not be available for public inspection or sent out pursuant to written or oral request."

Section 455B.52(3) mentioned in Rule 400—51.1(3) pertains only to the board of certification for waste water treatment officers and has no application here. The requirements of Chapter 68A regarding confidentiality have already been discussed. Chapter 52 of the Rules of the D.E.Q., regarding confidentiality of business information, provides a method for determining whether or not information possessed by the Department is entitled to protection pursuant to the exception of Section 455B.16. Rule 400—52.1 provides that no information shall be treated as confidential unless a written request for confidential treatment is made. Rule 400—52.3(1) imposes on the party making such a request the burden of establishing the necessity for such treatment and details the kind of supplemental information which must be supplied to support such a request.

Rule 400—52.3(2) specifies that the executive director's determination as to confidentiality must be based on his determination that release of such information, "would tend to disclose a trade secret, secret industrial process or method of manufacture or production or other privileged

communication" and provides mandatory guidelines for the executive director to use in making that determination. Chapter 52 also provides for notice of and a method of appeal from the executive director's determination. The final provision of Chapter 52 unequivocally states that, "No air contaminant emissions data . . . shall be confidential." IAC 400—52.9

The exceptions of 400—51.1(3), to the policy of public availability of information as stated in Rule 400—51.1(2), are limited to those provided by statute under Chapter 68A and Section 455B.16 of the Code of Iowa. The rules do not support a construction of the words "other privileged communications", in Section 455B.16 as creating a broad exception to Section 68A.2 but rather support the construction contemplated in this opinion, which construction limits the meaning of those words to information similar in kind to trade secrets and secret industrial processes.

In fact, the definition of "privileged communications" found in Rule 400—1.2(41) of the Rules of the D.E.Q. restricts the meaning of privileged communications to, "information other than air pollutants emission data the release of which would tend to affect adversely the competitive position of the owner or operator of the equipment."

In light of this discussion, the answers to your first two questions may be summarized as follows:

1. The words "privileged communications" as they exist under the Iowa Air Quality Commission rules are only those traditionally protected from disclosure as trade secrets, and

2. The phrase "other privileged communications" in Section 455B.16 of the Code of Iowa does not create a broad exception to Chapter 68A of the Code but rather creates a limited, qualified exception.

In response to your third question, 40 C.F.R. 60.9, the federal rule regarding availability of information, states in pertinent part as follows:

"(a) Emission data provided to, or otherwise obtained by, the Administrator in accordance with the provisions of this part shall be available to the public.

(b) Except as provided in paragraph (a) of this section any records, reports, or information provided to, or otherwise obtained by, the Administrator in accordance with the provisions of this part shall be available to the public, except that (1) upon a showing satisfactory to the Administrator by any person that such records, reports, or information, or particular part thereof (other than emission data), if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such records, reports, or information, or particular part thereof, confidential in accordance with the purposes of section 1905 of title 18 of the United States Codes, except that such records, reports, or information, or particular part thereof, may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out the provisions of the Act or when relevant in any proceeding under the Act; . . . ."

Comparing this federal rule with the Iowa provisions in light of the above discussion, it appears that the rules of the D.E.Q. and the public disclosure exception of Section 455B.16 are very closely in accord with

the federal rule. Any discrepancies between the federal rule and the Iowa provisions that might exist would arise from the provisions of 68A.7. The types of information which might be protected from disclosure under 68A.7 which would not be protected under the federal rule or the department's rules or Section 455B.16 of the Iowa Code are those types of information which are traditionally protected by the courts or which would involve the possibility of invasion of privacy.

Furthermore, in the case of such a discrepancy between the provisions of 68A.7 and 40 C.F.R. 60.9 or any other federal requirement for delegation of authority, such a conflict might be resolved by application of Section 68A.9 quoted above.

Therefore, it is this office's opinion that comparing the Iowa provisions to the federal provisions on public availability, that is, availability to the public of information held by the D.E.Q., there are no inconsistencies which would impair or damage the state, federal government or public's efforts to abate, control, or prevent air pollution or provide the basis for a refusal to delegate authority to the state to implement and enforce federal new source performance standards or federal hazardous pollutant emission standards.

September 9, 1976

STATE OFFICERS AND DEPARTMENTS: Public Employment Relations Board. Chapter 28A, Chapter 20, §§20.6, 20.9, 20.11 and 20.17(3), Code of Iowa, 1975. Public employers and public employees are exempted from Iowa's open meeting laws when in negotiating sessions pursuant to §20.17(3) of the Code. There is no statutory requirement that the meeting be open or closed. A demand to unilaterally require the session to be open or closed may be resolved by filing an unfair labor practice. There is precedent for the proposition that a unilateral demand to have open negotiating sessions is an unfair labor practice. (Beamer to Kolker, Chairman, Public Employment Relations Board, 9-9-76) #76-9-20

Mr. Edward F. Kolker, Chairman, Public Employment Relations Board: You have requested an Attorney General's opinion with respect to Chapter 28A, 1975 Code of Iowa, the "open meetings law" as it pertains to negotiating sessions of public employees or employee organizations. Specifically you have asked the following questions:

"1. Do the parties have to agree to open the sessions?

"2. Do the parties have to agree to close the sessions?

"3. Can the employee organization unilaterally require the sessions to be open or closed?

"4. Can the employer unilaterally require the sessions to be open or closed?

"5. If the parties disagree as to whether the sessions should be opened or closed, how is it determined whether said sessions are open or closed?"

Section 20.17(3) of the Code provides as follows:

"Negotiating sessions, including strategy meetings of public employers or employee organizations mediation and the deliberative process of arbitrators shall be exempt from the provisions of chapter twenty-eight A (28A) of the Code. Hearings conducted by arbitrators shall be open to the public."

Chapter 28A prohibits closed meetings by public agencies except under certain circumstances and for specific reasons set forth in Section 28A.3 of the Code. Inasmuch as the "open meetings law" is not applicable and the negotiating sessions are outside the scope of the coverage of Chapter 28A, the parties do not have to agree to open the sessions. Neither is there any statutory requirement that the parties agree to close the sessions.

The next questions presented in your request concern unilateral action to open or close a session by either public employer or public employee organizations. Section 20.6 of the Code authorizes the Public Employment Relations Board (PERB) to administer the provisions of Chapter 20, Iowa's collective bargaining statute.

Section 20.11 of the Code governs the procedure for the PERB to investigate prohibited practice violations and render decisions. In the first instance the dispute may be heard by a hearing officer. That decision may be appealed to the Board which is authorized to hear the case de novo or upon the record as submitted before the hearing officer. Section 20.11(2) of the Code.

Section 20.9 of the Code provides that the public employer and employee organization *shall* meet at reasonable times, to negotiate in good faith with respect to wages, hours, vacations and the like. The failure of a group to negotiate because it cannot have a closed meeting or an open meeting is a matter which falls within the jurisdiction of the PERB and may be resolved, if necessary, by the filing of a prohibited practice allegation under Section 20.11 of the Code.

In *Washoe County Teachers Association and Washoe County School District*, PERB Case No. A1-045295, item #54 (Nevada 1976), the WCTA notified the School district that it was ready to enter into negotiations, but only if the sessions were not open to the public. The WCTA filed a complaint with the local government labor relations board for Nevada asserting the district refused to negotiate in good faith by its unilateral determination that the sessions be open to the public. Nevada has an exception to its open meetings law which is similar to Iowa's. It was argued by the district that the Nevada statute was not applicable to school districts. However, the board concluded that the district's unilateral decision that bargaining should be public constituted a refusal to bargain in good faith under the unfair labor practice provisions of the bargaining law. The labor board cited the following cases where labor relations boards considered claims of bad faith where an attempt to unilaterally direct that negotiations be open: *Mayor Samuel E. Zoll and City of Salem, Massachusetts, and IAFF Local 1780 (GERR 485, B-7), Quamphegan Teachers Association, Eliot and South Berwick, and Eliot and South Berwick, Maine, School Board of Directors (GERR 505, B-11), and Pennsylvania Labor Relations Board vs. Board of School Directors of the Bethlehem Area School District (GERR 505, E-1).*

In the *Zoll* and *Quamphegan* cases, specific mention was made of existing laws comparable to Nevada's open meetings law (also comparable to Iowa's). The respective boards found that even without any specific statutory provisions exempting negotiations from these open

meeting provisions a unilateral determination negotiations be open constituted a failure to bargain in good faith. In *Zoll, Quamphegan,* and *Bethleham Area School District* the labor relations boards ordered that the parties enter into closed negotiations sessions. *GERR* 664, B-5.

In *Bassett v. Braddock*, 1972, 262 So.2d 425, the Supreme Court of Florida held that negotiations may be conducted on teachers contracts without a public meeting. See Beamer to King, O.A.G. #76-3-17. It should be noted that this ruling by the Florida Court was entered even though Florida's law does not contain the Iowa type exception to its open meetings law found in Section 20.17(3) of the Code.

The public employer must make the terms of a collective bargaining agreement public at least twenty-four hours prior to the acceptance or rejection of the proposed agreement by the governing body pursuant to the rules of the Public Employment Relations Board. 660-6.4(20) IAC.

In summary, the parties are not statutorily required to agree to open or close negotiating sessions. A demand to unilaterally require the session to be open or closed may be resolved by filing an unfair labor practice. There is precedent for the proposition that a unilateral demand to have open negotiating sessions is an unfair labor practice.

September 9, 1976

COUNTIES AND COUNTY OFFICERS: SHERIFFS: Section 695.7, Code of Iowa, 1975. Sheriffs must reasonably exercise their discretionary powers in issuing concealed weapons permits and cannot categorically refuse to issue permits to private citizens. (Cook to Millen, State Representative, 9-9-76) #76-9-21

The Honorable Floyd H. Millen, State Representative: You have requested an Opinion of the Attorney General as to the amount of discretion possessed by a county sheriff in issuing a permit to carry a concealed weapon.

In answering your question, Section 695.7, Code of Iowa, 1975, provides:

"It shall be the duty of the sheriff to issue a permit to go armed with a revolver, pistol, or pocket billy to all peace officers and such other persons who are residents of his county, and who, in the judgment of said official, should be permitted to go so armed." (Emphasis Added).

The underlined portion of the above statute was the subject of an earlier Attorney General's Opinion appearing at 1970 OAG 272. In that Opinion it was held:

". . . it is the mandatory ministerial duty of the sheriff to issue a permit to carry a revolver, pistol or pocket billy to any peace officer who is a resident of his county. With respect to 'other such persons who are residents of his county,' the sheriff, may, in the proper exercise of his discretion, determine that such person should not go so armed, and refuse to issue a permit."

We believe that the above quoted opinion is still valid under the current status of the law, and moreover makes it abundantly clear that while a sheriff has a mandatory duty to issue a permit to a peace officer, that

he has discretion in issuing a concealed weapons permit to a private citizen of his county.

The next question then goes to what constitutes a valid exercise of that discretion, and this vestiture of discretion should also be viewed against the back-drop of concealment statutes and their purposes. It has been said that:

". . . the purpose of all concealment statutes is to prevent, in a quarrel or commission of a crime, the drawing of a gun when the potential victim has no notice that his assailant is armed. For a victim might act one way if he knew his assailant was armed, and another if he could assume he was unarmed. People v. Cunningham, 20 Mich. App. 699, 174 N.W.2d 599, 601; People v. Jones, 12 Mich. App. 293, 295, 162 N.W.2d 847, 848; People v. Raso, 9 Misc.2d 739, 170 N.Y.S.2d 245, 251; State v. Gainey, 273 N.C. 620, 160 S.E.2d 685, 686.

"In the area of carrying handguns, the underlying purpose is achieved by limiting the number of persons who can carry them to the absolute minimum. State v. Macon, 57 N.J. 325; State v. Rheaume, 80 N.H. 319, 116 A. 758, 763." See also: 51 *ALR*3d 494.

Taking the foregoing into consideration, we analyze the discretionary process that a sheriff employs in arriving at his determination as to whether or not to issue a concealed weapons permit. In *Headid v. Rodman Iowa*, 1970, 179 N.W.2d 767, 769, the Iowa Supreme Court stated:

' "Discretion may be defined, when applied to public functionaries, *as the power or right conferred upon them by law of acting officially under certain circumstances,* according to the dictates of their own judgment and conscience, and not controlled by the judgment or conscience of others." Citations Omitted (Emphasis Added).

This concept of judgment or discretion implies an "acting" or decision making process between competing consideration. *Wendel v. Swanberg*, 384 Mich. 468, 185 N.W.2d 348; *Application of Blackburn*, 134 N.Y.S.2d 138, 142, 144, 206 Misc. 393. It also connotes a process that is reasonable and unarbitrary, and is not exercised merely by denying or granting the request of a party. *Poeschl v. Superior Court In and For Ventura County*, 40 Cal. Rptr. 697, 699, 229 C.A.2d 383.

If for example, a 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 abbrogated. 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. We reach the conclusion that the legislature stepped back from the general prohibition against private citizens carry concealed weapons because "the first Iowa law on the subject prohibited all persons other than police officers and those persons executing processes or warrants or making arrests, from carrying concealed weapons," (See, Section 3879, Code of Iowa, 1873), whereas in 1913 this general prohibition was removed and the privilege was predicated upon the sound judgment exercise of the county sheriff. (See, Sections 3 and 4 of Chapter 297, Acts of the 35th General Assembly), 1970 OAG 272. Such is the state of the law today.

We believe that the discretionary or judgment exercise of a sheriff cannot be accomplished by any hard and fast rule, *Goodman v. Goodman*, 68 Nev. 484, 236 P.2d 305 - 307 and that judgment on the circumstances must be exercised on each and every application. This discretion seems best exercised when a determination is made as to whether an individual has any disabilities [physical, mental, or legal (felony convictions)], whether an individual has provided proof of his familiarity and knowledge in handling firearms, and that he has a need to carry a weapon. 51 *ALR*3d 494, *Mayant v. Paramus*, 30 N.J. 528; *Grimm v. New York*, 56 Misc.2d 585, 289 N.Y.S.2d 358, 363, *Matthews v. State*, 237 Ind. 677, 148 N.E.2d 334.

In summary, it is our opinion that sheriffs must exercise their judgment on applications for concealed weapons permits; that they cannot categorically refuse to issue permits, and that denials must be based upon reasonable and unarbitrary grounds.

September 13, 1976

CITIES: License Fees, Iowa Commission for the Blind. Article III, §38A, Constitution of Iowa, Chapters 364 and 601C, Code of Iowa, 1975. Notwithstanding the home rule law, the Iowa Commission for the Blind continues to be exempt from municipal requirements with respect to obtaining restaurant licenses, vending machine licenses, business permits and the payment of inspection fees. (Haesemeyer to Jernigan, Director, Iowa Commission for the Blind, 9-13-76) #76-9-22

Mr. Kenneth Jernigan, Director, Iowa Commission for the Blind: Refernce is made to your letter of September 3, 1976, in which you state:

"Under date of July 18, 1973, the Attorney General issued an opinion which said, in part: 'The Iowa Commission for the Blind may not be required to obtain a restaurant license, vending machine license or pay inspection fees or obtain business permits.' This opinion was issued pursuant to a letter from the Commission for the Blind in which we asked whether cities or other local governmental units might require the Commission to pay fees, purchase licenses, or otherwise pay charges which they might impose on food services or vending operations controlled and managed by the Commission for the Blind. The legal department of the City of Des Moines has now informed the Commission for the Blind that your 1973 ruling has been superseded by the new home rule legislation enacted by the Legislature. We request your opinion as to whether this is a correct interpretation of the law or whether your original opinion is still valid."

As correctly stated in a 1973 opinion to you, 1974 OAG 175, the State is traditionally not subject to municipal police power ordinances, such as building codes, zoning laws, and restaurant regulations, unless the intention to include the state is clearly expressed in the statutes granting cities the power to adopt such ordinances. See *Leckliter v. City of Des Moines*, 211 Iowa 251, 233 N.W. 58 (1930); *City of Bloomfield v. Davis County Community School District*, 254 Iowa 900, 119 N.W.2d 909 (1963); *Rutgers State University v. Piluso*, 60 N.J. 142, 286 A.2d 697 (1972). The question with which we are now concerned involves the effect of the Home Rule Amendment, Article III, §38A, Constitution of Iowa, and the Home Rule Act, Chapter 1088, 64th G.A., Second Session (1972), on this traditional state immunity.

The City of Des Moines argues that now the state is subject to city ordinances unless a statute clearly says otherwise, in other words, the

current law is just the opposite of the pre-Home Rule situation. Since Chapter 601C does not clearly state that Commission restaurants are immune from city ordinances, the city can regulate them just as in any other restaurant in Des Moines. Support for this position is also claimed to be found in §364.2:

"1. A power of a city is vested in the city council except as otherwise provided by a state law.

"2. The enumeration of a specific power of a city does not limit or restrict the general grant of home rule power conferred by the Constitution. *A city may exercise its general powers subject only to limitations expressly imposed by a state or city law.*

"3. An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law." (Emphasis added)

The city says further that if Home Rule was not meant to alter the traditional rule, this would have been said in the "Limitation of powers" section of the Home Rule Act, §364.3 of the Code.

While the language of §364.2(2) does appear to lend some support to the city's position, we believe there are more persuasive arguments for continuance of the immunity.

Assistant Attorney General Larry Blumberg recently issued two opinions on this subject, both dated December 30, 1975; one to Wood, Hamilton County Attorney, and one to Richards, Legal Counsel, Legislative Service Bureau. The Wood opinion held that a county must meet city building codes, except where the state building code is met, and the county must pay permit fees. The Richards opinion concluded that state buildings are not subject to municipal building codes or permit fees.

Mr. Blumberg based his opinion to Richards chiefly on *Paulus v. City of St. Louis*, 446 S.W.2d 144 (Mo. 1969), a case in which the issue was whether the state's buildings were subject to the city ordinances requiring construction permits and fees. The relevant portions of the city charter were set forth in the opinion. 446 S.W.2d at 151:

"The City's charter, which we judicially notice as required by the 1945 Missouri Constitution, Art. VI, Sec. 33, gave the City power 'to regulate the construction and materials of all buildings and structures,' (Art. I, Sec. 1(29); 'to do all things whatsoever expedient for promoting or maintaining the comfort, education, morals, peace, government, health, welfare, trade, commerce or manufacture of the City or its inhabitants.' (Art. I, Sec. 1(33); and 'to exercise all powers granted or not prohibited to it by law for which it would be proper for this charter to enforce' Art. I, Sec. 1(35). It did not expressly or by necessary inference empower the City to regulate construction of state buildings on state land in the City."

In spite of the above provisions, the St. Louis Court of Appeals held that the charter must yield to the state's legislation which said it was the duty of the state to protect the health of its citizens, so the building, a state hospital, was not subject to local building ordinances. 446 S.W.2d at 152.

The problem with which we are here confronted seems to involve more than the mere question of what powers have been delegated through

statutes or constitutional provisions; it involves basic questions of sovereignty of state and local governments. The state's position in this case is supported by the theory that cities have the same police powers as they did before Home Rule, the only difference is that now they come from the city by its own authority, rather than from the legislature, as was the case previously. This is the concept adopted by Assistant Attorney General Blumberg in his opinion to Carroll Wood, Hamilton County Attorney.

Support for this position is found in *Mansfield v. Eudley*, 38 Ohio App. 528, 176 N.E. 762 (1931), aff'd 124 Ohio 652, 181 N.E. 886 (1931), where a state law limiting the amount of city council members' salaries was declared unconstitutional because the limit varied according to the size of the city. Part of the opinion was devoted to a discussion of the Home Rule provision of the Ohio Constitution, Art. 18, Sec. 3:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The phrase "all powers of local self-government" was defined to mean that "a municipal corporation may enact all such measures as pertain exclusively to it, *in which the people of the state at large have no interest or concern*, and which they have not expressly withheld by constitutional provision." 176 N.E. at 464.

A similar phrase is present in the Iowa Home Rule Amendment, the Twenty-fifth Amendment to the Iowa Constitution:

"Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the General Assembly, *to determine their local affairs and government*, except that they shall not have power to levy and tax unless expressly authorized by the General Assembly." (Emphasis added)

Accordingly, since the people of the state undoubtedly have an interest in the operation of these restaurants, such interest being expressed as Chapter 601C, relating to the Commission for the Blind, this is not a matter subject to the Home Rule Amendment, it is not a matter of "local affairs" or "local government".

Several cases have dealt with the question of what constitutes "local affairs", but most involved conflicts as to whether the state could legislate in a particular area, with the cities claiming that they had sole authority to regulate the activity. See *Van Gilden v. City of Madison*, 222 Wisc. 58, 267 N.W. 25, 105 A.L.R. 244 (1936) (compensation of city policemen is matter of state-wide concern and not "local affair" within home-rule amendment); and *State v. City of Milwaukee*, 189 Wisc. 84, 206 N.W. 210 (1925) (home rule amendment imposes no limitation on power of legislature to deal with subject of education).

This is a difficult question, for there is no clear line dividing what is of local, and what is of state concern, but where public health is the subject, the state usually has a superceding interest. In *Van Gilden, supra*, the Supreme Court of Wisconsin cites a passage written by Mr.

Justice Cardozo, then Chief Judge of the New York Court of Appeals, in a concurring opinion in the case of *Adler v. Deegan*, 251 N.Y. 467, 167 N.E. 705, 713 (1929). Part of that opinion, cited in 267 N.W. at 35, is as follows:

"There may be difficulty at times in allocating interests to state or municipality, and in marking their respective limits when they seem to come together. If any one thing, however, has been settled in this realm of thought by unison of opinion, it is the state-wide extension of interest in the maintenance of life and health. The advancement of that interest, like the advancement of education, is a function of the state at large."

A statute allowing for the operation of certain restaurants by the Commission for the Blind is a public health program, passed by the legislature to improve the lives of the blind citizens of Iowa. The Home Rule Amendment gives the cities powers only in regard to matters of local concern and local government, and the provisions of the Home Rule Act, Chapter 364 of the Code, should be read in light of this interpretation of the Amendment. Cities have the same powers now as they did before, but that power comes from a different source; the Home Rule Amendment and Act was not meant to alter the traditional exemption of the state from city police power ordinances. Accordingly, it is our opinion that the Iowa Commission for the Blind continues to be exempt from municipal requirements with respect to obtaining restaurant licenses, vending machine licenses, business permits and the payment of inspection fees.

September 13, 1976

ELECTIONS: Regulations—§§49.107, 49.21, 53.11, Code of Iowa, 1975. Commissioner of elections cannot bar the use of public buildings as polling places nor prohibit electors from casting absentee ballots at auditor's office, but may make other reasonable regulations. (Nolan to Millen, State Representative, 9-13-76) #76-9-23

Mr. Floyd H. Millen, House Minority Leader: You recently sent the following letter requesting an opinion of the Attorney General:

"It has been called to my attention that in at least one county in the state, polling places are set up in the offices of the county courthouse; by this I mean in the offices of elected county officials, some of whom are incumbent candidates and, consequently, their names are appearing on the ballot.

"Realizing that the election laws state that polling places shall be in 'suitable' public buildings if at all possible, I am wondering what, if any, restrictions could be placed on having the polling places in the offices of such public officials who might be seeking re-election."

There is no provision in the current Code of Iowa (1975) which prohibits the use of a county official's office as a polling place, in fact, first consideration is to be given to the use of public buildings supported by taxation. Code of Iowa, §49.21 (1975) provides:

"Polling places—accessible to elderly and handicapped persons. It is the responsibility of the commissioner to designate a polling place for each precinct in the county.

"Upon the application of the commissioner, the authority which has control of any buildings or grounds supported by taxation under the laws of this state shall make available the necessary space therein for the purpose of holding elections, without charge for the use thereof.

"Except as otherwise provided by law, the polling place in each precinct in the state shall be located in a central location if a building is available. However, first consideration shall be given to the use of public buildings supported by taxation.

"In the selection of polling places, consideration shall also be given to the use of buildings accessible to elderly and physically disabled persons."

See also §§49.10 and 49.24 relating to preferred polling places under certain circumstances.

Since it is the responsibility of the county commissioner of elections to designate a polling place for each precinct in the county, it is fully within his power to prevent the use of a county official's office for this purpose simply by designating a different place. However, the county commissioner, who under Code §47.2, is the county auditor, may not ban the use of his office as a place for casting absentee ballots. Any qualified elector applying in person at his office not more than forty days before the date of the general election shall be given an absentee ballot which the "elector shall immediately mark" and return to the commissioner (auditor). Such §53.11, Code of Iowa, 1975, provides:

"The commissioner of any county in which there is located a city of twenty-five thousand or more population, which is not the county seat, may permit qualified electors to appear in person at some designated place within each such city and there cast an absentee ballot in the manner prescribed by this section."

Of course under present law, no one may post signs or solicit votes within three hundred feet of any polling place, or may otherwise interrupt or hinder any voter who is going to the polls. Code §49.107.

September 15, 1976

COUNTIES — Construction Contract Lettings, §309.40, Code of Iowa, 1975, as amended by Chapter 168, Section 1, 66th G.A., First Session (1975). A county may choose to furnish certain items on a road construction project in lieu of including same in the list of bid items when advertising a letting. Applicable provisions of §309.40 must be complied with by the county when such items are acquired. (Schroeder to Kreamer, State Representative, 9-15-76) #76-9-24

The Honorable Robert M. Kreamer, State Representative: Your letter of September 2, 1976, asks the opinion of the Attorney General, with reference to the following question, which is quoted to wit:

"In the situation of a local county grading letting for a road construction project, to be funded exclusively by county monies, does the county board of supervisors and the county engineer have the legal authority or right to exclude certain products required for application to the work, such products subsequently to be purchased by these county officials, instead of by the low bidder to whom the contract is to be awarded."

The answer to your question is yes, subject to the following observations.

Section 309.40, Code of Iowa, 1975, as amended by Chapter 168, Section 1, 66th G.A., First Session (1975) states as follows:

"All contracts for road or bridge construction work and materials therefore of which the engineer's estimate exceeds twenty thousand dollars, except surfacing materials obtained from local pits or quarries, shall be advertised and let at a public letting."

On occasion a county may find it expeditious to utilize materials salvaged from other projects, or to provide materials from its own stockpiles. I find nothing in the statutes which would prohibit this practice. Assuming a project for road construction, which falls within the quoted section of the Code, the county may choose to advertise it, as one for which certain products will be provided by it, rather than by the bidder. In such instance, the bids involving items (such as culvert pipe) would contemplate only the installation of the pipe, and not its cost as well.

Obviously were the county to advertise the project with pipe included as a part of the bid, it could not subsequent to award of a contract, unilaterally delete the pipe simply because such material may be obtained at a lower price than quoted by the contractor.

In the event a county chooses to provide certain items for a project, it must observe §309.40 if they have been acquired through purchase. That is to say, even though the value of the items supplied to a given project may be nominal, the original purchase from which the items are taken, must be in conformance with that statutory requirement. See 1932 O.A.G. 11.

In summary then, it is my opinion, a county has statutory authority to acquire materials which will be furnished for individual road projects, in lieu of including same as contract bid items when advertising a letting. And that acquisition of such materials by the county is subject to the requirement of §309.40 of the Code.

September 16, 1976

TOWNSHIP TRUSTEES: Taxation of Fire Districts — §359.42, §360.8, §441.6, §443.2, §443.4, §443.21, §444.2, §444.3, Code of Iowa, 1975; Chapter 194, Acts of 66th G.A., 1975. An authorized tax rate for a regular fire district is certified to the County Auditor by the township trustees and not by the County Assessor. (Maggio to Martens, Iowa County Attorney, 9-16-76) #76-9-25

Mr. Kenneth R. Martens, Iowa County Attorney: This is in response to your request for an Opinion of the Attorney General in which you ask the following questions:

"1. Under Section 444.2 of the 1975 Code of Iowa is the officer charged with the duty of certifying any authorized tax rate within a taxing district, i.e. a fire district under Section 359.42, the Assessor or the township trustee(s)?

"2. Is the intent of Section 359.42 to provide for a simplified method for setting up fire districts for townships?

"3. If the township trustee certified to the County Auditor under Section 444.2 a tax rate in a dollar amount, who is responsible for implementing this dollar amount of taxation? Are the trustees to be responsible for determining which individuals in a township owe a certain amount for taxation for the purpose of setting up a fire district under Section 359.42?

"4. If the township trustees provide a legal description of the fire district under Section 359.42 to the County Assessor and Auditor, who has the duty of breaking this description down into a specified tax rate for individuals in that fire district?

"5. If a tax levy is collected, who has the responsibility of determining which fire district in a township receives a specified amount of tax funds when there is more than one fire district in a township?"

In response to your first question, the township trustees are the officers responsible for certifying any authorized tax rate in a dollar amount to the County Auditor pursuant to Section 444.2, Code of Iowa, 1975. Although this is not clearly stated, it can be inferred from Section 444.3, Code of Iowa, 1975, which states in relevant part:

"Provided that the county auditor shall, in computing the tax rate for any taxing district, deduct from the total budget requirements *certified by any such district* all of the tax to be derived from the monies and credits and other money capital taxed at a flat rate . . ."

Thus, it is the responsibility of the various taxing districts, and in particular the trustees, to certify budgets and authorized tax rates.

Similarly, §360.8, Code of Iowa, 1975, provides that the township trustees shall certify to the board of supervisors a tax on property to be used for the maintenance of township buildings. The reference from §444.3 is strengthened by this analogous authority.

The inference is also strengthened by the fact that the township trustees are expressly given the power to purchase and maintain fire apparatus, equipment and shelter. Where a statute grants powers in general terms, all, incidental powers necessary to effective implementation are granted by implication. *Koelling vs. Board of Trustees of Mary Frances Skiff Memorial Hospital*, 1966, 259 Iowa 1185, 146 N.W.2d 285; *Willis vs. Consolidated School District*, 1959, 210 Iowa 391, 227 N.W. 532.

Since your request indicated that the county assessor may be the "officer . . . charged with the duty of certifying" in §444.2, it should be noted that only elected officials may so act. *Ishell vs. Board of Supervisors of Woodbury County*, 1952, 243 Iowa 941, 54 N.W.2d 508; *State vs. Barker*, 1902, 116 Iowa 96, 89 N.W. 204; *State vs. Des Moines*, 1897, 103 Iowa 76, 72 N.W. 639. The rationale for this rule was explained in 62 OAG 108, 109f:

"Further, it has been held that elected officials and bodies only may be tax certifying bodies, for the reason that the legislature cannot, without the consent of the people, delegate the power of taxation to a body of persons not elected by and immediately responsible to the public."

Thus, a county assessor cannot certify budgets since he is an appointed, not elected, official. Section 441.6, Code of Iowa, 1975.

In response to your second question, the overriding intent of Section 359.42, as amended by Chapter 194, Acts of 66th G.A., is to *require* fire protection from each township. The Legislature is not as concerned with the simplicity of providing fire protection as with the *necessity* thereof since fire presents an extreme hazard to life and property.

In response to your third question, the County Auditor is responsible for implementing the dollar amount of taxation necessary to meet the budgets of the various taxing districts. Section 443.2, Code of Iowa, 1975, requires each County Auditor to compile a tax list which includes

"each description of tax" against every property owner within the specific taxing district. Note that the tax list includes property values as certified by the County Assessor pursuant to Section 443.21, Code of Iowa, 1975; however, the County Assessor is not in the business of certifying tax rates, only property values. This tax list is then delivered to the County Treasurer for collection pursuant to Section 443.4, Code of Iowa, 1975. Thus, it is the County Auditor who determines, and the County Treasurer who collects, a sum certain tax from each individual.

In response to your fourth question, it is the duty of the County Auditor to apply the necessary rate that will raise the required amount of money. Section 444.3, Code of Iowa, 1975.

In response to your fifth question, it should be noted that a township can only have one fire district. Section 359.42, Code of Iowa, 1975, formerly permitted several fire districts within one township, but that statute was amended by Chapter 194, Acts of the 66th G.A., providing that each township shall be composed of not more than one regular (i.e. not "benefited") fire district. Thus, there should be no problem alloting tax funds for fire protection since each township can have only one regular fire district to receive all of said funds. Under the old law the township trustees had the responsibility of determining, at the time of levy, the amount of funds to be collected for each fire district where there was more than one fire district in a township. See 1968 OAG 641.

September 16, 1976

TAXATION: Documentary Stamp Tax: Ch. 428.A, Code of Iowa, 1975. Ch. 428A, Code of Iowa, 1975, imposes the Iowa documentary stamp tax upon consideration paid for transfer of realty. A transfer of realty from an individual to a corporation in exchange for capital stock is a transfer subject to the documentary stamp tax. Said transfer is not specifically excepted from tax by §428A.2 of the Code of Iowa, 1975. (Maggio to Martino, Greene County Attorney, 9-16-76) #76-9-26

Mr. Nicola J. Martino, Greene County Attorney: You have requested an Attorney General's Opinion with reference to the applicability of the real estate transfer tax imposed by Chapter 428A, Code of Iowa, 1975. The substance of your inquiry is whether capital stock of a corporation received in return for a conveyance of real property constitutes "consideration" within the perview of §428A.1.

Section 428A.1 provides in pertinent part:

"There is imposed on each deed, instrument, or writing by which any lands, tenements, or other realty in this state shall be granted, assigned, transferred, or otherwise conveyed, a tax determined in the following manner: When there is no consideration or when the deed instrument or writing is executed and tendered for recording as an instrument corrective of title, and so states, there shall be no tax. When there is consideration and the actual market value of the real property transferred is in excess of five hundred dollars, the tax shall be fifty-five cents for each five hundred dollars or fractional part of five hundred dollars in excess of five hundred dollars. The term 'consideration' as used in this chapter, means the full amount of the actual sale price of the real property involved, paid or to be paid, including the amount of an incumbrance or lien on the property, whether assumed or not by the grantee."

Historically speaking, §428A.1 was a direct descendant from 26 USCA 4361 (1967). 26 USCA 4361 (1954) provides:

"There shall be imposed a tax on each deed, instrument, or writing whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchase or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 and does not exceed $500, in the amount of 55 cents; and at the rate of 55 cents for each additional $500 or fractional part thereof." (Aug. 16, 1954, Ch. 736, 68A Stat. 520.)

In 1965 Congress added the following sentence:

"The tax imposed by this section shall not apply on or after January 1, 1968." June 21, 1965, Pub. L 89-44, Title IV §401b, 79 Stat. 148.

The apparent purpose of the 1965 amendment was aimed at giving states a chance, if they so wished, to pass their own tax laws on real estate conveyances. ¶190,004 P.H. (1966). It was a result of the congressional declaration that the documentary stamp tax "could be better left to the administration of state and local governments." U.S. Code Cong. and Adm. News p. 1645 (1965).

In 1965, the Iowa legislature enacted Chapter 428.A, allowing a credit for federal real estate transfer tax paid. Acts 1965 (61 G.A.) Ch. 358.

Since the structure of the Iowa real estate transfer tax came from the federal real estate transfer tax and its 1965 amendment, it follows that the federal regulations and decisions predating the statutory repeal are extremely persuasive on this matter.

Under §428A.1, three areas are relevant to answer your question: A) the transfer of an interest in realty from one party to another; B) consideration given; and C) the amount of the actual sale price.

A. *Transfer.* The purpose of the federal stamp tax, like §428A.1, was to tax a transfer of real estate where the original interest in property changed hands. *Mt. Prospect Building & Loan Assn. v. United States*, 32 F.Supp. 78 (D.N.J. 1940). It is an excise tax upon the seller "who received cash or security for parting with his property." *Murray v. Hoey*, 32 F.Supp. 1008 (S.D.N.Y. 1940). The statute was "intended to cover the various kinds of instruments by which an interest in realty is conveyed from one person to another." *Occidental Life Ins. Co. v. United States*, 57 F.Supp. 691 at 694, 102 Ct. Cl. 633 at 697 (N.D. Ia. 1945). Since the underlying purpose of §4361 and §428A.1 are similar, the intent should likewise be similar, i.e. taxing the break in interest.

It is a fundamental principle of corporate law that a corporation is treated as a legal entity separate and distinct in identity from its shareholders. *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 54 S.Ct. 788, 78 L.Ed. 1348 (1934); *Appanoose Cty Rural Taxpayers Assn. v. Iowa State Tax Commission*, 261 Iowa 1191, 158 N.W. 2d 176, (1968). Therefore, by the conveyance of realty from an individual to a corporation where the interest of realty changes hands from the individual to the corporation, a §428A.1 "transfer" has occurred.

B. *Consideration.* Given a transfer of realty from an individual to a corporation is a taxable transfer under §428A.1, Code of Iowa, 1975, the next question is whether the exchange of stock for the transfer of property constitutes consideration. (An outright gift of a deed is exempt from the documentary stamp tax.) 1972 O.A.G. 657.

The Treasury Regulations of the repealed federal documentary stamp tax provide:

"(a) *Conveyances subject to tax.* The following are examples of conveyances subject to the tax: * * *

"(7) A conveyance of realty to a corporation in exchange for shares of its capital stock." Treas. Reg. 43.4361-2(7), 1960.

In *Greyhound Corp. v. United States*, 208 F2d 858 (7th Cir. 1954), a parent corporation sought recovery of documentary stamp taxes paid on the transfer of realty to it by a liquidating subsidiary. The Court stated at 860:

"The interpretive Treasury Regulations 71(1941 Ed.) relating to stamp taxes on 'Conveyance of Realty Sold' (subpart G), Secs. 113.80, 113.81b, 113.83(f) and (g) provides' valuable consideration . . . may involve money or anything of value'; . . . and that conveyance subject to the tax may comprise, among other things, '*a conveyance of realty to a corporation in exchange for shares of its capital stock*' . . . ." (emphasis added)

Another case on point is *Orpheum Bldg. Co. v. Anglim*, 127 F.2d 478 (9th Cir 1942), where in the court found a transfer of realty by Madison Square Garden Building Corporation to taxpayer for capital stock was subject to the documentary stamp tax.

In light of the federal regulations and case law on this matter, capital stock received in exchange for property constitutes consideration within the perview of §428A.1.

C. *Actual Sale Price.* Given the conveyance of property by an individual to a corporation constitutes a transfer and the capital stock received by the individual constitutes consideration, the remaining question relevant to your inquiry is what is the amount by which the stamp tax is measured.

"Consideration" is defined as ". . . the full amount of the actual sale price of the property involved . . . "428A.1, Code of Iowa, 1975." "Actual sale price" in regard to the exchange of realty for realty has been defined as the value of the "specific property received by the grantor in exchange for the transferred property." 1972 O.A.G. 654, 655. Thus, the stamp tax is based upon the value of the capital stock received.

Since the tax is $.55 for each $500 of the price paid, it is necessary to reduce the value of the consideration (capital stock) to a dollar amount. It is reasonable for the county recorder to use the fair market value of the land transferred as the value of the consideration for purposes of measuring the amount of the documentary stamp tax. See *Orpheum Bldg. Co. v. Anglim*, 127 F2d 478, 480 (9th Cir. 1942); 1972 O.A.G. 654, 656; Treas. Reg. 43.4361-2 (7), 1960.

September 17, 1976

MUNICIPALITIES: Trust and Agency Funds—§§97B.9(2), (3), 384.6(1), 384.16, 400.8(1), 410.1, and 411.8, Code of Iowa, 1975; §404.16, Code of Iowa, 1973; §2, S.F. 1086, 66th G.A. (1976); §87, Ch. 1088, Acts of the 64th G.A. (1972); §10, Ch. 96, Acts of the 60th G.A. (1963). A city must budget for its IPERS contributions, which must come from the same fund as the employees salary. A tax for IPERS contributions may only be levied if needed. Section 384.6, which provides for a trust and agency fund is ambiguous. (Blumberg to Willits and Griffin, State Senators, 9-17-76) #76-9-27

Honorable Earl M. Willits, State Senator; Honorable James W. Griffin, State Senator: We have received your opinion request of April 15, 1976, regarding Chapter 97B of the Code (IPERS) and a city's budgeting and taxing processes under the City Code. It appears that some cities have been told that they need not budget in the general fund for IPERS since they have the authority to tax over and above their legal general fund levy limit for it. You also indicated the following:

"We understand cities have followed one of two courses in making provision for the city's share of the Social Security, Iowa Public Employee's Retirement System, and Police and Fire Pension obligations: 1) to levy in the public safety and/or general functional funds (now called the general fund) or 2) to levy in the trust and agency fund. Those cities which were up to the 30-mill (now $8.10/$1000 tax rate limit have been levying in the trust and agency fund the amounts necessary to meet the city's share. Other cities not at that limit have also levied in the trust and agency fund for those costs.

"The question has been raised whether a levy for these purposes in the trust and agency fund is authorized only when the general fund levy is at or near the $8.10/$1,000 limit or whether such levy in the trust and agency fund is authorized regardless of the rate of the general fund tax levy.

"Another question has been raised concerning what items are included in the definition of 'related employee benefits,' as used in Code section 384.6, and whether costs of items other than pensions, IPERS and FICA may be levied in the trust and agency fund.

"In summary, our two questions are:

"1) May a city levy for 'pension and related employee benefits' in its trust and agency fund without having first reached the maximum $8.10/$1,000 levy limit in its general fund?

"2) Does the term 'related employee benefit as used in Code Section 384.6' encompass the following: a) group (health, life, disability) insurance, whether handled through an insurer or not; b) unemployment benefits; c) workers' compensation benefits, whether self-insured or payment of premiums; or d) any other common items deemed 'benefits', such as uniform allowances and the like?"

Section 384.6(1) 1975 Code of Iowa provides that a city may establish a trust and agency fund for the following:

"1. Accounting for pension and related employee benefit funds. A city may certify taxes to be levied for the trust and agency fund in the amount necessary to meet such obligations."

Section 97B.9(2), (3) provides:

"2. The employer shall pay its contribution from funds available and is directed to pay same from tax money or from any other income of the political subdivision; provided, however, the contribution shall be paid from the same fund as the employee salary.

"3. Every political subdivision is hereby authorized and directed to levy a tax sufficient to meet its obligations under the provisions of this chapter if any tax is needed."

As can be seen from §97B.9(2), the employer's contribution for IPERS must be paid from the same fund as the employee salary. Thus, if the employee is paid from the general fund, then the IPERS contribution is paid from that fund. Although §384.6 provides that a trust and agency fund may be established for pensions, such is not a requirement. And, even if a city could establish such a fund for pensions, it is not a necessity that IPERS be paid from that fund.

The key phrase in §97B.9(3) is "if any tax is needed." Our office has previously discussed this section. See, O.A.G., May 11, 1965 (Brick to Farnsworth). There, we said that this phrase, added to the section by §10, Ch. 96, Acts of the 60th G.A. (1963), was to "insure that each department within a political subdivision shows the tax or contribution as an operational cost in its budget." We still adhere to that position. Section 384.16 of the Code provides that the city budget must show estimates of expenditures for each program, income from sources other than property tax, and amounts raised by taxation. This appears to be all encompassing. If the city levies a tax, it must be included in the budget. If an expenditure is proposed, it must also appear in the budget. What §97B.9(3) provides is that an additional tax may be levied if there are insufficient funds available to meet the expenditure. It does not stand for the proposition that a city need not budget for IPERS and then levy a tax for the whole amount of the city's contribution regardless of the levy limit. In a prior opinion we held that political subdivisions may levy taxes for IPERS in excess of statutory limitations. 1974 O.A.G. 739. We did not feel compelled at that time to reach the question presented here. This opinion is not intended to be in conflict with the one of 1974. It merely expands upon the earlier one.

The remainder of your first question and your second question cannot be easily answered. Section 404.16, 1973 Code provided as follows:

"Municipal corporations shall have power to establish trust and agency funds for the purpose of accounting for gifts received by the corporation for a particular purpose and for the purpose of accounting for money and property received and handled by such corporations as trustee or custodian or in the capacity of an agent of any public moneys as authorized by law and to levy such taxes as are authorized by law."

Cities were permitted to establish any number of trust and agency funds for the two purposes listed within the section. When this section was amended and renumbered to §384.6 by §87, Ch. 1088, Acts of the 64th G.A. (1972), a substantial change was made. First, the language now provides for a trust and agency "fund" (singular). In addition, such a fund can now be used for *accounting* "for pension and related employee benefit *funds*." The words "accounting" and "funds" have been underscored because those words lend ambiguity to the section.

Neither the Code nor any cases give a good definition of a trust and agency fund. However, other literature has discussed the subject. In National Committee on Governmental Accounting, Governmental Accounting, Auditing and Financial Reporting (1968) there is a comprehensive discussion of trust and agency funds. "Trust fund' is defined on page

171 as a fund "consisting of resources received and held by the governmental unit as trustee to be expended or invested in accordance with the conditions of the trust." "Agency fund" is defined on page 152 as a fund "consisting of resources received and held by the governmental unit as an agent for others; for example, taxes collected and held by a municipality for a school district." It is also mentioned there that resources held by one fund of a governmental unit for other funds of that unit are sometimes handled through an agency fund.

The following from *Governmental Accounting* is a discussion of the general use of trust and agency funds across the nation (at pages 75-77):

"Trust and Agency Funds are set up for the purpose of accounting for money and property received from non-enterprise fund sources and held by a governmental unit in the capacity of trustee, custodian, or agent for individuals, governmental entities, and non-public organizations. From an accounting standpoint, the difference between a Trust Fund and an Agency Fund is principally one of degree. A Trust Fund is frequently in existence over a longer period of time than an Agency Fund; represents and develops vested interests to a greater extent; and involves more complex administrative and financial problems, such as the investment of fund assets. Agency Funds function primarily as clearing mechanisms for cash resources which are collected by a governmental unit, held as such for a brief period, and then disbursed to authorized recipients. Trust and Agency Funds are alike in that the governmental unit has a fiduciary responsibility for moneys and other assets which it does not own outright, and for this reason they are considered as one general class of fund.

"There are two general types of trust funds—expendable and non-expendable. Expendable trust funds, as their name implies, are those whose principal and income may be expended in the course of their designated operations. Non-expendable trust funds are those whose principal must be preserved intact. The most notable type of Expendable Trust Fund in state and local government is that for pension and retirement systems. . . .

"In addition to the basic classification of Expendable and Non-Expendable Trust Funds, these funds may also be classified as Public and Private. Public trust funds are those whose principal or income or both must be used for some public purpose, whereas private trust funds are those which will ordinarily revert to private individuals and organizations or will be used for private persons. Public employee retirement funds are examples of public trust funds, and performance deposits are examples of private ones.

"Trust Funds are operated by carrying out the specific terms of trust indentures, statutes, ordinances, or other governing regulations. Their operations include the receipt of money from general revenues, contributions, interest on investments, deposits, and other sources and the expenditure of these resources on specific purposes as authorized by the underlying legal document or regulation. Separate accounts should be maintained to record the transactions arising out of the operations of each Trust or Agency Fund . . . .

. . . .

"The accounting for most trust funds other than retirement and endowment-type funds is relatively simple and consists primarily of the proper recording of receipts and disbursements. Additions to these simpler Trust Funds are credited directly to the Fund Balance and reductions are charged directly against these balances. . . .

"Accounting for other types of Trust Funds is more complex. . . .

"The accounting for Agency Funds consists primarily of recording the receipt, custody, and transfer of money or other assets in accordance with agency agreements. Typical agency funds used by state and local governments include: (1) tax collection funds under which one local government will collect a tax for an overlapping governmental unit and remit the amount collected less administrative charges to the recipient unit; (2) employee benefit funds, such as those for hospital-surgical insurance, under which the government will collect premiums as a payroll deduction and periodically remit premiums collected in one lump sum to an insurance company; and (3) a Clearance Fund used to accumulate a variety of revenues from different sources and apportion them out to various operating funds in accordance with a statutory formula or procedure. . . .

. . .

"*Accounting for Public Employee Retirement Funds.* Judged by virtually any yardstick—monetary value, growth, impact on governmental budgets and personnel management, or economic significance to individual government employees, public employee retirement systems are among the most significant of those governmental operations which must be accounted for in trust funds. . . .

. . .

"Regardless of these differences in coverage, administration, and financial support which exist among retirement systems, the basic financial operations of all public employee retirement systems are similar in nature. These operations are characterized by the allocation and receipt of financial resources which are specifically designed to pay retirement and/or other benefits in accordance with applicable laws and administrative regulations. Under most retirement systems, these resources are provided in part from current employee earnings and in part from annual appropriations by the employer governmental unit. . . .

"The basic objective of an accounting system for a public employee retirement system is to reveal the amount and source of financial resources set aside for retirement benefits and the liabilities—both actual and prospective based on actuarial evaluation—applicable to such resources. Since the moneys received by a retirement system are held for the future benefit of employee members of the system, they are held by the governmental unit in a trust capacity and should, therefore, be accounted for in one or more trust funds. Whether one or several trust funds should be employed will depend upon the statutes or ordinances governing the retirement system, but as a minimum, one trust fund applicable to all revenues and expenditures for retirement benefits must be used. . . ."

As can readily be seen from the above quotations trust funds are generally used for retirement systems such, as example, those for policemen and firemen under Chapters 410 and 411. Agency funds are generally used as a conduit for such things as FICA where the governmental unit collects the monies in such a fund prior to their submission to the federal government. It is also apparent that agency funds can be used for collecting IPERS and unemployment compensation before they are sent to the State, and monies for group insurance before they are forwarded to the individual companies.

The above quotations, although giving us a better understanding of the general use of trust and agency funds, do not solve the question of Legislative intent of the amendments made effective in 1975. We cannot state that the Legislature contemplated that pension monies be placed in a trust and agency fund. Pensions, as set forth in either Chapters

410, 411 or 97B of the Code, require specifically named and designated funds (see §§410.1 and 411.8, 1975 Code), or that such funds be paid out of the employee salary fund (§97B.9). Thus, the words "accounting for" within the section may have some significance. For instance, that sentence may provide that monies may be accumulated in the trust and agency fund for the cost of administering the pension funds. The word "funds" may refer to monies or to a specific fund for a designated purpose. If "funds" refers to monies, then it might be said that related employment benefit monies can be placed in a trust and agency fund. If "funds" refers to a specific fund, then a different result would be reached.

On the other hand, if the Legislature intended a trust and agency fund to be used as indicated by *Governmental Accounting,* we would say that not only could pension monies be placed in such a fund, but also, IPERS, FICA, State and Federal income tax withholdings, unemployment compensation, workers compensation and the like. Such a statement, however, cannot be made with any degree of certainty. Although the pension funds set by Chapters 410 and 411 are, in reality, trust funds, whether or not named as such, we still cannot state that those funds were what the Legislature meant when it used the term "pension" in §384.6(1). Nor can we state with any certainty what is meant by the term "related employee benefit funds". Was this term meant to indicate funds related to employee benefits, or does the word "related" modify "pension", thereby indicating employee benefit funds relating to pensions?

The word "related" is a modifier. Under the rule of the last antecedent, modifying words at the end of a phrase or sentence normally refer only to the word or phrase immediately preceding them. See a prior opinion of September 19, 1975, no. 75-9-18. If this rule is applicable, then the only things that the Legislature intended to be included in a trust and agency fund under §384.6(1) would be those related directly to pensions. This would exclude uniform allowances, group insurance and the like. Similarly, the phrase, "related employee benefit funds" may be a modifier to the word "pension" with the same result. What this discussion leads to is but one conclusion: Section 384.6 is ambiguous.

Section 384.6(1) is also ambiguous because of the second sentence which provides that a city "may certify taxes to be levied for the trust and agency fund in the amount necessary to meet such obligations." This is also a change from the 1973 Code which permitted taxes only "as authorized by law." The Legislature may have indicated a change of the taxing power of a city by the word changes. That is, it may have intended that a city could levy taxes for a trust and agency fund in addition to other specific tax authorizations. Or, it could merely have cleaned up the language and still intended that any taxes levied for a trust and agency fund be only those taxes specifically authorized, such as the tax for IPERS under Chapter 97B, or the taxes for pension funds under Chapters 410 and 411.

The latter seems the most reasonable. Since it is apparent that trust and agency funds are generally used for the pension systems and as conduits for monies to other governmental units or businesses, and, since the pension funds under Chapters 410 and 411 are, in reality, trust funds, it would not be unreasonable to conclude that a trust and egency fund

from §384.6(1) could be used for those pension funds, IPERS, FICA, and the like. It would also be reasonable to state that the taxes mentioned in that section are, in reality, those taxes mentioned in Chapters 97B, 410, 411, and similar provisions.

One type of use of a trust and agency fund that is clear is found in §2, S.F. 1086, 66th G.A. (1976), which amended Chapter 400 by providing that the costs of physical examinations required under §400.8(1) shall be paid from "the trust and agency *fund* of the city." [Emphasis added] This expenditure does not appear to be covered by §384.6 (2) or (3). Therefore, it probably would come from Section 384.6(1). However, we are still unable to state that what the Legislature provided by this amendment is a clear indication of its intent when it promulgated §384.6(1) in 1972. In addition, this recent amendment uses the term "trust and agency fund" in the singular. Although one could surmize that the Legislature is intending to allow only one trust and agency fund per city under §384.6(1), we cannot state that such is the legislative intent. First, individual trust and agency funds are usually set up for each pension fund; see, *Governmental Accounting*. Second, §411.8, where applicable, requires five separate funds each for the police and firemen. In addition, it may not constitute good accounting practice to accumulate all pension funds, IPERS and FICA payments, withholding taxes and the like into the same fund.

Again, even though it is reasonable to assume that trust and agency funds may be used for pensions under Chapters 410 and 411, and as a conduit for IPERS, FICA, withholdng taxes and the like, we cannot state with any degree of certainty that this was the legislative intent. Nor can we state that group insurance, worker's compensation, unemployment benefits, or the like can be placed in such a fund, even though this is generally one of the functions of such a fund. Although we realize that under home rule a city could set up several funds for different purposes, §384.9, including the accumulation of monies for insurance, worker's compensation, IPERS, FICA, and the like, we are unable to state that such was contemplated to be done through a trust and agency fund.

In summary, IPERS contributions must show up in the budget, and must come from the same fund as the employee's salary. A tax for IPERS may only be levied if needed, and should not be levied for the full IPERS contribution regardless of the general fund tax levy. Section 384.6 is ambiguous. We strongly recommend that the Legislature consider appropriate amendments to better clarify its intent.

September 17, 1976

CAPITOL PLANNING COMMISSION: STATE OFFICE BUILDING: GENERAL SERVICES: NAMES: HOOVER BUILDING. Chapter 62, §19, 65th G.A., 1975. The Director of General Services properly designated a new state office building the "Herbert Clark Hoover Building" after that name had been selected by the Capitol Planning Commission from a statewide contest to name the building, and submitted it to the General Assembly for approval, although no action was taken thereon. (Turner to Norpel, State Senator, 9-17-76) #76-9-28

The Honorable Richard J. Norpel, Sr., State Senator: You have requested an opinion of the attorney general as to whether the Director of

General Services has properly proceeded to name a new state office building still unde reconstruction the Herbert Clark Hoover building under the provisions of §19, House File 898, 65th G.A., 1975 Session (now Chapter 62, p. 102, and which is part of an appropriations bill not included in the 1975 Code). §19 provides in pertinent part:

"The capitol planning commission shall sponsor a statewide contest to name the new state office building provided for in section one (1), subsection eight (8), paragraph b of this Act. All public school classes in Iowa history will be eligible to submit entries accompanied by an essay supporting their selection. It shall be the intent of this contest to not only provide a suitable name for the building, but to stimulate interest in Iowa history and its citizens who have contributed to its growth, welfare, and progress.

"The capitol planning commission shall select the winning entry and submit it to the *second session of the Sixty-sixth General Assembly for approval.*

"A suitable prize or award, not to exceed fifty dollars in cost, will be presented to the winning class."

The statewide contest was held and the Capitol Planning Commission selected "Herbert Clark Hoover" as the winning name from 137 entries received which suggested a total of 65 names, apparently because the number of essays favoring this name constituted a plurality.

On April 1, 1976, the Capitol Planning Commission met and voted unanimously to submit the name of "Herbert Clark Hoover" as the name for the new office building and said name was duly submitted and received by each house of the General Assembly on or about April 2, 1976, in full compliance with the directions of §19. The General Assembly then failed to act to either approve or disapprove the name.

As you point out, the Director of General Services has proceeded to erect temporary signs with that name on the hoarding at the construction site. When the building is completed, the construction contract provides for a sign on the lawn in front of the building of a nature similar to and uniform with those in front of other state buildings with 22 6″ high cast aluminum letters "extended mounting to concrete" apparently for the name "Herbert C. Hoover Building" or "Herbert Clark Hoover Bldg." As I understand it, no name will be placed on the building itself.

Whatever might be the ordinary legal effect of the General Assembly's failure to approve an action which is subject to their approval, it is my opinion that in this instance their inaction is tantamount to approval of the name "Herbert Clark Hoover" for their building and that the Director may quite properly so name the building in the aforesaid manner.

A name is defined in *Webster's* as a word or symbol constituting the distinctive designation of a person or thing. And of course a person or thing may be called different names by different people. For example, James Earl Carter, Jr., has been designated and will appear as "Jimmy Carter" on the Democratic presidential ballot in Iowa on November 2. The football stadium at Iowa State University has been unofficially named the "Jack Trice Stadium" by the students and O. T. Coffee (Donald Kaul). So, too, buildings as well as people are frequently

nicknamed. The First Presbyterian Church in Iowa City is thus called "Old Brick" and the President's mansion the "White House."

I presume that the legislature was satisfied with the name "Herbert Clark Hoover" whether you were or not. If they weren't, the next General Assembly can quite easily affix another name whether the people recognize it or not. (A rose is a rose and the building will now always be the Hoover Building to many whatever law may be passed.) Similarly, each successive General Assembly may then rename any state building. Perhaps your suggestion of the "Ansel Briggs Building" will be recognized by some enlightened legislature.

A name is perhaps analogous to a point. Ocheyedan Mound was, at least until recently, designated the highest point in Iowa (1675 feet). Now we are told that there are higher points which have not yet been named or designated. Nonsense. Until such a higher point is in fact somehow designated, I think it is quite proper for anyone to consider Ocheyedan Mound as still the highest point in Iowa. Who can sensibly argue otherwise without designating a higher point or points?

Moreover, we notice without deciding that §19 may be unconstitutional as not being within the title of the Act.

September 20, 1976

STATE OFFICERS & DEPARTMENTS: MERIT EMPLOYMENT DEPARTMENT: COMPTROLLER: OVERTIME PAY. §§17A.2, 17A.4 and 19A.9, Code of Iowa, 1975. The Legislature is the only proper body which can originate an "overtime policy" providing for additional compensation for state employees. But where funds were appropriated by the General Assembly for payment of overtime, additional compensation may be temporarily provided for overtime as part of a revised pay plan duly adopted by the Merit Employment Commission. Such a plan should define the pay period, with the number of hours to be worked within that period, before additional compensation can be paid. (Murray to Selden, State Comptroller, 9-20-76) #76-9-29

Mr. Marvin R. Selden, Jr., State Comptroller: You have requested a clarification of several matters raised in our August 9, 1976, opinion to Senator Doderer pertaining to overtime pay, the policy for which we found had not been properly promulgated by the merit employment commission.

We paraphrase your questions as follows:

1. Would it still be necessary to go through the formality of rescinding Rule 4.6 prior to the adoption of new overtime policies and procedures?

2. If Rule 4.6 is a rule under Chapter 17, does it fall within one of the exceptions set forth in §17A.2, Code of Iowa, 1975?

3. Is the Merit Commission the proper agency to determine overtime policies and procedures or should that function more properly lie under Chapter 8, Code of Iowa?

4. Can a new overtime policy be developed by rescinding Rule 4.6 and amending the pay plan under the provisions of §19A.9, Code of Iowa, 1975?

5. Since the Fair Labor Standards Act is no longer mandated to the State, is there a legal basis for the State to continue to pay overtime? In your opinion, was the inclusion of estimates of funds required for payment of overtime or partial payment in the departmental appropriations sufficient statutory authority for the payment of overtime?

In our August 9th opinion to Senator Doderer, we stated as follows:

". . . Thus, in order to accomplish what Mr. Vernon proposes, it would be necessary to amend Rule 4.6 to make provision for overtime pay along the lines of the policy statement, and that amendment would be subject to approval of the Legislative Rules Review Committee under the provisions of Chapter 17A, Code of Iowa, 1975, or to rescind Rule 4.6 subject to Rules Review Committee approval and then adopt overtime pay provisions as part of the pay plan in accordance with §19A.9(2)."

It is our understanding that the director of the Merit Employment Department, on August 16th, rescinded Merit Rule 4.6, a., b., pursuant to §17A.4(2). The subject matter dealt with in this document of rescission appears to fall within the discretion of the Merit Employment Director and hence, before answering the questions raised by you, we will consider that Merit Rule 4.6 has been rescinded. In approving this method of rescission, we are also aware of the provisions of §246.4, Code of Iowa, 1975, requiring extra pay for certain employees for time worked in excess of eight hours per day, but since this provision is quite explicit and refers to a definite class of employees of a particular agency, we feel it is unnecessary to have a rule construing the plain provisions of that section. We have also taken into consideration that we have been unable to find any other statutory references for the payment of overtime to state employees.

We have also noted that the document rescinding Merit Rule 4.6 also stated that at a regular open meeting held Thursday, August 12, 1976, that there would be a public hearing held to discuss a recommended pay plan which did include extra pay for time worked in excess of a determined number of hours during a pay period to be presented to the Iowa Executive Council. In discussing this public hearing held on August 27, 1976, with Mr. Wallace Keating, Director, Merit Employment Commission, we have learned that the Commission has taken a recommended new pay plan under consideration and has also heard from other agencies concerning their opinion that the overtime policy should remain as it was before the U.S. Supreme Court struck down the provisions of the Fair Labor Standards Act as it applied to the states. The Merit Employment Commission is the proper agency to decide on a new or revised pay plan.

In reference to your first question, it is our opinion as stated in our opinion of August 9, 1976, that it was necessary to rescind Merit Rule 4.6 and since the Iowa Merit Department has done so, we consider this question moot at this time.

Your second question refers to "Chapter 17" (Official Reports and Documents), but we assume you are referring to Chapter 17A (Administrative Procedures Act). Our research indicates that Merit Rule 4.6 was filed July 14, 1969, and was adopted under the authority of the Merit Employment Commission found in §19A.9. The Merit Employment Commission has been in existence since June 30, 1967, and, as already noted above, it adopted Merit Rule 4.6 in July of 1969, under the

procedures as outlined in then Chapter 17A and we, therefore, conclude that Merit Rule 4.6 was then an official rule of the Merit Employment Commission under the law that was then applicable.

Because there was no Iowa statutory authority for the rule, we assume that Merit Rule 4.6 was promulgated by the Merit Employment Commission after the decision of the U.S. Supreme Court in *Maryland v. Wirtz*, 392 U.S. 183, on June 10, 1968, which held that the Fair Labor Standards Act amendments of 1966 were applicable to the states. We view Merit Rule 4.6 as an amendment to pay plans which were in existence for employees affected by the U.S. Supreme Court decision. We consider the enactment of this Rule to be a management directive or guideline from the Merit Employment Commission to other state agencies who had employees who were to be affected by the new pay policy. In other words, the decision by the Supreme Court, in effect, amended pay plans for all state employees who came within its purview. The rule merely implemented the judicial legislation of an activist court.

As part of your question two, you also ask whether or not Merit Rule 4.6 falls within one of the exceptions set forth in §17A.2. It is our opinion, as stated above, that Merit Rule 4.6, when adopted, was clearly a rule within the meaning of old Chapter 17A, before the radical amendments made by the 65th General Assembly in Chapter 1090, 1974, which amendments were effective July 1, 1975. We take the view that Merit Rule 4.6 was an exception under §17A.2(7)(c) as:

"An intergovernmental, interagency, or intraagency memorandum, directive, manual or other communication which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof."

In answer to your third question, we must define what we think is meant by "overtime policy" with reference to employees of the State of Iowa. Prior to the federal amendments to the Fair Labor Standards Act in 1966, the states were exempt from this Congressional legislation. In fact, prior to the original enactment of the Fair Labor Standards Act in 1938, the term "overtime" was most usually confined to collective bargaining agreements between employers in the private sector and recognized union representatives. "Overtime" has been defined by the United States Supreme Court as follows:

" 'Overtime' is not a word of art and sometimes is used to denote work after regular hours, sometimes work after hours fixed by contract at less than statutory maximum hours and sometimes hours outside of the specified clock pattern without regard to whether previous work has been done." *Bay Ridge Operating Co. v. Aaron*, N.Y., 68 S.Ct. 1186, 1197, 334 U.S. 446, 92 L.Ed. 1502.

The question of whether or not to pay state employees "overtime" has never been the subject of an Iowa Fair Labor Standards Act. Our legislature has indirectly involved itself by appropriating extra money for various agencies throughout the state whose pay plans were modified by the 1966 and 1974 Amendments to the Fair Labor Standards Act. It is our opinion that the question of "overtime policy" is a matter which should be considered by the Legislature since, in the words of Justice Rehnquist in his opinion overruling *Maryland v. Wirtz*, in the *National League of Cities, et al. vs. Usery, Secretary of Labor*, 44 U.S. Law Week 4974, decided June 24, 1976, after our General Assembly adjourned:

"* * * States [have] freedom to structure integral operations areas of traditional governmental functions * * *"

We think the legislature is the only proper body which can originate "overtime" as additional compensation for state employees and that the legislature should determine what agency or agencies should be in charge of its administration.

However, in the interim, with the funds which have been appropriated, we think that the Merit Employment Commission may properly adopt "overtime policies" as part of a revised pay plan. But, as we have said in our earlier opinion, we think that it must be an amendment to a pay plan properly adopted. It is not the function of the Comptroller under the Budget and Financial Control Act, Chapter 8, Code of Iowa, 1975.

In answer to your question five, it is our opinion that there is no present legal authority for the State to continue paying overtime and compensation for overtime should have ceased with our opinion of August 9, 1976.

However, since certain affected state employees had been receiving overtime payments because the Fair Labor Standards Act as been applied to the states, and because the legislature had in fact appropriated monies to certain agencies for the payment of overtime thereunder, compensation may be paid for overtime if and when a revised pay plan is properly adopted by the Merit Employment Commission. This is true regardless of the fact that you say certain agencies now have "estimates of funds required for payment of overtime or partial payment in the departmental appropriations" and that this money is presently available for payment to employees who would have qualified under the Fair Labor Standards Act.

We think the revised pay plan approach is the only practicable temporary solution which can properly be reached, although we can't help but wonder whether the legislature might have refused to appropriate funds for payment of overtime had it known it was not required to do so by the federal statute.

If and when a revised pay plan is adopted, it should include a defined pay period, with a specified number of hours to be worked within that pay period, before additional compensation can be paid. This must be done under the procedures now available to the Merit Employment Commission and whether or not they label said additional compensation as "overtime" is a decision which must be made by that Commission.

September 22, 1976

BANKS: Lease participation—§§524.904, 524.1102 and 524.1104. Authority for state banks to enter into leases of personal property is limited by Code §524.908. Where a proposed lease participation is in fact a loan of funds to an affiliate bank ,the provisions of §§524.904, 524.1102 and 524.1104 apply. (Nolan to Hall, Deputy Superintendent of Banking, 9-22-76) #76-9-30

Mr. Howard K. Hall, Deputy Superintendent, Department of Banking: Sometime ago you submitted to this office correspondence relating to a state bank participating in leases negotiated by a third party. Your

letter stated that the position of the Banking Department has been that a state bank could not participate in such leases because the language of §524.907, Code of Iowa, 1975, which is a general statement of authority to buy or sell participation in obligations does not mention leases. Leases are specifically covered by §524.908.

The situation prompting your request for an opinion involves the Otoe County National Bank in Nebraska City, Nebraska, which is owned by a holding company, whose principal stockholder, Mr. Becker, is the majority stockholder of the Boone State Bank and Trust Company. The Otoe County National Bank has a wholly-owned subsidiary, Custom Leasing, Inc., which leases automobiles, office equipment and other personal property to its customers. After the leases have been made, they are assigned "without recourse" from Custom Leasing, Inc., to the Otoe County National Bank. During the minimum period of the lease, the rentals are equal to the cost of the property plus the interest returned to the Otoe County National Bank. Otoe County National Bank has offered a participation in a portion of such losses to other banks owned or controlled by Mr. Becker. The Boone State Bank and Trust Company has sought your approval of its participation in such leases. The quality of the leases is not questioned. There appears to be no participation agreement which is not accepted and concurred in by Custom Leasing, Inc., despite its "without recourse" agreement.

Boone State Bank and Trust Company's position is that by purchasing participation in such leases it is not involved in direct leasing, as contemplated by §524.908, but is, in fact, merely purchasing participation in agreements for the payment of money authorized by §524.907.

Section 524.103(2) defines agreements for the payment of money as monetary obligations "including but not limited to, amounts payable on open book accounts receivable and executory contracts and *rentals payable under leases of personal property*" [emphasis ours].

Assuming that the contemplated participation in leasing is indeed a purchase of rentals payable under a lease of personal property, such purchase would appear to be authorized under the general lending powers of the state bank set out in §524.902(1):

"A state bank may, subject to any applicable restriction under other provisions of this chapter . . . discount or purchase . . . agreements for the payment of money."

Such conclusion assumes that title to the property leased remains with Custom Leasing, Inc., that its assignment, without recourse, of leases to the Otoe County National Bank is for valid consideration and not merely a deposit of collateral security for additional lending, and that the purchase of such agreement by an Iowa state bank does not constitute an unauthorized loan to an affiliate under §524.1101(2) or §524.1102,, concerning the investment of Iowa state bank funds in obligations in excess of the statutory limitations. See §524.1104. Under §524.904, obligations of one customer which is a corporation include obligations with any other corporation when more than fifty percent of the shares entitled to vote in such corporation is owned or controlled by the customer. Further, under §524.904(3)(f), the obligations of the customer as an obligor include

those pursuant to agreements for the payment of money acquired by purchase or discount by the state bank. Accordingly, the total obligation of a single customer to the bank, secured or unsecured, cannot exceed the twenty percent of the capital and surplus of the state bank (§524.904 (2)) and this limit would appear to apply to any loan of funds by way of participation agreement between the Boone State Bank and Trust Company and the Otoe County National Bank.

September 23, 1976

CONSTITUTIONAL LAW; GENERAL ASSEMBLY; DUAL OFFICE HOLDING BY LEGISLATORS. Article III, §22, Constitution of Iowa. A legislator in the middle of his or her term could not serve as both a state legislator and local elective official if pay or compensation is attached to the latter office. It would make no difference that the legislator might serve in the local office without pay. (Haesemeyer to Culver, State Senator, 9-23-76) #76-9-31

The Honorable Louis P. Culver, State Senator: You have requested an opinion of the Attorney General, in which you state:

"Could a legislator in the middle of his or her term serve as both a state legislator and local elective official? If the only prohibition to serving would be the lucrative nature of the office, could the official serve without pay and then be eligible to hold both positions?"

Article III, §22, Constitution of Iowa, provides:

"No person holding any lucrative office under the United States, or this State, or any other power, shall be eligible to hold a seat in the General Assembly: but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative."

Assuming that the local elective office with which you are concerned is lucrative in nature, it seems clear from the plain language of the constitutional provision that a legislator could not hold both that office and his legislative office. Generally speaking, a lucrative office is one whose pay is fixed to the performance of its duties. **State, ex rel Little v. Slagle,** 1905, Tenn., 89 S.W. 326. For a more extensive discussion of what constitutes a lucrative office, see OAG Turner to Plymat, State Senator, January 16, 1975.

If there is pay or compensation attached to an office, it is a lucrative office within the meaning of the constitutional prohibition and the fact that a individual in a given case might undertake to serve without pay would make no difference.

September 27, 1976

ENVIRONMENTAL PROTECTION: National Pollution Discharge Elimination System Permit Delegation — Chapter 455B, Division III as amended by House File 1477, Acts of the 66th General Assembly, Second Session; Iowa Law grants such authority to the Iowa Department of Environmental Quality as will qualify it to administer NPDES permit program under Environmental Protection Agency guidelines. (Davis to Crane, Executive Director, Department of Environmental Quality, 9-27-76) #76-9-32

Mr. Larry E. Crane, Director, Iowa Department of Environmental Quality: In accordance with the desires of your Department and the

detailed questions required by the Environmental Protection Agency, we have reviewed the laws of Iowa and hereby issue the following:

ATTORNEY GENERAL'S STATEMENT

I hereby certify, pursuant to Section 402(b) of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251, *et seq.*), that in my opinion the laws of the State of Iowa provide adequate authority to carry out the program set forth in the "Request for NPDES Permit Delegation" submitted by the Department of Environmental Quality of the State of Iowa. The specific authorities provided, which are contained in lawfully enacted or promulgated statutes or regulations in full force and effect on the date of this Statement, include the following:

1. *Authority to Issue Permits.*

a. *Existing and new point sources.*

State law provides authority to issue permits for the discharge of pollutants by existing and new point sources to the same extent as required under the permit program administered by the U. S. Environmental Protection Agency ("EPA") pursuant to Section 402 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 *et seq.* (hereinafter "the FWPCA" or "the Act"). [*Federal Authority*: FWPCA §§301(a), 402(a)(1), 402(b)(1)(A); 40 C.F.P. §124.10.]

State Statutory or Regulatory Authority:

Section 455B.45, Code of Iowa 1975 as amended by House File 1477 Laws of 66th General Assembly Second Session; Section 455B.32(2); Section 455B.33(3) as amended by House File 1477; Chapters 19 and 20 of Title 400 of the Iowa Administrative Code.

Remarks of the Attorney General:

Laws of the State of Iowa do not specifically require that permits be issued for discharge of pollutants by existing point sources, however, Section 455B.45, as amended by HF 1477, Laws of the 66th General Assembly, Second Session, requires the issuance of permits for the operation of *any* waste disposal system, "operation" by definition would include the discharge of pollutants by such an existing system. That Section also specifically includes the construction or use of any new point source for the discharge of any pollutant into the waters of the state.

It must be noted that definition of the "Waters of the State of Iowa", as included in her laws, is broader than any definition of "navigable waters of the United States."

Neither of the laws nor regulations of the State of Iowa incorporate the scheme set out in Section 301B of the Federal Water Pollution Control Act.

Section 6 of House File 1477 adopted by the 66th General Assembly of Iowa, Second Session specifically authorizes the adoption of pretreatment or effluent standards promulgated pursuant to Section 301, 306 or 307 of the Federal Water Pollution Control Act.

b. *Disposal into wells.*

State law provides authority to issue permits to control the disposal of pollutants into wells. [*Federal Authority*: FWPCA §402(b)(1)(D); 40 C.F.R. §124.80.]

State Statutory and Regulatory Authority:

Section 455B.30(5) as amended by House File 1477; Laws of the 66th General Assembly, Second Session; Section 455B.45, Code of Iowa 1975

as amended by House File 1477 and Section 455B.32(3) 1975 Code of Iowa as amended by House File 1477; Section 455A.25, 1975 Code of Iowa, administered by the Iowa Natural Resources Council.

Remarks of the Attorney General:

The same D.E.Q. permit requirements are effective for the subsurface water disposal as for surface water disposal particularly with the specific inclusions of injection wells within the "sewer system" definition of Section 455B.30(5), by House File 1477. The same remarks apply in this subparagraph (b) as were made in subparagraph (a). Injection wells have long been regulated in Iowa under Section 455A.25.

2. *Authority to Apply Federal Standards and Requirements.*

a. *Effluent standards and limitations and water quality standards.*

State law provides authority to apply in terms and conditions of issued permits applicable Federal effluent standards and limitations and water quality standards promulgated or effective under the FWPCA, including:

(1) Effluent limitations pursuant to Section 301;

(2) Water quality related effluent limitations pursuant to Section 302;

(3) National standards of performance pursuant to Section 306;

(4) Toxic and pretreatment effluent standards pursuant to Section 307; and

(5) Ocean discharge criteria pursuant to Section 403. [Federal Authority: FWPCA §§301(b), 301(e), 302, 303, 304(d), 304(f), 306, 307, 402(b)(1)(A), 403, 208(e), and 510; 40 C.F.R. §124.42.]

State Statutory and Regulatory Authority:

Section 455B.32(1) (2) (3) (6), and Section 455B.35, as amended by House File 1477.

Remarks of the Attorney General:

The State of Iowa cannot and has not surrendered her sovereignty over future determination of the needs of the State in the Water Quality area and the criteria for the waters of the State, however, House File 1477, Acts of the 66th General Assembly, Second Session authorizes the Department of Environmental Quality to adopt water quality standards and effluent limitations in accordance wtih those adopted by the Environmental Protection Agency pursuant to the Federal Water Pollution Control Act.

b. *Effluent limitations requirements of Sections 301 and 307.*

In the absence of formally promulgated effluent standards and limitations under Sections 301(b) and 307 of the FWPCA, State law provides authority to apply in terms and conditions of issued permits effluent limitations to achieve the purposes of these sections of the FWPCA. Such limitations may be based upon an assessment of technology and processes as required under the FWPCA with respect to individual point sources, and include authority to apply:

(1) To existing point sources, other than publicly-owned treatment works, effluent limitations based on application of the best practicable control technology currently available or the best available technology economically achievable;

(2) To publicly-owned treatment works, effluent limitations based upon the application of secondary treatment or the best practicable waste treatment technology; and

(3) To any point source, as appropriate, effluent standards or prohibitions designed to prohibit the discharge of toxic pollutants in toxic amounts or to require pretreatment of pollutants which interfere with, pass through, or otherwise are incompatible with the operation of publicly-owned treatment works. [*Federal Authority:* FWPCA §§301, 304 (d), 307, 402(a)(1), 402(b)(1)(A); 40 C.F.R. §124.42(a)(6).]

State Statutory and Regulatory Authority:

Section 455B.32(1) (2) (3) (6), 1975 Code of Iowa, and Section 455B.33(4) as amended by House File 1477.

Remarks of the Attorney General:

Laws of the State of Iowa do not specifically require that permits be issued for discharge of pollutants by existing point sources, however, Section 455B.45 as amended by House File 1477, Laws of the 66th General Assembly, Second Session, requires the issuance of permits for the operation of *any* waste disposal system, "operation" by definition would include the discharge of pollutants by such an existing system. That Section also specifically includes the construction or use of any new point source for the discharge of any pollutant into the waters of the state.

It must be noted that the definition of "Waters of the State of Iowa" as included in its laws is broader than any definition of "navigable waters of the United States."

Neither the laws nor regulations of the State of Iowa incorporate the scheme set out in Section 301B of the Federal Water Pollution Control Act.

Section 6 of House File 1477 adopted by the 66th General Assembly of Iowa, Second Session, specifically authorizes the adoption of pretreatment or effluent standards promulgated pursuant to Section 301, 306 or 307 of the Federal Water Pollution Control Act.

c. *Schedules of compliance.*

State law provides authority to set and revise schedules of compliance in issued permits which require the achievement of applicable effluent standards and limitations or, in the absence of a schedule of compliance contained therein, within the shortest reasonable time consistent with the requirements of the FWPCA. This includes authority to set interim compliance dates in permits which are enforceable without otherwise showing a violation of an effluent limitation or harm to water quality. [*Federal Authority:* FWPCA §§301(b), 303(e), 304(b), 306, 307, 402 (b) (1) (A), 502(11), and 502(17); 40 C.F.R. §§124.44 and 124.72.]

State Statutory and Regulatory Authority:

Section 455B.32(1) (2) (3), 1975 Code of Iowa and Section 455B.33 (4) as amended by House File 1477.

Remarks of the Attorney General:

The Executive Director of D.E.Q. has this specific authority under Section 455B.33(4) as amended by House File 1477.

3. *Authority to Deny Permits in Certain Cases.*

State ilaw provides authority to insure that no permit will be issued in any case where:

a. The permit would authorize the discharge of a radiological, chemical, or biological warfare agent or high-level radioactive waste;

b. The permit would, in the judgment of the Secretary of the Army acting through the Chief of Engineers, result in the substantial impairment of anchorage and navigation of any waters of the United States;

c. The permit is objected to in writing by the Administrator of EPA, or his designee, pursuant to any right to object provided to the Administrator under Section 402(d) of the FWPCA; or

d. The permit would authorize a discharge from a point source which is in conflict with a plan approved under Section 208(b) of the FWPCA. [*Federal Authority:* FWPCA §§301(f), 402(d)(2), and 208(e); 40 C.F.R. §§124.41 and 124.46.]

State Statutory and Regulatory Authority:

Section 455B.32(3), 1975 Code of Iowa and Section 455B.33(4), as amended by House File 1477.

Remarks of the Attorney General:

No authority exists for a state agency to subject its judgment on the issuance of the state permit to the jupdgment of the Secretary of Army acting through the Chief of Engineers or the administrator of the EPA or his designee nor to a pre-existing plan approved by the Environmental Protection Agency, however, the issuance of a federal permit by a state agency pursuant to an agreement with the federal agency (which would require a Chapter 28E, 1975 Code of Iowa, interstate compact) could be subjected by the terms of the agreement to such considerations, but they could not effect the issuance of a state permit.

4. *Authority to Limit Duration of Permits.*

State law provides authority to limit the duration of permits to a fixed term not exceeding five years. [*Federal Authority:* FWPCA §402(b)(1)(B); 40 C.F.R. §124.51.]

State Statutory and Regulatory Authority:

Section 455B.32(3) as amended by House File 1477; Section 455B.33(4) as amended by House File 1477; Section 455B.45 as amended by House File 1477; Rule 19.3(7) of Title 400 of the Iowa Administrative Code.

Remarks of the Attorney General:

No statutory limitations presently exists in Iowa Law, however, the broad implications of the permit requirements and rule-making authority allow such permits to be limited as the commission and the executive director feel necessary. Such limitations presently include a five-year term for such permits under Rule 19.3(7).

5. *Authority to Apply Recording, Reporting, Monitoring, Entry, Inspection and Sampling Requirements.*

State law provides authority to:

a. Require any permit holder or industrial user of a publicly-owned treatment works to:

(1) Establish and maintain specified records;

(2) Make reports;

(3) Install, calibrate, use and maintain monitoring equipment or methods (including where appropriate, biological monitoring methods);

(4) Take samples of effluents (inaccordance with such methods, at such locations, at such intervals, and in such manner as may be prescribed; and

(5) Provide such other information as may reasonably be provided.

b. Enable an authorized representative of the State, upon presentation of such credentials as are necessary, to:

(1) Have a right of entry to, upon, or through any premises of a permittee or of an industrial user of a publicly-owned treatment works in which premises an effluent source is located or in which any records are required to be maintained;

(2) At reasonable times have access to and copy any records required to be maintained;

(3) Inspect any monitoring equipment or method which is required; and

(4) Have access to and sample any discharge of pollutants to State waters or to pblicly-owned treatment works resulting from the activities or operations of the permittee or industrial user. [*Federal Authority:* FWPCA §§304(h)(2)(A) and (B), 308 (a), 403(b)(2), and 402(b)(9); 40 C.F.R. §§124.45(c), 124.61-63, and 124.73(d).]

State Statutory and Regulatory Authority:

Section 455B.32(3) as amended by House File 1477; Section 455B.33 (4) as amended by House File 1477; Section 455B.45 as amended by House File 1477; Section 455B.32 as amended by House File 1477.

Remarks of the Attorney General:

The broad rule-making authority established by law for the issuance of permits and the new subsection inserted by the legislature in this session grants specific authorization for these requirements.

6. *Authority to Require Notice of Introductions of Pollutants into Publicly-Owned Treatment Works.*

State law provides authority to require in permits issued to publicly-owned treatment works conditioned requiring the permittee to give notice to the State permitting agency of:

a. New introductions into such works of pollutants from any source which would be a new source as defined in Section 306 of the FWPCA if such source were discharging pollutants directly to State waters;

b. New introductions of pollutants into such works from a source which would be a point source subject to Section 301 if it were discharging such pollutants directly to State waters; or

c. A substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. [Federal Authority: FWPCA §402(b)(8); 40 C.F.R. 124.45(d).]

State Statutory and Regulatory Authority:

Section 455B.32(3) as amended by House File 1477, Section 455B.33(4) as amended by House File 1477, Section 455B.45 as amended by House File 1477, Section 455B.32 as amended by House File 1477.

Remarks of the Attorney General:

The broad rule making authority established by law for the issuance of permits and the new subsection inserted by the legislature in this session grants specific authorization for these requirements.

7. *Authority to Insure Compliance by Industrial Users with Sections 204(b), 307, and 308.*

State law provides authority to insure that any industrial user of a publicly-owned treatment works will comply with FWPCA requirements concerning:

a. User charges and recovery of construction costs pursuant to Section 204(b);

b. Toxic pollutant effluent standards and pretreatment standards pursuant to Section 307; and

c. Inspection, monitoring and entry pursuant to Section 308. [*Federal Authority:* FWPCA §402(b)(9); 40 C.F.R. §124.45(e).]

State Statutory and Regulatory Authority:

Section 455B.33(4) as amended by House File 1477.

Remarks of the Attorney General:

No statutory authority now exists to insure that industries pay the user charges and recovery of construction costs pursuant to Section 204B of the federal act, however, statutory authority granted to the executive director by the last session of the General Assembly insures that the other requirements of this paragraph are met and the user charges and construction cost recovery are written into the federal grant contracts and are binding upon the grantees.

8. *Authority to Issue Notices, Transmit Data, and Provide Opportunity for Public Hearings.*

State law provides authority to comply with requirements of the FWPCA and EPA Guidelines for "State Program Elements Necessary for Participation in the National Pollutant Discharge Elimination System", 40 C.F.R. Part 124 (hereinafter "the Guidelines") to:

a. Notify the public, affected States and appropriate governmental agencies of proposed actions concerning the issuance of permits;

b. Transmit such documents and data to and from the U. S. Environmental Protection Agency and to other appropriate governmental agencies as may be necessary; and

c. Provide an opportunity for public hearing, with adequate notice thereof, prior to ruling on applications for permits. [*Federal Authority: Generally:* FWPCA §§101(e) and 304(h)(2)(B).]

Function 8(a): FWPCA §§402(b)(3) (public notice), 402(b)(5) (notice to affected States), 402(b)(6) (notice to Army Corps of Engineers); 40 C.F.R. §§124.31 (tentative permit determinations), 124.32 (public notice), 124.33 (fact sheets) and 124.34 (notice to government agencies).

Function 8(b): FWPCA §§402(b)(4) (notices and permit applications to EPA), 402(b)(6) (notices and fact sheets to Army Corps of Engineers); 40 C.F.R. §§124.22 (receipt and use of Federal data), 124.23 (transmission of data to EPA), 124.34 (notice to other government agencies), 124.46 (transmission of proposed permits to EPA), 124.47 (transmission of issued permits to EPA).

Function 8(c): FWPCA §402(b)(3) (opportunity for public hearing); 40 C.F.R. §§124.36 (public hearings), 124.37 (notice of public hearings).

State Statutory and Regulatory Authority:

Section 455B.32(6)(7), 455B.33(4) as amended by House File 1477; Section 455B.34 as amended by House File 1477.

Remarks of the Attorney General:

Statutory authorities cited above exists for public hearing with adequate notice thereof. Subparagraph (a) and (b) of this paragraph should becovered in the agreement between the Department of Environmental Quality and the Environmental Protection Agency. Authority for such agreement exists in Chapter 28E of the Code.

9. *Authority to Provide Public Access to Information.*

State law provides authority to make information available to the public, consistent with the requirements of the FWPCA and the Guidelines, including the following:

a. Except insofar as trade secrets would be disclosed, the following information is available to the public for inspection and copying:

(1) Any NPDES permit, permit application, or form;

(2) Any public comments, testimony or other documentation concerning a permit application; and

(3) Any information obtained pursuant to any monitoring, recording, reporting or sampling or other investigatory activities of the State.

b. The State may hold confidential any information (except effluent data) shown by any person to be information which, if made public, would divulge methods or processes entitled to protection as trade secrets of such person. [*Federal Authority:* FWPCA §§304(h)(2)(B), 308(b), 402(b)(2) and 402(j); 40 C.F.R. §124.35.]

State Statutory and Regulatory Authority:

Chapter 68A, 1975 Code of Iowa; Section 455B.33(4) as amended by House File 1477; Chapter 455B as amended by Section 13 of House File 1477.

Remarks of the Attorney General:

Federal requirements are fully covered by the statutes cited above.

10. *Authority to Terminate or Modify Permits.*

State law provides authority to terminate or modify permits for cause including, but not limited to, the following:

a. Violation of any condition of the permit (including, but not limited to, conditions concerning monitoring, entry, and inspection);

b. Obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts; or

c. Change ni any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge. [*Federal Authority:* FWPCA §402(b)(1)(C); 40 C.F.R. §§124.45(b) and 124.72.]

State Statutory and Regulatory Authority:

Section 455B.32(3) as amended by House File 1477; Section 455B.33(3)(4) as amended by House File 1477; Section 455B.34 as amended by House File 1477.

Remarks of the Attorney General:

Statutory authority completely covers this paragraph.

11. *Authority to Abate Violations of Permits or the Permit Program.*

State law provides authority to:

a. Abate violations of:

(1) Requirements to obtain permits;

(2) Terms and conditions of issued permits;

(3) Effluent standards and limitations and water quality standards (including toxic effluent standards and pretreatment standards applicable to dischargers into publicly-owned treatment works); and

(4) Requirements for recording, reporting, monitoring, entry, inspection, and sampling.

b. Apply sanctions to enforce violations described in paragraph (a) above, including the following:

(1) Injunctive relief, without the necessity of a prior revocation of the permit;

(2) Civil penalties;

(3) Criminal fines for willful and negligent violations; and

(4) Criminal fines against persons who knowingly make any false statement, representation or certification in any form, notice, report, or other document required by the terms or conditions of any permit or otherwise required by the State as part of a recording, reporting, or monitoring requirement;

c. Apply maximum civil and criminal penalties and fines which are comparable to the maximum amounts recoverable under Section 309 of the FWPCA or which represent an actual and substantial economic deterrent to the actions for which they are assessed or levied. Each day of continuing violation is a separate offense for which civil and criminal penalties and fines may be obtained. [*Federal Authority:* FWPCA §§402(b)(7), 309, 304(a)(2)(C), 402(h), 504; 40 C.F.R. §124.73.]

State Statutory and Regulatory Authority:

Section 455B.34 as amended by House File 1477; Section 455B.39 as amended by House File 1477; Section 455B.44 as amended by House File 1477; Section 455B.45 as amended by House File 1477; Section 455B.49 as amended by House File 1477.

Remarks of the Attorney General:

Iowa law includes a civil penalty of $5,000 per day or in the alternative a criminal penalty of $10,000 per day for each day of violation for discharge of pollutants with a maximum of $20,000 per day upon second conviction. A person making false statement or who falsifies, tampers with or renders inaccurate a monitoring advice is subject to a fine of not more than $10,000 or imprisonment in the county jail for not more than six months or both. The state additionally has authority to seek injunctive relief which, upon the adoption of proper rules, could restrict or prohibit the introduction of pollutants into a publicly-owned treatment work in the event a condition of a permit for the discharge of pollutants from such a treatment work is violated. The Attorney General may seek an injunction to stop pollution in addition to any penalty for past violations.

12. *State Board Membership.*

No State board or body which has or shares authority to approve permit applications or portions thereof, either in the first instance or on appeal, includes [or will include, at the time of approval of the State permit program], as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit. No State law requires representation on the State board or body which has or shares authority to issue permits which would violate the conflict of interest provision contained in Section 304(h)(2) of the FWPCA. [*Federal Authority:* FWPCA §304(h)(2)(D); 40 C.F.R. §124.94.]

State Statutory and Regulatory Authority:

None.

Remarks of the Attorney General:

There are no statutory regulations restricting board membership as required in FWPCA §304(h)(2)(D).

Under authorities in effect at the time of this Statement, no outstanding permits issued by this State for the discharge of pollutants are valid for the purposes of the National Pollutant Discharge Elimination System created under the FWPCA. All persons presently in possession of a valid State permit for the discharge of pollutants are required to:

1. Comply with the application requirements specified in subpart C of the Guidelines;

2. Comply with permit terms, conditions, and requirements specified in subparts E, F, and G of the Guidelines; and

3. If such persons are disposing of pollutants into wells without a permit from the Iowa Natural Resources Council, cease; if with a permit from the Iowa Natural Resources Council, apply for another from the Iowa Department of Environmental Quality.

RICHARD C. TURNER
Attorney General of Iowa

September 28, 1976

GENERAL ASSEMBLY: Public Bidding. Senate File 1251, Acts of the 66th G.A., 2nd Session; §23.18, Code of Iowa, 1975. The Peace Officers Retirement Systems Study Committee may hire an actuarial firm without reopening public bidding after the Committee's "good faith" efforts to secure bids has failed. (Kelly to Redmond, State Senator, 9-28-76) #76-9-33

Honorable James M. Redmond, State Senator: This opinion is in response to your request dated August 31, 1976, with regard to public bidding procedures. Your request stated:

"Pursuant to Acts of the Sixty-sixth General Assembly, 1976 Session, Senate File 1251 required public bidding prior to incurring costs for actuarial services incurred on behalf of the General Assembly. At the first meeting of the Peace Officers Retirement Systems Study Committee held August 27, 1976, the Study Committee tentatively approved the public bidding procedures to be implemented for actuarial services to be obtained to study certain aspects of the retirement systems in Iowa.

"The Committee requested an Attorney General's opinion on the following issue: If, subsequent to the implementation of the public bidding procedure for actuarial services, no bid is received by the Study Committee, may the Study Committee then contract with an actuarial firm without reopening the public bidding?"

Unfortunately, there aren't any statutory provisions or court decisions that specifically deal with the issues raised in your request. Section two of Senate File 1251 of the Sixty-Sixth General Assembly, states:

"Any actuarial services and costs to be incurred on behalf of the general assembly for development of legislation relating to retirement systems shall not be incurred until after public bidding for such services has been completed. However, it shall not be required that the lowest bid be accepted."

It is clear that the Peace Officers Retirement Systems Study Committee must make a "good faith" effort to follow the Legislature's mandate for public bidding. Section 23.18 of the Code of Iowa (1975) prescribes an excellent procedure for letting public bids. Though, the Committee

is not bound by the procedure found in Section 23.18, the Study Committee would be well advised to follow the section's format. We have also been informed that the Iowa Department of General Services, Centralized Purchasing Division, has in the past, aided numerous agencies in drafting bid specifications and job descriptions for seemingly difficult situations.

In answer to your question, it is the opinion of this office that if after utilizing "reasonable" bidding procedures the Study Committee does not receive *any* bids for actuarial services it may contract with an actuarial firm without reopening the public bidding. The disemination of bid specifications on a State wide basis can entail a substantial expenditure of funds. There is no reason for the Study Committee to unnecessarily reduce its appropriation on fruitless advertising *if* "good faith" efforts have already been utilized. However, if the Committee does receive some response and ultimately rejects those bids, we believe that in the interests of public policy the Committee should reopen the public bidding. This alleviates purchasing procedures which might be questionable as capricious, arbitrary or fraudulent, see 1974 O.A.G. 171.

September 29, 1976

STATE OFFICERS AND DEPARTMENTS: Variances issued by Air Quality Commission, personal liability of members of Commission—§§455B.22 and 25A.2, Code of Iowa, 1975, §§1, 2, 7, Ch. 80, Acts of the 66th G.A. (1975), 400-3.2(2) Iowa Administrative Code. Individual members of the Air Quality Commission are protected from personal liability in suits brought as a result of damage or injury resulting from the exercise of variances granted by the Commission so long as the members' acts are not willful and wanton and do not constitute malfeasance in office. (Dent to Crane, Executive Director, Department of Environmental Quality, 9-29-76) #76-9-34

Mr. Larry E. Crane, Executive Director, Iowa Department of Environmental Quality: You have requested the opinion of this office with regard to the possibility of the State of Iowa or the individual members of the Air Quality Commission being held liable for damages resulting from the exercise of variances granted by the Air Quality Commission.

Your requests supplied the following information:

"Section 455B.22 of the Code gives the Air Quality Commission the authority to grant a variance from the rules or standards of emissions promulgated by that Commission. A prerequisite to the granting of a variance is set out in subsection 455B.22(1)(a), which is a finding that "[t]he *emissions* occurring or proposed to occur do not endanger human health or safety or property." Subrule 400—3.2(2), Iowa Administrative Code, further requires an investigation by the Department as to whether the *emissions* will endanger human health, create safety hazards, or damage property.

The granting of a variance could result in injury to third parties or damage to their property, though not necessarily by emissions. For example, a variance for open burning could result in the fire spreading to another's property."

On the basis of this information you ask:

" . . . whether the Commissioners would be held personally liable, or if the State could be held liable for damage caused by emissions or other by-products such as fire which result from the granting of a variance."

First, with respect to the possibility of personal liability of commissioners, a recently enacted amendment to Chapter 25A of the Code of Iowa, the "State Tort Claims Act," must be drawn to your attention. Chapter 80, Acts of the 66th G.A. (1975), entitled "Liability Protection for State Employees" deals comprehensively with the type of liability situation your question presents.

Section 25A.2(3) of the Code, as amended by §1, Chapter 80, Acts of the 66th G.A., now provides in part as follows:

" 'Employee of the state' includes any one or more officers, agents, or employees of the state or any *state agency and persons acting on behalf of the state or any state agency in any official capacity, temporarily or permanently in the service of the state of Iowa, whether with or without compensation.*" (emphasis added)

Section 25A.2(5) of the Code, as amended by §2, Chapter 80, 66th G.A., defines "claims" in relevant part as follows:

" * * *

"b. Any claim against an employee of the state for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligence or wrongful act or omission, except an act of malfeasance in office or willful and wanton conduct, of any employee of the state while acting within the scope of his office or employment."

Section 7, Chapter 80, 66th G.A., amends Chapter 25A of the Code as follows:

"*Officers and employees defended.* The state shall defend any employee of the state, whether elected or appointed and, except in cases of malfeasance in office, willful and unauthorized injury to persons or property, or willful and wanton conduct, shall save harmless and indemnify such employees of the state against any tort claims or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring within the scope of their employment or duties."

As can be seen from the above-quoted sections, the State will defend, indemnify and hold harmless employees who are sued for their acts or omissions while in the course of their employment. In this regard, see also two recent Attorney General's Opinions, Blumberg to Pawlewski, O.A.G. #76-7-24 and Beamer to Lynch #76-8-10. Individual members of the Air Quality Commission acting within the scope of their official duties in issuing variances pursuant to §455B.22 would certainly be subject to the protection against liability provided by this Act. The only exceptions to this protection would be if the damage or injury complained of was the result of willful or wanton conduct or malfeasance in office.

Blacks Law Dictionary, Revised 4th Ed., defines malfeasance as:

"Evil doing; ill conduct; the commission of some act which is positively unlawful; the doing of an act wholly wrongful and unlawful; the doing of an act which a person ought not do at all or the unjust performance of some act which the party had no right or which he had contracted not to do." See also *Proksch v. Bettendorf*, 1934, 218 Iowa 1376, 257 N.W. 383, 384.

In interpreting a statute structured similarly to amended section 25A.2(5) quoted above, that is, which distinguished ordinary negligence

from willful and wanton misconduct, the Iowa Supreme Court described the terms willful and wanton as involving, "conduct which partakes to some appreciable extent, though not entirely, of the nature of a deliberate and intentional wrong. It is the element of deliberate recklessness which differentiates willful and wanton misconduct from ordinary negligence." *Fessenden v. Smith*, 1963, 255 Iowa 1170. 124 N.W.2d 554, 557.

Except then for malfeasance in office or willful and wanton conduct, the members of the Air Quality Commission would be protected against personal liability.

As to the possibility of the state being liable for damages or injury "caused by emissions or other by-products such as fire, which result from the granting of a variance," it is not possible to definitively answer that question since such a determination will depend upon the particular facts presented in a given situation. However, the State of Iowa has surrendered the traditional sovereign immunity from suit enjoyed by governmental agencies and is now amenable to claims for money only on account of damages to or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the state acting within the scope of his office or employment. See §25A.2(5)(a), counterpart to §25A.25(b) quoted above.

The fact that a suit may be filed for damage caused by negligent or wrongful acts or omission, however, should not in any way be considered as indicating that liability would ultimately be imposed in the situation you present. Even though suit may be authorized, it will still be necessary to adduce all the traditional elements for tort liability, i.e. legal duty, breach of duty, and proximate cause before any liability would result. Without adequate proof of fault no liability would result even though suit had been authorized.

Therefore, we are of the opinion that even though the State of Iowa and the individual members of the Air Quality Commission may be subject to suit for damages resulting from harm caused by the exercise of variances granted by the Air Quality Commission, ultimate liability for such damages is impossible to forecast, even though it would appear unlikely, and if personal liability is involved, the state will defend and indemnify and hold harmless any such individuals who act within the scope of their office or employment.

October 1, 1976

STATE DEPARTMENTS: Employees — §79.1, Code of Iowa, 1975, as amended by H.F. 1583, 66th G.A., 1976 Session. A person employed by the state may not receive additional per diem payment for serving on a state board or commission. (Nolan to Benton, Superintendent of Public Instruction, 10-1-76) #76-10-1

Dr. Robert D. Benton, Ed.D., Superintendent of Public Instruction: We have a request, originating from your department, for an opinion as to "the compatibility of an employee of the Department of Public Instruction serving as a member of the Civil Rights Commission". The rule on incompatibility of offices has been set forth by the Iowa Supreme Court in *State ex rel LeBuhn v. White*, 1965, 257 Ia. 606, 133 N.W. 2d 903. In that case, the Iowa Supreme Court decided that a person holding

two incompatible offices vacated the first by accepting the second. The question here involves a statutory office as an appointive position which, strictly speaking, is staff employment rather than an "office".

The employee in question (Chief, Urban Education Section with primary area of responsibility, Title IV Civil Rights Act Consultation) in the course of his employment with the Department of Public Instruction handles matters which have been or may be subject to his subsequent review as a commissioner of the Iowa Civil Rights Commission. Such dual authority appears to us to be inconsistent with public policy favoring a system of checks and balances.

As Superintendent of Public Instruction, you are empowered by §257.20 and §257.21 to prescribe the duties of the employees of the Department with due regard to performance of the proper function and the rendering of maximum services relating to the operation and improvement of the state's system of public education. In so doing, if foreseeable conflicts exist, as appears to be the case in question, you may require that, as a condition of employment, such employee devote full time to the service of the Department of Public Instruction.

It is interesting to note that the 66th General Assembly, in its 1976 Session, has, by the enactment of House File 1583, limited state employees to a single payment for all services rendered by such employee to the state. As amended, §79.1, Code of Iowa, 1975, now provides in pertinent part:

"Salaries specifically provided for in an appropriation act of the general assembly shall be in lieu of existing statutory salaries, for the positions provided for in any such act, and all salaries, including longevity, where applicable, by express provision in the code, shall be paid according to the provisions of the acts of the sixty-sixth general assembly, 1975 session, chapter ninety (90), and shall be in full compensation of all services, including any service on committees, boards, commissions or similar duty for Iowa government, except for members of the general assembly . . ."

This recent legislation precludes the payment of per diem for service on a state committee or commission by any person who, contemporaneously, is an employee of the State of Iowa. Accordingly, it is the opinion of this office that the employee in question may not, at the same time, hold a position on a state board or commission unless appointed to such board or commission "ex officio" as a representative of the Department of Public Instruction.

October 5, 1976

SCHOOLS: Special Education. §281.4, Code of Iowa, 1975. School board has discretion under §281.4 to pay necessary and reasonable reimbursement to parents of child receiving special education in another school district for taking the child from home to the place where the child boards during the school week. (Nolan to Daggett, State Representative, 10-5-76) #76-10-2

The Honorable Horace Daggett, State Representative: You have requested clarification of the duties incumbent upon a school board in your district which pays the tuition for a child now being educated at the Smouse School in Des Moines, who boards during the week at a home in

the Bondurant-Farrar School District, some eighty miles from his own home. According to your letter, the parents of the child take the child home every weekend, and return him to his boarding home, a distance of approximately 80 miles. The parents have requested the local board to reimburse them in accordance with Iowa Code §285.1(3) at the rate of 28 cents times 80 miles times two trips per week. The school board is willing to pay ten cents per mile for two trips per week. You ask what transportation options are available, as well as what the school district can be expected to pay and how much can be paid.

Section 285.1, Code of Iowa, 1975, generally requires the school board to provide transportation for all eligible resident pupils. The language of §285.1(3) in question is:

"In any district where transportation by school bus is impracticable or where school bus service is not available, the board may require the parents or guardian to transport their children to the school designated for attendance. The parent or guardian shall be reimbursed for such transportation service for elementary pupils by the board of resident district for the distance one way from the pupil's residence to the school designated for attendance at the rate of fifty-six cents per mile per day irrespective of number of children transported. For high school pupils, the parent or guardian shall be reimbursed eighty dollars per pupil per year for such service, provided however no family shall receive more than one hundred dollars per year for transporting members of the family who attend high school. The provisions of this section shall apply to eligible nonpublic school pupils as well as to eligible public school pupils. However, reimbursement for nonpublic school pupils shall not exceed eighty dollars per pupil per year."

Under §273.3(5) of the Code, a school district is authorized to contract with other public agencies for special education purposes. Section 282.20, as amended by House File 796, Laws of 66th G.A., 1976 Session, provides:

"The school corporation in which the student resides shall pay from the general fund to the secretary of the corporation in which he is permitted to enroll, the maximum tuition fee as prescribed in section two hundred eighty-two point twenty-four (282.24) of the Code."

In addition to the tuition paid by a local school district, it is also required to pay the receiving school district transportation furnished to the child. Section 285.1(6). In this case, it appears that the local school district is required to pay the transportation costs incurred for the travel between the Bondurant-Farrar bus pickup and the Smouse School.

Where the local school district requires parents to transport their children to a designated school because school bus transportation is impracticable or bus service is not available, the parents are entitled to receive reimbursement at the statutory rates provided in §285.1. That does not appear to be the situation in question here as transportation is provided between the boarding home and the school. However, the local board also has broad discretion in making suitable provisions for a child requiring special education to reimburse the parents for the cost of transporting such child to and from the boarding home to his own home. In such case, the rates fixed by statute for reimbursement for the distance traveled between home and school do not apply and the parents may be reimbursed their out-of-pocket expenses for such number of trips as the local board determines to be reasonable and necessary. Section 281.4.

October 5, 1976

SCHOOLS: Health Services to nonpublic school pupils. Health services furnished to nonpublic school pupils do not necessarily have to be delivered by certified medical personnel. Diagnostic speech and hearing testing may be conducted on nonpublic school premises by persons certified as speech or hearing clinicians by the Department of Public Instruction. (Nolan to Junkins, State Senator, 10-5-76) #76-10-3

The Honorable Lowell L. Junkins, State Senator: This is written in response to your request of October 9, 1975, for an opinion on the following:

"After the U.S. Supreme Court case of *Meek vs. Pittenger* in May of this year, the Iowa legislature, in Section 2 of H.F. 801, passed a law to conform with this opinion. I am concerned with what are the allowable 'health services' that a school district or AEA may furnish to non-public school pupils on non-public school premises. Must such services be delivered by certified medical personnel? May diagnostic speech and hearing services at least, mentioned in *Meek*, be delivered on non-public premises?"

In answer to your first question, it is the opinion of this office that health services may be delivered by persons other than "certified medical personnel". Diagnostic tests are in an indispensable step to corrective work for children with physical or mental handicaps. At the present time there are people who administer diagnostic tests who are not "certified" by the State Board of Health, although they do meet the certification requirements of the Department of Public Instruction pursuant to 670-12.25 and 670-12.26, Iowa Administrative Code, as support personnel for the delivery of special education services; 670-12.26(3) provides specifically for:

"Hearing clinician . . . for identification and diagnostic evaluation of students . . .

"Speech clinician . . . identifying . . . pupils with defects in language, voice articulation and fluency . . .

"Paraprofessional personnel.

"(1) Audiometrist . . . provide hearing screening . . ."

Senate File 476, Acts of the 66th G.A., 1976 Session, specifically exempts persons certified by the Department of Public Instruction as speech or hearing clinicians and employed by a school district or area education agency from the requirement of being licensed by the Board of Speech Pathology and Audiology. Therefore, they would appear to be qualified to provide limited health services in accordance with their competency to children in both public and nonpublic schools.

The second question you present asks whether diagnostic speech and hearing services may be delivered on nonpublic premises. It is the opinion of this office that such question should be answered affirmatively. Section 257.26(2), Code of Iowa, 1975, as amended by Chapter 153, Laws of the 66th General Assembly, 1975, provides in pertinent part:

"Services that are made available shall be provided on premises other than nonpublic school property, except health services which may be provided on nonpublic school premises."

It is our opinion that programs testing for speech and hearing handicaps may properly be considered within the parameters of allowable health services. In *Matter of Michael Greve v. Board of Education of Union Free School District No. 27*, New York 1973, 339 N.W.S.2d 697, speech and hearing services delivered by an itinerant teacher were held to be health services, the Court stating at page 702:

"If the services here involved cannot properly be characterized as therapeutic, they are not precluded because they are clearly 'health and welfare' services. These services, offered only to a limited group of children suffering from certain physical defects, seek to develop the ability to lead the life of a normal and healthy child. Matter of Cornelia [36 A.D.2d 576, 317 N.Y.S.2d 785, affirmed 29 N.Y.S.2d 586, 324 N.Y.S. 2d 314, 272 N.E.2d 896] supports this view. That case did not establish the distinction urged by respondent between 'corrective' and 'noncorrective' services, but rather held only that the speech therapy at issue there was a 'health and welfare' service. If the services involved here are not therapeutic, they are nonetheless health and welfare services."

After the U.S. Supreme Court decision was rendered in *Meek v. Pittinger*, 421 U.S. 349 (1975), several states have amended legislation to bring public funded services to children in nonpublic schools within allowable parameters. In Ohio, Sec. 3317.06, O.R.C., which among other things authorizes "speech and hearing diagnostic services, physician nursing, dental and optometric services and diagnostic psychological services, to be provided in the nonpublic schools", has been held constitutional. (*Wolman v. Essex*, filed July 21, 1976, D.S.C.D. Ohio).

October 13, 1976

SCHOOLS: Special Education Services; Children Resident in a Private Childrens' Boarding Home & School. Chapter 202, Code of Iowa, 1975, as amended by Chapter 153, 66th G.A., 1975 Session. If a private childrens' boarding home licensed by the State does not maintain adequate school facilities for the children of school age, requiring special education, who live there, or if having previously maintained such facilities it wishes to discontinue doing so, the school district where the boarding home is located must accept such students in its special education program. The school district may charge tuition for providing special education to nonresident children. (Haesemeyer to Swanson, Assistant Montgomery County Attorney, 10-13-76) #76-10-4

Mr. R. John Swanson, Assistant Montgomery County Attorney: Your letter of September 11, 1976, requests an opinion of the Attorney General with respect to the following:

"The Powell School is located within Red Oak Community School District, approximately one mile south of the City of Red Oak. It has been in existence, serving as a custodial home and school for retarded persons, since before the turn of the century. The patrons at the School range in age from minor children to octogenarians. It is a private institution licensed under the Department of Social Services. The license issued to The Powell School refers to '. . . a child caring license . . . as provided by Chapter 237 of the Code of Iowa.'

"Tuition and fees for the patrons of the School are paid in numerous ways. Some are paid from private funds, some from the Department of Social Services of the State of Iowa, some from various counties within the State, and a number of the students come from states other than Iowa and are paid from funds from these states.

"At the present time, the overall census of the School approximates 35. Of this number, approximately 16 are of school age between 11 and

21 years of age. Of these sixteen (16) children, none are residents of the Red Oak Community School District, nine (9) are residents of other areas in Iowa, and seven (7) are non-residents of the State of Iowa.

"The opinion which we request from your office pertains only to the patrons of the School who are of school age. They have all been classified from a mental standpoint and range from 'mild mental disabilities' to 'severely and profoundly handicapped'. The majority of the school age patrons fall into the latter classification.

"For many years The Powell School has advertised for students and has 'maintained a school' which has met the requirements of supplying basic educational needs for the limited academic abilities of the children. The School has maintained an appropriate staff for many years to fulfill these educational requirements and continues to do so.

"On July 21, 1976, Mr. Riley R. Nelson, Executive Director of The Powell School, wrote the Superintendent of the Red Oak Community School District requesting that the Board make provision to enroll approximately sixteen (16) of the children from The Powell School in the Red Oak Community School system effective in the fall of 1976. This request came as a complete surprise to the Board of Education. The school district was not geared to accommodate these children, all of whom are classified as in need of special education. A copy of said letter is attached hereto, marked Exhibit A. * * *

"It is imperative that we receive your opinion concerning the following questions:

" '1. Does the Board of Education of the Red Oak Community School District have the right, under Section 282.27 of the Code, to deny the request of The Powell School, a private institution, to enroll any of its students, all of whom require special education?

"2. Does Section 282.1 of the 1975 Code of Iowa vest in the Board of Education of the Red Oak Community School District the legal right to deny enrollment to students who are not residents of the school district, a number of whom are non-residents of Iowa?

"3. Does the Board of Education of the Red Oak Community School District have authority, under section 282.3, to exclude the admission of students who are so abnormal that regular instruction would be of no substantial benefit to them and whose presence would be detrimental to the welfare of the school?"

In response to your request, we shall attempt to answer the questions submitted in the order in which they were presented.

I

Chapter 282, Code of Iowa, 1975, was amended by Chapter 153, Laws of the 66th G.A., 1975 Session, to mandate a board of directors of each public school district to provide adequate educational provisions "for each resident child requiring special education appropriate to the nature and severity of the child's handicapping condition pursuant to rules promulgated by the department under the provisions of chapters two hundred seventy-three (273) and two hundred eighty-one (281) of the Code". §4, Chapter 153. Section 11 of Chapter 153, supra, provides:

"When a child requiring special education is living in a . . . licensed boarding home as defined in this chapter which does not maintain a school and the residence of the child requiring special education is in a school district other than the school district in which the . . . licensed

boarding home is located, the child is eligible for special education programs and services provided for children requiring special education who are residents of the school district in which the . . . boarding home is located."

While it is true, as you point out, that Chapter 282 as amended does not contain a definition of the expression "licensed boarding home" as such, §282.23, as amended, does speak of a "children's boarding home licensed by the state". Under all the circumstances and in view of the fact that The Powell School has been issued a "child caring license" by the Department of Social Services, it is our opinion that it falls within the meaning of the term "licensed boarding home" as used in §11 of Chapter 153.

In view of the plain language of §11, it is our opinion that if The Powell School does not maintain adequate school facilities for the children of school age, requiring special education, who live there, or if having previously maintained such facilities it wishes to discontinue doing so, the Red Oak Community School District must accept such students in its special education program.

II

We have closely examined the language of §282.1, Code of Iowa, 1975, and particularly the language which states:

"Persons between five and twenty-one years of age shall be of school age . . . Nonresident children and those sojourning temporarily in any school corporation may attend school therein upon such terms as the board may determine."

We find nothing in this language which would vest the school district with a right to deny enrollment to students who are not residents of the school district, including those who may even be residents of other states. We invite your attention to the language which appears in §11 of Chapter 153, Laws of the 66th G.A., supra, which states:

". . . the child is eligible for special education programs and services provided for children requiring special education who are residents of the school district in which the institution or boarding home is located. . . . No child requiring special education shall be denied special education programs and services because of a dispute over determination of residence of that child . . . For the purposes of this section, the term 'district of residence of the child' means the residence of the parent or legal guardian, or the location of the district court if the district court is the legal guardian, of the child."

The Red Oak School District may charge tuition for providing special education to nonresident children. House File 795, 66th G.A., 1976 Session.

Section 11, supra, also makes provision for counting the child requiring special education under the factor of weighted enrollment for purposes of reimbursement to the school district from state foundation aid as well as provision for the school district to make application for reimbursement from the school budget review committee for the educational costs incurred.

III

With respect to children who are so abnormal that regular instruction would be of no substantial benefit to them, §282.3 of the Code of Iowa now provides:

"The board may exclude from school children under the age of six years when in its judgment such children are not sufficiently mature to be benefited by regular instruction, or any incorrigible child or any child who in its judgment is so abnormal that regular instruction would be of no substantial benefit to him, or any child whose presence in school may be injurious to the health or morals of other pupils, or to the welfare of such school. However, *the board shall provide special education programs* and services under the provisions of chapters two hundred seventy-three (273), two hundred eighty-one (281), and four hundred forty-two (442) of the Code *for all children requiring special education.*" [emphasis added]

Thus, children may be excluded from a classroom where regular instruction is provided if in the judgment of the board such instruction would be of no substantial benefit to them. However, the board nevertheless must provide some suitable education program for each such child.

October 14, 1976

HIGHWAYS: Secondary Road Assessment Districts, Chapter 311, Code of Iowa, 1975, as amended. The County may or may not surface a secondary road with concrete pavement when petitioned for such under Chapter 311.7. (Hogan to Kelly, Jefferson County Attorney, 10-14-76) #76-10-5

Mr. Edwin F. Kelly, Jr., Jefferson County Attorney: Reference is made to your letter of August 26, 1976, in which you state the following questions:

(1) ". . . whether or not the county has authority under Chapter 311 to pave secondary roads. Throughout Chapter 311 the language refers to 'graveling, oiling, or other suitable surfacing of secondary roads' . . . .

(2) ". . . Can this Chapter be construed so as to require paving of roads where there is already gravel or some other surface at the time of petition under the Chapter? . . . ."

The words *or other suitable surfacing* are not capable of a single application in road construction. Such a phrase could include the various road surfaces of gravel, oil, asphalt, concrete pavement, etc.

Section 311.1, Code of Iowa, 1975, states:

"In order to provide for the *graveling, oiling,* or *other suitable surfacing* of secondary roads, the Board of Supervisors shall have power, on petition, to establish secondary road assessment districts." (emphasis added)

The words *graveling, oiling,* or *other suitable surfacing* are placed within the sentence to read from a lesser to a greater degree of roadwork costs; that is, *oiling* is a more expensive surface than *graveling,* and *other suitable surfacing* could include a concrete pavement surface, which is considerably more expensive than an oil-type road surface. To read *other suitable surfacing* to mean a lesser road surface or a

surface limited by the previous words would conflict with Chapters 306, 309, and 310, Code of Iowa, 1975. These Chapters allow the County Board to construct a road without limitations on types of surfacing. When statutes relate to the same subject matter or to closely allied subjects, they are said to be pari materia and must be construed, considered and examined in the light of their common purpose and intent so as to produce a harmonious body of legislation. *Rush v. Sioux City*, 1976, 240 NW2d 431, 445 (Iowa). The words *other suitable surfacing* have been used in this law since, at least, 1924, Section 4746, Code of Iowa, 1924. A revision in 1976 did not alter these words, House File 739, 66th General Assembly, 2nd Sess. (1976). Also, through the years *other suitable surfacing* has been informally interpreted by the Iowa Department of Transportation, Highway Division, formerly Iowa State Highway Commission, to include concrete pavement.

Section 311.7, Code of Iowa, 1975, as amended by House File 739, 66th General Assembly, 2nd Sess. (1976), states:

". . . petition the Board of Supervisors of their county for the improving by graveling or *other suitable surfacing* . . . When the petition has been filed, the Board of Supervisors shall review the project proposed by the petition and *may accept or reject* the proposed project." (emphasis added)

Pavement projects will normally fall within the dollar requirements of Section 309.42, Code of Iowa, 1975; wherein the Iowa Department of Transportation shall first approve such road construction work before such a construction contract is effective. The type of *suitable surfacing* will be a discretionary function of the Board of Supervisors and reviewable by the Iowa Department of Transportation. The Board and the Department might consider such factors as: (1) type of traffic, (2) number of vehicles, (3) alternate roads available for the traffic, (4) safety, (5) environment, (6) budget limitations, and (7) other public needs and so forth.

Therefore, the county does have authority under Chapter 311 to pave secondary roads. However, Chapter 311 should not be construed so as to require paving of secondary roads where there is already a *suitable* surface, *suitable* within the discretion and budget of the government. Chapter 311 assists a petitioner in upgrading his road but does not require that the surface be more than a gravel surface.

October 14, 1976

MUNICIPALITIES: Donation of City Funds—Iowa Constitution art. III, §31. A subsidy by a municipality to employers who hire employees laid off due to the closing of an industry in the city is in violation of the Iowa Constitution. (Blumberg to Smith, State Auditor, 10-14-76) #76-10-6

Honorable Lloyd R. Smith, State Auditor: We have your opinion request of August 19, 1976. You indicated that a city wishes to offer a subsidy to any local employer who employs any workers who have been recently laid off. You wish to know whether a city can legally give such a subsidy.

Article III, section 31 of the Iowa Constitution provides in pertinent part:

"[N]o public money or property shall be appropriated for local or private purposes, unless such appropriation, compensation, or claim, be allowed by two-thirds of members elected to each branch of the General Assembly."

In *Love v. City of Des Moines*, 1930, 210 Iowa 90, 101, 230 N.W. 373, it was held, in relation to this section of the Constitution:

"The body of Section 31 is emphatically prohibitive. Its prohibition operates as a limitation of power, not only upon the legislature, but upon every city council in this state."

Our office has issued several opinions on the application of this provision. In 1974 OAG 240, we held that this provision prevented a city from levying a tax under §384.12, to help fund a cultural or scientific facility owned and operated by a private group. In 1972 OAG 395 we held that a city could not donate funds to a recreation center owned, operated and otherwise funded by private citizens. A similar result was reached in 1972 OAG 403. We again held to our former opinions in an opinion issued February 6, 1975, No. 75-2-2, when we held that a municipal board of trustees could not donate money to a private hospital and clinic.

Generally, the legislature has broad discretion to determine what is a public purpose. *Dickinson v. Porter*, 1949, 240 Iowa 393, 34 N.W.2d 66. Also, there is no inflexible definition of a public or private purpose. *Carroll v. City of Cedar Falls*, 1936, 221 Iowa 277, 261 N.W. 655. It has been held that it is not within the power of a municipality, even with express statutory authority, to donate funds in aid of a private institution. 56 Am.Jur.2d *Municipal Corporations* §591; *Washington Home v. Chicago*, 156 Ill. 414, 41 N.E. 893; *Farmer v. St. Paul*, 65 Minn. 176, 67 N.W. 990; *Curtis v. Whipple*, 24 Wis. 350.

The situation of which you speak is not even a donation of funds to an institution. The funds which will go to the businesses are not for the benefit of those businesses, but rather for the benefit of those employees recently laid off due to the closing of a large industry in the city. This is for the benefit of only those private individuals. Accordingly, we are of the opinion that a subsidy from a municipality to employers who hire employees laid off due to the closing of a large industry would be in violation of art. III, sec. 31 of the Iowa Constitution.

October 15, 1976

COUNTIES AND COUNTY OFFICERS; COUNTY ATTORNEY; MOTOR VEHICLES. §321.556, Code of Iowa, 1975, as amended. A county attorney must request the District Court to determine if a person is an habitual offender when the Department of Transportation finds a driver appears to be an habitual offender of the traffic laws and certifies abstracts of conviction record to the county attorney. (Linge to Schilling, Assistant Dubuque County Attorney, 10-15-76) #76-10-7

Mr. James G. Schilling, Assistant Dubuque County Attorney: You requested an opinion of the Attorney General whether the Habitual Offender Act, section 321.556, Code of Iowa, 1975, requires a county attorney to file an action in District Court against a person when conviction record abstracts described in that Act are received from the Department of Transportation.

Section 321.556, as amended by sections 65 and 66 of House File 894, Acts of the 66th General Assembly, 1st Session, 1975, provides:

"The director of transportation shall certify three abstracts of the conviction record as maintained in the department of transportation of any person who appears to be an habitual offender, to the county attorney of the county in which such person resides, or to the attorney general if such person is not a resident of this state. The county attorney or attorney general, upon receiving the abstract from the director of transportation, *shall* file a petition against the person named therein in the district court of the state of Iowa in the county wherein such person resides or, in the case of a nonresident, in the district court in Polk county. The petition shall request the court to determine whether or not the person named therein is an habitual offender." [Emphasis added]

Section 4.1, Code of Iowa, 1975, provides in part:
"In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute: * * *

"36. Unless otherwise specifically provided by the general assembly, whenever the following words are used in a statute enacted after July 1, 1971, their meaning and application shall be:

a. The word "shall" imposes a duty.

b. The word "must" states a requirement.

c. The word "may" confers a power."

Section 321.556 was enacted after July 1, 1971, and to construe the word "shall" to impose a duty in the context of this statute does not appear repugnant nor inconsistent with the intent of General Assembly.

A county attorney, upon receiving abstracts of conviction record from the Director of the Department of Transportation, must file a petition against the person named therein with the District Court as provided in section 321.556. The county attorney retains no discretion in this matter.

October 18, 1976

COURT OF APPEALS: JUDGES: DISTRICT COURT: SUPREME COURT: ELIGIBILITY. Art. V, §§18, 1 and 10, Const. of Iowa; §684.1, Code of Iowa, 1975; SF 1092, 66th G.A., 2nd (1976). Judges of the District Court are constitutionally ineligible to the office of judge of the Iowa Court of Appeals while serving on the District Court and for 2 years thereafter. The new Iowa Court of Appeals is a five judge intermediate court, separate and distinct from the Supreme Court and its nine justices, which latter may not be increased by more than one judge at any one session. (Turner to Ray, Governor of Iowa, 10-18-76) #76-10-8

The Honorable Robert D. Ray, Governor of Iowa: As Attorney General, it is my duty and responsibility to inform you of a grave problem which has arisen by virtue of your appointments of three judges of the District Court to the new Iowa Court of Appeals created by Senate File 1092, 66th General Assembly, 2nd Session, 1976.

Article V, Constitution of Iowa, as amended in 1962 to add §18 provides in pertinent part:

"Judges of the Supreme Court and District Court shall be *ineligible* to any other office of the state while serving on said court and for two years thereafter, except that District Judges shall be eligible to the office of *Supreme Court* Judge." (Emphasis added.)

As a consequence, your appointments of District Court Judges Allbee, Carter and Oxberger are clearly void.

Nor can there be any question that the new court is part of the Supreme Court. It is not. §684.1, Code of Iowa, 1975, provides that the "supreme court shall consist of nine judges." In enacting Senate File 1092, the General Assembly did not amend §684.1 to add the five new appellate judges to the Supreme Court. And they could not have done so in any case because Art. V, §10, Constitution of Iowa, specifically provides that the General Assembly "may increase the number of judges of the supreme court; but such increase . . . shall not be [by] more than . . . one judge [of the Supreme Court] at any one session [of the General Assembly]." [1]

Thus the Iowa Court of Appeals is a new court, composed of judicial officers, seperate and distinct from the Supreme Court and its justices. Indeed, §1 of SF 1092 provides for establishment of "an *intermediate* court of appeals." Unlike the Supreme Court, which was created by the Constitution, the Iowa Court of Appeals is a creature of a statute which the legislature was authorized to enact by Article V, §1 and perhaps also by the third sentence of the 1962 amendment to Article V (§18):

"Other judicial officers shall be selected in such manner and shall have such tenure, compensation and other qualifications as may be fixed by law."

§18 recognizes three distinct classes of judicial officers: (1) Supreme Court Judges, (2) District Court Judges and (3) "Other judicial officers." Neither Supreme Court nor District Court Judges are eligible to any other office except that District Judges may become Supreme Court Judges. Other judicial officers may become District Court Judges, Appeals Court Judges or Supreme Court Justices provided they other-

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[1] While much of Art. V, §10 was superseded by the 8th Amednment to the Constitution of Iowa, in 1884, that amendment applied only to the District Court and left intact the one judge per session limitation on increasing the size of the Supreme Court.

The limitation has been scrupuously observed. The Supreme Court started with 3 judges. Art. V, §2. Additional justices, 4 through 9, were added as follows:

4th Justice 2-23-1864	Acts 1864 (10 G.A.)	Ch. 23, §1
5th Justice 2-11-1876	Acts 1876 (16 G.A.)	Ch. 7, §1
6th Justice 4-28-1894	Acts 1894 (25 G.A.)	Ch. 69, §1
7th Justice 4-15-1913	Acts 1913 (35 G.A.)	Ch. 22, §1
8th Justice 4-16-1927	Acts 1927 (42 G.A.)	Ch. 230, §1
9th Justice 2-13-1929	Acts 1929 (43 G.A.)	Ch. 260, §1

See also "Historical Development of the Judicial System in Iowa," by Justice Charles F. Wennerstrom of the Iowa Supreme Court, 40 Iowa Code Annotated 73, 105, West Publishing Co., 1950 Edition. A copy may be found in the office of Iowa Code Editor Wayne A. Faupel.

wise qualify therefor. But Supreme Court Justices and District Court Judges may not be eligible to serve on either the District Court or the Iowa Court of Appeals until two years after completion of their service.

Obviously, it is necessary that this problem be resolved at the earliest possible time. It would be tragic if these three judges were to be removed at a later date, after assuming their duties, and find that other judges had been appointed to fill their offices on the District Court.

October 26, 1976

MOTOR VEHICLES: Licenses Issued—Section 321.189, Code of Iowa, 1975. The issuance of a license to operate motor vehicles may not be denied a person solely on the ground that he refuses to have his photograph taken, when that refusal is based upon his religious beliefs. (Szymczuk to Preisser, State Director, Department of Transportation, 10-26-76) #76-10-9

Mr. Victor Preisser, State Director, Department of Transportation: You have requested an opinion as to whether an individual may be denied a driver's license because he refuses for religious reasons to have his photograph taken. Your question arises due to the recent amendment to §321.189, Code of Iowa, 1975, contained in S.F. 1145, §5. As amended, §321.189 reads in pertinent part as follows:

"The department shall upon payment of the required fee, issue to every applicant qualifying therefor an operator's or chauffeur's license as applied for, which license shall bear thereon a distinguishing number assigned to the licensee, the full name, date of birth, occupation, sex, residence address, a colored photograph and a brief description of the licensee, and the usual signature of the licensee . . . ."

In answering your inquiry, we must look first to what both the United States and Iowa Constitutions contain regarding the question of religion. The United States Constitution states as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Constitution, Amendment 1.

The Iowa Constitution states as follows:

"The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Iowa Constitution, Article I, §3.

"No religious test shall be required as a qualification for any office, or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion . . . ." Iowa Constitution, Article I, §4.

The First Amendment to the United States Constitution and Article I, §3 of the Iowa Constitution embrace two concepts, freedom to believe and freedom to act. "The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society . . . In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell v. Connecticut*, 1939, 310 U.S. 296, 303-304.

In reaching an answer to your question, we must determine whether the state in exercising its power to regulate the issuance of driver's

licenses by requiring the inclusion of a photograph, will unduly infringe upon the applicant's religious freedom, should an applicant's religious beliefs prohibit having his photograph taken. In making our determination, we have been guided principally by three opinions of the Supreme Court of the United States. The first, *Sherbert v. Verner*, 1963, 374 U.S. 398, held that where a Seventh-Day Adventist was discharged by her employer because she refused to work on Saturday, the Sabbath Day of her faith, and was unable to obtain other employment because of her refusal to work on Saturday, and was refused employment compensation because she would not accept suitable work requiring Saturday work when offered, such action constituted an unconstitutional burden on the free exercise of her religion. The second case, *Wisconsin v. Yoder*, 1972, 406 U.S. 205, reversed the convictions of members of the Old Order Amish religion and the Conservative Amish Mennonite Church for violation of Wisconsin's compulsory school attendance law, which required attendance until age sixteen. The Court held that the application of the law to respondents violated their rights under the Free Exercise Clause of the First Amendment and that the State's interest in universal education did not, in this instance, outweigh the protection afforded respondents of the free exercise of their religious beliefs. The State had failed to show with sufficient particularity how its interest in compulsory education would be adversely affected by granting an exception to the Amish. The third case, *Torcaso v. Watkins*, 1961, 367 U.S. 488, held unconstitutional Maryland's requirement that state officers declare a belief in the existence of God.

An initial problem to be faced in approaching any question regarding state regulatory power versus individual religious freedom is what religious beliefs or practices are sufficient to demand constitutional protection. Some general guidelines do exist:

"In evaluating those claims we must be careful to determine whether the Amish faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses." *Wisconsin v. Yoder*, 1971, 406 U.S. 205, 215-216.

For the purpose of this opinion, we shall assume that a religious belief has been asserted which is sufficient to qualify for constitutional protection. Given this premise, there remain two determinations which must be made: First, does the state requirement that all driver's licenses shall contain a photograph of the licensee infringe upon the prospective licensee's constitutional right of free exercise?; Second, if infringement exists, is it justified by a compelling state interest in the regulation of a

subject within the State's constitutional power to regulate? See, *Sherbert v. Verner*, 1962, 374 U.S. 398, 403.

In holding in *Sherbert* that the state statute infringed on appellant's free exercise of her religion, the Court stated:

"For '(i)f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' *Braunfield v. Brown, supra* (366 U.S. at 607). Here not only is it apparent appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand . . . nor may the South Carolina court's construction of the statute be saved from constitutional infirmity, on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege'." *Sherbert, supra* at 404.

Application of the above reasoning to the present question compels the conclusion that the photograph requirement would constitute an infringement upon the prospective licensee's free exercise of his religion, albeit an indirect infringement. Ineligibility for a driver's license would derive solely from the practice of the applicant's religion, forcing such applicant to choose between following the precepts of his religion and forfeiting a license, on the one hand, and abandoning one of the precepts of his religion in order to obtain a license, on the other hand. It is clear that a motor vehicle operator's license, its issuance and retention, involves sufficiently important interests of the licensee that issuance or suspension must satisfy relevant constitutional limitations. *Bell v. Burson*, 1971, 402 U.S. 535. It is immaterial whether the license is considered a "right" or a "privilege". *Sherbert, supra; Bell, supra.* Nor can it be argued that a prospective licensee would not be compelled to believe or disbelieve merely because he is not being compelled to apply for a license to drive. In *Torcaso v. Watkins*, the Court held that "(t)he fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Torcaso v. Watkins*, 1960, 364 U.S. 488, 495-496.

The second point of inquiry is whether there is a compelling state interest to justify the infringement of the First Amendment right. The test to be applied has been stated as follows:

"It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses endangering paramount interests, give occasion for permissible limitation,' *Thomas v. Collins*, 323 U.S. 516, 530." *Sherbert v. Verner*, 1962, 374 U.S. 398, 406.

Although the State has a clear interest in regulating the licensing of those who drive on its highways and to provide for uniform laws in that regard, we believe the State would be hard pressed to justify the denial of driving privileges to an individual, otherwise qualified, who for religious reasons refuses to have his photograph taken. Submission to a photograph would not seem to directly relate to an individual's driving

ability or responsibility, nor would the absence of a photograph on a license seem to pose a threat to public safety, peace or order. Such a threat has been held sufficient to justify state regulation of religiously based actions. *Sherbert, supra* at 403 and citations. The State would seem to have an even greater burden in justifying denial of a driver's license for lack of a photograph due to religious reasons than has been set forth by the United States Supreme Court in light of Article I, §4 of its own Constitution, set forth above on page one. Whether one considers a license to drive to be a privilege or a right, the Iowa Constitution clearly states that a person shall not be deprived thereof in consequence of his opinions on the subject of religion.

Therefore, it is our opinion that the issuance of a driver's license may not be denied a person solely on the ground that he refuses to have his photograph taken, when that refusal is based upon his religious beliefs.

October 20, 1976

ELECTIONS: Ballot, order of arranging candidates names. §§43.73, as amended by §7, H.F. 1011, 66th G.A., 1976 and §49.37, as amended by §69, Chapter 81, 66th G.A., 1975. A county commissioner of elections is free to arrange the party and non-party political organization tickets and names of candidates nominated by petition in such order as he sees fit so long as the officers within each party ticket are in the same order and so long as the political parties, as defined, appear above or to the left of any non-party political organizations. (Haesemeyer to Synhorst, Secretary of State, 10-20-76) #76-10-10

The Honorable Melvin D. Synhorst, Secretary of State: You have requested an opinion of the Attorney General with respect to the arrangement of the ballot in Dubuque County for the forthcoming General Election on November 2, 1976.

Pursuant to §43.73, Code of Iowa, 1975, you, in your capacity as State Commissioner of Elections, on September 7, 1976, sent a Certification of Nominees and Party Tickets to the various county auditors in their respective capacities as county commissioners of elections. In your certification, you listed the various parties, non-party organizations and candidates in the following order:

Republican party
Democratic party
Communist party (nominated by petition)
Libertarian party (nominated by petition)
American Party of Iowa (nominated by convention)
Socialist Labor Party (nominated by petition)
U.S. Labor party (nominated by petition)
Socialist Workers' party (nominated by petition)
Socialist Party USA (nominated by petition)
Nominated by Petition (no party)

The Dubuque County Auditor has altered this order to the extent that the last item, "Nominated by Petition (no party)", has been removed from last place on the ballot and placed directly under the Democratic party. The arrangement of the names of the various candidates within each of the tickets is undisturbed.

Sections 43.73, as amended by §7, House File 1011, 66th G.A., 1976 Session and §49.37, as amended by §69, Chapter 81, 66th G.A., 1975 Session, provide respectively and in relevant part:

"State commissioner to certify nominees. Not less than ffity-five days before the general election the state commissioner shall certify to each commissioner, under separate party headings, the name of each person nominated as shown by the official canvass made by the executive council, or as certified to him by the proper persons when any person has been nominated by a convention or by a party committee, or by petition, the office to which he is nominated, and the order in which the tickets of the several political parties shall appear on the official ballot. * * *"

"Columns or rows to be separated. * * *"

"2. The commissioner shall arrange the ballot in conformity with the certificate issued by the state commissioner under section 43.73, in that the names of the respective candidates on each political party ticket shall appear in the order they appeared on the certificate, above or to the left of the non-party political organization tickets."

It is apparent from the foregoing that the county commissioner of elections is free to arrange the ballot in any manner he sees fit so long as such arrangement conforms to the certified ballot in these two respects:

1. The names of the respective candidates for each political party must appear in the same order, and

2. They must appear above (on a voting machine ballot) or to the left of (on a written ballot with vertical columns) the non-political party organizations.

The term "political party" is statutorily defined as §43.2 as follows:

"'Political party' defined. The term 'political party' shall mean a party which, at the last preceding general election, cast for its candidate for president of the United States or for governor, as the case may be, at least two percent of the total vote cast for all candidates for that office at that election. It shall be the responsibility of the state commissioner to determine whether any organization claiming to be a political party qualifies as such under the foregoing definition. * * *"

By the terms of this statutory definition, there are only two political parties on the ballot, the Republican Party and the Democratic Party. The names of the candidates for those two parties are in the same order on the Dubuque County ballot as they appeared on the certificate of the State Commissioner of Elections. In other words, first are the presidential and vice-presidential candidates, then the United States representative candidates, then the state senator candidates, etc., for each of the two political parties. The American Party of Iowa, which nominated its candidates by convention, is the only non-party political organization having a ticket on the ballot. §44.1. All of the rest of the candidates were nominated by petition. Even though some of them call themselves parties, they are not in fact parties within the statutory definition.

The Dubuque ballot does have the political parties (Republican and Democrat) above or to the left of the one non-party political organization ticket (the American Party of Iowa) and therefore, the Dubuque County commissioner of elections is in compliance with §49.37. There is nothing in the Code which addresses the question of the order in which the candidates nominated by petition must be placed on the ballot and we must therefore conclude that each county commissioner of elections is free to place them anywhere he wants so long as any non-party political organization tickets are somewhere below or to the right of the political party tickets.

Accordingly, it is our opinion that the Dubuque County ballot which you furnished us is in compliance with statutory requirements.

October 1, 1976

ELECTIONS: Ballot, vacancy in nomination. §43.78, Code of Iowa, 1975, as amended by Chapter 81, §25; House File 1033, §1 and House File 1011, §§8 and 76, 66th G.A., 1976; §43.97, Code of Iowa, 1975. A vacancy on the general election ballot for an office to be filled by the voters of an entire county may only be filled by a reconvened county convention and not by the county central committee. (Haesemeyer to Bradley, Keokuk County Attorney, 10-1-76) #76-10-11

Glenn M. Bradley, Keokuk County Attorney: Reference is made to your letter of September 20, 1976, in which you request an opinion of the Attorney General with respect to a question presented to you by the Keokuk County Auditor. In his letter to you, the County Auditor states:

"The Democrats had no candidate for Board of Supervisors and after the Primary Election a Notice was sent to the Democratic Central Committee advising them that a meeting was called for June 30, 1976, for the purpose of nominating a person to fill vacancy on the General Election ballot for Board of Supervisors. The Auditor read the Notice as being correct. The meeting was held and the Committee nominated Francis Devine as a candidate for the office. The Democratic Central Committee certified this nomination to the Keokuk County Auditor and was accepted as being correct. A letter was received September 9, 1976, from George Swearingen, Chairperson, Keokunk County Republican Central Committee, advising the Auditor of the new law and objecting to the legal insufficiency of the certificate of nomination of Mr. Devine. In checking the Iowa Code the Auditor learned that the name of a candidate may not appear on the ballot unless he is appointed by a county convention fifty-five days prior to the General Election. This year the deadline was September 8th. Mr. Devine stated he was not notified that his nomination was invalid until September 10th."

Section 43.78, Code of Iowa, 1975, as amended by Chapter 81, §25; House File 1033, §1 and House File 1011, §§8 and 76, 66th G.A., provides in relevant part as follows:

"1. A vacancy on the general election ballot may be filled by the political party in whose ticket the vacancy exists, as follows: * * *

"d. For any office to be filled by the voters of an entire county, by the party's county convention, which may be reconvened by the county party chairperson if the vacancy occurs after the convention has been held or too late to be filled at the time it is held. * * *"

Section 43.97 provides in part as follows:

"The said county convention shall:

"1. Make nominations to fill vacancies on the general election ballot as provided by law. * * *"

The language of these statutes is plain, clear and free of ambiguity. It is a reconvened county convention and not the county central committee which has the authority to fill a vacancy on the general election ballot for board of supervisors. The fact as you state that "the Auditor read the Notice as being correct" is irrelevant. It is not the responsibility of the Auditor to make sure that political parties follow the statutory procedures.

The situation you present is not that dissimilar from a situation we had to consider in connection with an earlier opinion of the Attorney General, O.A.G. October 6, 1975, Haesemeyer to Connors, State Representative. There, a candidate for the Des Moines City Council relying on erroneous advice of the Polk County Elections Office as to the number of signatures required on his nominating papers filed papers bearing more signatures than needed according to the advice received but less than the statute required. It was our opinion in that case that the statutory requirement with respect to the number of signatures was mandatory, that the circumstances of reliance on erroneous advice by public officials was irrelevant and that it was not possible to add signatures to nominating papers once they had been filed. This dispute eventually ended up in the courts and in an opinion handed down earlier this year, the Polk County District Court agreed with our opinion that the candidate who had insufficient signatures on his nominating papers should not have been on the ballot. In the matter of the contest of the municipal primary election and general election filed by George Wingert, contestant against Tim Urban, incumbent, Polk County No. CE5-2463. The decision of the Polk County District Court has been appealed to the Iowa Supreme Court and it is expected that it will be heard some time next month.

Accordingly, it is our opinion that the name of Francis Devine should not be placed on the November election ballot as a Democratic candidate for supervisor.

November 9, 1976

MUNICIPALITIES: Board of Adjustment—§§364.3(3), 414.14 and 414.23, Code of Iowa, 1975. A city may pass an ordinance setting the vote requirements necessary for passage of any matter above the minimum set by §414.14. (Blumberg to Holschlag, Chickasaw County Attorney, 11-9-76) #76-11-1

Mr. Frank H. Holschlag, Chickasaw County Attorney: We have received your opinion request of August 27, 1976, regarding a zoning board of adjustment. You indicated that a city in your county availed itself of §414.23 of the Code and increased the size of its planning and zoning commission and board of adjustment accordingly by adding two members to each body. The board of adjustment originally had five members, and three constituted a quorum. When the membership was raised to seven, the city amended the applicable ordinance making four a quorum. At the same time it adopted another ordinance requiring a concurring vote of four of the board's members to reverse an order, requirement, or decision of an administrative officer, or to decide in favor of the applicant, or to effect any variation in the application of the zoning ordinances.

That board of adjustment met to consider an appeal from the ruling of an administrative officer. Five members of the board were present. Three voted in favor of overruling the officer, one voted against, and one abstained. The city determined that the three concurring votes were not sufficient to overrule the officer in light of the ordinance. You therefore ask:

"1. When a City avails itself of Section 414.23 and increases its Board of Adjustment membership five to seven, does Iowa Code Section 414.14 still apply?

"2. Does Section 364.3(3) of the Code authorize the City to set standards and requirements that are higher and more stringent than those imposed by State law when such relate to the conduct of a quasi-appeal Hearing Board?"

Section 414.23, 1975 Code of Iowa, reads in pertinent part:

"The powers granted by this chapter may be extended by ordinance by any city to the unincorporated area up to two miles beyond the limits of such city, except for those areas within a county where a county zoning ordinance exists. The ordinance shall describe in general terms the area to be included. The exemption from regulation granted by section 358A.2 to property used for agricultural purposes shall apply to such unincorporated area. If the limits of any such city are at any place less than four miles distant from the limits of any other city which has extended or thereafter extends its zoning jurisdiction under this section, then at such time the powers herein granted shall extend to a line equidistant between the limits of said cities.

"A municipality, during the time its zoning jurisdiction is extended under this section, shall increase the size of its planning and zoning commission and its board of adjustment each by two members. The additional members shall be residents of the area outside the city limits over which the zoning jurisdiction is extended. They shall be appointed by the board of supervisors of the county in which such extended area is located and for the same terms of office and have the same rights, privileges, and duties as other members of each of said bodies."

Section 414.14 of the Code provides:

"The concurring vote of three members of the board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance."

This section dates back to the Code of 1924. Until §414.23 was added by §2, Ch. 1192, Acts of the 63rd G.A. (1970), the membership of a board of adjustment was five. Therefore, the three vote requirement in §414.14 was a majority of that body. However, with the increase in membership to seven, a vote of three if all seven members were there would not be a majority.

Generally, unless specified otherwise, a majority of a quorum is sufficient to pass any measure. *Thurston v. Huston*, 1904, 123 Iowa 157, 98 N.W. 637; *Cowles v. Independent School Dist.*, 1927, 204 Iowa 689, 216 N.W. 83; 1970 OAG 42; OAG No. 75-7-4; and, OAG No. 76-9-7. Thus, under the common law rule, three, being a majority of five, the vote of the board of adjustment would have been sufficient to override the officer. However, we are faced with an ordinance that provides for a higher concurring vote. Thus, your second question.

Section 364.3(3) of the Code provides:

"A city may not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise."

Nowhere in that chapter or any other provision of the City Code of Iowa is this section defined or limited. Section 414.14 sets a minimum number of votes, not a maximum. In other words, it states that an officer cannot be overruled unless *at least* three members of the board concur. Because this is a minimum standard, and there is nothing else which sets a maximum number of votes for this type of proceeding, we know of no reason why home rule should not permit a city to require a greater number of votes than the minimum set by statute.

Accordingly, we are of the opinion that where a board of adjustments' membership is raised from five to seven, a city may adopt an ordinance setting the vote requirements necessary for passage of any matter above the minimum set by §414.14.

November 9, 1976

COUNTIES AND COUNTY OFFICERS: Incompatibility — An incompatibility of positions does not exist where one partner is county attorney and another is a city or school district attorney. (Blumberg to Anderson, Howard County Attorney, 11-9-76) #76-11-2

Mark B. Anderson, Howard County Attorney: We have received your opinion request of October 8, 1976, regarding incompatibility of positions. Under your facts, you, as county attorney, are in partnership with someone who is a city attorney and also represents school districts. You ask whether this constitutes an incompatibility of positions.

In a prior opinion, Blumberg to Locher, No. 76-7-8, a copy of which you have, we held that an individual could not be both county attorney and city attorney at the same time. We assume that you are asking whether that opinion is dispositive of your fact situation. The answer is no. Incompatibility of positions applies where *one* person occupies two or more positions that are incompatible with one another. See, *State ex rel. Le Buhn v. White*, 1965, 257 Iowa 660, 133 N.W.2d 903; *Crawford v. Anderson*, 1912, 155 Iowa 271, 273, 136 N.W. 128. Although a conflict might arise within your firm because of the positions you and your partne rhold, there is nothing placing your facts within the proscription of incompatibility of positions.

Accordingly, we are of the opinion that an incompatibility of positions does not exist where one partner is county attorney and another is a city or school district attorney.

November 9, 1976

POLITICAL SUBDIVISIONS: Community Action Agencies — 42 U.S.C. 2790 et seq.; §97B.41, Code of Iowa, 1975. A community action agency pursuant to 42 U.S.C. 2790 is not a political subdivision. It may be an instrumentality or agency of a governmental unit depending upon the facts. (Blumberg to Brandt, State Representative, et al., 11-9-76) #76-11-3

Honorable Diane Brandt, Honorable Mary O'Halloran, Honorable Peter Middleton, State Representatives; Honorable Willard Hansen, Honorable Fred Nolting, State Senators; Honorable Henry Wulff, State Representative: We have received your opinion request regarding a definition of a

political subdivision. You are concerned with Operation Threshold, a local community action agency for Black Hawk and Buchanan Counties. Specifically, you are concerned about a ruling from the Iowa Employment Security Commission that as of January 1, 1977, Operation Threshold would be responsible for 100% of all unemployment insurance claims against the agency pursuant to §97B.41 of the Code. Prior to this, your agency has been contributing on a percentage basis. You believe that the effect of this change would place your agency in the same status of political subdivisions. Although you ask for a definition of a political subdivision, the issue is actually whether your agency is a political subdivision or an agency or instrumentality of a political subdivision.

Community Action Agencies (CAA), like Operation Threshold, were established pursuant to Title II of the Economic Opportunity Act of 1964, Public Law 88-452, 78 Stat. 508 (1964), (42 U.S.C. 2790 et seq.) as amended in 1967, 1970 by the Green Amendment, and 1975 by Public Law 93-644. Section 210(a) of the Act provides that a CAA shall be "a State or political subdivision of a State (having elected or duly appointed governing officials), or a combination of such political subdivisions, or a public or private nonprofit agency or organization which has been designated by a State or such a political subdivision . . . ." Subsection (d) provides that a public or private nonprofit agency may be designated as a CAA in lieu of one that is the State or a political subdivision. Section 211 sets forth the make up of the agency's board. It is the same whether a State or political subdivision, or a public or private nonprofit agency, and consists of one-third being elected public officials, one-third as representatives of the poor, and one-third as members of business, industry, religious organizations and other such groups.

Section 201 states the purposes of the Act, which include (1) the strengthening of community capabilities for planning and coordinating Federal, State and other assistance related to the elimination of poverty; (2) the better organization of a range of services related to the needs of the poor; (3) the greater use of new types of services; (4) the development and implementation of all programs and projects designed to serve the poor or low-income areas; and, (5) the broadening of the resource base of programs directed to the elimination of poverty. Pursuant to §212(b) a CAA shall have at least the following functions: planning for and evaluating the program as to the problems and causes of poverty; encouraging agencies active in the CAA program to plan for, secure and administer assistance; undertaking actions to improve efforts to attack poverty; initiating and sponsoring projects responsive to the needs of the poor; establishing procedures by which the poor and other residents will be able to influence the character of programs; and, joining with and encouraging business, labor and the like to undertake, with public officials and other agencies, activities in support of a community action program. Finally, §221(a) provides for financial assistance to CAAs for the planning, conduct, administration and evaluation of community action programs and components. The components may involve activities designed to assist participants to secure and retain employment, to attain adequate education, to make better use of income, to provide and maintain adequate housing, to provide family planning, to obtain services for the prevention of drug and alcohol abuse, to obtain emergency assistance; to help solve personal and family problems, to achieve

greater participation in community affairs, and the like. Operation Threshold is financed by federal funds through the Community Services Administration which replaced the Office of Economic Opportunity.

The term "political subdivision" is defined in 72 C.J.S. *Political Subdivision* 223 (1951):

"The term is broad and comprehensive and denotes any division of a state made by the proper authorities thereof, acting within their constitutional powers, for the purpose of carrying out those functions of the state which by long usage and inherent necessities of government have always been regarded as public; a division of a parent entity for some governmental purpose. The term may be used in more than one sense, and it may designate a true governmental subdivision such as a county, township, etc., or it may have a broader meaning, denoting any subdivision of the state created for a public purpose although authorized to exercise a portion of the sovereign power of the state only to a limited degree.

"Broadly speaking, a political subdivision of a state is a subdivision thereof to which has been delegated certain functions of local government."

In *Fair v. School Employees Retirement System of Ohio*, 1975, 44 Ohio App.2d 115, 335 N.E.2d 868, the issue was whether the Retirement System was a political subdivision. The court recognized that many statutes define "political subdivision", and although such a definition only has application to that particular statute or chapter, it is still helpful in determining what is generally regarded as a political subdivision. After quoting from C.J.S., as above, the court held (335 N.E. 2d at 871-872):

"In 2 Bouv.Law Dict., Rowie's Third Revision, the word 'political' is defined simply as: 'Pertaining to policy, or the administration of the government. * * *' The word has broad and varying meaning depending upon the context in which it is used. In the context with which we are concerned, the word 'political' is essentially synonymous with 'governmental.' The word 'subdivision' means simply a part of a larger whole into which the whole has been divided. Accordingly, a subdivision of the state is a part of the state rather than the entire state. A political subdivision then is a governmental part of the state.

"A political subdivision of the state is a geographic or territorial division of the state rather than a functional division of the state. Almost invariably the statutory definitions of 'political subdivision' involve a geographic area of the state which has been empowered to perform certain functions of local government within such geographic area. Accordingly, a 'political subdivision of the state' is a geographic or territorial portion of the state to which there has been delegated certain local governmental functions to perform within such geographic area."

The court then held the System to be an instrumentality of the state because it exercised its powers throughout the state and not solely within a geographical subdivision of the state.

In determining whether a Levee District was a political subdivision of a state, it was held in *Commander v. Board of Com'rs of Buras Levee Dist.*, 1942, 202 La. 325, 11 So. 2d 605, 607:

"Broadly speaking, a political subdivision of a state is a subdivision thereof to which has been delegated certain functions of local government. 49 C.J., page 1077. Thus it has been held that a drainage district is a local subdivision of the state, created for the purpose of administering therein certain functions of local government. . . .

. . .

"In Standard Oil Co. v. National Surety Co., 143 Miss. 841, 107 So. 559, the Supreme Court of Mississippi held that a drainage district is a political subdivision of the state which created it. The holding of the court was announced in the following language, appearing on page 560 of the opinion in 107 So.: 'A political subdivision of a state is a subdivision thereof to which has been delegated certain functions of local government. Drainage districts are created for the purpose of draining and reclaiming wet and overflowed land, and of conserving the public health and convenience, for the accomplishment of which they are vested with the necessary governmental powers, and, consequently, they are political subdivisions of the state by which they are created.' . . .

. . .

"It would therefore appear that the Buras Levee District was created by the Legislature for the purpose of constructing and maintaining the levees within its territorial jurisdiction for the accomplishment of which it is invested with wide governmental powers. Consequently, it is a political subdivision of the State as defined in Standard Oil Company v. National Surety Company and the other cases hereinabove referred to."

The Texas Court of Civil Appeals was faced with a similar question in *Bolen v. Board of Firemen, Etc.*, 308 S.W.2d 904, 906 (C.C.A. Tex. 1958), and stated:

"The Board just simply is not a political corporation nor a political subdivision of the State. It does not have any of the attributes of a political subdivision. A political subdivision contemplates: geographical area and boundaries, public elections, public officials, taxing power and a general public purpose or benefit. The Board has none of these attributes."

In *Arkansas State Highway Commission v. Clayton*, 1956, 226 Ark. 712, 292 S.W.2d 77, it was held:

"Moreover, political subdivisions have been defined as that 'they embrace a certain territory and its inhabitants, organized for the public advantage and not in the interest of particular individuals or classes; that their chief design is the exercise of governmental functions; and that to the electors residing within each is to some extent committed the power of local government, to be wielded either mediately or immediately within their territory for the peculiar benefit of the people there residing.' Allison v. Corker, 67 N.J.L. 596, 52 A. 362, 365, 60 L.R.A. 564."

These two cases were cited with approval in *Maryland-Nat. Cap. P. & P. Com'n v. Montgomery Cty.*, 1972, 267 Md. 82, 296 A.2d 692, 698. The Maryland Court also cited to the fact that the following "agencies" were not political subdivisions: State Highway Commission, *State ex rel. State Highway Commission v. Hudspeth*, 297, S.W.2d 510 (Mo. 1957); Housing Authority, *Mount Vernon Housing Authority v. American Motorists Ins. Co.*, 1964, 21 A.D.2d 788, 250 N.Y.S.2d 479; Board of Regents, *State ex rel. Miller v. State Board of Education*, 1935, 56 Idaho 210, 52 P.2d 141; City Ward, *Gibbany v. Ford*, 1924, 29 N.M. 621, 225 P. 577; Board of Public Instruction, *Roberts v. Board of Public Instruction for Broward County, Fla.*, 112 F.2d 459 (5th Cir. 1940); County Hospital Authority, *Richmond County Hospital Authority v. McClain*, 1965, 112 Ga. App. 209, 144 S.E.2d 565.

Finally, in *State ex rel. Maisano v. Mitchell*, 1967, 155 Conn. 256, 231 A.2d 539, 542, it was held:

" 'The word "state" means "a body of people occupying a definite territory and politically organized under one government." McLaughlin

v. Poucher, 127 Conn. 441, 447, 17 A.2d 767; see also Terry v. Olcutt, 4 Conn. 442, 445. On this theory, the subdivision of a state would be a body of people less in number than the total number in the state, politically organized, and occupying a part of the territorial area of the state—hence a city, borough or town.' Norwalk v. Daniele, 143 Conn. 85, 88, 119 A.2d 732. '"The term 'political subdivision' is broad and comprehensive and denotes any division of the State made by the proper authorities thereof, acting within their constitutional powers, for the purpose of carrying out a portion of those functions of the State which by long usuage and the inherent necessities of government have always been regarded as public."'" [citation omitted]

See also, *McClanahan v. Cochise College*, 1975, 25 Ariz. 13, 540 P.2d 744, 747-748; *Kansas City Area Transportation Auth. v. Ashley*, 478 S.W.2d 323, 324 (Mo. 1972); *Conner v. Herd*, 442 S.W.2d 501, 502 (Mo. 1969); *Sarisohn v. Dennison*, 1967, 53 Misc. 2d 1081, 281 N.Y.S.2d 475, 478; *NLRB v. Natural Gas Utility District*, 1971, 402 U.S. 600, 29 L.Ed.2d 206, 91 S.Ct. 1746; *NLRB v. Natchez Trace Electric Power Association*, 476 F.2d 1042 (5th Cir. 1973).

From the above discussion it is apparent that Operation Threshold and similar CAAs are not political subdivisions since they lack most of the requisites. This is not to say that they are not instrumentalities of political subdivisions. Whether or not Operation Threshold is such an instrumentality is a fact question. We cannot nor will we make a determination whether Operation Threshold is such an instrumentality. The most we can do is indicate what the law is in this area.

In order to determine what is an instrumentality or agency of a government each case must be determined by its own set of facts. This was so stated in *Unemployment Comp. Com'n v. Wachovia Bank & T. Co.*, 1939, 215 N.C. 491, 2 S.E.2d 592, 595-596:

"Perhaps it is impossible to formulate a satisfactory definition of the term 'instrumentalities of government' which would be applicable in all cases. At least it is unwise to undertake to do so. Each case must be determined as it arises. Generally speaking, however, it may be said that any commission, bureau, corporation or other organization, public in nature, created and wholly owned by the government for the convenient prosecution of its governmental functions, existing at the will of its creator, is an instrumentality of government; and that any state created corporation or association, privately owned, and organized and doing business primarily for profit, which is granted certain incidental duties or privileges by the Federal Government is not. The enjoyment of a privilege conferred by either a national or a state government upon an individual, association or corporation operating primarily for profit in a private enterprise, even though to promote some governmental policy, does not convert such individual, partnership or corporation into an instrumentality of government. . . ."

. . .

"In the border line cases in which it does not clearly appear that the agency is or is not an instrumentality of government important factors, among others, which must be considered in determining that such agency is an instrument of government are: (1) It was created by the government; (2) it is wholly owned by the government; (3) it is not operated for profit; (4) it is primarily engaged in the performance of some essential governmental function; (5) the proposed tax will impose an economic burden upon the government, or it serves to materially impair the usefulness or efficiency of the agency or to materially restrict it in

the performance of its duties. While perhaps, no one of these factors is sufficient, and the presence of all is not required, to constitute any given agency an instrumentality of government, the presence or absence of either requires serious consideration. If the tax in fact is to be paid out of government money, thus placing an economic burden on the government, or if it constitutes an undue interference with the agency in the performance of its governmental functions, the agency may usually be classed as a governmental instrumentality."

A vast number of cases have determined what is or is not an instrumentality or agency of some form of government. In *Stanley v. Southwestern Comm. Col. Merged Area, Etc.*, 184 N.W.2d 29 (Iowa 1971), it was argued that a community college merged area was an agency of the state since it was under the direct regulation and control of the state through the State Board of Public Instruction. This contention was rejected on the basis that the enabling legislation created a separate and independent public corporation — a body politic with the authority to sue and be sued, hold property, and exercise other powers of public corporations. In *State v. Des Moines County*, 1967, 260 Iowa 341, 149 N.W.2d 288, a case concerning §97B.41 of the Code, it was held that a drainage district is a political subdivision of a county — "a legally indentifiable political instrumentality." They were held to come within the classification of a political subdivision or instrumentality of the state, or one of its political subdivisions or instrumentalities.

It was held in *Falls City Brewing Co. v. Reeves*, 40 F. Supp. 35, 39 (W.D. Ky. 1941), as to whether a military post exchange was an instrumentality of the government:

"'Instrumentality' is defined by Webster as 'a condition of being an instrument; subordinate or auxiliary agency; agency of anything as means to an end.' The same word is defined in 32 Corpus Juris, page 947, as 'anything used as a means or an agency; that which is instrumental; the quality or condition of being instrumental.' It is clear from the facts in this case that a Post Exchange is an integral part of an army organization and is an essential factor in military life. They are not purely voluntary organizations, as is contended by the State in this case, but they are set up, organized and operated pursuant to military authority. It is the duty of the commanding officer of the post to establish and maintain a post exchange whenever there is a need for it; the duties of the post exchange officer are his official duties as an army officer, and he receives entire compensation for the performances of these duties in the salary received by him from the United States Government as an army officer. . . . The Post Exchange occupies a building constructed and maintained by the Federal Government and equipped with federal funds. . . . Some expenditures for this purpose come by way of direct appropriations by the United States Congress, but a large portion can be attributed to the proceeds that are made available by the operations of the Post Exchange, which proceeds inure to the benefit of the Government, thereby relieving the Government from additional appropriations to this extent."

The exchange was thus held to be an instrumentality of the United States.

Courts look to different properties when determining whether something is an agency or instrumentality of a governmental unit. The fact that the governing body of the organization is selected by the governing body of the governmental unit or that the title to the organization's property vests in the governmental unit has been held to constitute an agency or instrumentality of that governmental unit. *State v. Morrow*,

1964, 276 Ala. 385, 162 So.2d 480; *Miller v. Board of Com'rs*, 1942, 199 La. 1071, 7 So.2d 355; *First Agricultural National Bank v. State Tax Com'n*, 1967, 353 Mass. 172, 229 N.E.2d 245; *Bergen County Sewer Authority v. Hackensack Meadowlands Development Com'n*, 1974, 129 N.J. Super. 519, 324 A.2d 108. See, *Contra, Cuilla v. State*, 1948, 191 Misc. 528, 77 N.Y.S.2d 545; *Massachusetts Turnpike Authority v. Commonwealth*, 1964, 347 Mass. 552, 199 N.E.2d 186; *Boston Elevated Ry. Co. v. Welch*, 25 F.Supp. 809 (D. Mass. 1939); *L. I. Waldman & Co. v. Power Authority of New York*, 1959, 18 Misc. 2d 886, 190 N.Y.S. 2d 88.

It has also been held that an organization which provides facilities in furtherance of a governmental goal and is used by a government in lieu of its own agencies to carry out a governmental program is an instrumentality of that government. *United States v. Brown*, 384 F.Supp. 1151 (E.D. Mich. 1974); *Mallory v. White*, 8 F.Supp. 989 (D. Mass. 1934). An office exercising governmental powers pursuant to statute has been held to be such an instrumentality. *County of Ulster v. CSEA Unit of Ulster Co. Sh. Dept.*, 1971, 37 A.D.2d 437, 326 N.Y.S.2d 706. The fact that a bank acts as a depository for the United States Treasury and as fiscal and monetary agents of the government is determinative of its status as a governmental agency. *Federal Res. Bk. of Boston v. Commissioner of Corp., Etc.*, 382 F.Supp. 207 (D. Mass. 1974).

Some courts have stated that the "authority to act with the sanction of government behind it determines whether or not a governmental agency exists." And, that the forum an agency takes or the functions it performs are not determinative of the issue of whether it is an agency. *Lassiter v. Guy F. Atkinson Co.*, 176 F.2d 984, 991 (9th Cir. 1949). In *United Accounts, Inc. v. Dachtler*, 100 N.W.2d 93 (N.D. 1959), it was held that a public corporation is one created by the State for political purposes, and to act as an agency in the administration of civil government within a particular territory or subdivision. The court also based its decision upon the definition of "agency" in Black's Law Dictionary, 3rd Ed., p. 78, which stated that "agency" denotes a relation created by law or contract whereby one party delegates the transaction of some lawful business or authority to do certain acts to another. Finally, courts have distinguished agencies from instrumentalities on the basis that the former contemplate an authority to which the government delegates some of its functions, while the latter connotes one through whom the government acts indirectly carrying out its governmental functions. *Cuilla v. State*, supra.

Thus, the following have been held to be agencies or instrumentalities of the United States: Planned Parenthood League, *United States v. Brown*, supra; National Red Cross, *American Nat. Red Cross v. Department of Employment*, 263 F. Supp. 581 (D. Colo. 1965); Federal Land Banks, *Federal Land Bank of St. Paul v. Bismark Lumber Co.*, 1941, 314 U.S. 95, 86 L.Ed. 65, 62 S.Ct. 1; Unincorporated Associations pursuant to regulations of the Defense Department, *State v. Green*, 174 So.2d 546 (Fla. 1965). Sheriffs, conservancy districts and Port Commissioners have been held to be agencies or instrumentalities of the state. *Miller v. Board of Com'rs*, supra; *Hopkins v. Upper Scioto Drainage & Conservancy Dist.*, 1940, 67 Ohio App. 505, 37 N.E.2d 430; *County of*

Ulster v. CSEA Unit of Ulster Co. Sh. Dept., supra. A sewer authority has been held to be an agency or instrumentality of a county, *Bergen County Sewer Authority v. Hackensack Meadowlands Dev. Com'n*, supra; and city waterworks and gas boards have been held to be the same for a city, *State v. Morrow*, supra.

The following have been held not to be agencies or instrumentalities of a governmental unit, even if they possessed some of the properties discussed above: Housing, Health and Power Authorities, *L. I. Waldman & Co. v. Power Auth. of New York*, supra; *Panters v. Saratoga Springs Authority*, 1938, 255 App. Div. 426, 8 N.Y.S.2d 103, and *Cuilla v. State*, supra; Irrigation Districts, *Logan Irr. Dist. v. Holt*, 1943, 110 Colo. 253, 133 P.2d 530; School Districts, *Muse v. Prescott School District*, 1961, 233 Ark. 789, 349 S.W.2d 329; Cities, *Kucera v. City of Wheeling*, 1969, 153 W.Va. 531, 170 S.E.2d 217; State and National Banks, *Unemployment Compensation Com'n v. Wachovia Bank & T. Co.*, supra; *First Agricultural National Bank v. State Tax Com'n*, supra; Street Railway Corporations, *Boston Elevated Ry. Co. v. Welch*, supra; and, Community Action Agencies, *Hines v. Cenla Community Action Committee, Inc.*, 474 F.2d 1052 (5th Cir. 1973), *Robles v. El Paso Community Action Ag., Proj. Bravo, Inc.*, 456 F.2d 189 (5th Cir. 1972). In these last two cases, the courts only indicated that these community action agencies were not agencies or instrumentalities of the federal government.

As can be seen from the above discussion, we are not able to state one definition of an instrumentality or agency of a governmental unit that will fit all cases. The above cited cases do, however, give an indication of what criteria one could look for in making such a determination. Accordingly, we are of the opinion that your community action agency is not a political subdivision. We are not able to determine whether it is an instrumentality of a political subdivision.

November 9, 1976

SCHOOLS: School boards — §§277.27, 301.28, Code of Iowa, 1975. A school board member who provides medical services to football team is not providing "school supplies" within the meaning of §301.28. Board members, school officers, area education director and teachers are precluded from becoming a responsible bidder under §301.8, since they are prohibited from acting as agents for school supplies. This limitation does not apply to spouses. (Nolan to Casjens, Lyon County Attorney, 11-9-76) #76-11-4

Mr. David W. Casjens, Lyon County Attorney: This is written in reply to your request for an opinion concerning the interpretation of §§301.28 and 277.27 of the Code of Iowa. The questions you submitted are as follows:

"1. Does the term 'School Supplies' encompass services supplied to a school; for example, medical examinations furnished to the school football team by a doctor who is also a member of the Board?

"2. Does the prohibition against School Directors, Officers, Area Education Directors, and teachers acting as agents also cover their spouses?

"3. Does it matter whether or not the supplies furnished are the result of a low bid?"

In answer to your first question, it is the opinion of this office that the term "school supplies" does not encompass services supplied to a school. However, §277.27 of the Code specifically provides:

"Notwithstanding any contrary provision of the Code, no member of the board of directors of any school district, or his or her spouse, shall receive compensation directly from the school board."

Accordingly, a doctor who is a member of a school board could not be paid for providing medical examinations furnished to the school football team.

Your second question asks whether the prohibitions of §301.28 with respect to acting as agents for any school textbooks or school supplies during the term of office or employment, also covers their spouses. It is the view of this office that the maxim expressio unius est exclusio alterius applies in this case. Since §301.28 specifically names the person prohibited from acting as agents or dealers in school books or school supplies, all other persons, including the spouses of such individuals, are excluded from the statutory prohibition.

In answer to your third question, it is immaterial whether or not supplies furnished are the result of the low bid in the event the low bidder is a member of the school board, since the rule is longstanding that school board members are prohibited from contracting with the board on which they serve as a member. In 1930 O.A.G. 335, this office advised that the purpose of the statute prohibiting school board members from acting as agents for the school for school supplies:

". . . is to render the act of the member of the board of directors of the school corporation that of an entirely disinterested party in a contract which he is making for the corporation, and to leave his judgment entirely free to act without any personal interest whatsoever."

Language in §301.8, providing that the board "shall award the contract for such textbooks or supplies to the lowest responsible bidder . . ." does not create authority for a board's member to contract with the board. On the contrary, the specific statutory prohibitions of §301.28 would exclude any "school director, officer, area education director or teacher" from becoming a "responsible bidder" within the meaning of §301.8.

November 9, 1976

POLICEMEN AND FIREMEN: §411.6(8)(9), Code of Iowa (1975). A deceased member's dependent children, under the age of eighteen, are entitled to the additional twenty dollar monthly payment, found in §411.6(9)(b), even after the member's spouse dies. (Kelly to Shaw, State Senator, 11-9-76) #76-11-5

Honorable Elizabeth Shaw, State Senator: This opinion is in response to your request dated September 9, 1976, with regard to accidental death benefits under Chapter 411 of the Code. Your request was prompted by a letter written to you by the Corporation Counsel of the City of Davenport. That letter stated:

"The Davenport Board of Police Trustees are currently having a problem in interpreting subsections 8 and 9 of Section 411.6 of the 1975 Code of Iowa. We have a policemen whose death was caused by the performance of his duties so as to entitle his surviving spouse to receive the accidental death benefits under subsection 9. Until recently, the surviving spouse received the pension referred to in Section 9, plus the adjusted equivalent of the $20 provided therein for one dependent child. The widow has now died, leaving the dependent child, aged 14. The question is whether the guardian of the child shall receive for him only the pension or shall the $20 (adjusted) also be paid?

"The Board has tentatively decided not to pay the additional sum, but only the pension, but would appreciate an Attorney General's opinion, if you would be so kind as to request it. . . ."

Section 411.6(9)(a)(b)(c) provides:

"9. Accidental death benefit. If, upon the receipt of evidence and proof that the death of a member in service or the chief of police or fire departments was the natural and proximate result of an injury or disease incurred in or aggravated by the actual performance of duty at some definite time and place, or while acting pursuant to order, outside of the city by which he is regularly employed, the board of trustees shall decide that death was so caused in the performance of duty there shall be paid, in lieu of the ordinary death benefit provided in subsection 8 of this section, to his estate or to such person having an insurable interest in his life as he shall have nominated by written designation duly executed and filed with the respective board of trustees the benefits set forth in paragraphs 'a', 'b' and 'c' of this subsection:

"a. His accumulated contributions; and in addition thereto—

"b. A pension equal to one-half of the average final compensation of such member shall be paid to his spouse, children or dependent parents as provided in paragraphs 'c', 'd' and 'e' of subsection 8 of this section. *In addition to the benefits for the spouse herein enumerated, there shall also be paid for each dependent child of a member under the age of eighteen years the sum of twenty dollars per month.*

"c. If there be no spouse, children under the age of eighteen years or dependent parent surviving such deceased member, the death shall be treated as an ordinary death case and the benefit payable in accordance with the provisions of subsection 8, paragraph 'b' in lieu of the pension provided in paragraph 'b' of this subsection 9, shall be paid to his estate." [Emphasis added]

This opinion should be prefaced with the thought that the Iowa Supreme Court has held on numerous occasions that laws creating pension rights are to be liberally constructed with the view of promoting the objects of the Legislature, see for example, *Flake v. Bennett*, 261 Iowa 1005, 756 N.W.2d 849 (1968) and *Rockenfield v. Kuhl*, 242 Iowa 213, 46 N.W.2d 17 (1951).

Subsection 411.6(9)(b) outlines the Accidental Death Benefits that shall be paid to the member's "spouse", "children" or "dependent parents". This subsection further states: "In *addition* to the benefits for the spouse herein enumerated, these shall *also* be paid for each dependent child of a member under the age of eighteen years the sum of twenty dollars per month." [Emphasis added] This subsection could be construed to mean that in addition to the benefits already listed *for* the *spouse*, and only the spouse, there is an additional twenty dollars a month for each dependent child. However, it is the opinion of this office that the additional twenty dollars per month is not contingent upon the survival of the spouse. The Legislature never intended that this provision be so strictly interpreted so as to deny dependent children this small sum of money. We believe the additional twenty dollar payment is distinct from the rest of the pension payment and is only determined by the existence of a dependent child or children under the age of eighteen. This point becomes more readily apparent after examining the Ordinary Death Benefit found in Section 411.6(8). Section 411.6(8) doesn't contain the grammatical vagueness found in the Accidental Death Benefit

section with regard to the additional twenty dollar payment. It would certainly be an unfair interpretation of these two benefit sections, to permit the twenty dollar payment to be made to a deceased member's children under the Ordinary Death Benefit section, but then deny the additional twenty dollars to the children of a member who was killed or died in the line of duty under the Accidental Death Benefit provisions.

November 9, 1976

COURTS: Hospitalization of the Mentally Ill: Judicial Hospitalization Referees: Magistrates. §§602.5, 602.32, 602.60, 602.61, 1975 Code of Iowa; §§6, 7, 8(3)(a), 11, 12, 21, 22, Ch. 139, Acts of the 66th G.A. (1975); R.C.P. 377, 378. Judicial hospitalization referees and magistrates may perform their duties under the Iowa laws pertaining to hospitalization of the mentally ill, in counties other than the county for which they are appointed, when necessary and when either consented to by the parties or authorized by the chief judge of the district. (Murphy to Shirley, Dallas County Attorney, 11-9-76) #76-11-6

Mr. Alan Shirley, Dallas County Attorney: We have received your request for an opinion of the Attorney General on two issues that arise from the application of Iowa's new laws dealing with hospitalization of the mentally ill, Chapter 139, Acts of the 66th G.A., 1975 Session [hereinafter referred to as "the Act"]. You first ask whether a judicial hospitalization referee (§21 of the Act) can hold hearings in a county other than the county for which he or she is a referee. Your second question is whether a magistrate can hold emergency hearings (§22 of the Act) in a county other than the county for which he or she is a magistrate. As you point out these issues are of special concern to Polk County and the counties of the State mental health institutes, as well as the counties bordering said counties.

With respect to your first question, I see two situations in which a commitment hearing might be required in a county other than the county in which the court action is commenced. One situation might arise after an emergency hospitalization pursuant to Section 22 of the Act. This provision allows for emergency detention of a person in a suitable hospital or a public or private facility (as defined in the Act) prior to any commitment action being initiated, under certain limited circumstances. In some cases such detention may of necessity be in a county other than the county of residence of the person. The person must be released aftr 48 hours unless an application for involuntary hospitalization under Section 6 of the Act is filed. Such application may be filed either where the person is presently located or where the place of residence is. The person has an absolute right (which may be waived) to be present at a hospitalization hearing. Certainly there will be circumstances in which the detained person may not be moved, for example for compelling medical or security reasons, thus the hearing may have to be moved to the facility. The way to avoid your question is to file the application in the county where the person is detained. However it may happen that an application is filed in the county of residence, such that the hearing has to be held in another county in the circumstances described above.

A second situation where your question would be relevant is where an application for involuntary hospitalization is filed, and the person placed in immediate custody, prior to a hearing, pursuant to Section 11 of the

Act. Such custody may be in a county other than the county in which the application is filed, and under circumstances such as described above it may be necessary to hold the hospitalization hearing in the county where the person is in custody.

There may be other situations which necessitate out-of-county hearings but I feel the above adequately demonstrate the problem. It is the opinion of the Attorney General that a judicial hospitalization referee has authority to hold a hospitalization hearing anywhere in the judicial district, with the consent of all parties, or anywhere in the judicial district designated by the chief judge of the district.

The judicial hospitalization referee is a creature of Section 21 of the Act, which provides in pertinent part:

"(1) . . . If the judges [in each judicial district] find that the accessibility of district court judges in any county is not sufficient [for them to perform at all times the duties prescribed concerning commitment of the mentally ill and drug addicts], the chief judge of the district shall appoint in that county a judicial hospitalization referee."

The judicial hospitalization referee performs "all of the duties imposed upon judges of the district court by Sections seven (7) through twenty (20) of th[e] Act," when an application for involuntary hospitalization is filed and no district judge is accessible in the county. §21(3) of the Act.

The Act itself places no limitation on the place of hearing, the court (referee) being directed simply to "set a time and place for hearing". §§7, 8(3)(a) of the Act. The hearing is to be informal, but orderly and tried as a civil matter. §12 of the Act. Section 602.5, 1975 Code of Iowa provides that:

"Courts must be held at the places in each county, as designated by the chief judge of the judicial district, except for the determination of actions, special proceedings, and other matters not requiring a jury, when they may be held at some other place in the district with the consent of the parties."

Normally then, in a situation such as described above, the parties would naturally consent to holding the hearing at the confinement facility, and such a hearing would be authorized. In addition, it is the opinion of this office that consistent with the powers assigned to the chief judges by R.C.P. 377 and 378, as well as Sections 602.5, 1975 Code of Iowa, and 21 of the Act, the chief judge by order could authorize the referee to hold hearings outside the county, at designated places, to deal with the special situations giving rise to your inquiry.

With respect to your second question, the answer is even clearer that "magistrates", which term as used in the context of emergency hospitalization includes judges of the supreme and district courts, district associate judges and judicial magistrates, can hold an emergency hearing in a county other than the county for which he or she is a "magistrate".

Section 22 of the Act provides that when it appears that a person should be immediately detained due to serious mental impairment, which is reasonably likely to be physically injurious to the person or others, but there is no immediate access to the district court for immediate

custody procedures (§11 of the Act), a peace officer may cause the person to be taken to the nearest available detention facility as defined in the Act. The "nearest available magistrate" is to be notified immediately and shall immediately proceed to the facility; if appropriate under the standards of the Act, and under the procedures of Section 22 of the Act, the "magistrate" shall order appropriate emergency hospitalization.

The statute is highly ambiguous as to who the "nearest available magistrate" might be—nearest to the peace officer at the time the circumstances giving rise to emergency detention arise? or nearest to the facility to which the person is taken? A common sense approach would be to notify the magistrate nearest the facility, and this would be consistent with the intent of the emergency hospitalization provision to get a magistrate to the facility at the earliest time possible. You indicate that frequently, however, the magistrate nearest the peace officer is immediately contacted, before the officer finally decides to detain the person. This procedure would also be consistent with the statute as it is written. In either event it is entirely possible that the nearest available magistrate would be outside of the county.

Magistrates, including judicial magistrates, can perform their duties under Section 22 of the Act anywhere within their district (or the State in the case of Supreme Court judges) in the same manner as judicial hospitalization referees may go outside of their county. §§602.5, 602.32, 602.60, 602.61, 1975 Code of Iowa.

November 15, 1976

STATE OFFICERS AND DEPARTMENTS: Practice of Medicine — §§148.1 and 148.2, Code of Iowa, 1975; §1(c), H.F. 1503, 66th G.A. (1976). Generally, an unlicensed person, such as a secretary, who relays a physician's patient orders, upon the direction of the physician, to a hospital is not practicing medicine. The nurses receiving the orders, therefore, should follow them. (Blumberg to Rolfe, Union County Attorney, 11-15-76) #76-11-7

Robert A. Rolfe, Union County Attorney: We have received your opinion request of May 10, 1976. Under your facts non-licensed personnel of physicians, such as secretaries, have been calling in patient orders to hospitals upon request of the physicians. These orders entail prescriptions and other general orders regarding a patient's care. You ask whether these non-licensed personnel can legally give these orders, and whether the nurses in the institutions who receive them have a responsibility to accept them. The problem you set forth in this request is one that is not confined to your area. It is a widespread practice that has raised this issue more than once.

Chapter 148 of the 1975 Code defines the practice of medicine and surgery as publicly professing to be a physician and surgeon or assuming those duties incident to such a practice; prescribing or prescribing and furnishing medicine for human ailments or treating the same by surgery; and acting as a representative of any person in doing anything mentioned in §148.1. Chapter 150A is similar. We do not know what the Legislature intended by this last definition found in §148.1(3). We can find no cases or opinions which speak of that subsection. This subsection was added in 1931 by Ch. 52, Acts of the 44th G.A. The evils, if any, that the Legislature was attempting to diminish are unknown to us.

Logic dictates that those unlicensed individuals who are calling in orders at the direction of a physician should not be held criminally liable for practicing medicine without a license. They apparently are not making these decisions on their own, but rather are acting as intermediaries, relaying messages between the physician and the hospital. Although this is a common practice, it is not always wise to employ it. The medical personnel receiving the information may be unfamiliar with the person transmitting it and are sometimes unsure of whether such an order is binding. Also, because there is a third person interposed between the physician and the hospital there is a chance that a mistake can be made in either giving or understanding the order. In addition, any discussion or questions between the hospital staff and the physician as to the orders may be severely hampered because of the use of intermediary. This is not to say that those intermediaries do not have sufficient knowledge to do their jobs properly. Rather, we are indicating that good patient care may require the physician to personally give the orders.

Although our logic tells us that these intermediaries should not be held to be practicing medicine and surgery, we cannot state with any certainty that they do not fall within the provisions of §148.1. That is, the possibility exists that this section was intended to prevent this type of practice. If these individuals fall within any part of §148.1 it would be subsection three rather than the first two.

Most of the litreature which speaks of delegating a physician's duties concern physicians' assistants, both with and without enabling legislation. As a result, they are not helpful to us in answer to your first question. Section 148.1(3) may have been intended to prevent persons from administering to or treating patients when such persons were doing so upon the direction of another. See, *State v. Baker*, 1931, 212 Iowa 571, 235 N.W. 313. In that respect, this section may prevent "physicians' assistants" from treating and prescribing for patients, except to the extent permitted by Chapter 148B of the Code. However, there is nothing in §148.1(3) limiting its extent, nor is there anything in §148.2 which provides an exception to §148.1(3). Some states, such as Arizona, have an exception to the practice of medicine and surgery for any person acting at the direction or under the supervision of a physician as long as he is acting in his customary capacity, not in violation of any statute, and does not hold himself out publicly as being a physician. Iowa has no such exception.

The secretary or other unlicensed individual acts as a representative of the physician in relaying the information. Such an act does not constitute publicly professing to be a physician, prescribing and furnishing medication for human ailments, or treating the same by surgery. It may or may not constitute assuming the duties incident to the practice of medicine and surgery, and prescribing medication, dependent upon the facts of each case. However, a more logical interpretation of §148.1 (3) would be a prohibition of an unlicensed individual from diagnosing, treating and prescribing for a patient based on that individual's discretion upon the direction or order of a physician or any other person doing any of the acts in §148.1(1) and (2). We have no reason to believe that the Legislature intended to regard the acts you speak of as being the practice of medicine and surgery. There is no doubt, however,

that the unlicensed individuals of which you speak would be practicing medicine if they gave these orders on their own. Neither is this a violation of the nurse practice act because of a specific exception in §1(c) of H.F. 1503, 66th G.A. (1976).

Your next question is governed by the answer to the first. If the relaying of orders from a physiican to a hospital by an unlicensed individual is not generally illegal, then the nurse receiving the orders should not have to be concerned about his or her duty to carry them out. This is not to say that the nurse should not exercise his or her judgment or discretion to verify or check the orders with the physician or to contact the physician when there are questions. The nurses should carry out the physicians' orders whether called in by the physicians or the physicians' employees. However, it might be wise, if any questions arise, for the nurses to verify the orders with the physicians. If this is done, the nurses should not have to worry about liability on their part because they received the physicians' orders from a third person.

Accordingly, we are of the opinion that generally the relaying of physicians' orders upon direction of a physician by an unlicensed person will not constitute the practice of medicine. Therefore, the nurses receiving such orders should follow them. However, verification by the physician might be wise. This opinion is not an endorsement of the practice of using these third persons, but merely an indication of the legality of their use.

November 15, 1976

MUNICIPALITIES: Obligations to Abutting Property Owners—§614.1 (4), Code of Iowa, 1975. If an action can be maintained against a city to repay property owners their expenses for removing trees from the city parking, it would probably be governed by the five year statute of limitations in §614.1(4). If, for any reason a city is not obligated to repay the property owners, the city may still do so based upon an equitable or moral obligation. (Blumberg to Scheelhaase, State Representative, 11-15-76) #76-11-8

Honorable Lyle Scheelhaase, State Representative: We have received your opinion request regarding a restitution to property owners of payments for removal of trees. You indicated that in 1970, the city council adopted a resolution placing the responsibility for the removal of dead trees on the parking on the abutting property owner. The property owners removed these trees at their own expense until some time in 1975, when the city took over the responsibility. You ask the following questions:

"1. Under Iowa law, is the City obligated to repay to the property owners who removed dead trees from street parking the expenses they paid for such removal?

"2. If so, what statute of limitation applies?

"3. If the City is not required to make such payment, either because of the statute of limitations or for any other reason, does the City Council have authority to make payment although not required to do so?"

In a prior opinion, 1972 OAG 336, we discussed a similar situation. There, the city was a special charter city and §§420.44 and 420.45 applied. Those sections were statutes of limitations for unliquidated damages

and demands, and personal injury. Since the statute of limitations had barred a recovery, we held that the city could still reimburse the property owners by ordinance if it desired. There, the city removed the trees and assessed the property owners. This was declared to be void by *Shriver v. City of Jefferson*, 190 N.W.2d 838 (Iowa 1971). We are assuming that your city is not a special charter city.

In discussion of the general law of restitution in that prior opinion, we stated:

"What we are referring to here is basic law regarding restitution. The general rule gives recovery to one, not a volunteer, who performs a duty which the law has imposed upon another — in this case the city. The requirements are that the prompt performance of the duty is of grave public concern; the person upon whom the duty rests must have failed or refused to act; and the person who intervenes must not be a mere intermeddler, but a proper person to perform the duty. We believe that these elements exist in the instant situation. Generally, a person who has conferred a benefit upon a municipal corporation under mistake of law is entitled to restitution. 3 Antieau, *Municipal Corporation Law* §§30.00 and 30.06. Thus, municipal corporations have been awarded restitution as against other governments, based upon mistakes of law. *City of Milwaukee v. County of Milwaukee*, 1965, 27 Wis.2d 53, 133 N.W.2d 393, citing to Restatement of Restitution §46."

We then cited to the following cases where courts had held a city liable for restitution: *Beachlawn Building Corp. v. City of St. Clair Shores*, 1963, 370 Mich. 128, 121 N.W.2d 427; 1965, 376 Mich. 261, 136 N.W.2d 926; *Gordon v. Village of Wayne*, 1963, 370 Mich. 329, 121 N.W.2d 823; and, *Theater Control Corp. v. City of Detroit*, 1963, 370 Mich. 382, 121 N.W.2d 828. In these cases, the courts held that recovery was permitted because the payments were involuntary, citing to authorities where restitution was not permitted because those payments were voluntary. We cannot make any determination here as to the voluntariness of the actions by the abutting property owners. In the above cases, the statute of limitations question was at issue.

We need not determine whether your facts constitute a true restitution case, for the type of action brought would probably fall within §614.1(4) of the Code, which provides with reference to types of actions:

"4. Unwritten contracts—injuries to property—fraud—other actions. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, *and all other actions not otherwise provided for in this respect*, within five years, except as provided by subsection 8." [Emphasis added]

Most of the cases regarding the underlined portion of §614.1(4), concern the collection of a tax, or the refund of a tax erroneously or illegally collected. In *City of Burlington v. The B. & M. R.R. Co.*, 1875, 41 Iowa 134, the Court held that in an action to recover taxes, a city is limited to five years on the basis of an unwritten contract "and all other actions not provided for in this respect . . .". In *Scott v. County of Chickasaw*, 1879, 53 Iowa 47, 3 N.W. 820; *Hamilton v. City of Dubuque*, 1878, 50 Iowa 213; and, *Callanan v. County of Madison*, 1877, 45 Iowa 561, it was held that an action to recover taxes erroneously or illegally collected was also barred by the above quoted statute of limitations. This same statute

of limitations, specifically "all other actions not provided for in this respect", was applicable in actions to recover amounts collected by a sheriff at a foreclosure sale. *Liljidahl v. Montgomery County*, 1931, 212 Iowa 951, 237 N.W. 523; *George v. Webster County*, 1930, 211 Iowa 164, 233 N.W. 49. For recovery of a tax erroneously and illegally collected by the state Insurance Commissioner, the same statute of limitations applied. *Lincoln Nat. L. Ins. Co. v. Fischer*, 1945, 235 Iowa 506, 17 N.W.2d 273. Finally, *Clark v. Figge*, 181 N.W.2d 215 (Iowa 1970), was an action brought by a corporate stockholder for alleged interference with business relationships . The Court stated (181 N.W.2d at 215):

"Is the tort alleged here founded on 'injuries to property' under §614.1 (4)? Is it an action 'not otherwise provided for' under that subsection? The typical case which comes to mind as injury to property is the negligence action involving damage to a motor vehicle or an action for damages to land, but the term 'property' in a statute of limitations is broader than that. It encompasses, for example, stockholders' derivative suits and actions for financial loss from deceit. These are not considered to be injuries to the person or reputation. Kalmanash v. Smith, 291 N.Y. 142, 51 N.E.2d 681; Micheletti v. Moidel, 94 Colo. 587, 32 P.2d 266. The residuary clause, 'actions not otherwise provided for', has been held to include such cases as actions to recover damages from corporate directors, refunds of fees paid as costs, and overpayments of taxes—cases which do not seem to fit under other classifications in the limitation statute." [citations omitted]

Thus, if an action for restitution is permitted, the statute of limitations would probably be five years.

If an action based upon your facts is brought under the theory of an implied contract because property owners did work for the city and the city was benefited in that it was saved the time and expenditure, the same statute of limitations would apply. This statement is made assuming that an action based upon an implied contract can be maintained against a municipality. In your first question you asked whether a city is obligated to repay the property owner. We do not know whether you are asking us what types of actions can be brought against a city under your facts. We are not prepared to enter into a detailed discussion as to different theories of recovery. All the cases we have researched and discussed regarding actions to recover money from a municipality concerned situations where payments of some kind were made to a municipality. We found no cases under your facts where recovery was sought without there having been any such payments. This is not to say that such actions do not exist. We are merely stating that any action brought to recover money spent by property owners would probably fall within §614.1(4).

The answer to your third question can be found in our prior opinion. There, in discussing a voluntary payment made by a municipality based upon an equitable or moral obligation, we cited to *Harbold v. City of Reading*, 1946, 355 Pa. 253, 49 A.2d 817, 820, for a general definition of "moral obligation", and then stated:

"We feel that the present situation fits the definition. The abutting property owners had a right to claim payment for their services rendered to the city, but for the fact that the statute of limitations precluded them. The city had the obligaion to remove the trees from its property at its own expense. However, it illegally attempted to pass this burden and

cost onto others. The property owners rendered a service to the city by removing the trees at their own expense.

"The Supreme Court of Pennsylvania, in *Harbold v. City of Reading*, supra, held that a moral obligation or claim founded on equity and justice may be recognized by a legislature. It stated (49 A.2d at 820):

'[I]t is well established in our own State, as well as generally elsewhere, that a claim supported by such a moral obligation and founded in equity and justice, even though not legally enforceable, may be recognized by the legislature and made collectible either from the State itself or any of its political divisions; the legislature may compel municipalities to adopt and discharge such obligations and to exercise the power of taxation for that purpose.'

"As examples of situations where a legislature has accepted a claim supported by a moral obligation, the court listed the following: Reimbursing citizens who had advanced money to pay bounties to volunteers; repay subscriptions made by citizens to pay for recruits; validating a street improvement contract made under an ordinance which was defective because unrecorded; providing for the payment of a school teacher for services rendered under an unauthorized appointment; ordinance for the payment of a municipal contractor for work done under an allegedly illegal contract; providing for payment for construction work done under an act which had been held unconstitutional; and resolution of the salary board of a county paying a tax assessor for services rendered under an illegal appointment. If a legislature can authorize payments to individuals based upon moral obligations, may not a city do the same under its home rule powers? We think it may."

See also, 56 Am.Jur. 2d *Municipal Corporations*, §804, and *Evans v. Berry*, 1933, 262 N.Y. 61, 186 N.E. 203, 89 A.L.R. 387, for the proposition that a municipal corporation has the discretion to approve and pay claims based upon a moral obligation, especially where there is home rule.

Accordingly, we are of the opinion that if an action can be maintained against a city to repay property owners their expenses for removing trees from the city parking, it would probably be governed by the five year statute of limitations in §614.1(4). If the statute of limitations has passed, or if for any other reason a city is not obligated to repay the property owners, the city may still do so based upon an equitable or moral obligation.

November 15, 1976

COUNTIES AND COUNTY OFFICERS: County Attorney, Duty to Advise County Officers. §336.2, Code of Iowa, 1976. The county attorney's duty is to give his advice or opinion to the various public officials named in §336.2(7) and then only when requested. He has no duty to advise candidates for election or political parties with respect to the election laws or any other matters. (Haesemeyer to Bradley, Keokuk County Attorney, 11-15-76) #76-11-9

Mr. Glenn M. Bradley, Keokuk County Attorney: Reference is made to your letter of October 28, 1976, in which you state:

"I am the Keokuk County Attorney and also a member of the Keokuk County Republican Central Committee.

"The Democratic Party in Keokuk had no candidate for Keokuk County Board of Supervisors on the primary election ballot. On June 8, 1976, Francis P. Devine received seventy-six write-in votes in said election. Thereafter, the chairman of the Democratic Central Committee notified Mr. Devine that said Central Committee would meet on June 30,

1976, to select a candidate. This committee did meet and notified the Commissioner of Elections, J. W. Scott, that they had 'voted Francis P. Devine as the Democratic Candidate for Board of Supervisors for the 1977 term to appear on the general election ballot November 2, 1976.' Mr. Scott as Commissioner of Elections and Keokuk County Auditor 'read as correct' the notice sent to Mr. Devine and on July 6, 1976, 'accepted as correct' the notice he received from the Democratic Central Committee. The chairperson of the Keokuk County Republican Committee, by letter written by the undersigned, dated September 9, 1976, notified Mr. Scott of changes in the election laws and objected to the legal sufficiency of the certification of Mr. Devine. Mr. Scott notified Mr. Devine on October 6, 1976, that his name would not appear on the November 2, 1976, General Election Ballot.

"Thereafter Mr. Devine filed a Petition for Injunction to require his name to be placed on the election ballot, and his petition was denied. Enclosure 1.

"Members of the Keokuk County Republican Central Committee including the undersigned were aware of the changes in the election laws prior to September 8, 1976, closing date for nominations by the County Convention to fill the vacancy on the general election ballot.

"I was first informed by the Chairman of the Keokuk County Republican Central Committee about July 1976 of the attempted nomination by the Keokuk County Democratic Central Committee of Francis P. Devine. I did not betray the trust of the Keokuk County Republicans by informing any person or persons of this matter prior to September 8, 1976. I was not requested prior to September 8, 1976, to furnish an opinion to the Keokuk County Auditor and Commissioner of Elections as to whether the purported nomination of Francis P. Devine by the Keokuk County Democratic Central Committee was legally sufficient and correct.

"Mr. Francis P. Devine has published in a local newspaper a letter to the voters of Keokuk County calling for my resignation and alleging I had a duty to inform the Auditor and Commissioner of Elections that Francis P. Devine had not been legally nominated. (Enclosure 2). A letter to the Editor of a similar complaint has also been published. (Enclosure 3)

"Please advise whether I, as Keokuk County Attorney, in the absence of a request for an opinion, was under any duty to advise the Keokuk County Auditor and Commissioner of Elections, or whether under any circumstances I was under a duty to advise Mr. Francis P. Devine, or the Keokuk County Democratic Central Committee with respect to the contents of the election laws and whether the attempted nomination of Francis P. Devine by the Keokunk County Democratic Central Committee was legally sufficient and correct."

The duties of the county attorney with respect to other county officers are set forth in §336.2, Code of Iowa, 1975. Such §336.2 provides in relevant part:

"It shall be the duty of the county attorney to: * * *

"7. Give advice, or his opinion in writing, without compensation, to the board of supervisors and other county officers and to school and township officers, *when requested so to do* by such board or officer, upon all matters in which the state, county, school, or township is interested, or relating to the duty of the board or officer in which the state, county, school, or township may have an interest; but he shall not appear before the board of supervisors upon any hearing in which the state or county is not interested. * * *" (emphasis added)

It is clear from the foregoing that you as County Attorney had no duty to volunteer any advice to the County Auditor with respect to the

situation you describe. Moreover, you certainly had no duty to advise Mr. Devine or the Keokuk County Democratic Central Committee with respect to the contents of the election laws or with respect to any other matter. They are no more entitled to free legal opinions and advice from the county attorney than is the public at large. The county attorney's duty is to give his advice or opinion to the various public officials named in §336.2(7) and then only when requested.

As to your question whether the attempted nomination of Francis P. Devine by the Keokuk County Democratic Central Committee was legally sufficient and correct, we have already answered that question in an earlier opinion, Haesemeyer to Bradley, Keokuk County Attorney, October 1, 1976, and this has been confirmed by the Keokuk County District Court in the decision to which you make reference, *Devine, et al. v. Scott,* Equity No. 20667-92-3, Keokuk County District Court, decided October 21, 1976.

November 15, 1976

COUNTIES AND COUNTY OFFICERS: County Clerk, Appointment of Deputies. §§341.1, 341.3 and 341.6, Code of Iowa, 1976. The first and second deputies in a three-man county clerk's office serve at the pleasure of the county clerk and a newly elected clerk may replace them both. (Haesemeyer to Greenfield, Guthrie County Attorney, 11-15-76) #76-11-10

C. F. Greenfield, Guthrie County Attorney: Reference is made to your letter of November 8, 1976, in which you state:

"Section 341.1 of the 1975 Code of Iowa provides that the County Auditor, Treasurer, Recorder, Sheriff, County Attorney and Clerk of the District Court may, with the approval of the Board of Supervisors, appoint one or more deputies or assistants respectively not holding county office for whose acts he shall be responsible.

"In Guthrie County the office of the Clerk of the District Court has been held by appointment from the Board of Supervisors because the original clerk elected for that term died in office. At the election on November 2nd a new clerk was elected. The office of the Clerk of the District Court has two deputies. The second deputy primarily serves for Magistrate Court. Section 341.1 of the Code does not set out the tenure in office of deputies. The present appointed Clerk and the deputies are Democrats, and the newly elected Clerk is a Republican.

"The newly elected Clerk has published a notice asking for applications for the positions of deputies in his office. The present deputies have applied. Under the case of Richard J. Elrod, et al, vs. John Byrnes, et al, represented in the United States Supreme Court Reports 49, Lawyer's Edition 2nd, commencing at page 547, the Supreme Court of the United States holds that certain deputies are non civil service employees, and the deputies in the Clerk of the District Court's office in Guthrie County are non civil service employees.

"I need to know the answer to the following:

"1. Can a newly elected office holder discharge all of the old deputies and appoint all new deputies?

"2. What is the term of office of a duly appointed deputy?

"3. If the newly elected Clerk is of one party, must he retain all of the present deputies when they are of the opposite party or even if they are of the same political party?

"4. Under the Elrod case, has 'patronage practice' been overruled?"

Sections 341.1, 341.3 and 341.6, Code of Iowa, 1975, provide respectively:

§341.1

"Appointment. Each county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, may, with the approval of the board of supervisors, appoint one or more deputies or assistants, respectively, not holding a county office, for whose acts he shall be responsible. The number of deputies, assistants, and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board."

§341.3

"Revocation of appointment. Any certificate of appointment may be revoked in writing at any time by the officer making the appointment, which revocation shall be filed and kept in the office of the auditor."

§341.6

"Powers and duties. Each deputy, assistant, and clerk shall perform such duties as may be assigned to him or her by the officer making the appointment, and during the absence or disability of his principal, the deputy or deputies shall perform the duties of such principal."

It would seem plain on the face of it under the foregoing statutory authorities that a newly elected clerk of court could, by simply revoking the certificate of appointment, discharge all of the old deputies and following the procedures laid down in §341.1, appoint replacements. The term of office of a deputy would commence at the time indicated in his certificate of appointment and terminate with its revocation. In other words, he would in effect serve at the pleasure of the officer appointing him. This has always been the practice with political offices where employees are not covered by civil service and is sometimes referred to as the patronage system.

However, as you point out, some doubt as to the constitutionality of the patronage system has been raised by the case of *Elrod v. Burns*, ... U.S. , 49 L.Ed.2d 547, 96 S.Ct. , decided June 28, 1976. In this case, the United States Supreme Court concluded that the First and Fourteenth Amendment rights under the United States Constitution of certain employees of the Cook County, Illinois', Sheriff's office were violated by their politically motivated discharge. However, we do not think *Elrod v. Burns* is applicable to the situation you describe. In the first place, the Cook County Sheriff's office involved in that case employs 3,000 persons, half of whom are under civil service. The Guthrie County Clerk's office on the other hand, as I understand it, consists only of the clerk and his first and second deputies.

Beyond this, *Elrod* makes it clear that patronage dismissals are legitimate where they involve policy making positions. Since, under §341.6, each deputy clerk during the absence or disability of his principal, performs the duties of the principal, it can hardly be denied that such deputies have the same policy making powers at such times as the clerk himself has. In addition, in *Elrod v. Burns*, it is clear that the dismissals

were solely motivated by political considerations. It is not clear that this is the case in Guthrie County where there may be other bases for terminating the employment of the present deputies. As stated in *Elrod v. Burns*,

"Specifically, employees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist."

But be this as it may be, it is our opinion that *Elrod v. Burns* does not apply to the Guthrie County Clerk's office because of the factual distinction between a 3,000 member sheriff's department and a 3 man clerk of the court's office and because the first and second deputies of the Guthrie County Clerk are both in policy making positions.

November 19, 1976

MUNICIPALITIES: Historical Preservation Districts—§§364.1, 364.2(3), 414.1, 414.2 and 414.3, Code of Iowa, 1975; H.F. 1498, 66th G.A. (1976). House File 1498 supercedes an action by a city to establish a historical preservation district in addition to one established by H.F. 1498. A municipality may not establish a historical preservation district through a zoning regulation merely for asthetic purposes. (Blumberg to Glenn, State Senator, 11-19-76) #76-11-11

Honorable Gene W. Glenn, State Senator: We have received your opinion request of September 29, 1976, regarding Historical Preservation Districts. You ask:

"Is a city permitted by the Home Rule Amendment to the Iowa Constitution and Section 364.1 to adopt as part of its zoning ordinance provisions providing for and regarding Historical Preservation Districts, landmark sites and landmarks; or has the General Assembly, by enactment of H.F. 1498, preempted the area and thereby precluded the city in so doing?"

House File 1498, 66th G.A. (1976) provides for the establishment of historical preservation districts. Pursuant to that Act, such districts are established by petition of at least ten percent of the eligible voters in an area of historical significance to the division of historical preservation of the Iowa State Historical Department. A hearing and an election must be held for the area in question. If a majority approves the measure, a commission is established to control the district. This is, in reality, a type of zoning regulation for those districts. However, it is one governed by state, not municipal or county, law.

The Constitutional Amendment granting home rule and §364.1, 1975 Code of Iowa, stand for the proposition that a municipality may perform any function it deems appropriate if not expressly limited by the Constitution or inconsistent with any law of the general assembly. Section 364.2(3) provides that an exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law. There is nothing in the Constitution or any other statute which expressly prohibits a city from setting up a historical preservation district. Would, then, such an ordinance or zoning regulation be inconsistent or irreconcilable with H.F. 1498?

The word "irreconcilable" is defined in Webster's New Twentieth Century Dictionary 970 (2nd ed. 1971) as "that cannot be reconciled; not

capable of being made to agree or be consistent; conflicting; incompatible . . . ." Various synonyms for "irreconcilable," found in Roget's International Thesaurus (3rd ed. 1963), are: 16.7—different, disimilar, diverse, widely apart, disparate, inconsistent, disagreeing, inharmonious, contrary; 27.9—incongruous, incompatible; 624.9—inflexible, uncompromising; 927.12—alienated, separated, disunited.

The legislature has indicated its intent that Historical Preservation Districts are to be established and controlled pursuant to H.F. 1498. House File 1498 and its application to a Historical Preservation District would supercede any similar action by a municipality. The remaining question is whether a municipality, pursuant to Chapter 414 of the Code, may establish districts wherein the style of architecture is controlled, assuming that a Historical Preservation District has not been established.

The purpose of zoning is to limit the use of land in the interest of public welfare; to stabilize the use or occupancy of property; stabilize a neighborhood; and, preserve the character of the community. 101 C.J.S. Zoning §2 (1958). It is an exercise of police power in the interest of public peace, order, morals, health safety, comfort, convenience and general welfare, *Granger v. Board of Adjustment of City of Des Moines*, 1950, 241 Iowa 1356, 44 N.W.2d 399, delegated from the state and must be strictly construed, *Business Ventures, Inc. v. Iowa City*, 234 N.W.2d 376 (Iowa 1975).

Section 414.1 of the Code provides:

"For the purpose of promoting the health, safety, morals, or the general welfare of the community, any city is hereby empowered to regulate and restrict the height, number of stories, 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."

Section 414.2 provides:

"For any or all of said purposes the . . . council, may divide the city into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this chapter; and within such district it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations and restrictions shall be uniform for each class or kind of buildings throughout each district . . . ."

Finally, §414.3 provides:

"Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the street; to secure safety from fire, flood, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements.

"Such regulations shall be made with reasonable consideration, among other things, as to the character of the area of the district and the peculiar suitability of such area for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city."

These three sections give a good overview of what zoning is to accomplish. Strictly construing these sections, as we must, we cannot state

that a zoning regulation to preserve the architectural design of a building falls within the purview of Chapter 414. The power to regulate how a building is constructed, reconstructed, altered or repaired does not necessarily constitute the power to prohibit *any* construction, alteration, repair or demolition of a private structure.

In *Stoner McCray System v. City of Des Moines*, 1956, 247 Iowa 1313, 1319, 78 N.W.2d 843, the Supreme Court discussed zoning regulations based upon asthetic considerations. It noted a trend to foster under police power the asthetic and cultural side of municipal development. That is, to prevent a thing offensive to sight. The Court stated:

"Asthetic consideration can be said to enter into the matter as an auxillary consideration where the zoning regulation has a real or reasonable relation to the safety, health, morals or general welfare of the community . . . .

" 'Asthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation' . . . ." [Citations omitted]

Therefore, we believe that a zoning ordinance merely for asthetic purposes is not permitted.

Accordingly, we are of the opinion that H.F. 1498 supercedes a city's actions if a city attempts to establish a historical preservation district in addition to one established pursuant to H.F. 1498. In any such event, a city may not set up such an area by a zoning regulation for mere asthetic purposes.

November 19, 1976

COUNTIES AND COUNTY OFFICERS: Low-Rent Housing—§6, H.F. 1590, 66th G.A. (1976). The new subsection to §427.1 of the Code, added by H.F. 1590, applies only to low-rent projects for the elderly or physically and mentally handicapped. The Legislature has failed to define low-rent housing within §427.1. A county assessor may look to Chapters 403A or any federal guidelines to determine whether a project qualifies for the exemption in §427.1. (Blumberg to Schild, Poweshiek County Attorney, 11-19-76) #76-11-12

Mr. Donald L. Schild, Poweshiek County Attorney: We have received your opinion request regarding a low-rent housing corporation. We assume this corporation is not a low-rent housing agency within Chapter 403A of the Code, but is private in character. You state that the residents of the local project established by this corporation are below the $5,300 income guideline and therefore the project qualifies for the lowest FMHA interest rate. The county assessor is of the opinion that this is not a low-rent project based upon the amount charged for rent. You ask whether this project falls within the recent amendment to §427.1, and also what guidelines the assessor should use to determine whether a project is in fact low-rent housing.

Section 6 of H.F. 1590, 66th G.A. (1976), amended §427.1 of the 1975 Code by adding the following new subsection so that §427.1 now reads, in pertinent part:

"The following classes of property shall not be taxed:

. . .

"LOW-RENT HOUSING. The property owned and operated by a nonprofit organization providing low-rent housing for the elderly and the physically and mentally handicapped. The exemption granted under the provisions of this subsection shall apply only until the terms of the original low-rent housing development mortgage is paid in full or expires, subject to the provisions of subsections twenty-three (23) and twenty-four (24) of this section."

We held in an earlier opinion, Blumberg to Brunow, #76-6-11, that this new subsection only applies to projects for the elderly or physically and mentally handicapped, and only until such time as the original mortgages are paid in full or expire. Thus, as we previously stated, this new section does not appear to solve the problem which precipitated its adoption.

The Legislature has failed to define, for purposes of §427.1, what constitutes low-rent housing. Chapter 403A of the Code sets forth various definitions and requirements for low-rent housing. That chapter, however, only concerns low-rent projects of a municipality or its delegated agency. The guidelines contained therein are not binding upon §427.1. This does not mean that an assessor cannot use these guidelines as an aid in determining whether a project falls within §427.1. If a project falls within the guidelines of §§403A.2,403A.6 or 403A.7 or any of the federal government we believe that such a project could properly be termed low-rent. We are unable to determine whether your project falls within §427.1.

November 19, 1976

MUNICIPALITIES: Mobile Home Parks — §§135D.2, 135D.8, 135D.16, 135D.17, 135D.18 and 135D.20, Code of Iowa, 1975. A municipality may not adopt ordinances for the licensing of mobile home parks. That area is preempted by Chapter 135D of the Code. (Blumberg to Harvey, State Representative, 11-19-76) #76-11-13

Honorable Lavern R. Harvey, State Representative: We have your opinion request regarding an ordinance on mobile homes. Said ordinance restricts the power of a mobile home park operator to evict or terminate the lease of a mobile home occupant. This is accomplished by the park operator preparing "reasonable rules and regulations (which are not appressive or immoderate)" specifying the grounds for termination, and notice to the tenant of a violation of the rules. A park operator violating the ordinance shall have his license to operate a park revoked. The ordinance then provides that an occupant can seek, in a court, the appointment of a receiver for the park. You asked:

"1. Is such an ordinance a valid exercise of the home rule powers vested to citizens?

"2. Does such ordinance conflict with state law such as Chapters 135D and 648, Code of Iowa, 1975, and as such render the ordinance invalid?

"3. Are the words 'oppressive' and 'immoderate' as used to describe rules in section 38-19 A-1 unconstitutionally vague and is it possible and necessary to secure acknowledgements of such rules signed by tenants?

"4. Is the penalty section 38-19 A-3 which allows any interested party to institute proceedings to appoint a receiver in substantial compliance with the due process clauses of the Constitution?"

Chapter 135D, 1975 Code, provides for the regulation of mobile home parks. Section 135D.2 requires a license for the park to be issued by the State Department of Health. The State Department of Health has power to adopt rules and regulations regarding mobile home parks (§135D.16). A license can be denied by the State (§135D.8) or revoked or suspended by a court of proper authority and jurisdiction (§135D.17). The State shall first give notice of the failure to comply with the Chapter. If corrections are not made the county attorney may be requested to file a civil action to correct the problems. A criminal penalty attaches for violation of the Chapter (§135D.18). The State can delegate its powers to a local health officer or other city officer or to local boards of health (§135D.20).

Chapter 135D controls the licensing and regulation of all mobile home parks in the State. Unless the State delegates its duties to the local body a city has no power to regulate such parks. Home rule does not alter this conclusion. A city, of course, has a right to impose its zoning regulations and the like upon the establishment of a mobile home park. However, any ordinances prescribing licensing of mobile home parks and a subsequent revocation of the license would be in conflict with Chapter 135D. Such a conflict would be irreconcilable.

Accordingly, we are of the opinion that a municipality may not adopt ordinances for the licensing of mobile home parks. That area is preempted by Chapter 135D. Because this is dispositive of the entire issue we need not discuss your other questions. However, in response to your fourth question we direct your attention to an earlier opinion, (Blumberg to Thatcher, #76-7-35) wherein we held that a city has no power to confer jurisdiction in the District Court by ordinance.

November 19, 1976

SPANISH SPEAKING PEOPLES COMMISSION; MERIT SYSTEM; STATE OFFICERS AND DEPARTMENTS: S.F. 1336, §§1, 3, 5, 9, Acts of the 66th G.A.; §§19A.3(2), 19A.3(4), 1975 Code of Iowa; Ch. 77, §2, Acts of the 66th G.A. The employees of the Spanish Speaking Peoples Commission, with the exception of the director and one stenographer or secretary for him, are under the state merit system. (Haskins to Keating, Director, Merit Employment Department, 11-19-76) #76-11-14

Mr. W. L. Keating, Director, Iowa Merit Employment Department: You ask the opinion of our office as to whether the employees of the Spanish Speaking Peoples Commission are covered by the state merit system. The Spanish Speaking Peoples Commission (hereafter referred to as the "commission") is created in S.F. 1336, Acts of the 66th G.A., and is set to expire on June 30, 1979, unless reestablished by the legislature prior to that date. *See* S.F. 1136, §9, Acts of the 66th G.A. The Governor appoints nine persons to be on the commission and the commission is empowered to employ a director and clerical staff. See S.F. 1336, §§3, 5, Acts of the 66th G.A. The director is designated as "the adminsitrative officer" of the commission. *See* S.F. 1336, §5, Acts of the 66th G.A.

Specific appropriation is made to the office of the Governor for payment of the expenses generated by the employees of the commission. §1 of S.F. 1336 states in pertinent part:

"There is appropriated from the general fund of the state to the office of the governor for the fiscal year commencing July 1, 1976, and ending June 30, 1977, the following amount or so much thereof as is necessary, to be used for the purposes designated:

1. For payment of expenses of the Spanish-speaking peoples commission established by sections three (3) through eight (8) of this Act, *including employment of a director and clerical staff* and payment of forty dollars per diem and actual expenses of commission members . . . $35,000." [Emphasis added]

With regard to coverage by the state merit system, §19A.3, 1975 Code of Iowa, sets forth the general principle as follows:

"The merit system shall apply to all employees of the state and to all positions in the state government now existing or hereafter established except the following: . . ."

The following exceptions contained in §19A.3 which are pertinent are set forth as follows:

2. All board members and commissions whose appointments are otherwise provided for by the statutes of the state of Iowa, ... * * *

4. The personal staff or the governor.

Clearly, the members of the commission themselves are exempt under §§19A.3(2). And the director of the commission and one stenographer or secretary for him would be exempt under the following new subsection added to §19A.3 by Ch. 77, §2, Acts of the 66th G.A.:

"The chief administrative officer of each board or commission who is appointed by the board or commission and one stenographer or secretary for the chief administrative officer."

The difficult question concerns the remainder of the clerical staff of the commission aside from the director and one stenographer or secretary for him.[1] The only way in which the remainder of the clerical staff could be exempted from the scope of the merit system is if it fell under §19A.3(4) as being part of the "personal staff of the governor." However, we do not believe that the remainder of the clerical staff is part of the "personal staff of the governor."

It is true that the appropriation for the employees of the commission is made to the "office of the governor." But assuming that this means that the employees of the commission are part of the office of the governor, this does not mean that they are part of his "personal staff." Significance must be given to the word "personal" in the language "personal staff of the governor." If §19A.3(4) simply read "the staff of the governor," it could be cogently argued that all persons who are in the office of the governor are exempt from the state merit system. But it must be presumed that the word "personal" was intended to have some independent importance. The word must therefore serve to restrict those persons in the office of the governor who are exempt from the state merit system to a group of persons who are in personal contact

[1] It is recognized that the amount of the appropriation to the commission may well prevent it from employing more than a director and one stenographer or secretary for him.

with the governor. The employees of the commission presumably would lack this contact and thus are not on the governor's "personal staff."

It should be noted that the fact that the commission is of uncertain duration is not relevant to the question of whether its employees are exempt from the coverage of the state merit system. Under §19A.3, as indicated, the general principal is that all employees of the state fall under the state merit system, subject only to specifcally delineated exceptions. No specific exemption exists for employees of agencies which are of only temporary duration.

Thus, since the remainder of the employees aside from the director and one stenographer or secretary for him fall within no specific exception to the scope of the state merit system, they must be deemed to be covered by that system.

In sum, the employees of the commission, with the exception of the director and one stenographer or secretary for him, are under the state merit system.

November 19, 1976

SCHOOLS: Bussing. §285.1(3), Code of Iowa, 1975. Parents Transporting children attending a non-public school in a contiguous school district are not entitled to statutory reimbursement under Chapter 285 unless they transport the children the entire distance from home to the designated school. (Nolan to Koogler, State Representative, 11-19-76) #76-11-15

The Honorable Fred L .Koogler, State Representative: We have your letter of September 8, 1976, requesting an opinion on the following:

"A family living in the North Mahaska School District has designated a Christian School in the Oskaloosa School District as the non-public 'school designated for attendance'. The resident school district, *North Mahaska*, has contracted with the non-resident school district, Oskaloosa, to transport the children to the non-public school. The Oskaloosa School District has designated a pick-up point, well within its district boundary line, that is 2.3 miles from the pupil's home.

"QUESTION: Are the parents of the non-public school pupils entitled to the re-imbursement, as outlined in Section 285.1, sub-section 3, since they transport their children in excess of three-fourths of a mile to meet the bus, as outlined in Section 285.1, subsection 2. Further, sub-section 3 specifically states, 'The provisions of this section shall apply to eligible non-public school pupils as well as to eligible public school pupils."

The applicable statutory provisions are to be found in §285.1(16), Code of Iowa, 1975, as amended by Chapter 161, Acts, 66th G.A. (1975 Session):

"If the non-public school designated for attendance for pupils is located outside the boundary line of the school district of the pupil's residence, the pupil may be transported by the district of residence to a public school or other location within the district of the pupil's residence. A public school district in which a non-public school is located may establish school bus collection locations within its district from which non-resident non-public school pupils may be transported to and from a non-public school located in the district. If a pupil receives such transportation, the district of the pupil's residence shall be relieved of any requirement to provide transportation.

"As an alternative to the provisions enumerated in this subsection, subject to the provisions of section two hundred eighty-five point nine (285.9) subsection three (3), of the Code, where practicable, and at the option of the public school district in which a non-public school pupil resides, a school district may transport a non-public school pupil to a non-public school located outside the boundary lines of the public school district if the non-public school is located in a school district contiguous to the school district which is transporting the non-public school pupils, or may contract with the contiguous public school district in which a non-public school is located for the contiguous school district to transport the non-public school pupils to the non-public school of attendance within the boundary lines of the contiguous school district."

Section 285.1(17), as amended by Chapter 161, Acts, 66th G.A. (1975 Session), and House File 628, 66th G.A. (1976 Session) provides:

"The public school district may meet the requirements of subsections 14 to 16 by any of the following:

"(a) Transportation in a school bus operated by a public school district.

"(b) Contracting with private parties as provided in section 285.5. However, contracts shall not provide payment in excess of the average per pupil transportation costs of the school district for that year.

"(c) Utilizing the transportation reimbursement provision of subsection 3. **However, no reimbursement shall exceed eighty dollars per non-public school pupil per year.**

"Contracting with a contiguous public school district to transport resident non-public school pupils the entire distance from the non-public pupil's residence to the non-public school located in the contiguous public school district or from the boundary line of the public school district to the non-public school."

It is the opinion of this office that the statute clearly provides an option to the local school board of the child's residence as to the manner of transportation to be furnished in accordance with the section set out above. The selection of any one of the transportation set forth in (a), (b) or (c) of §285.17, satisfies the mandatory transportation requirements of the Code.

However, where the designated school of attendance is in a school district which is contiguous to the district of residence of the child, that district must also give due consideration to the provisions of §285.1(2):

"Any pupil may be required to meet a school bus on the approved route a distance of not to exceed three-fourths of a mile without reimbursement."

Further, the provisions of §285.1(3) must be construed in *pari materia*:

"In any district where transportation by school bus is impractical or where school bus service is not available, the board may require the parents or guardian to transport their children to the school designated for attendance. The parent or guardian shall be reimbursed for such transportation service . . . The provisions of this section shall apply to eligible nonpublic school pupils as well as to eligible public school pupils. However, reimbursement for nonpublic school pupils shall not exceed eighty dollars per pupil per year."

Accordingly, if the parent transports a child the entire distance from home to school because the local school board has determined, pursuant to §285.1(3) that transportation by school bus is impracticable or not avail-

able, then reimbursement should be paid in accordance with the provisions of that section. If the local school board has contracted with a contiguous school district to transport children to a designated nonpublic school pursuant to §285.1(17), the contract should provide that the children be either transported "the entire distance from the nonpublic pupil's residence to the nonpublic school located in the contiguous public school district or from the boundary lines . . .". Any contract providing less is not in accord with the statutory requirement and, in our view, is tantamount to appropriate bus service not being available, thus transferring the burden to the parents to transport their children the entire distance to the designated school, for which they would be entitled to receive reimbursement as provided in the statute.

November 23, 1976

MUNICIPALITIES: Regulation of Air Pollution — §§455B.10 through 455B.29, Code of Iowa, 1975; 400-4.2(455B) IAC. In the absence of any local program and ordinances regarding air pollution control, a city may not enforce Department of Environmental Quality rules on open burning by putting out a fire when those rules prescribe other procedures. If the burning constitutes a fire or health hazard, the city may exercise its police power. (Blumberg to Koogler, State Representative, 11-23-76) #76-11-16

Honorable Fred L. Koogler, State Representative: We have received your opinion request regarding a city's ability to enforce rules and regulations of a state agency. Your facts and question are:

"The City of Oskaloosa has had a number of occasions where the Oskaloosa Fire Department has been called to a rural fire and when they arrived they were informed by the owner that they did not desire to have the fire extinguished and also that the owner claimed he did not call the Fire Department."

"What is of concern, is what the legal obligation of the City is with respect to an open burning fire and whether they have a legal obligation to put out the fire under Chapter 455B Sections 10 through 29 whether the owner wants the fire put out or not. In other words if a person is doing open burning, voluntarily or involuntarily, in violation of Department of Environmental Quality rules, does the City of Oskaloosa have an obligation to put out the fire over the objection of the property owner?"

Although your facts indicate a situation of the city's problem outside its boundaries, the problem is similar if it occurs within city limits. We assume that the city has no ordinances regarding this subject matter, nor any local air pollution control program.

Sections 455B.10 through 455B.29, 1975 Code of Iowa, concern the Air Quality Commission of the Department of Environmental Quality. Those sections detail the duties of the Commission and the executive director of the DEQ; the adoption of rules; administrative and judicial proceedings; local programs and the like. Section 455B.12, in outlining the duties of the Commission, provides that the Commission shall adopt rules, review and evaluate air pollution control programs conducted by political subdivisions, encourage voluntary cooperation by persons or affected groups, and encourage political subdivisions to handle air pollution problems within their jurisdictions. Nowhere in those sections is there any mention of the manner in which political subdivisions may enforce the rules of the DEQ in the absence of a local program outside of a specific request by the DEQ. If the city had its own control program and had

ordinances or even rules on this subject, there would be no question as to its ability to control open burning within its limits. The existence of such ordinances or rules, however, would not have any effect outside the city's territorial limits. If a city had no such ordinances or rules the question of its authority under these facts would be the same as its authority outside of its territorial limits.

The rules of DEQ found in 400-4.2(455B) IAC provide that there shall be no open burning of combustible materials except for disaster rubbish, diseased trees, flare stacks, landscape waste, recreational fires, residential waste, and training fires. These rules do not indicate what authority a political subdivision has to enforce them, except for those rules regarding local programs and ordinances. The procedures set up by §§455B.17 through 455B.21, prescribe the administrative procedures to be followed regarding a violation of the rules. Section 455B.17 provides that when there is a complaint the executive director shall notify the alleged violator and attempt an informal settlement. If that is unsuccessful, the Commission shall hold a hearing. Section 455B.18 allows the executive director to issue an emergency order prior to a hearing. Sections 455B.19 and 20 provide for judicial review of a hearing, and actions brought by the Attorney General. Section 455B.25 provides for a civil action in district court based upon the violation of an order or rule. Those sections do not indicate any ability of the Commission or the director to abate the problem on their own prior to these procedures. Nor do we find any such provision in the rules. If the DEQ does not have the authority by either statute or rule to abate a pollution problem by actually extinguishing a fire, we do not see how a city could do so on the mere pretense of enforcing Chapter 455B and the rules promulgated thereunder.

We realize that if a city has a local program and ordinances banning open burning the city could follow those ordinances without having to rely upon the DEQ rules as the sole source of its authority. Nor would it have to follow the hearing procedures of the DEQ rules if the ordinances provided for other remedies. If the burning constituted a nuisance or a fire or health hazard, a city could stop the burning in the exercise of its police power. However, in the absence of such a situation, and in the absence of ordinances regarding this subject, we do not believe that a city could enforce the DEQ rules by putting out a fire when those rules provide for other procedures.

November 23, 1976

SCHOOLS: School Reorganization. Chapter 275, Code of Iowa, 1975. (1) The proposition voted on by the electors binds future school boards; (2) When a school district is reorganized by consolidating several districts as provided in Chapter 275, the electors of the new district as a whole vote on any proposition authorized by law; (3) Acts of school directors when not assembled or acting as a board do not bind the school district. (Nolan to Koogler, State Representative, 11-23-76) #76-11-17

The Honorable Fred L. Koogler, State Representative: You have requested an opinion on three questions pertaining to the obligations of a local school board as follows:

"*Question 1.* Are the representations and statements contained within, and concerning, a consolidation agreement promulgated and approved by the electorate under Chapter 275, Code of Iowa (1971), binding upon the decisions and actions of future boards of that consolidated district?"

The proposition voted upon by the electors and the terms of any agreement incorporated by reference therein are binding on future school boards. Statements of board members made prior to the vote concerning interpretations and meanings of the consolidation agreement are helpful to the interpretation of such agreement but do not change the plain meaning of such agreement. Chapter 275 of the Iowa Code was intended to encourage reorganization of school districts in interests of economy efficiency and higher educational standards. *Liberty Consolidated School District v. Schindler*, 1955, 246 Iowa 1060, 70 N.W.2d 544.

"*Question 2.* By what process might the terms of a consolidation agreement be modified by subsequent boards of directors of the consolidated district? Does such modification of a consolidation agreement require a vote of the electorate, and if so, do all eligible electors in the entire consolidated district vote on the issue or are seperate boundary lines established depending upon the issue raised by the attempted modification of the consolidation agreement?"

Matters of policy as are involved in formation of school districts are legislative in character and subsequent school boards are bound by the legislative intent of prior school boards. *Chappell v. Bd. of Directors of Ind. School Dist. of Keokuk*, 1950, 241 Iowa 230, 39 N.E.2d 628.

Under the school reorganization statute, if the proposition to establish a new corporation carries in the districts in which a separate vote is cast and the district is reorganized as provided in Chapter 275 of the Code, then the board of directors of the new district should see to it that any terms of the consolidation agreement remaining to be performed are carried out. Subsequently, the electors of the new district as a whole have the power under Chapter 278 of the Code to vote on any proposition authorized by law.

"*Question 3.* If a school board pursuant to Chapter 275.32, Code of Iowa, 1975, submits to the qualified electors of the district the question of authorization to the board to issue bonds for the purpose of purchasing buildings for use as attendance centers for the children of the district, are the oral and written statements made by the board members and administrators of the district regarding the interpretation and meaning of the bond issue with reference to the utilization of other attendance centers in the district binding upon that school and/or that administration subsequent to the successful passage of that bond referendum?"

The school directors are given specific statutory authority to determine the number of schools and determine the particular school which each child shall attend. §279.11. However, acts of board members when not assembled and acting as a board will not bind the school district. *Richards v. School Tp. of Jackson*, 1907, 132 Iowa 612, 109 N.W. 1093.

November 23, 1976

STATE OFFICERS AND DEPARTMENTS: Privileged Communications —§622.10, Code of Iowa, 1975. There is no statute which prohibits the transmission of a patient's name to a receiving hospital in an emergency situation. (Blumberg to Pawlewski, Commissioner of Health, 11-23-76) #76-11-18

Mr. Norman L. Pawlewski, Commissioner of Health: We have your opinion request of November 6, 1976, regarding the physician-patient privilege and confidential information. It appears that ambulance personnel, when taking a patient to a hospital on an emergency call, sometimes radio ahead to the hospital regarding the time of arrival, condition of the patient and sometimes the patient's name. These radio transmissions many times are made with citizen band radios, which can be heard by any number of people with CBs. You ask whether the transmission of these messages with the patient's name violates the physician-patient privilege or is in any other way deemed to be confidential.

Section 622.10, 1975 Code of Iowa, provides in pertinent part:

"No . . . physician, surgeon, or the stenographer or confidential clerk of any such person, who obtains such information by reason of his employment . . . shall be allowed, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the person in whose favor the same is made waives the rights conferred; nor shall such prohibition apply, as the same relates to physicians or surgeons or to the stenographer or confidential clerk of any such physicians or surgeons, in a civil action to recover damages for personal injuries or wrongful death in which the condition of the person in whose favor such prohibition is made is an element or factor of the claim or defense of such person or of any party claiming through or under such person. Such evidence shall be admissible upon trial of the action only as it relates to the condition alleged. If an adverse party desires the oral deposition, either discovery or evidentiary, of any such physician or surgeon to which such prohibition would otherwise apply or the stenographer or confidential clerk of any such physician or surgeon or desires to call any such physician or surgeon to which such prohibition would otherwise apply or the stenographer or confidential clerk of any such physician or surgeon as a witness at the trial of the action, he shall file an application with the court for permission to do so. The court upon hearing, which shall not be ex parte, shall grant such permission unless the court finds that the evidence sought does not relate to the condition alleged and shall fix a reasonable fee to be paid to such physician or surgeon by the party taking the deposition or calling the witness."

This section appears to apply solely to testimony given regarding a patient. We are not faced with that type of fact situation. The information being transmitted is probably not by a physician, but rather an ambulance attendant. Secondly, this information is being transmitted for the benefit of the patient to ensure proper care and treatment, not only at the hospital, but also in the ambulance. The patient's name may be given so that the physician can be contacted or that any existing medical records can be checked to ensure proper treatment. We know of no other statute which makes such information confidential under these circumstances.

The possibility always exists that a patient may file an action for invasion of privacy. Generally, the right to privacy is that right to be free from unwarranted appropriation or exploitation of one's personalty, the publicizing of one's private affairs, or the wrongful intrusion into one's private activities. 62 Am.Jur.2d *Privacy* §1 (1972). This right of privacy is relative to the customs of the time and place and the norms of an ordinary person. The oversensitive must give way to other interests. There are shocks, inconveniences and annoyances which mem-

bers of the public must absorb without redress since the right of privacy does not guaranty "hermitic seclusion." Id. at §13. While invasion of privacy is actionable in Iowa, *Yoder v. Smith*, 1962, 253 Iowa 505, 112 N.W.2d 862; *Bremmer v. Journal-Tribune Pub. Co.*, 1956, 247 Iowa 817, 76 N.W.2d 762, we have not found any case based upon invasion of privacy which has your facts. We cannot state that such an action under your facts would not be sustained. We do believe that such a recovery would be unlikely.

Accordingly, we are of the opinion that there is no statute prohibiting the transmission of a patient's name to the receiving hospital in an emergency situation. It is unlikely that these facts alone would constitute an invasion of privacy.

November 24, 1976

SCHOOLS: Directors Office Compatible with Trustee. The offices of township trustee and school board director are not incompatible. Nolan to Bordwell, Washington County Attorney, 11-24-76) #76-11-19

Mr. Richard S. Bordwell, Washington County Attorney: This is written in response to your request for an Attorney General's Opinion as to whether the offices of township trustee and school board director are incompatible.

It appears that a number of years ago an informal opinion was issued by this office to the effect that an incompatibility did exist in these two offices. However, we have been unable to locate a copy of such opinion, and believe it to have been issued prior to the change in the school laws requiring reorganization of school districts in accordance with the provisions presently found in Chapter 275, Code of Iowa. Under the present state of the law, it does not appear that the duties of a township trustee or school board director are incompatible when measured by the test enunciated by the Iowa Supreme Court in *State ex rel LeBuhn v. White*, 257 Iowa 606, 133 N.W.2d 903, 1965, where the Court said:

"The test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power', or where the duties of the two offices 'are inherently inconsistent and repugnant'."

Since the county school system has been abolished, there is little possibility that an interest of the township and of the local school district might, at any time, be at odds. Accordingly, it is the view of this office that a duly-elected and qualified township trustee could simultaneously be elected and qualify as a member of a local school district which includes the geographic territory covered by the township.

November 19, 1976

COUNTIES: Overtime Pay. Supervisors may authorize overtime pay to county employees for work in excess of forty (40) hours in seven (7) consecutive days. (Nolan to Tyson, Director, Office of Planning & Programming, 11-19-76) #76-11-20

Mr. Robert F. Tyson, Director, Office of Planning & Programming: This is written in response to your request for an Attorney General's opinion on the following:

"Because of the Iowa collective bargaining law and the recent United States Supreme Court ruling overturning Federal legislation regarding payment of overtime to state and local government employees, our Local Government Personnel Service Center is receiving many telephone calls from county governments in Iowa.

"May a County Board of Supervisors authorize overtime payments to county employees for work in excess of forty (40) in seven (7) consecutive days?"

The answer to your question is affirmative. In our opinion of June 7, 1971, 1972 O.A.G. 147, this office advised that the board of supervisors has authority to provide that county road employees be paid either on an hourly basis or a set salary with additional compensation for overtime work at a rate determined prospectively. That opinion pointed out that it is the engineer's duty to direct and supervise the county employees on road construction and maintenance work, but the duty of the board of supervisors to establish the feasibility of such work and to allocate funds. The opinion noted an earlier opinion of the Attorney General, 1950 O.A.G. 111, wherein it was determined that because the board of supervisors does not have the power to determine the working hours of the employees of the various county officers, overtime pay is not allowable to such county employees, as a general rule.

It is now our view that the 1950 opinion overlooked the statutory provision of §332.3(10), which authorizes the supervisors to fix compensation for all services of the county officers, not otherwise provided by law; and §341.1, which requires that the supervisors determine and approve the number of assistants and clerks employed by the several county officers.

In an opinion dated March 5, 1975, this office advised that the employer of county employees for the purposes of all matters pertaining to collective bargaining agreement is the county board of supervisors. Subsequent to *Maryland v. Wirtz*, 392 U.S. 183 (1968), counties were required by federal law (Public Law 87-30, 75 stat. 65), to pay under the Fair Labor Standards Act, for overtime worked by employees of hospitals, institutions and schools. Counties included required amounts in their budgets and levied additional taxes accordingly. Additional amendments to the Fair Labor Standards Act imposed minimum wage and maximum hour requirements on almost all public employment. (29 U.S.C. §203). In *National League of Cities v. Usery*, decided by the United States Supreme Court on June 24, 1976, the *Wirtz* case was overruled and the court held the 1974 amendments to the Fair Labor Standards Act unconstitutional insofar as they operate to directly displace the State's freedom to structure integral operations in areas of traditional government functions.

Under the Iowa Public Employment Relations Act, Chapter 20, 1975 Code of Iowa, the county board of supervisors as the governing body which determines the policies for the operation of the political subdivisions in addition to all powers and duties established by other provisions of statutes, has authority under §20.7 of the Code, to "6. Determine and implement methods, means, assignments and personnel by which the public employer's operations are to be conducted". In an opinion dated March 2, 1970, 1970 O.A.G. 462, we advised that the county board of supervisors has authority under their general powers to provide for

vacation and sick leave at county expense for all county employees. Accordingly, it is now our opinion that although the board of supervisors is no longer required under federal law to pay overtime to county employees working more than forty hours a week, there is implied authority under the board of supervisors' general power in §332.3 of the Code, and also in the provisions of the Public Employees Relations Act, cited above, for the board of supervisors to make provision for the payment of overtime wages to county employees who work in excess of the number of hours determined by the supervisors to be the maximum required. This, of course, does not effect the provisions of the Code and the interpretations thereof which hold that the salaries provided for county officers (either by statute or by the county compensation board's recommendation) are the total compensation which may be paid to such officers, regardless of the number of hours which they are required to work to fulfill the duties of their office.

November 24, 1976

SCHOOLS: Tuition—§282.2. A parent who, as sole stockholder, is personally liable for payment of property taxes paid by a corporation, may be allowed such taxes as offset against his children's tuition unless the property taxes are paid by the corporation as a business expense. (Nolan to Oliver, Madison County Attorney, 11-24-76) #76-11-21

Mr. Jerrold B. Oliver, Madison County Attorney: We have received your request for an opinion with reference to §282.2, Code of Iowa, 1975. Your letter of September 24, 1976, raises the following question:

". . . whether or not a shareholder of a corporation is allowed to deduct the amount of school tax paid by the corporation in which he owns stock in the district of which said stockholder is not a resident from the amount of tuition required to be paid for his children when they attend school in said school district."

According to your letter, a resident of the Van Meter Community School District desires to have his children attend school in the Winterset Community School District. Since he owns real estate within the Winterset Community School District, that school district has agreed that he may deduct the amount of school tax which he pays there from the amount of tuition required to be paid. However, the parent also owns all of the capital stock of a corporation which pays both real estate taxes on the land it owns and personal property taxes. The corporation is a separate entity and the Winterset Community School District takes the position that the taxes paid by this corporation cannot be deducted from the tuition which the parent pays for his children.

We agree with the position taken by the Winterset Community School District which limits the tuition offset to the amount of tax directly paid by the parent or guardian. Section 282.2, Code of Iowa, 1975, provides:

"The parent or guardian whose child or ward attends school in any district of which he is not a resident shall be allowed to deduct the amount of school tax paid by him in said district from the amount of the tuition required to be paid."

In an opinion of the Attorney General at 1936 O.A.G. 422, it is stated that the section providing offset of tuition for taxes paid does not require that the taxpayer be the owner in fee of the property, but merely provides

that in the event he pays school taxes, the amount may be deducted or offset, by a person other than the owner in fee where a purchaser under a real estate contract is obligated to pay the taxes. The parent who paid moneys and credits tax on stock of a bank located in a school district where his children attended school but did not reside was entitled to a deduction in tuition equal to the amount of school taxes paid by him in that independent school district. 1911-12 O.A.G. 160. In the case presented, it would appear that the test should be whether or not the parent is personally liable for payment of the real and personal property taxes of the corporate entity of which he is the sole stockholder. If so, then the amount of school taxes paid by him on behalf of the corporation may properly be allowed as an offset against his children's tuition. On the other hand, the property taxes as paid by the corporation are an ordinary business expense of the corporation and are not passed through to the owner of the capital stock, then the parent would not be entitled to a tuition offset since the taxes paid would not be his taxes. 1932 O.A.G. 54.

November 30, 1976

COUNTIES: Food Stamps: Administrative Costs. Food Stamp Act of 1964, Section 15, Public Law 93-347, Section 2. Sections 4.1(36)(a), 234.11, 332.3, subsections 5, 6, 11, 12 and 15, 1975 Code of Iowa. Chapter 165, Section 23, Acts 63rd G.A., Chapter 186, Section 16, and Chapter 1163, Section 20, Acts of 65th G.A. County Boards of Supervisors are authorized to expend county funds to pay administrative costs of the Food Stamp program. (Cosson to Burk, Assistant Black Hawk County Attorney, 11-30-76) #76-11-22

Mr. Peter W. Burk, Assistant Black Hawk County Attorney: I am in receipt of your letter requesting an opinion of the Attorney General as to whether a County Board of Supervisors is authorized to expend funds for expenses directly connected with the Food Stamp program, including liability and theft insurance, building lease costs and utility expenses, a safe for safekeeping of documents, etc.

As the Food Stamp program is of federal origin, the federal law should be mentioned. Section 15 of the Food Stamp Act of 1964, as amended by Section 2, P.L. 93-347, reads in part as follows:

"2. Except as otherwise provided in this section, each state shall be responsible for financing, *from funds available to the state or political subdivision thereof*, the costs of carrying out the administrative responsibilities assigned to it under the provisions of this Act." (Emphasis added)

A county is a political subdivision of the state. *Larsen v. Pottawattamie County*, Iowa 1970, 173 N.W.2d 579, 581. Therefore under federal law, funds may originate from either county or state.

The authority of a county board of supervisors is limited to those powers expressly conferred by statute or necessarily implied from the powers so conferred. *Woodbury County v. Anderson*, Iowa 1969, 164 N.W.2d 129, 134. Section 234.11, 1975 Iowa Code reads, in part, as follows:

"Each county shall participate in federal commodity or food stamp program."

The word "shall" is generally considered imperative or mandatory. *McDunn v. Roundy*, 1921, 191 Iowa 976, 979, 181 N.W. 453, 454. It imposes a duty, Section 4.1(36)(a), 1975 Code of Iowa. This command clearly authorizes the county to expend funds under Section 332.3, subsection 5, 6, 11, 12, and 15, as necessary to pay for the costs of the Food Stamp program.

Admittedly the laws concerning the relationship between the Department of Social Services and the counties are still in need of clean-up legislation, particularly concerning Food Stamps. The mandate that the counties participate in the Food Stamp program was originally enacted by Section 23, Chapter 165, Acts of the 63rd G.A., and was directed to then powerful county boards of social welfare. Since then the Legislature has given the Department of Social Services most of the authority the county boards previously exercised.

However the Legislature repeated the obligation to the counties to participate in the Food Stamp program in the same legislation that weakened the county boards of social welfare. See Section 16, Chapter 186, and Section 20, Chapter 1163, of the Acts of the 65th General Assembly. The requirement has not been repealed, but has been expressly reenacted. It must therefore be harmonized with the rest of the law if at all possible. See 1974 OAG 405 at 409, concerning the requirement of harmonizing the roles of the Department of Social Services and the County Boards of Social Welfare on the investigation of ADC cases.

The same logic would apply here. As the obligation to the counties was repeated as their obligation, the counties clearly are authorized to expend funds for administrative costs of the Food Stamp program.

November 30, 1976

GENERAL ASSEMBLY: CONSTITUIONAL LAW; Assistant Police Chief; Seat of General Assembly. Article III, §22, Constitution of Iowa. An assistant police chief is not a public officer and may hold a seat in the general assembly. (Haesemeyer to Hultman, State Senator, 11-30-76) #76-11-23

The Honorable Calvin O. Hultman, State Senator: Reference is made to your letter of November 23, 1976, in which you state:

"An Opinion of the Attorney General dated June 1, 1976 (1972 O.A.G. 471) clearly points out that a municipal employee on civil service may return to his position after his election to public office—such as the Legislature—and after having taken the 30 day leave of absence mandated by section 400.29, Code of Iowa, 1975.

"That Opinion further notes if a city employee does not hold a 'public office' (as defined in the Opinion) that he can be a legislator and still hold the city position. The Opinion also notes that while there are no requirements for a city employee taking a leave of absence during his term as a legislator, it is obvious that it is necessary to do so while the Legislature is in session since it probably would be impossible to be in the Legislature and at his city position at the same time.

"The question now arises whether a city's assistant police chief is a 'public officer' or is not and consequently is eligible to run for the Legislature under the guidelines described above.

"The assistant chief is under civil service and is appointed by the police chief from a list of at least three individuals who qualify for the position on the civil service list. The appointment is neither approved nor ratified by either the Mayor or City Council.

"Section 400.13 of the Code discusses the appointment of chief of police, but not assistant. Accordingly it would seem the post of assistant has not been created by the Legislature or through authority conferred by the Legislature.

"I would appreciate at your earliest convenience an opinion as to whether legislator and assistant police chief are compatible offices. In the alternative, if the offices are incompatible, could the assistant chief move to another position in the department upon his election?"

Article III, Section 22 of the Constitution of Iowa provides:

"No person holding any lucrative office under the United States, or this State, or any other power, shall be eligible to hold a seat in the General Assembly: but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative."

As stated in the 1972 Opinion of the Attorney General to which you make reference, 1972 O.A.G. 471:

" 'Lucrative office' has been interpreted to mean lucrative public office. 1968 O.A.G. 257. 'Public office' has been defined in *State v. Taylor*, 1967, 260 Iowa 634, 144 N.W. 2d 289, to contain the following five essential elements: (1) It must be created by the constitution or legislature or through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government; (3) the duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) the office must have some permanency and continuity, and not be only temporary and occasional. See also, *Hutton v. State*, 1947, 235 Iowa 52, 16 N.W.2d 18. . . ."

In our opinion, an assistant police chief, under the circumstances you describe, is not a "public officer" as defined in *State v. Taylor*, supra, and is not barred from serving in the general assembly. As you point out, the position has not been created by the legislature, or through authority conferred by the legislature. The assistant police chief is in essentially the same position as any other lower ranking police officer.

November 30, 1976

COUNTIES: County Care Facilities: §§253.6, 252.1, 253.7, 222.59, 222.80, Code of Iowa, 1975. Private patients may be accepted at county care facilities if they are "poor" or are transferred there by the superintendent of the hospital school for the mentally retarded. (Nolan to Newhard, State Representative, 11-30-76) #76-11-24

The Honorable Scott D. Newhard, State Representative: This is written in response to your request for an opinion on the question of whether or not county owned and operated care facilities can accept private patients.

The statutory provision pertaining to the admission of persons to county care facilities is to be found in §253.6, Code of Iowa, 1975:

"No person shall be admitted in the county care facility as a resident except upon order of the board of supervisors, which shall be issued only after the person seeking admission has received a pre-admission physical examination by a physician. However, if the need for admission of the person to the county care facility is immediate and no physician is readily available to perform the examination, the board may order the person's admission pending an examination by a physician, any provisions of section one thirty-five C point three (135C.3) and one thirty-five C point four (135C.4) to the contrary notwithstanding. When an admission is so ordered, the physical examination shall be completed within three days after the person's admission to the county care facility."

The Iowa Code provision clearly indicates that persons who are able to care for themselves shall not be continued as patients at a county care facility. An opinion of this office (1946 O.A.G. 79) stated that to be eligible for admission to a county home, a person must be a "poor person" as defined in §252.1. Section 252.1 provides:

"The words 'poor' and 'poor person' as used in this chapter shall be construed to mean those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor, but this section shall not be construed to forbid aid to needy persons who have some means, when the board shall be of the opinion that the same will be conducive to their welfare and the best interests of the public."

It should be noted that Chapter 252 further provides that relatives of a "poor person" are liable to relieve or maintain such person. Section 253.7 contemplates that a resident receiving treatment or care in a county care facility will be discharged when he becomes able to support and care for himself or provide for his own care. Thus, the test does not appear to be whether there are any resources available to pay the cost of the treatment of a resident admitted to the county home, but rather whether the person admitted is able to support and care for himself.

Further, it should be noted that pursuant to §222.59 of the Iowa Code, the superintendent of the hospital school for the mentally retarded may, on application of a parent or guardian, or in cooperation with other social agencies, arrange for the patient to be placed in an appropriate public or private care facility. Under §222.80 any person admitted to a county home or care facility is liable to the county for the reasonable costs of such support as may be provided in §222.78.

December 3, 1976

MOTOR VEHICLES: Speed limit violation prosecutions. §§321.1 and 321.285, Code of Iowa, 1975. Showing the posted limit is sufficient to establish the speed limit element of a prima facie case of violation of §321.285. (Baty to Bloom, Montgomery County Attorney, 12-3-76) #76-12-1

Mr. Dennis D. Bloom, Montgomery County Attorney: You asked whether in a speeding case the prosecution must prove the posted speed limit and also be prepared to produce witnesses to prove that the posted limit is proper.

Section 321.285, 1975 Code of Iowa, sets forth specific speed limits in business, residence or school, and suburban districts. Sections 321.1(57), (58), (59) and (60), 1975 Code of Iowa, defines the districts and

§321.1(61) explains how the measurements involved in determining the districts are to be made. Section 321.285(4) and §321.289, 1975 Code of Iowa, direct, in certain instances, that these speeds be posted.

The prosecution must prove every element of a traffic offense beyond a reasonable doubt. *Iowa City v. Nolan*, 239 NW2d 102 (Iowa 1976). However, in "public welfare offenses" the court has permitted the shifting of the burden of proof as to certain elements of the crime. *Iowa City v. Nolan*, supra at 105 (operator of illegally parked car).

In a negligence case, the Iowa Supreme Court stated that, in the absence of proof to the contrary, the court would presume that town officers properly performed their duty in erecting a 25 mile per hour speed limit sign and thus the 25 mile resident district limit was applicable. *Doherty v. Edwards*, 277 Ia. 1264, 290 NW 672.

In all cases it is necessary to prove the applicable limit. In my opinion, showing the posted limit establishes the speed limit element of a prima facie speeding case. Without a posted limit, the nature of the district would have to be shown. In the case of a posted limit and testimony concerning the nature of the area, the trier of fact would weigh the evidence. Depending on the prosecutor's opinion as to the importance of the case and his estimate of the likelihood that the posted limit will be challenged, the prosecutor may consider it prudent to have further evidence of the nature of the district available.

December 3, 1976

ELECTIONS: BOARD OF CANVASSERS: QUALIFICATIONS OF CANDIDATES: GENERAL ASSEMBLY: RESIDENCE: Art. III, §§4, 5 and 7, Const. of Ia.; §§50.37, 50.39 and Chs. 57 and 59, Code of Iowa, 1975. It is the ministerial duty of the Executive Council, in its capacity as State Board of Canvassers to certify, as elected to the Senate, the candidate receiving the most votes, although it appears that he is constitutionally disqualified because he was not an inhabitant of the state for the year next preceding his election. Neither the Attorney General nor the State Board of Canvassers has power to determine factual questions of inhabitancy, residency or other qualifications for the office of State Senator, or discretion to deny certification, such being the constitutional prerogative of the Senate under Art. III, §7. (Turner to Executive Council, 12-3-76) #76-12-2

Executive Council, State of Iowa; Re: John Richard Scott, Candidate for State Senate, 24th Senatorial District: On November 22, 1976, I asked you, in your capacity as State Board of Canvassers, to temporarily refrain from declaring John Richard Scott of Pocahontas County, a Democrat, as having been elected state senator from the 24th senatorial district, although he received more votes than incumbent Senator William P. Winkelman of Calhoun County, a Republican.

The basis of my request was that Article III, §§4 and 5, Constitution of Iowa, when read together, provide in pertinent part that "No person shall be" a member of the Senate unless he "shall have been an *inhabitant* of this State one year next preceding his election, and at the time of his election shall have had an *actual residence* of sixty days in the County, or District he may have been chosen to represent." (Emphasis added.)

The Republican State Central Committee had that day provided me

with evidence that Mr. Scott was not an inhabitant of Iowa for one year immediately preceding his election and therefore was constitutionally ineligible or disqualified from becoming a member of the Senate.

The words "inhabitant" and "actual residence" as used in Article III, §4, have never been construed by the Iowa Supreme Court. *20 Iowa Law Review*, 483, 484. There are myriad cases from Iowa and other states interpreting such words, for various purposes, but they are not all in agreement. The question arises here whether "inhabitant" means "legal residence" or "domicile" (which terms are usually equated), or whether it means mere physical presence or temporary place of abode. The same is true of the words "actual residence.' Do those words mean "actual *legal* residence" or domicile ,or do they mean physical presence? It seems to me that the provision is ambiguous and open to construction. In any case it is obvious that the people of Iowa, in adopting Article III, §4, meant "inhabitant" to mean something other than "actual residence" or they would not have used different terminology in the two instances. And "actual residence" is probably something more or less, or different, than residence or legal residence.

What was the object and purpose of the one year inhabitant requirement and the object and purpose of the 60 day actual residence requirement? Did the people mean by inhabitant that the candidate should have physically lived in the state for a full year so that he would know the needs and problems of the state but that he need be a "legal" resident of the district for only 60 days? Or did they mean that he must have been a "legal" resident of the state for a year, regardless of where he actually had his abode, but physically present (in "actual" residence or abode) in the district for 60 days prior to his election? Logical arguments can be made for either position. Nothing from the mere words, or logic, provides an answer. The answer must derive from the arguments of the framers of the Constitution or from case law. And even then, there can be no certainty until our Supreme Court has construed the provision. See *Fitzgerald v. Arel*, 63 Iowa 104, 16 N.W. 712, *18 N.W. 713* (1884); *Kollman v. McGregor*, 240 Iowa 1331, 39 N.W.2d 302 (1949); *Brown v. Lambe*, 119 Iowa 404, 93 N.W. 486; (1903); *Dodd v. Lorenz*, 210 Iowa 513, 231 N.W .422 (1930); *Ruth and Clark v. Emery*, 233 Iowa 1234, 11 N.W.2d 397, 398 (1943). It will be seen from these cases that terms such as "inhabitant," "resident" and "actual residence" take on different meanings depending upon the object which the statute was designed to accomplish and that every case must be determined upon its facts. *State ex rel. Killpack v. Hemsworth*, 112 Iowa 1, 83 N.W. 728 (1900); *20 Iowa Law Review 483.*

While the United States Supreme Court has not yet ruled directly on the validity of durational residency requirements for candidacy for public office, the great weight of authority in the several states is that durational residency requirements are constitutional and that, generally, longer residency requirements are permitted for the higher offices. *65 A.L.R. 3rd 1048*, 1053, 1085.

In my opinion it is unnecessary to decide definitely whether an inhabitant is the equivalent of a legal resident to resolve this problem. If being an inhabitant required Mr. Scotts physical presence in a dwelling or

place of abode within the state, then he was clearly not an inhabitant for the year next preceding his election. He admittedly lived and worked in Washington, D.C., and maintained his dwelling, at atleast two different addresses there between 1970 and the spring of 1976.

We assume for Mr. Scott's benefit, and we think it probably legally correct, that under this provision an inhabitant means a legal resident; that for purposes of Art. III, §4, the two terms are synonymous. We also find that at the time of his election Mr. Scott was in "actual residence" (which we assume is less than legal residence and which probably means physical presence in at least a temporary abode) in the district from which he was elected, for more than 60 days next preceding the election. See *1974 OAG 459* and *1968 OAG 154*.

Nevertheless, even giving Mr. Scott the benefit of any doubt about the meaning of these terms, the evidence that he was not a legal resident of Iowa, and hnce not an inhabitant, during the entire year next preceding his election, seems impressive.

Despite the alleged *animus revertendi* (intention of returning), declared by him, there are certain indicia of legal residence which appear to foreclose Mr. Scott's constitutional right to the office and overcome his oral claims of intention to maintain Iowa residence.

True, statements and declarations made by a person whose legal residence is in dispute, whether oral or in writing, are to be considered in connection with the other facts of the case and given due credit as an index of his intention. Written declarations are given greater weight than oral ones. However, declarations, whether of legal residence or of intention concerning it, are not conclusive; and they have been termed "the lowest species of evidence." *28 C.J.S. 43*, Domicile §18(b).

Certainly, the Iowa Court considers indicia of residence, in addition to the statements of the individual in question, in determining whether he is in fact a legal resident. Thus, in *Edmundson v. Miley Trailer Co.*, 211 N.W.2d 269, 271 (1973), the Iowa Supreme Court in determining a question of residence of plaintiff's decedent in an automobile accident case considered the plaintiff's ties in Iowa, including his checking account, mailing address, the horses left in Iowa, plaintiff's frequent visits here, the tax return filed in Iowa when none was filed in Michigan, plaintiff's driver's license and the fact that he voted in Iowa. Where a person sleeps and keeps his clothes, as well as where his spouse resides, may also be considerations. No one consideration is necessarily conclusive.

In this instance, it appears that Mr. Scott is a lawyer, having graduated from the University of Iowa College of Law and been admitted to practice in Iowa in 1969. He tells me he has never been admitted to the bar of the District of Columbia but that he worked as a lawyer in the Civil Rights Division of the Department of Justice in Washington, D.C. He authorized the Department of Justice to write and inform me that he was employed in that capacity from January 5, 1970, to May 14, 1976, and that when he applied for the job he gave his residence as Pocahontas, Iowa.

Mr. Scott was born in Pocahontas County on March 2, 1944, where

he was raised and where there is some evidence that he now helps farm the family farm. He insists he never intended to change his Iowa residence. But it appears he actually resided in Washington, D.C., from 1970 until the spring of 1976; that he has not voted in Iowa since at least 1970;* that he registered a 1974 Peugenot automobile in the District of Columbia on March 22, 1976, showing a previous address as 1301 33rd St. NW, Washington, D.C. 20007 and a new address as 456 N St. SW. The car registration does not expire until March 31, 1977. He also was issued a Washington, D.C., driver's license on March 28, 1974, (and a duplicate thereof on December 20, 1974) which does not expire until March 28, 1978, showing his address as 456 N St. SW, Washington, D.C. He admits to paying local residence income tax in the District of Columbia and that he has filed no Iowa resident or non-resident income tax returns in the past few years. He has paid no taxes to the Treasurer of Pocahontas County.

But perhaps the strongest evidence that Mr. Scott abandoned his Iowa residence is that in December, 1970, he voluntarily renewed his Iowa State Bar Association membership by paying $10 dues as a *non-resident* member. And on February 22, 1974, he also again voluntarily paid $25 *non-resident* membership dues showing his address as 1546 44th St. NW, Washington, D.C. Since then he has paid no Iowa Bar Association dues at all, but this latter fact is not conclusive because membership in that association is voluntary and not a prerequisite to practicing law in Iowa.

Under all of the circumstances, it seems clear to me that he was not an inhabitant of this state for the year immediately preceding his election. But this is a question of fact which neither the Attorney General nor the Executive Council, in its capacity as State Board of Canvassers, can properly determine. It is, as we shall see, a question for the Iowa Senate to determine. The Senators are sworn to uphold the Constitution of Iowa and we must presume that they will proceed to exercise their prerogative in a fair and judicious manner.

§50.37, Code of Iowa, 1975, provides:

"*State canvassing board.* The executive council shall constitute a board of canvassers of all abstracts of votes required to be filed with the state commissioner, except for the offices of governor and lieutenant governor. No member of such board shall take part in canvassing the votes for an office for which he is a candidate. Any clerical error found by the state board of canvassers shall be corrected by the county commissioner in a letter addressed to the state board of canvassers."

§50.39, Code of Iowa 1975, provides:

"*Abstract.* It shall make an abstract stating, in words written at length, the number of ballots cast for each office, the names of all the persons voted for, for what office, the number of votes each received, and whom it declares to be elected, and if a public question has been submitted to the voters of the state, the number of ballots cast for and against the question and a declaration of the result as determined by

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* Records in Johnson County show Mr. Scott registered to vote there on November 8, 1972, the day *after* the general election that year, showing his address then as 721 Carriage Hills Apartments, Iowa City, Iowa.

the canvassers; which abstract shall be signed by the canvassers in their official capacity and as state canvassers, and have the seal of the state affixed."

We must determine whether or not the duties of the State Canvassing Board are merely ministerial or whether they are discretionary in character. In other words, does the State Canvassing Board have the power to do anything other than to determine which candidate received the most votes or may it inquire into other matters such as, in this case, the eligibility or qualifications of the winning candidate to the office in question? In *26 Am.Jur.2d* 123, Elections §300 we find:

"If the members of a canvassing board are made judges of the election and given full power and authority to approve thereof, or set it aside and order a new election, their power is clearly judicial. In most jurisdictions, however, such a board is considered merely a ministerial body, empowered only to accept returns that are in due form, and to ascertain and declare the result as it appears therefrom. Questions of illegal voting and fraudulent practices are passed on by another tribunal. The canvassers are to be satisfied of the genuineness of the returns, that is, that the papers presented to them are not forged and spurious, that they are returns, and that they are signed by the proper officers. When so satisfied, however, in most jurisdictions they may not reject any returns for informalities in them or for illegal and fraudulent practices in the election, although there is some authority to the contrary. Furthermore, it is not the duty or province of the board to challenge or question the legal qualification of candidates for office."

Davies v. Wilson, 229 Iowa 100, 294 N.W. 288 (1940) involved a situation where a candidate for Attorney General in the Republican primary election died shortly after being elected but before the returns of the primary were certified to the Secretary of State. The losing candidate brought an action in mandamus against the Executive Council to compel that body to certify him as the Republican nominee for Attorney General. The Iowa Supreme Court rejected plaintiff's contention and denied the relief requested stating:

"It is true that the canvass by the State Board of Canvassers of the abstracts of election returns filed by the County Auditors is one of the statutory steps in an election for public office, but it cannot ordinarily alter the record made by the voters. Its duty is the *ministerial* or administrative one or ascertaining or verifying that record and declaring the result as it was shown on the face of the abstracted return [citations omitted]. In 20 C.J. page 200, §255, it is stated: 'Where there is no question as to the genuineness of the returns or that all of the returns are before them, the powers and duties of the canvassers are limited to the mechanical or mathematical function of ascertaining and declaring the apparent result of the election by adding or compiling the votes cast for each candidate as shown on the face of the returns before them, and then declaring or certifying the results so ascertained'." (Emphasis added.)

Thus in *Davies v. Wilson* the court in effect concluded that the Executive Council, meeting as a State Board of Canvassers, had no alternative but to certify the election of a dead man! Although the *Davies* case may possibly be distinguished from the present situation in that the winning candidate for the Republican nomination for Attorney General was eligible for the office at the time of the election, i.e. he was alive and met the other qualifications, whereas Mr. Scott did not have the requisite qualifications to make him eligible for election on the day of the election, i.e. he had not completed the requirement of inhabitance in Iowa,

we must nevertheless conclude that the Executive Council's function in canvassing the votes is merely ministerial and it has no discretion in determining whether Mr. Scott is elected. See also *Bradfield v. Wart*, 36 Iowa 291 (1873); *1904 OAG 123*.

While this result may seem unwise it appears to be the law in Iowa and most other jurisdictions. (One can conceive of *reductio ad absurdum* results which might stem from this rule. For example, the students in a college town might in a mischievous bent elect by write-in votes a chimpanzee, albeit a very learned and erudite chimpanzee, who, appearing with his certificate of election in one hand and a banana in the other would be allowed to take his seat unnoticed.)

The question of certifying as elected a person who is constitutionally ineligible, or who plainly does not have the qualifications required in the State's highest law, is nevertheless a serious legal problem and one into which the Courts have ventured. *Bond v. Floyd*, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966). Recently, in Minnesota, a 19 year old was elected to the office of court commissioner and the county auditor refused to certify him as elected because of a constitutional provision requiring that persons holding that office be at least 21 years of age. The 19 year old brought suit to compel issuance of the certificate of election. The Minnesota Supreme Court affirmed the District Court's refusal to compel issuance of the certificate. *Meyers v. Roberts*, 246 N.W.2d 186, Minn. 1976. And in *People ex rel. Sherwood v. Board of State Canvassers*, 129 N.Y. 360, 29 N.E. 345 (1891) the New York Court of Appeals refused to grant a writ of mandamus compelling the State Board of Canvassers to issue a certificate of election to an individual who had been elected to the New York Senate because of a constitutional prohibition against persons holding a city office from being elected to the Senate. However, although refusing to grant the relief requested, the Court nevertheless went on to say that the duty of the State Board of Canvassers was purely ministerial and that they had no power or jurisdiction to go outside the returns of the county canvass or to institute an inquiry as to the eligibility of the candidates who are voted for by the electors.

In any event, under the great weight of authority, it appears that the only remedy available in the case of an ineligible or unqualified person being elected to the Iowa Senate would be an election contest filed under the provisions of Chapters 57 and 59 of the Code, to be heard and determined by the Senate.

Article III, §7 provides:

"Each house shall choose its own officers, and judge of the *qualification*, election, and return of its own members. A contested election shall be determined in such manner as shall be directed by law." (Emphasis added.)

Provisions such as the foregoing are ordinarily held to vest the state legislature with full and exclusive power to determine the qualifications of its members and to deprive the courts of jurisdiction. Decisions thereon are ordinarily final and conclusive and not subject to review or revision by any court. *107 A.L.R. 205*, 209, 216 and authorities cited therein; *Barry v. United States*, 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867

(1929); *Annotation 7 L.Ed.2d 911,* 912; *Roudebush v. Hartke,* 405 U.S. 15, 92 S.Ct. 802, 31 L.Ed.2d 1, 8 (1972).

In *Roudebush,* the United States Supreme Court recognized:

"Which candidate is entitled to be seated in the [U.S.] Senate is, to be sure, a non-justiciable political question—a question that would not have been the business of this court even before the Senate acted." (Citing *Powell v. McCormack,* 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491.)

However, see note in *26 L.R.A. 207,* 208, which indicates that an action in quo warranto might lie to test the title to the office of a city councilman lacking the requisite qualifications for office, notwithstanding power given to the council to judge of the election and qualifications of its members, which latter the annotation says "is cumulative merely."

In any case, it is my opinion that if the Executive Council, as State Board of Canvassers, finds that John Richard Scott received more votes than William P. Winkleman, or any other candidate, for the office of Senator from the 24th Senatorial District, the Board must declare Mr. Scott the winner of the election and a Certificate of Election must be issued to him in due course. It is for the Senate, under Article III, §7, Constitution of Iowa, and Chapters 57 and 59, Code of Iowa, 1975, to determine Mr. Scott's qualifications.

December 3, 1976

ELECTIONS: Campaign Finance Disclosure Commission. §§56.11(2), 56.11(3), 56.11(4), 56.16, Code of Iowa, 1975. The Campaign Finance Disclosure Commission must have a reasonable belief that a willful violation of a provision of Chapter 56 occurred before it can recommend criminal prosecution pursuant to §56.16. (Enke to Connolly, Executive Director, Campaign Finance Disclosure Commission, 12-3-76) #76-12-3

Mr. Richard Connolly, Executive Director, Campaign Finance Disclosure Commission: This Opinion of the Attorney General is in response to a letter written by the former Executive Director of the Campaign Finance Disclosure Commission, Ms. Barbara Snethen. Ms. Snethen requested a construction of Section 56.11, Code of Iowa, 1975, as it relates to Section 56.16. Specifically, the question is phrased as follows:

"[T]he Campaign Finance Disclosure Commission would like to know whether it must find only that there are reasonable grounds to believe that a violation of the Iowa disclosure law occurred, or whether, in addition, the Commission must determine that the person(s) involved in the matter appear to have willfully violated the law in order for the Commission to make a recommendation of criminal prosecution to the United States Attorney, the Attorney General or the county attorney as the result of an administrative hearing conducted by the Commission."

The relevant portions of the statutes involved are:

Section 56.11(2). "The commission shall investigate the complaint and conduct the hearing . . . . After the hearing the commission shall determine whether or not there is a reasonable belief that a violation of the provisions of this chapter did occur . . . ."

Section 56.11(3). "If the commission finds that the person, candidate, or political committee has engaged in any act or practice which consti-

tutes a violation of this chapter, the commission shall report such a suspected violation of law to the United States attorney, the attorney general, or the county attorney, as the case may be, with the recommendation of appropriate action to be taken."

Section 56.11(4). "Upon receipt of the report and recommendations of the commission, the county attorney or attorney general shall review the report and recommendation and within five days of receiving the report institute the recommended actions and any other action for relief, including a permanent or temporary injunction, restraining order or other appropriate remedy in the district court in and for the county in which the accused resides or shall advise the commission that in his judgment the case does not merit prosecution."

Section 56.16. "Any person who willfully violates any provisions of this chapter shall upon conviction, be subject to a fine of not more than one thousand dollars or imprisonment in the county jail for not more than thirty days."

In Ms. Snethen's request, she refers to the phrase "reasonable grounds to believe." I would initially point out that such a phrase is not presently contained in Section 56.11(2). However, a similar phrase, "reasonable belief", is present. While I do not feel that this difference in phraseology would effect the outcome of this Opinion, I will refer to the language in Section 56.11(2) as it presently exists. The essence of your question, then, is whether the Campaign Finance Disclosure Commission must have a reasonable belief that a willful violation of Chapter 56 has occurred before the Commission can recommend criminal prosecution under Section 56.16.

As stated in Section 56.11(2) the Commission shall, after hearing, determine whether there is a reasonable belief that a violation of the provisions of Chapter 56 did occur. The specific provision of Chapter 56 to which your letter has reference is the general criminal penalty provision contained in Section 56.16. Before recommending criminal action to the appropriate prosecuting authority, pursuant to Section 56.11(3), the Commission must, therefore, have a reasonable belief that a violation of Section 56.16 did occur.

In making this reasonable belief determination, the Commission must consider all of the elements which constitute a violation of Section 56.16. If all elements are not present, a criminal prosecution will fail. *State v. Grindle*, 1973, Iowa, 215 N.W.2d 268. One need only refer to Section 56.16 to determine that there are two elements of the crime penalized therein. The two elements are, first, that one or more provisions of Chapter 56 were violated and, second, that such provision or provisions were willfully violated. If the Commission was not required to consider the second element of willfullness, an absurd result would transpire: the Commission would be recommending criminal prosecution under Section 56.16, but such prosecution would never occur since the prosecuting attorney could never in good conscience file an information or obtain an indictment in the absence of a necessary element of the crime defined in Section 56.16. We cannot assume that the Legislature intended to enact a law which would lead to absurd consequences. *Graham v. Worthington*, 1966, 259 Iowa 845, 146 N.W.2d 626.

The only question remaining is posed by the questionable wording of Section 56.11(3). This paragraph does not contain the phrase "reasonable belief"; rather, it states that the Commission must *find* "that the person, candidate, or political committee has engaged in any act or practice which constitutes a violation of this chapter" before it can make any recommendation to the attorney general, county attorney or United States attorney. This particular phraseology would seem to require an absolute finding of a violation rather than merely a reasonable belief that a violation occurred. Thus, it would appear that paragraph 3 of Section 56.11 conflicts with paragraph 2 of Section 56.11. However, it is a well established rule of statutory construction that statutes relating to the same subject, enacted at the same time, are to be construed as being in pari materia and harmonized if possible. *McKinney v. McClure*, 1928, 206 Iowa 285, 220 N.W. 354. *Northern Natural Gas Company v. Forst*, 1973, Iowa, 205 N.W.2d 692, 695 phrases this rule as follows:

". . . In seeking the meaning of a law the entire act should be considered. Each section must be construed with the act as a whole and all parts of the act considered, compared and construed together."

Thus, we must construe Section 56.11(3) in light of Section 56.11(2). In addition, the first portion of Section 56.11(3), which appears to speak in terms of an absolute finding of a violation, must be construed and considered in light of the last portion of Section 56.11(3), which speaks in terms of a "suspected violation", a phrase more closely akin to "reasonable belief". In this regard it need only be pointed out that if the Legislature had intended that the Commission make an absolute finding, there would be little need for the Commission then to refer its findings to a prosecuting attorney for his review as required by Section 56.11(4). Reading these various sections and portions of sections in pari materia, it is apparent the Legislature intended that the Commission have a reasonable belief that a willful violation of Chapter 56 occurred before it can recommend criminal prosecution of the crime set forth in Section 56.16.

December 3, 1976

TAXATION: Inheritance Tax: Expenses of selling property in Estates. §450.12(1), Code of Iowa, 1975, as amended by Chapter 220, Acts of 66th G.A., first session. The provisions of Chapter 220 authorizing costs of the sale of property in an estate as a deduction from the gross value of an estate for Iowa inheritance tax purposes would not be applicable to estates of decedents dying before July 1, 1975. (Griger to Redmond, State Senator, 12-3-76) #76-12-4

The Honorable James M. Redmond, State Senator: You have requested an opinion of the Attorney General concerning the question of whether expenses of selling property in an estate can be taken as proper deductions for purposes of determining the net estate subject to Iowa inheritance tax where the statutory provisions authorizing such deductions were not effective on the date of the decedent's death.

The factual situation which you presented is as follows: The decedent died testate on September 17, 1974, bequeathing his property to his nieces and nephews. On October 16, 1974, the property was sold at

auction and sales expenses were incurred. On November 15, 1975, the executor remitted Iowa inheritance tax to the Department of Revenue.

At the outset, certain background information must be set forth to place the question which you have raised in proper prospective. In the case of *In Re Estate of Waddington*, 1972, Iowa, 201 N.W.2d 77, the Iowa Supreme Court held that certain expenses incurred in the administration of an Iowa decedent's estate in connection with the sale of real estate situated in Iowa were not allowable deductions, for Iowa inheritance tax purposes, from the gross value of the estate for the reason that such expenses were not enumerated as deductions in §450.12(1), Code of Iowa, 1975. Probably as a response to this decision, the legislature amended §450.12(1), in 1975, by the enactment of Chapter 220, Acts of 66th G.A., first session. This amendment was signed by the Governor on June 16, 1975 and became effective on July 1, 1975. See §3.7, Code of Iowa, 1975. Chapter 220 expressly enumerates costs of selling property within the context of §450.12(1) as allowable deductions for Iowa inheritance tax purposes.

In your opinion request, you refer to Chapter 208, Acts of the 66th G.A., first session, which was passed by the legislature prior to July 1, 1975 and signed by the Governor on July 14, 1975, and which, in §2 thereof, amended the definition of costs of administration in §633.3(8), Code of Iowa, 1975 (Probate Code) to state that court costs included expenses of selling property, as the particular amendment changing the decision in the *Waddington* case. Regardless whether Chapter 208 which, pursuant to §3.7, Code of Iowa, 1975, became effective on August 15, 1975, would have overruled the *Waddington* case, it is clear that Chapter 220 does have that effect and this opinion will be concerned with the application of Chapter 220 to the situation you posed. In essence, the question is whether Chapter 220, effective on July 1, 1975 can be applicable to those estates of decedents dying before July 1, 1975.

The Iowa inheritance tax is imposed on the succession of property from the dead to the living and is specifically imposed upon the transfer of decedent's property by will or under statutes of inheritance. *Estate of Dieleman v. Department of Revenue*, 1974, Iowa, 222 N.W.2d 459; §§450.2 and 450.3(1), Code of Iowa, 1975. The Iowa inheritance tax is imposed instantly as of the date of death of the decedent. *Matter of Estate of Bliven*, 1975, Iowa, 236 N.W.2d 366; §450.6, Code of Iowa, 1975. Title to a decedent's property in Iowa passes instantly at death to the decedent's testate or intestate beneficiaries, subject to possession by the personal representative during probate proceedings for administration, sale, or lawful disposition. *DeLong v. Scott*, 1974, Iowa, 217 N.W.2d 635; *Noel v. Uthe*, 1971, Iowa, 184 N.W.2d 686; §633.350, Code of Iowa, 1975. Consequently, it is clear that both the succession and the tax are considered applicable as of the date of the decedent's death, not at some other date. Therefore, it seems reasonable to conclude that the tax should be computed according to the laws existing when the decedent died where the legislature does not say otherwise. Indeed, there are several cases from other jurisdictions concerning the nonapplication of statutes enlarging inheritance tax deductions to estates of decedents dying before such statutes became effective.

In the case of *In Re Benjamin's Estate*, 1940, 235 Wis. 152, 292 N.W. 304, the decedent died testate on March 6, 1938. On July 3, 1939, the Wisconsin inheritance tax law was amended to allow a deduction from the gross value of an estate for federal estate taxes paid. The Court held that the statutory amendment authorizing the federal estate tax deduction could not apply to estates of decedents dying before the amendment became effective for the reason that such application would give the amendment retroactive effect in absence of any express legislative intent to do so. The Court stated at 292 N.W. 308:

"The doctrine to which we adhere is stated in Will of Clark, 182 Wis. 384, 196 N.W. 839, that the tax is to be computed in accordance with the laws existing at the time of the accrual."

As previously noted, the Iowa inheritance tax accrues at the death of the decedent. *Matter of Estate of Bliven*, supra; §450.6 of the Code.

In the case of *In Re Ingraham's Estate*, 1944, 106 Utah 337, 148 P.2d 340, the decedent died testate on June 26, 1942 and her will, inter alia, bequeathed her real estate situated in Utah to a university. On May 11, 1943, the Utah inheritance tax law was effectively amended to allow, as a deduction from the gross value of the estate, all bequests for educational purposes. The decedent's estate had not been closed when this statutory amendment authorizing the deduction became effective. The Court held that the amendment would not apply to estates of decedents dying before May 11, 1943 and stated at 148 P.2d 342:

"To hold this amendment is retroactive in its effect is to place a penalty on those who through diligence closed their estates and paid their tax prior to May 11, 1943, and would award a premium in the form of a deduction under the amendment in question to those who by delay and procrastination failed to settle the affairs of an estate until after the effective date of this amendment. This we do not believe the legislature intended and such is not consonant with justice and is contrary to every fundamental principle of law and equity as we know it. The law has always sought to award the diligent and refuse its approval of delay."

While the exact situation you posed has never been the subject of an Iowa Supreme Court decision, our Court has held that statutes imposing the Iowa inheritance tax would not be construed to retroactively apply to estates of decedents dying before the statutes became effective. *Lacey v. State Treasurer*, 1911, 152 Iowa 477, 132 N.W. 843; *In Re Estate of Higgins*, 1922, 194 Iowa 369, 189 N.W. 752. That being the case, and in view of the authorities previously cited herein, no sound reason would appear to justify a construction of Chapter 220 to retroactively apply to estates of decedents dying prior to July 1, 1975. Statutes are presumed to be prospective unless expressly made retroactive. See §4.5, Code of Iowa, 1975.

Therefore, it is the opinion of this office that the provisions of Chapter 220 authorizing costs of the sale of property in an estate as a deduction from the gross value of an estate for Iowa inheritance tax purposes would not be applicable to estates of decedents dying before July 1, 1975.

December 3, 1976

COUNTIES AND COUNTY OFFICERS: Platting — §§4.7, 409.1, 409.4, 409.5, 409.6, 409.7, 409.12 and 409.14, Code of Iowa, 1975; §§1, 2 and 3, H.F. 909, 66th G.A. (1976). Section 409.14 prevails over §409.1 for plats within cities of twenty-five thousand population and within two miles of such cities, and cities which have, by ordinance adopted §409.14, and within two miles of such cities. (Blumberg to Correll, Black Hawk County Attorney, 12-3-76) #76-12-5

David H. Correll, Black Hawk County Attorney: We have received your opinion request of November 2, 1976, regarding Chapter 409, 1975 Code of Iowa. You asked:

"1. If a proprietor tenders for recording a formal plat of property that is subject to the provisions of Section 409.14 of the 1975 Code of Iowa as amended by House File 909, and if said proprietor does not convey any of said property prior to the completion of the formal platting process, must the recorder require the proprietor to file, in addition to the formal plat, the certified copy of a registered land surveyor's plat of said property 'for assessment and taxation purposes' required by Section 409.1 of the 1975 Code of Iowa as amended by House File 909?

"2. If a plat 'for assessment and taxation purposes' is tendered to the county recorder for recording pursuant to the provisions of Section 409.1 of the 1975 Code of Iowa as amended by House File 909, and if the property covered by the plat is within a city having a population by the latest federal census of 25,000 or over, or is within a city of any size which by ordinance has adopted the restrictions of Section 409.14, or is within 2 mile sof the limits of such city, must the recorder refuse to accept such plat for recording unless such plat has been first filed with and approved by the council of such city as provided in Section 409.7, after review by the city plan commission in cities where such commission exists

"3. If a proprietor tenders for recording a plat 'for assessment and taxation purposes' pursuant to the provisions of Section 409.1 of the 1975 Code of Iowa as amended by House File 909, must the recorder require that said proprietor comply with the requirements of Sections 409.4 to 409.12, inclusive, of the Code before accepting such plat for recording?"

Section 409.1, as amended by §1, H.F. 909, 66th G.A. (1976) reads:

"Every original proprietor of any tract or parcel of land, of forty acres or less or of more than forty acres if divided into parcels any of which are less than forty acres and every original proprietor of any tract or parcel of land of any size located within a city or within two miles of a city subject to the provisions of section four hundred nine point fourteen (409.14) of the Code, who shall subdivide the same into three or more parts, shall cause a registered land surveyor's plat of such subdivision, with references to known or permanent monuments, to be made by a registered land surveyor holding a certificate issued under the provisions of chapter 114, giving the bearing and distance from some corner of the subdivision to some corner of the congressional division of which it is part, which shall accurately describe all the subdivisions thereof, numbering the same by progressive numbers, giving their dimensions by length and breadth, and the breadth and courses of all the streets and alleys established therein.

"The registered surveyor shall certify on the plat of the subdivision that the plat is a true and correct representation of the lands surveyed. The certification shall be signed by the surveyor and shall display the surveyor's registration number and official seal.

"Prior to, or at the time of conveyance of the tract or a parcel thereof.

the proprietor shall cause a certified copy of the plat to be recorded by the county recorder for assessment and taxation purposes, and the county recorder shall forward certified copies of the plat to the county auditor and assessor. The recording of a plat pursuant to this paragraph is in addition to any other requirement of this chapter, and the recording for assessment and taxation purposes shall not constitute a dedication or impose any liability upon the state or any of its political subdivisions."

Section 409.12, as amended by §2, H.F. 909, provides:

"The signed and acknowledged plat and the attorney's opinion, together with the certificates of the clerk, recorder, and treasurer, and the affidavit and bond, if any, together with the certificate of approval of the council, shall be entered of record in the proper record books in the office of the county recorder. When so entered, the plat only shall be entered of record in the offices of the county auditor and assessor and shall be of no validity until so filed, in those offices.

"A plat certified by the council shall supersede any plat recorded for assessment and taxation purposes pursuant to section four hundred nine point one (409.1) of the Code and any plat so superseded shall be voided." [Emphasis added]

Finally, §409.14, as amended by §3, H.F. 909, reads in pertinent part:

"No county recorder shall hereafter file or record, nor permit to be filed or recorded, any plat purporting to lay out or subdivide any tract of land into lots and blocks within any city having a population by the latest federal census of twenty-five thousand or over, or within a city of any size which by ordinance adopts the restrictions of this section or, except as hereinafter provided, within two miles of the limits of such city, unless such plat has been first filed with and approved by the council of such city as provided in section 409.7, after review and recommendation by the city plan commission in cities where such commission exists.

. . .

"If any such plat of land is tendered for recording in the office of the county recorder of any county in which any city of the above class may be situated, it shall be the duty of such county recorder to examine such plat, to ascertain whether the endorsement of approval by the city council, as herein provided for, shall appear thereon. If it shall, and the plat otherwise conforms to the provisions of law, said officer shall accept same for recording. If such endorsement does not appear thereon said officer shall refuse and decline to accept such plat, and any filing thereof shall be void. Any failure to observe the provisions of this section on the part of any county recorder shall constitute a misdemeanor in office."

Section 15, H.F. 909, made companion amendments to Chapter 441 of the Code.

Section 409.7, of which you make reference and to which reference is made in §409.14, is itself in reference to §§409.4, .5 and .6. Those sections refer to plat requirements for additions to, subdivisions of or lands within or adjacent to a city. If, under §409.7, the city council approves the plat, said plat is then filed with the county recorder along with other materials pursuant to §409.12. It is apparent at this point that the possibility exists that two plats of the same property could be filed with the county recorder. They may be identical plats in some instances, but this is not necessarily true. The problem arises with the first paragraph of §409.14 which provides that no county recorder shall file or permit to be filed any plat within (1) a city of at least twenty-five thousand

population, (2) a city having adopted this section by ordinance, or (3) two miles of such city, unless such plat has been approved by the city council.

Section 409.1 pertains to all land that is subdivided. Any such subdivision must be platted, and said plat filed with the county recorder up to the time of conveyance. The first paragraph of §409.14 appears to deal only with cities which have at least twenty-five thousand population, have adopted that section by ordinance, or areas within two miles of such city. Section 409.14 appears to be special whereas §409.1 is general in nature. As such, pursuant to §4.7 of the Code, section 409.14 would prevail. This does not mean that subdivisions in all cities or within two miles of all cities fall within the purview of §409.14. That section applies to cities of at least twenty-five thousand population, cities that have, by ordinance, adopted the restrictions of §409.14, and the area within two miles of a city of at least twenty-five thousand population or a city that has adopted §409.14. The section is not applicable to other cities or areas.

In response to your first question, §409.1 requires the filing of a plat at any time to the time of conveyance. Thus, if the proprietor files a formal plat, with approval of a city council, pursuant to §409.12 prior to conveyance, and such a plat supercedes all other plats filed for assessment and taxation purposes, it would not be necessary for the proprietor to also file a plat for assessment and taxation purposes pursuant to §409.1.

Based upon the above discussion, the answer to your second question is that under those facts the county recorder cannot file such a plat until the provisions of §409.14 are met. The answer to your third question is no. The last paragraph of §409.14 requires that the county recorder examine the plat to determine whether the approval of the city is attached. If it is attached and the plat otherwise conforms to the provisions of law, the plat shall be recorded. We do not believe that the Legislature intended the city to approve the plat pursuant to §§409.4 through 409.6, and then have the county recorder make the same decision. This is especially true since §§409.5 and .6 leave the discretion with the cities as to the matters contained therein. We believe that the phrase "otherwise conforms to the provisions of law" refers to §§409.1, 409.4, 409.7, 409.8, 409.9, 409.10, 409.11 and 409.12.

December 7, 1976

POLICEMEN AND FIREMEN. §411.8(3), as amended by H.F. File 914, 66th G.A., 1976; §3.7 and §4.5, Code of Iowa (1975). A deduction for the pension accumulation fund should not have been made retroactively. (Kelly to Connors, State Representative, 12-7-76) #76-12-6

Honorable John H. Connors, State Representative: This opinion is in response to your request with regard to deductions for the pension accumulation fund. Your request stated:

"I have been requested to get an Attorney General's Opinion on the following matter:

"House File 914, passed by the 1976 session of the General Assembly became effective July 1, 1976 . . . Section 31 of the Act reads as follows:

'Section four hundred eleven point eight (411.8), subsection three (3) Code 1975, is amended by adding the following new paragraph;

'*NEW PARAGRAPH.* An amount equal to one and twenty-one hundredth percent of each member's compensation from the compensation of the members shall be paid to the pension accumulation fund.

'The provisions of section four hundred eleven point eight (411.8), subsection one (1), paragraphs b and c, of the Code relating to the contributions of members shall be applicable to this paragraph.'

"The question concerns which pay period the one and twenty-one hundredths percent of each member's compensation from the compensation of the member shall be paid to the pension accumulation fund?

"For example the City of Des Moines pays their employees biweekly, and for the pay period of June 14 - 27, the pay date was July 2, 1976. The next pay period was June 28-July 11, and the pay date was July 16, 1976.

"Should not the one and twenty-one hundredth percent of each members contribution be paid into the pension accumulation fund commence with the pay period of June 28 - July 11, which was paid on July 16, instead of the pay period of June 14-27, which was earned prior to July 1, but paid on the July 2 pay date? This seems all the more correct, as a salary increase for fiscal year July 1, 1976 - June 30, 1977, was not paid on the July 2 pay date, but commenced with the June 28 - July 11 pay period which was paid on July 16."

The thrust of your request is the effective date and application of House File 914 of the 66th General Assembly, second session.

We have been advised by the Secretary of State's Office that House File 914 was signed by the Governor on June 28, 1976. Also, House File 914 did not have a specific effective date within its provisions. With regard to the effective date of legislation, section 3.7 of the Code of Iowa (1975) states:

"All Acts and resolutions of a public nature passed at regular sessions of the general assembly shall take effect on the first day of July following their passage, unless some specified time is provided in the Act, or they have sooner taken effect by publication. All Acts and resolutions of a public nature which are passed prior to July 1 at a regular session of the general assembly and which are approved by the governor on or after such July 1, shall take effect on August 15 next after his approval. However, this section shall not apply to Acts provided for in section 3.12, Acts which specify when they take effect, or Acts which take effect by publication."

Because House File 914 didn't contain a specific effective date it would seem that the July 1 starting date found in §3.7 of the Code would apply. However, your request goes to the practical application of this new deduction. A statute passed by both houses of the legislature and approved by the Governor is without force before its effective date. *See Butters v. City of Des Moines*, 202 Iowa 30, 209 N.W. 401 (1926). In the situation you described, the pay period began on June 14, ended on June 27, the paychecks weren't physically distributed until July 2. As of the end of this pay period, House File 914 hadn't become a law; yet the deduction for the pension accumulation fund was made.

At first blush, it appeared that we were faced with an accounting problem more than anything else. Most governmental bodies operate

on a "cash basis" as opposed to an "accrual basis." Simply defined, "cash basis" means that receipts or disbursements are only credited or debited on the books when actually received or paid out. "Accrual basis" means that all income earned and all expenses incurred are credited and debited on the books at the time the *right* to receive or the *obligation* to pay is incurred. Generally, these accounting procedures are formulated for purposes of convenience and meeting employer-employee tax obligations. A review of a number of cases under the Internal Revenue Code revealed that the City's deduction was not only justified but mandated under the taxing provisions. But, we are not dealing with a tax, this is a deduction for the pension accumulation fund. Therefore, any decisions under the Internal Revenue Code or Iowa revenue statutes are not controlling.

As inconvenient as it may seem, the City of Des Moines should not have subtracted from the June 14 through June 27 paycheck the new deduction for the pension accumulation fund. "A statute is presumed to be prospective in its operation unless expressly made retrospective." §4.5, Code of Iowa (1975). There is nothing in House File 914 that would authorize a retroactive application of this deduction. This deduction should not have been made from wages earned prior to the effective date of the legislation. Likewise, our opinion also applies to pay increases. That is, statutes increasing the rate of pay for governmental employees only entitles that employee to a higher rate from the effective date of the legislation; not when it is convenient for accounting purposes. *State v. Marsh*, 29 N.W.2d 799 (Neb. 1947).

A simple solution to this problem, would be to have the effective dates for all legislation dealing with pay increases or pension deductions couched in terms of "pay periods." This opinion should not be construed to effect any existing accounting procedures dealing with federal, state, or other taxes.

December 8, 1976

COUNTIES: Drug Abuse Treatment: Funding. Sections 224.1, 230.24, 444.12, 1975 Code of Iowa. Chapter 28E, Code of Iowa. Section 41, Chapter 139, Acts 66th G.A. A county board of supervisors may pay for the cost of drug abuse treatment in a privately owned drug abuse treatment agency in specified situations. Costs to be paid from the County mental health and institution fund. (Cosson to Lipsky, State Representative, 12-8-76) #76-12-7

Ms. Joan Lipsky, State Representative: You have asked for an opinion of the Attorney General on three questions relating to the cost of treatment for drug problems at Reality 10, a program of the Linn County Mental Health Center which is a duly licensed drug abuse treatment agency. The factual background states that the patients might be receiving either inpatient or outpatient care, either voluntarily or through court commitment, and that Reality 10 accepts patients from various counties. The questions are:

1. Can a county board of supervisors legally pay Reality 10 for the care and treatment of persons with drug problems?

2. Can the board of supervisors legally enter into a contract or purchase of service agreement with Reality 10 for the care and treatment of persons with drug problems?

3. Can a district court judge, when ordering or recommending care and treatment of a person, order payment for said care and treatment from the court fund or from any other county fund?

In response to your first question, the county supervisors may, in some cases, pay Reality 10 for the care and treatment of persons with drug problems. Authority for this is in two areas.

First, drug addicts are persons in need of psychiatric examination and treatment. See 1970 Attorney General's Opinions, p. 217 and p. 772. Funding is available through the county mental health and institutions fund, as provided in Sections 230.24 and 444.12, 1975 Code of Iowa.

Section 444.12, The Code, reads in part as follows:

"The board of supervisors of each county shall establish a county mental health and institutions fund, from which shall be paid:

"* * *

"2. Any portion which the board of supervisors may deem advisable of the cost of psychiatric examination and treatment thereof . . . at any suitable public or private facility providing inpatient or outpatient care in such county . . .

"3. The cost of care and treatment of persons placed in the county hospital, county home, a health care facility as defined in section 135C.1, subsection 8, or any other public or private facility:

"a. In lieu of admission or commitment to a state mental health institute, hospital-school, or other facility established pursuant to chapter 222.

"b. Upon discharge, removal or transfer from a state mental health institute or state hospital-school or other institution established pursuant to chapter 222.

Therefore there is clear authority to pay Reality 10 in cases covered by the above sections.

Secondly, Section 224.1, The Code, as amended by Section 41, Chapter 139, Acts 66th G.A., provides that a district court may commit persons addicted to the excessive use of certain controlled substances to various places, including private facilities designated by the Iowa Drug Abuse authority. This section further requires the approval of the board of supervisors unless the patient or responsible relatives agree to pay the full costs of treatment and make necessary arrangements for admission and support. The requirement that the board of supervisors approve is very clearly tied to the county's authority to pay for treatment in this type of situation.

You have also asked whether a board of supervisors could contract with Reality 10 for the care and treatment of persons with drug problems. The answer here is yes, if the expenditures would be proper for the county as defined above. Section 28E.4, The Code, allows a public agency to enter an agreement with a private agency for joint or cooperative action in accordance with the terms of Chapter 28E.

Your last question asked which county fund would be chargeable with these expenses, and the correct fund would be the county mental health and institution fund, Section 444.12, Code of Iowa.

December 10, 1976

WELFARE: Work as a condition of granting relief. §§252.27, 252.42, 1975 Code of Iowa. County Board of Supervisors may require persons receiving relief to work only on streets or highways at the prevailing hourly wage rate, or on joint projects between county and cities, towns or United States Government. County poor fund is charged with these costs, not secondary road fund. (Cosson to Myers, Assistant Woodbury County Attorney, 12-10-76) #76-12-8

Mr. Jeffrey Myers, Assistant Woodbury County Attorney: I am in receipt of your letter requesting an opinion of the Attorney General as to whether the Woodbury County Board of Supervisors may adopt a plan to require recipients of county general relief "to perform various duties, such as cleaning patrol cars, performing services relating to the public utilities and various tasks that the highway commission can come up with for them. . . . it should be noted that arrangements have been made with the local police chief, the city public utilities office, and the local State Highway Commission (sic) . . . ."

You have cited Section 252.27, 1975 Code of Iowa. That section reads in part, as follows:

"* * *

"The amount of assistance issued to meet the needs of the person shall be determined by standards of assistance established by the county boards of supervisors. They may require any able bodied person to labor faithfully on the streets or highways at the prevailing local rate per hour in payment for and as a condition of granting relief; said labor shall be performed under the direction of the officers having charge of working streets and highways."

The other relevant section is 252.42, which reads:

"Notwithstanding the provisions of any laws to the contrary, the county board of supervisors shall have the power to use the poor fund to join and co-operate with the United States government, and/or cities and towns within their boundaries, or both the United States government and cities and towns within their boundaries, in sponsoring work projects, provided that the money used from the poor fund for such purposes does not exceed the cost per month of supplying relief to the certified persons working on projects who would be receiving direct relief if they were not employed on said work projects."

These statutes create two schemes of permissible work projects. The first, under 252.27, of laboring on the streets or highways, the second of work projects in conjunction with federal, city or town governments.

These sections were interpreted at 1968 OAG 299, when a county board proposed requiring relief recipients to work in county parks under the supervision of the County Conservation Board at $1.25 per hour. That proposal was deemed invalid because the proposed work project fell under neither section cited above, and because the wage was deemed too low.

The authority of a county board of supervisors is limited to those powers expressly conferred by statute or necessarily implied from the powers so conferred. *Woodbury County v. Anderson,* Iowa 1969, 164 N.W.2d 129, 134. Accordingly, the grant of authority under 252.27, supra, should not be unduly expanded. It is my opinion that cleaning

patrol cars does not qualify as "labor on the streets or highway", and such labor is not authorized under Section 252.27.

The restrictions of 252.27 would apply to any projects undertaken with other county boards or state agencies, but would not apply to work projects under 252.42. Under Section 252.42, your board may develop joint work projects with federal, city, or town governments, and those parts of your proposal could be implemented which call for joint projects with cities.

There is also a discrepancy in the opinion at 1968 OAG 299. It states that "amounts paid persons performing work on streets and highways shall be paid out of secondary road funds and not the poor fund, 1932 OAG 117". Although that is an accurate citation, it overlooks a later opinion, 1938 OAG 868, 869, that states:

"The payment of relief costs, where the same are offset by manual labor on the roads and highways, are payable from the so-called 'poor fund' of the county."

The 1938 opinion is more reasoned and should be followed. The relief costs offset by labor on the roads and highways should be paid from the county poor fund.

December 10, 1976

CRIMINAL PROCEDURE: Court costs in criminal proceedings where Defendant has received a deferred judgment pursuant to Section 789A.1 (1) may be taxed against the Defendant at the time of conviction or acceptance of a guilty plea. (Raisch to Polking, Carroll County Attorney, 12-10-76) #76-12-9

William G. Polking, Carroll County Attorney: You have requested an opinion from this office on the following questions of law:

(1) "Does the language 'without entry of judgment' mean that the defendant (given a deferred judgment pursuant to Section 789A.1(1), Code of Iowa, 1975) is exonerated from the obligation of meeting the Court costs in the criminal action from which the deferred judgment or deferred sentence was imposed?"

(2) If such Defendant has such an obligation when does it arise?

Costs in criminal actions as well as civil actions come within the purview of Chapter 625, Code of Iowa, 1975. "That the provisions of the general chapter of the code relating to costs, and the taxation thereof, govern in criminal as well as in civil cases, is conceded. Section 3853 (now Section 625.1, Code of Iowa, 1975) provides that costs shall be recovered by the successful against the losing party . . .", *Hayes v. Clinton County*, 1902, 118 Iowa 582, 92 N.W. 857, 861. See also *State v. Belle*, 1894, 92 Iowa 258, 60 N.W. 525. More recently the Supreme Court indicated that if the legislature had provided for taxing certain expenditures under Section 775.5, Code of Iowa, 1966, as part of the costs such costs would be properly taxable under either Section 625.1 or Section 625.14, Code of Iowa, 1966. *Woodbury County v. Anderson*, 1969, 164 N.W.2d 129, 133.

Section 625.1, Code of Iowa, 1975, reads: "Costs shall be recovered by

the successful against the losing party." The question, hence, hinges on whether or not the State is the successful party then when the Court imposes a deferred judgment pursuant to Section 789A.1(1), Code of Iowa, 1975. "In criminal prosecutions the party is successful as to all or as to no part of his demand, the demand on the one hand being guilty and upon the other innocent." *State v. Belle, supra,* at 526. Other Iowa statutes dealing with payments of costs by the city, county, or state in criminal actions when read in *pari materia* with Section 625.1 clearly indicate that the order allowing costs should be entered upon conviction, Chapter 785, Code of Iowa, 1975, or acceptance of a guilty plea. See Section 622.73 (payment of fees to expert witnesses by county or city; defendant adjudged not guilty or action dismissed); Section 751.35 (payment of costs of a search warrant proceeding; where prosecution fails); Section 789.20 (payment of costs in a criminal case against an inmate of any state institution; where the prosecution fails), Code of Iowa, 1975. But see somewhat ambiguous language in Section 602.63, Code of Iowa, 1975, ". . . judgment including costs . . ." and in Section 606.15(27), Code of Iowa, 1975, "When judgment is rendered against the defendant . . .". "Judgment" in section 606.15(27) may mean an order allowing costs to be taxed against Defendant to be consistent with the Sections of law and cases cited above. The language in Section 602.63 and Section 606.15(27) cited above although ambiguous does not conflict with the view that when the Defendant pleads guilty or a verdict of guilt has been returned by the jury the prosecution has been successful and the State may recover costs of the criminal action against the losing party, the Defendant, pursuant to Chapter 625.

The taxation of costs against the Defendant in criminal actions operates independent of the judgment fixing punishment, although incidental thereto. *Hayes v. Clinton County, supra; State v. Belle, supra,* 20 Am.Jur.2d Costs §100 (1965) (even if judgment suspended). Hence the Court in entering its order allowing costs need not enter at the same time its judgment of conviction, Section 789.2, or adjudication of guilt, Section 789A.1(1). Additional costs could be allowed for entry of adjudication of guilt should the terms of probation be violated or for the costs of discharging probation pursuant to Section 789A.6.

An analogous case, *Estep v. Lacy,* 1872, 35 Iowa 419, reached the same result regarding costs taxed to the Defendant when the Defendant had received a full and complete pardon from the Governor. Such costs were not affected by the pardon and the Defendant after conviction could be taxed for such costs.

December 17, 1976

STATE OFFICERS AND DEPARTMENTS: Mobile Home Parks — §§135D.1(2) and 135D.2, Code of Iowa, 1975. Even though a person sells individual plots of land upon which mobile homes are placed, the entire area encompassing said plots and mobile homes can be considered a mobile home park within Chapter 135D. (Blumberg to Pawlewski, Commissioner of Health, 12-17-76) #76-12-10

Norman L. Pawlewski, Commissioner of Health: We have your opinion request regarding mobile home parks. You indicate that certain land owners sell individual plots of land to people with mobile homes. The

plots are as in a mobile home park. That is, several plots with mobile homes in the same area. They are then served by a common water supply and sewerage system. You ask whether this type of arrangement falls outside of the licensing requirements for mobile home parks.

Section 135D.1(2), 1975 Code of Iowa, defines a mobile home park to mean "any site, lot, field or tract of land upon which two or more occupied mobile homes are harbored, either free of charge or for revenue purposes . . . ." Section 135D.2 provides: "No person, firm or corporation shall establish, maintain, conduct or operate a mobile home park . . . without first obtaining an annual license therefore from the state department of health."

There is nothing in Chapter 135D which indicates that a person, firm or corporation must own the land involved in a mobile home park before the requirements of that Chapter must be met. On the contrary, the definition of mobile home park is worded in such a manner that two or more spaces which have mobile homes can be considered a site, lot, field or tract of land. And, when read with §135D.2, there can be but one conclusion.

Accordingly, we are of the opinion that even though a person sells individual plots of land upon which mobile homes are placed, the entire area encompassing said plots and mobile home can be considered a mobile home park within Chapter 135D.

December 17, 1976

COUNTIES: Auditor — §§558.57, 558.67. County auditor performs ministerial task in connection to entering deeds on transfer book and should not refuse to make such entries on grounds that the chain of title does not appear to be complete according to the plat book. (Nolan to Neas, Audubon County Attorney, 12-17-76) #76-12-11

Mr. David M. Neas, Audubon County Attorney: In response to your request for an opinion on the question of how far the auditor can go in refusing to enter what appears to be an erroneous deed in the transfer book once he has notified the parties and they insist on recording, we advise that a similar question was the subject of an attorney general's opinion of February 8, 1932, 1932 O.A.G. 181, where it is stated:

"We are of the opinion that the county auditor only has authority to call the parties' attention to the error and that then if they insist upon its entering the same on the transfer records as per the description contained in the deed, that he has no discretion in the matter and must do so."

In 1962 the Attorney General advised in his opinion of June 22, 1962 O.A.G. 104:

"The duty of the county auditor under that Act [§558.57 Code, 1962] is the making of certain entries upon the transfer book before a recording of the deed. This statute prescribing the auditor's duty is clear and unambiguous, and specific in its terms, and may not be extended to include other duties. County auditor, exercising ministerial duties, may not refuse to make the entry in his book under the circumstances stated, nor can he require an affidavit to be filed testifying to the prior death of the other joint tenant or of the life tenant of the property being deeded as a condition. He has fulfilled his duty when he does what the statute prescribes.

"It is interesting to note that requiring the aid of an affidavit testifying to the death of a joint tenant is a proper and needed requirement where marketable title is involved in land title examination . . ."

Bartels v. Henessey Brothers, Inc., 1969 Iowa, 164 N.W.2d 87, holds that correction of a property description made in accordance with section 558.67 and the subsequent indexing and recordation of the instrument is sufficient to impart constructive notice of the conveyance to third parties. The Supreme Court there stated at page 93:

"Section 558.67, 'supra', discloses the auditor is required to notify the grantee when a descriptive error is discovered in any instrument, and he is to 'permit the same to be corrected by the parties before completing such transfer'."

Your letter points out that the transfer book may, in some instances, be at variance with the auditor's plat book. The object of the maintenance of a plat book is to facilitate the assessment of property and the collection of taxes. *Heinricks v. Terrell,* 1884, 65 Iowa 25, 21 N.W. 171. The Court there stated:

". . . For the purpose of compiling the book, the statute assumed that whoever paid taxes or real estate for the prior year was the owner; and when conveyances were thereafter made, changes were made on the plat book by the erasure of a name, and writing the name of the granter with pencil across the piece of land, as designated on the plat-book, which, in the opinion of the auditor, had been conveyed . . . The book, at most, is but a copy of the deed, and, if the deed is in existence, it clearly constitutes the best evidence as to what land is thereby conveyed."

You also ask what the Auditor should do when orally requested to change names on the plat book for tax purposes. In our view the plat book should not be changed merely to comply with such requests. Any person having an interest in the real estate can receive information of taxes due thereon from the County Treasurer pursuant to §445.23 and §445.26.

December 20, 1976

COUNTIES AND COUNTY OFFICERS: Municipal Assessments Against Property — §§364.12 and 384.84, Code of Iowa, 1975; Chapters 317 and 445, Code of Iowa, 1975; §38, Ch. 203, Acts of the 66th G.A. (1975). Assessments for delinquent sewer bills and sanitary disposal fees, weed cutting and snow removal may be certified to the county for collection with taxes, and the treasurer must collect them. Assessments for water bills are somewhat different. The provisions of Chapter 445 are applicable in determining delinquency, penalty and interest for these assessments. (Blumberg to Kelso, Supervisor of County Audits, Office of State Auditor, 12-20-76) #76-12-12

Mr. William E. Kelso, Supervisor of County Audits, Office of State Auditor: We have received your opinion request of October 22, 1976, regarding the certification of taxes. You ask:

"Are the following items eligible to be certified to the County Treasurer to be collected along with regular taxes and, if so, must the Treasurer collect them:

1. Delinquent water bills due a city.
2. Delinquent sewer bills due a city.

3. Delinquent sanitary disposal fees.

4. Weed cutting on lots and farm land.

5. Snow removal from sidewalks.

If the above may be certified to the County Treasurers, are these taxes payable upon certification or to be the next assessment."

Section 38, Ch. 203, Acts of the 66th G.A. (1975), amended §384.84(1), 1975 Code of Iowa, by adding the following:

"All rates or charges for the services of sewer systems, sewage treatment, solid waste collection, solid waste disposal, or any of these, if not paid as provided by ordinance of council, or resolution of trustees, shall constitute a lien upon the premises served by any of these services and may be certified to the county auditor and collected in the same manner as taxes."

Therefore, points two and three of your question are answered in the affirmative.

Section 364.12(2)(b) provide that the abutting property owner is responsible for the prompt removal of snow and ice from sidewalks. Section 364.12(2)(e) provides:

"If the abutting property owner does not perform an action required under this subsection within a reasonable time, a city may perform the required action and assess the costs against the abutting property for collection in the same manner as a property tax."

Accordingly, point five is answered in the affirmative.

Section 364.12(3)(g) provides that a city may require the cutting or destruction of weeds or other growth which constitutes a health, safety or fire hazard. Pursuant to §364.12(3)(h), if the property owner does not do this the city may do so and assess the costs against the property for collection in the same manner as a property tax. A somewhat similar procedure is used for weeds on farm lands pursuant to Chapter 317 of the Code. Therefore, point four is answered affirmative.

A more difficult problem arises with delinquent water bills. In an earlier opinion, #75-7-20, we held that under Home Rule a city could assess unpaid water bills against the property and certify for collection in the same manner as taxes. We are now called upon to reassess our prior holding. Rates of a municipally owned utility, such as water, are not ordinarily taxes or assessments. 12 E. McQuillen, Municipal Corporations §35.38 (3rd Ed. 1970); *Waterworks and Sanitary Sewer Board v. Dean*, 260 Ala. 221, 69 So.2d 704; *City of Worcester v. Hoffman*, 1963, 345 Mass. 674, 189 N.E.2d 226; *Ripperger v. Grand Rapids*, 1954, 338 Mich. 682, 62 N.W.2d 585; *Jones v. Board of Water Comm'n of Detroit*, 34 Mich. 273; *Powell v. Duluth*, 1903, 91 Minn. 53, 97 N.W. 450; *City of De Pere v. Pub. Serv. Comm'n*, 1954, 266 Wis. 319, 63 N.W.2d 764.

Generally, water rates are not a lien on the property served unless so provided by statute or otherwise in express, unambiguous terms. 12 E. McQuillen, supra; 64 Am.Jur.2d, *Public Utilities* §61; *Friedman v. District of Columbia*, 1961, 172 A.2d 562; *Farrell v. Ward*, 1947, 53 A.2d 46; *Puckett v. City of Muldraugh*, 403 S.W.2d 252 (Ky. 1966); *Covington v. Patterman*, 128 Ky. 336, 108 S.W. 297; *Linne v. Bredes*, 43 Wash. 540,

86 P. 858. In those cases we found where such liens were upheld a statute authorizing the liens existed. See, *City of Worcester v. Hoffman*, supra; *Framingham Homes v. Dietz*, 1942, 312 Mass. 471, 45 N.E.2d 381; *New Brunswick Sav. Inst. v. City of New Brunswick*, 1938, 124 N.J.Eq. 258, 1 A.2d 378. Since such liens cannot exist except by statute, any assessment for water that is not statutory could not constitute a lien. Therefore, the above cases do not resolve the issue of assessments for water rates.

We have not found any case which states that assessments against property for water cannot be made in the absence of statutory authority. There is authority for the proposition that an assessment for water cannot be made against the property where a tenant received the service or some other type of lease is involved. It is stated in 64 Am.Jur.2d, *Public Utilities* §60:

"In the absence of statute there is no unconditional personal liability imposed upon owners of real estate for water rents or water rates while the property is in the possession of their tenants. Nor can the owner of property be found unconditionally liable for utility charges incurred by another during a former ownership, at least in the absence of lien. However, the legislature may authorize a public utility, such as a water company, to refuse to deal with the tenants of premises which it is under obligation to supply. . . . In the absence of a statute affecting his rights, however, the occupant of premises dependent upon a public service corporation for service, if otherwise entitled to such service, cannot be denied because he is the tenant and not the owner of the premises, nor can a property owner be made liable for charges incurred, even during his ownership, by an occupant of the property, as a condition of obtaining service for his premises. In this respect, a contract by the owner of a building to pay for water furnished to tenants thereof will not be implied from mere knowledge on his part of the existence of a regulation of the water company requiring him to do so, if the regulation is not valid and enforceable against him. However, a contract by a landlord has been held implied from the fact that he connects his property with the water facilities of a city and permits the occupant to use the real estate, where a statute provides that the owner of premises occupied by a tenant is liable with such tenant for charges for water service, the owner being charged with notice of such statute and of an ordinance incorporating it. Furthermore, liability may be imposed on owners of property for utility charges incurred by tenants, as a condition of continued service to the premises, where authorized by statute. In the absence of a lien securing utility charges owed a municipality or a utility company, a tenant entering upon occupation of premises cannot be made liable, as a condition of service, for the arrears of a former occupant of the property."

See also, *Oliver v. Hyle*, 513 P.2d 806 (Or. 1973) [citing to 19 A.L.R.3d 1227, 1232; 1 Priest, Principles of Public Utility Regulation 256 (1969); 12 E. McQuillen, Municipal Corporations §34.92; 2 Antieau, Local Government Law, Municipal Corporation Law 645-46, §19.10, 650, 652, §19.12; 94 C.J.S., *Waters* §305(b)]; *Home Owners' Loan Corp. of Washington, D.C. v. Mayor and City Council*, 1939, 175 Md. 676, 3 A.2d 747. These also stand for the proposition that a property owner cannot be assessed the charges of a prior owner without statutory authority. However, there is nothing that we found which indicates that in the absence of statutory authority an assessment for water cannot be made against the property owner who contracts for the water.

As stated in our prior opinion, §368.2, 1973 Code prohibited an assess-

ment by a city in the absence of express statutory authority, even though Home Rule was applicable. That section was repealed by Ch. 1088, Acts of the 64th G.A. (1972). Thus, it can be said that the Legislative intent is that express statutory authorization is not needed for an assessment. Therefore, we reaffirm our prior opinion with the exceptions regarding a lien and tenants or prior owners as stated above.

You next ask whether the county treasurer must collect the assessments. The applicable statutes for assessments for sewer bills, sanitary disposal fees, weed cutting and snow removal authorize certification to the county for collection in the same manner as taxes. It is obvious that the Legislature intended the treasurer to collect these assessments. In addition, §445.13 provides that the assessment list prepared by the auditor and delivered to the treasurer "shall be sufficient authority" for the treasurer to collect. See also, *Bennett v. Greenwalt*, 1939, 226 Iowa 1113, 286 N.W. 722; 1970 OAG 452, 454. This is not necessarily true for water bills. Although Home Rule may allow a city to assess these costs for collection with other taxes, it does not create a mandatory duty on the treasurer. This does not mean that the treasurer cannot collect a water assessment with the rest of the taxes, but only that the city cannot force the treasurer to collect them.

Your last question is whether these assessments are payable when certified or at the time the other taxes are payable. It appears that this question concerns when a penalty and interest attaches. It has been held that the delinquency and penalty and interest provisions of the tax statutes do not apply to special assessments for street improvements and the like (see Division IV of Ch. 384, 1975 Code). *Ankeny v. Henningsen*, 1880, 54 Iowa 29, 6 N.W. 65; 1968 O.A.G. 608. However, the statutes regulating those types of special assessments set forth, in express language, when the amounts are due, when they are delinquent, and when and what penalty or interest attaches. See, §§384.65 and 384.67. The assessments referred to in this opinion do not have any statutes which specify delinquency and the like. Therefore, we must look to the language of the applicable statutes which prescribe that they are to be collected in the same manner as taxes. Taking that phrase at face value, we believe that the provisions of Chapter 445 are applicable.

December 17, 1976

ELECTIONS: Paster on Ballot. §§49.68, 49.93, 49.99, 49.100, Code of Iowa, 1975. A paster placed on a ballot may not cover up any portion of the printed ballot and a sticker containing the words "for Member Board of Supervisors, term commencing 1977" which covers up a portion of the ballot should not be counted. It is proper to aggregate the votes received by a write-in candidate in the different columns. A sticker placed over the name of another candidate should not be counted. Where a name printed on the ballot is scratched out and another's name written in the ballot is defaced and should not be counted. Writing in the name of the same person more than once on the same ballot would constitute an attempt to vote more than once for the same candidate and the ballot should not be counted. Where the same procedure was followed and then a line drawn through one of the written in names, the ballot would be defaced and should not be counted. (Haesemeyer to Bradley, Keokuk County Attorney, 12-17-76) #76-12-13

Mr. Glenn M. Bradley, Keokuk County Attorney: Reference is made to your letter of December 8, 1976, in which you request an opinion of the Attorney General and state:

"During the course of an election contest proceeding in Keokuk County, Iowa, regarding the office of county supervisor and conducted in accord with Chapter 62 of the Code, several questions have arisen during the recounting of the ballots by the election contest court which require an immediate answer before the recounting may be concluded.

"Paper ballots are used in Keokuk County. In the November 2 General Election Raymond James Wonderlich, a Republican, was the only candidate on the ballot for Member of the Board of Supervisors for the term commencing in 1977. Columns were included on the ballot for the Republican Party, Democratic Party, Communist Party, Libertarian Party, American Party of Iowa, Socialist Labor Party, U.S. Labor Party, Socialist Workers Party, Socialist Party U.S.A., Nominated by Petition, and Independent (write-ins).

"At the election that was held on November 2, 1976, in Keokuk County, Francis P. Devine, of RFD, Sigourney, ran for the office of Board of Supervisor, 1977 term, as a write-in candidate. He had originally been certified as the Democratic party candidate, but the County Auditor ruled on October 6, 1976, that the name 'Francis P. Devine' should not appear on the ballot as the Democratic nominee because he had been selected by the Democratic Central Committee and not by a reconvened County Convention. See your opinion of October 1976, on this question.

"Subsequent thereto a Petition for an Injunction was filed in Keokuk County District Court by Francis P. Devine which Petition prayed that the Auditor be required to place the name of Francis P. Devine on the ballot. At the hearing, J. W. Scott, the County Commissioner of Elections and Auditor testified that he had printed stickers that could be placed on the ballots that had been printed so if the Court ruled that the name 'Francis P. Devine' should be on the ballot, that he could place these stickers on the ballot. Enclosed is Exhibit A, which is a copy of one of the stickers that Mr. Scott had printed. After the Court ruled against Mr. Devine, Mr. Scott gave these stickers to a Mr. George Thorburn of Sigourney, Iowa, and Mr. Thorburn caused these stickers to be widely distributed throughout Keokuk County and urged voters to place the sticker on the ballot as a write-in vote for Francis P. Devine.

"At the school of instruction for election officials before the election, J. W. Scott, the County Auditor, instructed the officials to count the votes that were cast as write-in votes for Francis P. Devine which were placed on the ballot by use of the Sticker which is attached as Exhibit A.

"The County Attorney also instructed the election officials that there is an Attorney General's Opinion which states the printed portion of the ballot should not be covered up or changed. The Auditor also instructed the election officials that they could take scissors to the polling places, and if any voters should so request, the officials could assist the electors by cutting off from the stickers all of the printed material except the name of Francis P. Devine.

"Prior to the election Francis P. Devine published in the County newspapers a statement, 'Since my name will not be printed on the ballot I am asking that you write in my name. J. W. Scott gave me the stickers that had been printed for use, if the Court had ruled in my favor. If you have one of these stickers, you should cut out that portion of the sticker where the name "Francis P. Devine" is printed and place only this portion of the sticker with my name on it on the ballot.'

"At the official canvass Francis P. Devine was declared to be the winner by two votes having received write-in votes (both in hand-written

form and through the use of stickers with his name imprinted) and received votes in the following columns: Democratic Party, Republican Party, Communist Party, and Independent. Raymond James Wonderlich has filed an election contest.

"In the course of the recount being conducted by the election contest court, the following questions arise:

"1. Stickers were used by some voters which reproduced a portion of the ballot and contained the words: 'For Member Board of Supervisors Term Commencing 1977', as well as a box and the name of Francis P. Devine. See Exhibit A. In many cases the voter cut out the name 'Francis P. Devine' and pasted it on the ballot in the appropriate space for Board of Supervisor. No questions have arisen regarding these votes.

"However, several voters pasted these entire stickers on the ballot (see Exhibit B) these covering up a portion of the printed ballot but using the same language. Does such an act spoil or deface the ballot and cause it to be rejected? Also consider the possibility that the sticker might be placed so as to cover a portion of another part of the ballot, such as part or all of another candidate's name. (Enclosed as Exhibit C is sample unmarked ballot)

"2. Is it appropriate to take the votes received by Mr. Devine in the four different columns—Democratic, Republican, Communist, and Independent—and add them together for the vote total, or should only the total in one of the four columns be officially certified? On the official canvass Mr. Devine received 1 Republican vote, 4 Communist votes, and 45 Independent votes.

"3. What is the result if the ballot where Mr. Devine is credited with one Republican vote reveals either (1) a sticker with Mr. Devine's name was placed over Mr. Wonderlich's name or (2) Mr. Wonderlich's name was scratched out and Mr. Devine's name written in?

"4. Also a question has arisen with regard to a voter writing in the name 'Francis P. Devine' at the place to write in a vote for the Democratic Candidate for Supervisor and the same voter also writing in the name 'Francis P. Devine' at the place to write in the name of an Independent Candidate for Supervisor. In other words the name 'Francis P. Devine' was written in twice on the same ballot, once as a Democrat and once as an Independent. Does this procedure cause the ballot to be a spoiled ballot which should be rejected? In the alternative, what would be the answer if the voter wrote in the name in both such places, and then drew a line through the name 'Francis P. Devine' on the Independent Column, but left the write-in the same in the Democratic Column.

"Your immediate attention to these questions will be appreciated since the Election Contest Court has recessed pending receipt of your opinion. As per Mr. Haesemeyer's verbal request, there is enclosed as Exhibit D a copy of a Memorandum to Election Contest Court dated December 7, 1976, expressing my opinion on some of these questions prior to the Court's request that I seek this opinion from you."

(1) Section 49.99, Code of Iowa, 1975, provides:

"Writing name on ballot The voter may also insert in writing in the proper place the name of any person for whom he desires to vote and place a cross or check in the square opposite thereto. The writing of such name shall constitute a valid vote for the person whose name has been written on the ballot without regard to whether the voter has made a cross or check opposite thereto. The making of a cross or check in a square opposite a blank without writing a name therein, shall not affect the validity of the remainder of the ballot."

The written instructions to voters prepared by the State Commissioner of Elections, pursuant to §49.68, provide in part:

"Unmarked or improperly marked ballots will not be counted. Do not write your name on the ballot or put any mark or sign upon it by which it can be identified as the ballot which you have voted. Any erasures or identification marks, or anything else spoiling or defacing the ballot, will render it invalid. Therefore, if you have by accident or mistake made any mark, blot, or in any way defaced, spoiled or torn the ballot, you should return it to the election official and obtain another one as directed above. Do not vote a spoiled or defaced ballot."

In an earlier opinion of the Attorney General, 1925-26 O.A.G. page 253, the legality of using stickers in lieu of writing in names on a ballot was recognized, although the opinion did indicate that the better practice is for the voter to write rather than paste on the ballot the name of the person for whom he decides to vote. Another opinion of the Attorney General, 1923-24 O.A.G. page 162 also recognized the validity of the use of stickers. However, this latter opinion also went on to state:

" * * *

". . . We are of the opinion, however, that such a paster must be in form such that it may be inserted in the blank space provided on the ballot for the writing in of names and *must not in any manner cover up or change the printed portion of the ballot.* In other words, it must not be of such a nature as to become a substitute for the official ballot *or any portion thereof.* . . ." (Emphasis added)

Since the use of any sticker containing the words "for Member Board of Supervisors, term commencing 1977" would cover up a portion of the ballot, it is our opinion, consistent with the earlier opinion referred to, that such ballots should not be counted. This would be true also in any case where the sticker was so placed as to cover another part of the ballot such as part or all of another candidate's name.

(2) In our opinion, it is appropriate to aggregate all the votes received by Mr. Devine in the four different columns. A write-in candidate is not the nominee of any particular party and it would frustrate the will of the electorate to require that only the votes received by such a candidate in a particular column would be counted. *See* 1970 O.A.G. page 786.

(3) In the event a sticker with Mr. Devine's name on it were to be placed over the name of another candidate, such a ballot should not be counted. See our answer to your question number one. In such an event, the sticker would clearly be covering up or changing the printed portion of the ballot. Insofar as scratching out the name of another candidate and writing in Mr. Devine's name is concerned, it is our opinion that this would amount to defacing the ballot. Moreover, under §49.99, a write-in vote must be placed in the "proper place". The voter casting this ballot should have returned the same to the precinct election officials and received another ballot in accordance with §49.100.

(4) Section 49.93, provides:

"But one vote for same office except in groups. No voter shall vote for more than one candidate for the same office, nor for a greater number of candidates for two or more offices of the same class than there are offices of such class to be filled at such election."

In our opinion, writing in the name of the same person more than once

on the same ballot would constitute an attempt to vote more than once for the same candidate and the ballot should not be counted. Where the same procedure was followed and then a line drawn through the name Francis P. Devine on the end of the column, the ballot would be defaced and should not be counted for that reason.

December 29, 1976

STATE OFFICERS AND DEPARTMENTS: liability protection afforded employees of the Iowa Board of Regents by the State of Iowa — §§4.5, 25A.2(1), 25A.2(5), 25A.13, 1975 Code of Iowa; Ch. 80, §§1, 7, Acts of the 66th G.A. The phrase "tort claim or demand" in §7 of Ch. 80, Acts of the 66th G.A., encompasses every type of action for damages, including those which are statutory in origin, other than actions for breach of contract, and hence employees of the Board of Regents are entitled to defense and indemnification with respect to them. Ch. 80 should be broadly construed to achieve the goal of protecting state employees from liability while in the performance of their duties. (Beamer to Richey, Executive Secretary, State Board of Regents, 12-29-76) #76-12-14

R. Wayne Richey, Executive Secretary, State Board of Regents: You have requested the opinion of this office with regard to liability protection afforded employees of the Iowa Board of Regents by the State of Iowa. The subject of personal liability coverage by the State for state employees has been the subject of several recent opinions, Blumberg to Pawlewski, O.A.G. #76-7-24; Beamer to Lynch, O.A.G. #76-8-10; and Dent to Crane, O.A.G. #76-9-29.

Specifically, you have asked for an opinion on provisions of the Iowa Tort Claims Act, Chapter 25A, 1975 Code of Iowa as amended by Chapter 80, Acts of the 66th G.A., in regard to the following questions:

"1) In view of the reference to 'tort claim or demand' in Iowa Code §25A.21 and the refernce only to 42 U.S.C. §1983 in Iowa Code §25A.22, is the right to defense and indemnification under Iowa Code §25A.21 and .22 restricted to a narrower class of cases than those encompassed in the word 'claim' as defined in Iowa Code §25A.2(5) (a and b)? For example, is there a right to defense and indemnification under §§25A.21 or 25A.22 in cases based on alleged violation of state and federal statutes or regulations, such as 42 U.S.C. §§1981, 1982; 42 U.S.C. 2000c et seq.; 20 U.S.C. 1681 (Supp. IV 1974); Chapter 601A, Code of Iowa (1975); or federal copyright legislation, Pub. L. 94-553 (1976) (not yet effective)?

"2) Strict Liability. In view of the definition of 'claim' in the Tort Claims Act, §25A.2(5), Code of Iowa, and the use of the phrse [sic] 'any tort claim or demand' in §25A.21 of the Act, does the Tort Claims Act apply to actions against the state based on strict liability or products liability? Must the state defend or indemnify an employee of the state against a claim based on strict liability or products liability?

"3) Prior Acts. Do the indemnification provisions of the Tort Claims Act, §§25A.21 and 25A.22, Code of Iowa, require or permit the state to defend or indemnify a state employee against a claim based on acts within the scope of employment or duties but which occurred prior to the effective date of §§25A.21 and 25A.22?

"4) Post-Termination. Do the indemnification provisions of the Tort Claims Act, §§25A.21 and 25A.22, Code of Iowa, require or permit the state to defend or indemnify an individual in an action brought against him or her after the individual has left state employment but based on acts occurring while the individual was an employee?

"5) Willfulness Allegation. In view of the definition of claims in the Tort Claims Act, §25A.2(5), Code of Iowa, and the exceptions to the defense and indemnification provisions of the Act, §25A.21 and §25A.22, will the mere allegation of willful, wanton, unauthorized or malfeasant conduct terminate the Attorney General's obligation to defend?

"6) Punitive Damages. In the absence of malfeasance in office, willful and unauthorized injury, or willful and wanton conduct, is the state obligated to indemnify an employee of the state for a punitive damage judgment, or for civil penalties, notwithstanding Iowa Code §25A.4?

"7) Do §§25A.21 and 25A.22 obligate the state to defend employees in actions in which only injunctive, declaratory, or other non-monetary relief is sought? If not, does Chapter 13 of the Iowa Code impose such an obligation?

"8) At present, the Board of Regents has private insurance which covers Regents' officers or employees in relation to their activities with or services for certain independent but university-related organizations, such as The University of Iowa Foundation, the Iowa State Memorial Union, the Alumni Achievement Fund, the Athletic Council, The Alumni Association, the 4-H Club Association, and similar and related funds and associations. Does the Tort Claims Act cover state employees in their activities with such organizations as long as the employee is acting on behalf of or in the interests of the Regents' institution or the state? If the independent, but university-related, institution exists primarily to serve the Regents' institution, such as The University of Iowa Foundation, are employees of such university-related institutions 'employees of the state' for purposes of the State Tort Claims Act, Ch. 25A, Iowa Code?

"9) May an action be brought against an employee of the state without prior resort to the state appeal board, and thus free of the two year limitation period established in §25A.13 of the Iowa Code?"

In regard to your first question, the word "tort" in Section 7 of Chapter 80, Acts of the 66th G.A., does modify the definition of claim in the amended Section 25A.2(5), 1975 Code of Iowa. Tort has been defined as a private or civil wrong or injury independent of contract, and is a breach of legal duty. *Poindexter v. Willis*, 256 N.E.2d 254, 259, 23 Ohio Misc. 199. However, a contract may establish a relationship demanding exercise of proper care and acts and omissions in performance may give rise to tort liability. In that event coverage would exist under Section 7 of Chapter 80. *Kunkel v. United Sec. Ins. Co. of N.J.*, 168 N.W.2d 723, 733, 84 S.D. 116.

Basically a tort is *every* type of action including those statutory in nature other than those based on contract. Hence the statutory actions to which you refer would constitute a tort claim or demand. The fact that only 42 U.S.C. 1983, among the statutory actions, is specifically mentioned does not mean that all other federal actions are excluded. However, the language is ambiguous on this very important issue and legislative corrective action is desirable.

With respect to your second question, recovery against the State on a strict liability basis would not be permitted. See *Laird v. Nelms*, 406 U.S. 797, 92 S.Ct. 1899, 32 L.Ed.2d 499 (1972), interpreting the federal tort claims act, after which Chapter 25A is modeled. But, in the event a suit was commenced against an individual employee on a strict or products liability theory, clearly the action would be covered as a tort claim or demand and the employee defended and saved harmless.

As to your third question, "prior acts", Section 7 of Chapter 80 is prospective only. Section 4.5, 1975 Code of Iowa, provides as follows:

"A statute is presumed to be prospective in its operation unless expressly made retrospective."

Since Section 7 is not expressly made retroactive it must be deemed not to cover tort claims or demands made prior to July 1, 1975, the effective date of Section 7.

In connection with your fourth question, the termination of an employee would not affect the State's obligation to defend and indemnify him if the action arose during the course of his employment and he is not excluded by reason of the other criteria, such as malfeasance in office, willful and wanton conduct and the like.

The answer to your fifth question is in the negative. The mere allegation of willful, wanton, unauthorized or malfeasant conduct or its equivalent does not divest the State of its obligation to defend or indemnify.

In question six, the issue of punitive damages against the State is resolved by Section 25A.4, 1975 Code of Iowa. Punitive damages are not permitted against the State. The construction of this section as to an employee is presently pending in the district court of Iowa. A finding of punitive damages is necessarily predicated upon a finding of willful and wanton conduct. *Giltner v. Stark*, 219 N.W.2d 700, 708 (Iowa 1974). However, this does not mean that the State is precluded from indemnifying an employee for an award of punitive damages. The State is not bound by a finding of a court or jury that an employee acted maliciously if the governing body determines that it is in the best interest of the State, particularly with respect to the maintenance of high morale. Such damages can be paid legally. *Douglas v. City of Minneapolis*, 230 N.W.2d 577 (Minn. 1975).

As to question seven, it is clear that Section 7 of Chapter 80 pertains only to actions for money damages; hence there is no duty under *that* section to defend in the actions to which you refer. However, as you imply, Section 13.2, 1975 Code of Iowa, obligates the Attorney General to defend the employees, as well as the State, in those actions.

Question eight presents a mixed question of law and fact. State agency is defined in Section 25A.2(1), 1975 Code of Iowa, as follows:

" 'State agency' includes all executive departments, agencies, boards, bureaus, and commissions of the state of Iowa, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the state of Iowa, whether or not authorized to sue and be sued in their own names. This definition shall not be construed to include any contractor with the state of Iowa."

The exact nature of the organizations to which you refer may or may not fall in such category. For instance, The Iowa State Memorial Union certainly would appear to be such an agency, but as to the others, we cannot categorically state without additional information as to the relationship and the context in which they exist. With regard to whether

employees of such university related institutions are covered under Chapter 80, the following emphasized language of Section 1 of Chapter 80 is pertinent:

"SECTION 1. Section twenty-five A point two (25A.2), subsection three (3), Code 1975, is amended to read as follows:

"3. 'Employee of the state' includes any one or more officers, agents, or employees of the state or any state agency, including members of the general assembly, *and persons acting on behalf of the state or any state agency in any official capacity, temporarily or permanently in the service of the state of Iowa, whether with or without compensation.* Professional personnel, including medical doctors, osteopathic physicians and surgeons, osteopathic physicians, optometrists and dentists, who render service to patients and inmates of state institutions under the jurisdiction of the department of social services are to be considered employees of the state, whether such personnel are employed on a full-time basis or render such services on a part-time basis on a fee schedule or arrangement, but shall not include any contractor doing business with the state." [Emphasis added]

It is to be noted that Section 1 is a broad statutory classification which would appear on the face to include the relationship you have described in question eight.

Finally, question nine involves the issue of the requirement of filing a claim with the state appeal board and the two year statute of limitations found in Section 25A.13, 1975 Code of Iowa. In light of the definition of "claim" in §25A.2(5) being broadened to include claims against the employee and the failure of the legislature to differentiate between claims against the State and claims against the employee for purposes of the requirement of filing a claim with the state appeal board under §25A.5, 1975 Code of Iowa, and the two year statute of limitations, it is evident that claims against employees are also subject to these restrictions and several district courts have so held. However, until this issue is resolved in the Supreme Court of Iowa or further legislative clarification is made the matter is not entirely free from doubt, especially when willful and wanton conduct is present.

Chapter 80, "An Act relating to liability protection for state employees" is remedial in nature and should be broadly construed to achieve the goal of protecting state employees from liability while in the performance of their duties. The encouragement of fearless and unhesitant conduct, without concern for economic reprisals through civil damage lawsuits, is the ultimate aim of this Act.

INDEX

Page

ACCOUNTANCY, BOARD OF

Advisory Committee; Qualification for Office 257
Registration of Certified Public Accountants 385

AGING, COMMISSION ON THE

Constitutional Law; Separation of Powers 253
Political Activities of Area Agency on the Aging Personnel 587

AGRICULTURE, DEPARTMENT OF

Care of Animals; Commercial Breeder's License 469
Dairy Trade Practices 689
Goat Milk; Products Regulations 683
Hair Restraints — Bartenders 368
Licensing; Non-Packer Buyers 607
Licensing Slaughter Houses, Dealers, Brokers, and Operators 28
Licensing Slaughter Houses, Dealers, Brokers, and Operators 76

AIR QUALITY COMMISSION

Variances Issued by Commission; Personal Liability of Members 801

ALCOHOLISM, IOWA COMMISSION ON

Allocation of Funds 624
Contracts with Facilities 626
Corporations Contracting with Commission on Alcoholism 388
Courts; Payment of Costs of Treating Court-Referred Alcoholics 210
Emergency Commitment 111
Estate of an Alcoholic 62
Expenditure of Funds—Prior Approval Must Be Obtained 2
Facilities; Providing Funds 83
Public Records; Agency Evaluation 448
Public Records; Books of Account Viewed by Public 160
Treatment Facilities; Not Subject to State Nepotism, Merit Employment or IPERS Acts 49
Treatment Facility Funding 158

AMERICAN REVOLUTION BICENTENNIAL COMMISSION

Appropriations; Matching Funds 323

ANTI-TRUST

Fuel Oil Distributor Franchise 520

ARCHITECTURAL SERVICE, BOARD OF

Defense in Event of Claims or Litigation 709

ASSESSOR, COUNTY

Acting as Private Appraiser 744

ATTORNEY, COUNTY

Advising School District Officers 79

Page

Public Records; Indictments and Information 466

AUDITOR, COUNTY

Ministerial Tasks 883
Plat Book 584

BANKS AND BANKING

Credit Unions 299
Credit Unions; Out of State 377
Discrimination; Banking; Public Accommodations and Services 261
Electronic Fund Transfer; Satellite Facilities 301

BLIND, COMMISSION FOR THE

Guide Dogs Accompanying Students 525
Insurance Agent; Blind Licensed Insurance Salesman 194
Lease Participation 789
License Fees; Municipal 769
Power to Hire and Fire Employees 183

CAPITOL PLANNING COMMISSION

State Office Building; General Services; Names; Hoover Building 784

CITIZENS AIDE

Public Records; Criminal History and Intelligence Data 664

CIVIL RIGHTS

Discrimination; Banking; Public Accommodations and Services 261
Subpoena Power of Civil Rights Ordinances 574

CIVIL DEFENSE COUNCIL

Salary of Assistant to Director; Authority to Set 199

CIVIL SERVICE

Chiefs of Police Must Be Appointed 382
Constitutionality of Civil Service Examinations 501
Costs of Hearing Before Commission 461

CODE EDITOR

Appointment of Code Editor by Supreme Court 527

COMPATIBILITY

Cities and Towns; Voting Rights 465

COMPTROLLER, STATE

Appropriations; Departmental Claim Voucher 266

CONFLICT OF INTEREST

City Attorney may not have Interest in Property in City's Urban Renewal Project 393

Page

City Councilman may not contract with his city 81
Hospital Trustee Acting as Bank President and Shareholder at Bank Hospital Deposits Money 31
Park Board Member May Enter into Contracts with City 354
Utility Board Member may not also be Member of City Council 623

CONSTITUTIONAL LAW

Abortion; Conscience Clause 486
Abortions; Conscious Clause 474
Abortion; Consent 643
Abortion; Defined 434
Civil Rights; Discrimination; Banking; Public Accommodations and Services 261
Civil Service Examinations 501
Civil Service Department has Authority to Accept Federal Funds not Made Available to Aid in Civil Defense 34
Collective Bargaining for Public Employees 224
Contracting Debt by State; Borrowing from Federal Unemployment Trust Fund 481
Criminal Penalties; Restoration of Elector's Rights; Pardons; Definition of Crimes 493
Delegation of Legislative Power 59
Federal Unemployment Trust Fund 481
General Assembly; Legislators; Commission on Aging; Separation of Powers 253
General Assembly; Arrest; Privilege 186
General Assembly; Dual Office Holding by Legislators 791
General Assembly; Legislator on Commission; Lucrative Office; Separation of Powers 6
General Assembly; Retroactive Pay Increase for Legislative Officers and Employees 162
Governor; Item Veto 138
Governor; Item Veto 222
Legislative Officers and Employees; Providing Compensation 457
Nuisance Actions; Operation of Feedlots 451
Obscenity; Municipalities and Counties Passing their own Obscenity Laws and Ordinances 309
Petroleum Corporations Owning and Operating Retail Outlets 329
Poiltical Contributions; Gifts; Sheriffs 455
Price Controls on Fuel 315
Regulation of the U.S. Mails 128
Residency Requirements; Iowa Veterans Home 655
Separation of Powers; Supreme Court; Appointment of Code Editor 527
Sheriffs; Gifts; Political Contributions 455

CONSUMER FRAUD

Industrial and Small Loan Companies; Equal Credit Opportunity Act 557
Iowa Consumer Credit Code; Illegal Discrimination 636

CONTROLLED SUBSTANCES

Acceptance and Disposal by Hospital 91

Page

CORPORATIONS

Articles of Incorporation; Amendment to Change Chapter Under Which Incorporated 360
Corporation May be Incorporated by a Chapter 491 Corporation 358
Nonprofit Corporations 56

COUNTIES

Auditor; Ministerial Tasks 883
Civil Defense Council; Salary of Assistant to Director; Authority to Set 199
Civil Service Commission; Costs of Hearing 461
Collective Bargaining; Responsibilities of County Board of Supervisors 65
Compensation Board 294
Compensation Board 534
Compensation Board 675
Construction Contract Letting 773
County Attorney; Advising School District Officers .....
County Attorney; Claims for Stenographic Work 267
County Attorney; Duty to Advise County Officers 840
County Attorney; Motor Vehicles 812
County Attorney; Salary of Public Defender May Not Exceed Salary of County Attorney 312
County Attorney; Township Trustees 676
County Care Facility .....
County Care Facility 507
County Clerk; Appointment of Deputies 842
County Hospital; Sale of Bonds 531
County Officers; Chief Deputy Sheriff Not Covered Under Civil Service 230
County Officers; Deputies; Salary Increase 353
County Officers; Election of 230
County Officers; Prisoners; Medical Expenses 184
County Officers; Property Found on Body of Deceased 224
County Officers; Weed Commissioner May Not Also be Solid Waste Disposal Program Head 93
County Seat 341
Court Expense Fund; Providing Space for Court Related Services 41
Deferred Compensation for County Officials 94
Deputy Sheriffs; Taking Position Not Covered by Civil Service 90
Drainage Assessments; Bearing Interest 245
Drug Abuse Treatment; Funding 878
Expenditure of Funds; Equipping Judge's Office 576
Fairground Fund 666
Fairs; County and District Receiving State Aid 70
Food Stamps; Administrative Costs 859
Hospitals; Consortium of Private Hospitals does not Become a "Public Agency" within Meaning of §28A.1 565
Hospitals; Sale of Property 489
Hospital Trustees; Licensed Nurses May not be a County Hospital Trustee 1

Page

Hospital Trustee; Trustee Being President and Shareholder at Bank Where Hospital Deposits Money 31
Incompatibility; County Attorney and City Attorney 630
Incompatibility; One Partner County Attorney and Another is City or School District Attorney 823
Joint County and City Property 166
Landfill 675
Library Support 93
Low Rent Housing 846
Mental Retardation; Collection of Claims 403
Mental Retardation; Legal Residence 400
Municipal Assessments Against Property 884
Municipal Assistance Fund 604
Obscenity; Municipalities and Counties Passing Their Own Obscenity Laws and Ordinances 309
Open Meetings; Iowa Public Relations Act 514
Overtime Pay 856
Platting 874
Prisoners; Medical Expenses 184
Public Defender; Salary May Not Exceed that of County Attorney 313
Public Funds; Use for Private Purposes 69
Recorders; Statutory Prohibition Against Collection of Release Fees 174
Sale of Property 713
Secondary Road Fund 715
Sheriff; Compensation 196
Sheriff; Concealed Weapons 767
Sheriff; Peace Officers' Public Records 247
Supervisors; County Detention Facilities 593
Supervisors; Expenditure of Funds 470
Supervisors; Motion of Substance Recorded in Minutes 334
Supervisors; Moving From District he was Elected 123
Supervisors; Salary of Deputy Officers 603
Supervisors; Terms of Office 540
Supervisors; Vacancy; Manner of Filling 63
Supervisors; Vacation of Road 431
Township Trustees 676
Vacation of Road 431

COURTS

Alcoholism; Costs of Treating Court-Referred Alcoholics 210
Commitment of Juveniles to Commissioner of Social Services 600
Costs; Magistrates Court; Nonindictable Misdemeanors 86
Court of Appeals; Eligibility 820
Court Costs; Assessment of Costs Between Muncipalities and Counties in Criminal Actions 697
Deferred Sentences; Withdrawal of Pleas 234
Hospitalization of the Mentally Ill; Judicial Hospitalization Referees; Magistrates 833
Inheritance Tax Appraisers Hearings 365
Judges; Magistrates; Distribution of Power 132
Lis Pendens Index 95
Resignation of Judges; Withdrawal of Resignation 72

Page

COURT OF APPEALS

Judges; District Court; Supreme Court; Eligibility 813

CRIMINAL LAW

County Attorneys; Public Records; Indictments and Informations .. 466
Court Costs; Assessment of Fees and Costs Between Municipalities and Counties in Criminal Actions 697
Court Costs in Deferred Sentence Cases 881
Deferred Sentence; Withdrawal of Plea; Expunging Records 234
Gambling; Fussball Tournaments 213
Gambling; Social Games 319
Human Artificial Insemination 168
Liquor and Beer; Gambling; License Required 200
Obscenity; Municipalities and Counties Passing Their Own Obscenity Laws & Ordinances 309
Possession of Machine Guns 264
Swindling in the Sale of Grain or Seed 305

DRAINAGE DISTRICTS

Individual Drainage Rights; Restoration of Lost Records 329

ELECTIONS

Absentee Ballots 690
Ballot; Order of Arranging Names 818
Board of Canvassers; Qualifications of Candidates; General Assembly; Residence 863
Campaign Disclosure Act; Election Funds 157
Campaign Finance Disclosure Commission 869
Corporations; Legality of Continuing Salary of Candidate or Office Holder 599
County Officers 230
Duplicate Registration Lists; Right to Examine and Copy 79
Electronic Voting System 692
Municipal Elections; Runoffs; Write-in Candidate 322
Municipal Elections; Votes Required for Election; Write-in Votes 320
Nomination Petition 650
Nomination Petitions; Municipal Primary Election; Number of Signatures 274
Nominations; Political Non-Party Organization; Nomination by Petition 591
Paster on Ballot 887
Political Party State Central Committee 177
Presidential Electors; Nomination by Petition 650
Primary Election; Special Charter City; Votes Required for Nomination 290
Public Buildings as Polling Places 772
Registration by Mail; Postcard 747
Registration by Mail; Postcard 686
School Treasurer in Cities 704
Soil Conservation District Commissioners; Election Costs 621

Page

Time of Opening Polls; Change of Names; Registering High School Students; Number of Voting Machines 269
Vacancies in Elective Officers 730
Vacancies in Office; Election to Fill 208
Voter Registration 318
Write-in Candidates; Votes Required 590

EMPLOYMENT OPPORTUNITY BOARD

Appropriations; Reversion 280

EMPLOYMENT SECURITY COMMISSION

Partial Unemployment Defined 262

EMINENT DOMAIN

Land Condemned by Landlocked Owner Becomes Public Way 446

ENGINEERING EXAMINERS, BOARD OF

Disclosure of Confidential Information 430

ENVIRONMENTAL PROTECTION

Abandoned River Channels and Islands in Navigable Streams 99
Mine Maps; Open to Examination 579
National Pollution Discharge Elimination System Permit Delegation 759
Public Access to Air Quality Records 759
Sewage Treatment Permits 721

EXECUTIVE COUNCIL

Court Costs and Expenses; §19.10 286

FAIR BOARD, STATE AND COUNTY

Secretary and Treasurer do not have to be Elected; Salary for Secretary set by General Assembly 5
Secretary and Treasurer may be Elected From Either "existing" Board Members or Persons Not on Board 308

GAMBLING

Contribution of Net Receipts 616
Discount Wheels 371
Fussball Tournaments 213
Illegal Lottery 369
Liquor and Beer; License Required 200
Social Games Where no Cover Charge, Participation Charge, Entrance Fee, or Admission is exacted 319

GENERAL ASSEMBLY

Commission on Aging; Separation of Powers 253
Dual Office Holding by Legislators 791
Elections; Board of Canvassers; Qualifications of Candidates; General Assembly; Residence 863
Gifts; Limitation 523

Page

Iowa Public Officials Act 702
Legislative Council; Contracts; Committees 749
Legislative Council; Joint Legislative Intern Committee 424
Police Communications Review Committee 356
Public Bidding 800
Retroactive Pay Increase for Legislative Officers and Employees 162
Statutes; Titles; Subject Matter; Appropriations to Various Departments 149
Statutes; Titles; Subject Matter; Appointment of a Secretary and Treasurer of School Board 292
Statutes; Titles; Subject Matter; Length of Trucks 405

GENERAL SERVICES, DEPARTMENT OF

Director has Power to Lease Necessary Office Space for State Departments 33
State Office Building; Names 784

GOVERNMENTAL SUBDIVISIONS

Joint Exercise of Governmental Powers; Tort Liability of Governmental Subdivisions 345

GOVERNOR

Item Veto 138
Item Veto 222

HANDICAPPED

Accessibility to Buildings by Handicapped 707
Building Access for Handicapped Persons 328
Facilities for Handicapped 504

HEALTH

Health Service Agencies 395
Vital Statistics 446

HIGHWAYS

Functional Classification of Highways 366
Secondary Road Assessment Districts 810
Temporary Closing for Construction 402
Village Streets 126

HOME RULE

Home Rule Charter 324
Obscenity; Municipalities and Counties Passing their own Obscenity Laws and Ordinances 309

HOSPITALS

Consortium of Private Hospitals does not Become a "Public Agency" within meaning of §28A.1 565
County Hospitals; Sale of Bonds 531
Hospital Trustees; Licensed Nurse May not be County Hospital Trustee 1

Page

Hospital Trustees; Trustee Acting as President and Shareholder at Bank Where Hospital Deposits Money 31
Liability of Parents of Mentally Retarded Children for Foster Care 711
Mentally Ill; Judicial Hospitalization Referees; Magistrates 833
Privileged Communication; Transmission of Patient's Name in Emergency Situations 854
Sale of Property 489
Voluntary Sterilization; Consent 308

INCOMPATIBILITY

County Attorney and City Attorney are Incompatible 630
County Attorney and City or School District Attorney 823
General Assembly; Legislators on Commissions 11
Mayor and Executive Director of Inter-governmental Agency 563
Mayor May not also be Civil Defense Director 364
Township Trustee and School Board Director are not Incompatible 856
Transportation Commission; Commissioner; City Councilman and County Supervisor Incompatible 189

INSURANCE

Group Insurance for Employee's Dependents 333
Health Maintenance Organizations 390
Medical Malpractice Act 490
Newly Born Coverage 508
Schools; Group Coverage 602

IOWA CONSUMER CREDIT CODE

Cure Notice Requirements 338

IOWA PUBLIC EMPLOYMENT RELATIONS BOARD

Administrative Procedures Act 336
"Employee Organization" Defined 568
Open Meetings Law 514
Police Officers as Public Employees 632

IPERS

Des Moines Metropolitan Transit Authority Subject to IPERS 283

JUDGES

Court of Appeals; Eligibility 813

JUDICIAL MAGISTRATES

Judges; Magistrates; Distribution of Power 132

LAW ENFORCEMENT

Law Enforcement Academy; Rules 497

LEGISLATURE

Retirement; Legislature 145

Page

LIBRARIES

Regional Library Trustees not State Officers 209
Regional System 677

LICENSING

Insurance Agent; Blind Licensed Insurance Salesman 194

LIQUOR, BEER AND CIGARETTES

Barrel Tax Rebate 57
City Council has Power to Approve or Disapprove Renewal of Class C Liquor Licenses 414
Delivery of Liquor Supplies by Department Employees 167
Gifts; Administration of Iowa's Liquor Laws 108
Gifts; Political Contributions 455
Necessary Requirements for Selling Beer at Army and Air Force Exchanges 153
Sale of Native Wines 82
Sheriffs; Gifts; Political Contributions 455
Suspension or Revocation of Liquor License or Beer Permit and Incompatibility of Duties of County and City Attorneys 113

MENTAL HEALTH

Hospitalization of Mentally Ill; Judicial Hospitalization Referees; Magistrates 833

MERIT EMPLOYMENT DEPARTMENT

Overtime Pay 706
Overtime Pay 786
Rules and Regulations; Merit 410
Spanish Speaking Peoples' Commission 848

MOTOR VEHICLES

County Attorney; Habitual Offender 812
Delivery of Certificate of Title by County Treasurer 130
Driver's License; Photostat Copies 522
Implied Consent 606
Licenses Issued 815
Motor Vehicle Reciprocity 435
Private Use 339
Reckless Driving 746
Safety Regulations; Private Carriers 595
Speed Limit Violations; Prosecutions 862
Trailers; Gooseneck or 5th Wheel Variety must be Registered for Combined Gross Weight 27
Trailers; Gooseneck; Implement of Husbandry 40

MUNICIPALITIES

Air Pollution; Regulation of 852
Airport Commissions 541

	Page
Annexations	52
Annexations	473
Annexations	272
Appointment of Officers	426
Appointment to Boards	175
Assessments Upon State Property	566
City Council; Change in Terms	348
City Council; Nepotism	268
City Utility Boards; Increasing Membership on	219
City Utility Property	724
Civil Service; Chief of Police	382
Civil Service; Police and Fire Chiefs	716
Civil Service; Promotional Lists	620
Civil Service; Promotional Lists	716
Civil Service; Tie for Tenth Spot	620
Compatibility; Voting Rights	465
Conflict of Interest; City Attorney may not have Interest in Property in City's Urban Renewal Project	393
Conflict of Interest; Contracts in Violation of §362.5 are Void	216
Conflict of Interest; Councilman may not Contract with his City	81
Conflict of Interest; Park Board	354
Contracts with City	551
Contribution of Funds Pursuant to Chapter 28E	445
Curfew; Municipality May Enact Curfew Ordinances	298
Donations; Cities and Towns may not Donate Money for Private Purposes	31
Donations of City Funds	634
Donation of City Funds	811
Filling Vacancies	732
Filling Vacancies; Mayor	487
Filling Vacancies; Mayor may not Break a Tie to Fill a Vacancy on Council	535
Financing Industrial Projects	217
Financing Industrial Projects	129
Financing Recreational Facility	156
Gifts and Donations	745
Group Insurance for Employee's Dependents	333
Historical Preservation Districts	844
Home Rule Charter	324
Home Rule Charter	681
Incompatibility; Assistant City Manager and Director of City Human Relations Commission	578
Incompatibility; Mayor may not be County Civil Defense Director	364
Incompatibility; Mayor and Executive Director of Intergovernmental Agency	563
Lease of Space in Parking Facilities	87
Library Employees	513
License Fees; Commission for the Blind	769
Low Rent Housing	342
Low Rent Housing	609
Low Rent Housing Agencies	38
Majority Vote by Council	163

Page

Mayor; Filling Vacancy ... 487
Mayor to Vote; Authority ... 39
Mobile Home Parks ... 847
Municipal Assessments Against Property ... 884
Municipal Band Tax ... 85
Municipal Band Tax ... 579
Municipal Building Codes ... 360
Municipal Support of Industrial Projects ... 258
Municipal Utilities; Erecting Water Works Plant ... 81
Obligations to Abutting Property Owners ... 837
Park Board; City Employee may not Receive Compensation as City Employee While Serving on Park Board ... 298
Parking Meter Funds ... 105
Partition Fences; Cities not Exempt from Chapter 113 ... 433
Policemen and Firemen; Deduction for Pension ... 876
Policemen and Firement Retirement Systems ... 582
Public Records; Garbage Collection Assessment Disclosure ... 524
Quorum ... 605
Residence of City Employees ... 512
Resolution of Necessity ... 542
Road Use Tax Money ... 734
Sewer Rents; Collection of ... 110
Solid Waste Fees; Collection in Advance ... 194
Suspension of Officers ... 673
Townships; Fire Protection ... 550
Townships; Fire Protection Contracts ... 742
Trust and Agency Funds ... 779
Utility Boards; County Officer Precluded from Serving on City Utility Board ... 460
Utility Board Members; Incompatible with City Council Member ... 623
Utility Rates ... 554
Volunteer Firemen; Emergency Assistance ... 631

NATURAL RESOURCES COUNCIL

Appointments; Vacancies ... 220

NURSING, BOARD OF

Board of Examiners has Authority to Require Continuing Education 1
Definition of Nursing ... 727
Disclosing Scores of Examinations ... 232
Felonies Directly Related to Practice of Nursing ... 231
Licenses for Foreign Applicants ... 673
Multi-Year Contracts ... 432
Open Meetings; Tape Recording Official Meetings ... 138

OBSCENITY

Municipalities and Counties Passing their own Obscenity Laws and Ordinances ... 309

OPEN MEETINGS

Iowa Public Relations Act; Collective Bargaining ... 514

Page

Parole, Board of ... 415
Recording of Official Meetings ... 138
Superintendent of Schools; Annual Review of Salary ... 384

OPTOMETRY EXAMINERS, BOARD OF

Licensing Optometrists; Examinations ... 688

PARTICIPLE

Taxation; Agricultural Property Valuation ... 546

PENAL INSTITUTIONS

Juvenile Home and Training Schools for Girls and Boys ... 439

PER DIEM

Historical Board Member also State Employee ... 255
Professional Teaching Practices Commission Member also salaried officer for public instruction ... 255

PHYSICIANS AND SURGEONS

Podiatrists may perform surgery on the foot; not amounting to amputation thereof ... 32

PHYSICAL THERAPY

Chiropractors may perform without license ... 60

POLICEMEN AND FIREMEN

Cost of living increase ... 54
Deceased member's dependent children entitled to additional $20 monthly payment ... 831
Deduction for pension accumulation ... 876
Retirement systems ... 582

POLITICAL SUBDIVISIONS

Community action agencies ... 823

PSYCHOLOGY, BOARD OF

Scope of practice ... 638

PUBLIC EMPLOYEES

Retirement; legislature ... 145

PUBLIC EMPLOYMENT RELATIONS BOARD

Administrative procedures act ... 336
Collective bargaining responsibilities of county board of supervisors and county elected officials ... 65
"Employee organization" defined ... 568
Open meetings law ... 765
Open meetings law; collective bargaining sessions ... 514
Judges; resignation of, withdrawal of resignation ... 72

Page

PUBLIC RECORDS

County attorney; indictments and informations 466
Garbage collection assessment disclosure 524
Law enforcement; intelligence data 661
Law enforcement agencies 559
Lien for institutional care 503

PUBLIC SAFETY, DEPARTMENT OF

Confidential records 103
Employment system; rules 327

REGENTS, BOARD OF

Coal purchase; bids for coal contracts 176
Liability protection afforded employees of the Iowa Board of Regents by the State of Iowa 891

REVENUE, DEPARTMENT OF

Motor vehicles; private use of 339

SCHOOLS

Appointment of secretary and treasurer by General Assembly 292
Appropriation for resource materials 574
Area community colleges 450
Area education agency; space in courthouse 381
Athletic fields 723
Busses; privately owned painted national school bus chrome 208
Bussing 115
Bussing 657
Bussing 850
Compatibility; office of school board director and township trustee are not incompatible 856
Distribution of assets by county boards of education 106
Election of school treasurer in cities 704
Health services to nonpublic school pupils 726
Higher education; subvention 726
Higher education tuition grants 197
Insurance; group coverage 602
Joint use of fairgrounds 107
Liability of parents of mentally retarded children for foster care 711
Merit employment; overtime pay 706
Open meetings; annual review of superintendent 384
Professional teaching practices commission; cost of obtaining substitute teacher 211
Professional teaching practices commission; jurisdiction 126
Reorganization 853
Reorganization plans 78
School boards; medical services to football team 830
Schoolhouse fund 649
Schoolhouse fund 198

Page

Secretary may be assigned duties of business manager 561
Special education 804
Special education services; private boarding homes 807
Supplemental aid 648
Surtax and boundary changes 744
Tuition 858
Tuition; handicapped students 229

SECRETARY OF STATE

Rights of aliens; "nonresident aliens" defined 425
Service of original notice; nonresident defendants; small claims 614

SEPARATION OF POWERS

Supreme Court; appointment of Code Editor 527

SHERIFF

Chief deputy sheriff not covered under civil service 215
Compensation; sheriff 196
Deputy sheriff; taking position not covered by civil service 90
Political contributions; gifts 455
Public records 247

SOCIAL SECURITY

Definition of "dependent child" 615

SOCIAL SERVICES, DEPARTMENT OF

Commitment of juveniles to commissioner of Social Services 600
Community-based correctional programs 467
Council on social services 417
Division on community services; juveniles 736
Division on community services; placement of children 419
Division on correctional institutions 376
Food stamps; administrative costs 859
Iowa veterans home; residency requirements 655
Rules 471
Welfare; work as a condition of granting relief 880

SPANISH SPEAKING PEOPLES COMMISSION

Merit system 848

STATE OFFICERS AND DEPARTMENTS

Agriculture; care of animals; commercial breeder's license 469
Agriculture; goat milk; products regulations 683
Agriculture; licensing, non-packer buyers 607
Agriculture; licensing of slaughter houses 28
Agriculture; licensing of slaughter houses 76
Air Quality Commission; variances issued by Commission; liability of members 801
Alcoholism; allocation of funds 624

	Page
Alcoholism; contracts with facilities	626
Alcoholism; estate of an alcoholic	62
Alcoholism! expenditure of funds; prior approval must be obtained	2
Alcoholism; facilities; providing funds	83
Alcoholism; treatment facilities not subject to state nepotism, merit employment or IPERS acts	49
Appointment of officers; failure of Senate to act	532
Banking; credit unions	299
Banking; electronic fund transfers; satellite facilities	301
Blind, Commission for the; guide dogs accompanying students	525
Capitol Planning Commission; state office building; names	767
Citizens' Aide; public records; criminal history and intelligence data	664
City Development Board; annexations	347
Code Editor; appointment by Supreme Court	527
Comptroller; appropriations; departmental claim voucher	266
Dentistry; rules and regulations	412
Employees; additional per diem	803
Employees; rights, duties and benefits	496
Employment Opportunity Board; appropriations reversion	280
Employment Security Commission; partial unemployment defined	262
Executive Council; court costs and expenses, §19.10	286
Fair Board; secretary and treasurer do not have to be elected; salary for secretary set by General Assembly	5
Fair Board; secretary and treasurer may be elected from either "existing" board members or persons not on the board	308
General Assembly; Iowa Public Officials Act	702
General Assembly; limitation on gifts to	523
Handicapped; facilities for	504
Historical Board; member who is also state employee entitled to per diem	255
Hospitals; privileged communication	854
Iowa Public Employees Retirement System; Des Moines Metropolitan Transit Authority	283
Law Enforcement Academy; rules	497
Libraries; regional system	677
Manufacturer's representatives possession of prescription drugs	296
Medicine and surgery; recommending vitamins, minerals, etc.	536
Merit employment; overtime pay	706
Merit employment; overtime pay	786
Mobile homes	733
Mobile home parks	882
Motor vehicle reciprocity	435
National guard; arrest privileges	660
Nursing; definition	882
Nursing; licenses for foreign applicants	673
Nursing; multi-year contracts	432
Nursing home administrators; board of examiners has authority to require continuing education	1
Optometry examiners; licensing; examinations	688
Parole, Board of; open meetings	415
Psychology, Board of; scope of practice	638

Page

Public Instruction; member of professional teaching practices and also officer of public instruction entitled to per diem 255
Public Safety; confidential records 103
Renal disease; residence requirements for assistance 57
Rules and regulations; merit 410
Secretary of State; service of original notice, nonresident defendants; small claims 614
Social Services; community based correctional program 467
Social Services Council 417
Social Services; rules 467
State Building Code 362
Transportation; Department of; organization of divisions within department 519
Transportation, Department of; railroad assistance program 646
Vietnam veterans bonus; residency requirements 4
Volunteer employment 665

STATUTES

Abortion; conscience clause 474
Abortion; defined 434
Conflict of interest 521

STATUTORY CONSTRUCTION

Criminal justice agency; communications agreements 668
Criminal justice agency; civil service 671
Public records 559

STATUTES CONSTRUED

Page

Code of Iowa, 1897

16 697

Code of Iowa, 1958

312.6 734

Code of Iowa, 1971

148.1 536
150A.1 536
403A.25 342
403A.26 342

Code of Iowa, 1973

7.9 34
18A 6
29C.1 34
29C.9 34
35C 4
68A.2 103
123.44 108
123B.4 626
147.2 60
147.13 412
147.127 1
148A.1 60
148A.3(1) 60
149.5 32
151.1(2) 60
153.1 412
153.2 412
172A 28
172A.4 28
173.1 5
204.506 91
251.3 34
321.1(9) 27
321.1(10) 27
321.11 103
321.123(5) 27
321.266 103
321.271 103
347.9 1
362 52
362 272
366.1 309
366.4 163
368.11 440
368.37 81
368A.22 81
375 85
375.4 579
375.5 579
390.5 87
390.8 105
390.11 87
390.12 87
422.42(13) 87
422.43 87
427.3 44

	Page
427.5	44
444.10	41
633.425	62
701	643

Code of Iowa, 1975

	Page
2.12	749
2.32	220
2.42	424, 749
2.43	749
2.45	749
2.49	59
3.7	59
4.1	301, 217
4.1(1)	410, 412
4.1(3)	566
4.1(13)	358, 390, 388, 412
4.1(30)	605
4.1(36)(a)	111, 446, 859
4.1(36)(b)	274
4.1(37)(a)	626
4.1(37)(c)	626
4.2	258
4.4	258
4.5	52, 217, 272, 620, 891
4.6	258, 419, 566, 730, 749
4.6(5)	247, 744
4.7	342, 348, 382, 609, 874
4.8	342, 348, 609, 626
4.12	396
4.13	52
8.33	266
8.38	33
8.51	117
14	527
17A	569, 706
17A.2	786
17A.2(1)	336
17A.2(7)	412
17A.2(7)(a)(k)	471
17A.3	231
17A.4	410, 786
17A.4(4)(a)	410
17A.5(2)	410
18.117	339
19.10	286
19A.3	49
19A.3(2)	848
19A.3(4)	848
19A.3(9)	183
19A.9	706, 786
19B.8	33
20	65, 514, 765
20.1	632
20.3(3)	632
20.3(4)	568
20.4	632
20.6	765
20.9	765
20.11	765
20.17(3)	514
20.20	336
20.21	336
20.22	336
20.22(9)	224
23.18	800
24.14	96
25A.2	665, 709, 801
25A.2(1)	891
25A.2(5)	891
25A.13	891
28A	138, 384, 415, 514, 765
28A.3	487, 724
28B.2	283
28E	345, 445, 563, 668, 724, 878
28E.1	376
28E.2	283, 576, 634
28E.3	376
28E.4	376, 445, 634
28E	345, 634, 668, 724, 878
28E.1	376
28E.2	238, 576
28E.3	376
28E.4	376, 445, 576
28E.5	107, 445
28E.6	445
28E.11	445
29A.41	660
29C.7	199, 364
39.3	219
43.16	274
43.53	290
43.66	590
43.73	818
43.78	820
43.80	650
43.97	820
43.111	177
43.112	290
43.117	290
44	591
44.16	274
45	591
46.12	72
48.1	269
48.2	747
48.3	686, 747
48.5	79
48.30	269
48.31	269
49.3	318
49.21	772
49.25	269
49.30	692
49.31(4)	320, 322
49.37	818
49.68	887
49.93	887
49.99	887
49.100	887
49.107	772
50.37	863
50.39	863
50.45	320
52.26	692
52.28	692

	Page
52.30	692
53.1	690
53.7	690
53.11	772
53.35	690
54.1	650
54.2	650
54.7	650
56	599
56.11(2)	869
56.11(3)	869
56.11(4)	869
56.16	869
57	863
59	863
64.19	268
68A	514, 524, 559, 569
68A.1	160, 247, 448, 466, 559, 759
68A.2	79, 122, 160, 247, 466, 503, 759
68A.3	448
68A.7	448, 661, 664, 759
68A.7(2)	160
68A.7(6)	514
68A.7(11)	448
68A.9	759
68B.2	523
68B.4	521
68B.5	523, 702
69.1	220
69.2	123, 220
69.2(3)	730
69.8	63
69.8(2)	72
69.12	63, 208, 230, 487, 730
71.1	49, 268
71.2	267
73.7	176
79.1	255, 803
80	668
80.15	327
80B	215
80B.11	426
96.19(10)	262
97B.1	
97B.2	49
97B.9(2)	779
97B.9(3)	779
97B.41	823
97B.41(2)	49
97B.41(3)	49
97B.42	283
97B.53	283
99B	200
99B.1(6)	616
99B.1(10)	616
99B.7	616
99B.11	213
103A.10	362
103A.19	362
103A.20	362
103A.20(2)	360
104A.1	328, 504
104A.2	328, 504
111	99
113.1	433
114.32	430
116.2	257
116.6	385
116.7	257
116.9	257
116.18	385
123.3(10)	455
123.3(25)	167
123.18	455
123.30	414
123.31	414
123.32(2)	414
123.37	414
123.39	113
123.41	82
123.45	153, 167
123.49	113
123.50	113
123.53(3)	624
123.56	82
123.130	153
123.146	57
125.1	111
125.2(2)	83, 210, 388, 626
125.2(6)	210
125.3	83
125.7(1)	626
125.7(2)	626
125.8	83
125.12(4)	49, 388
125.13	626
125.13(1)	49, 83, 388, 624, 626
125.13(4)	49, 626
125.13(5)	49
125.14	388
125.18	49
125.18(1)	111
125.18(2)	111
125.18(3)	111
125.20(1)	160, 448
125.26	388
125.27	49, 83, 158, 210, 388, 626
125.28	49, 158, 210
125.30	210
125.31	62
125.33	60
125.34	62
125.36	62
134	704
135.45	57
135.47(4)	57
135.47(6)	57
135A	258
135D.1(1)	733, 882
135D.2	847, 882
135D.8	847
135D.16	847
135D.17	847
135D.18	847
135D.20	847

	Page
144.13	168
144.13(4)	446
144.39	446
147.1	638
147.3	231, 638, 673
147.4	231, 638, 673
147.13	412
147.14(4)	412
147.19	412
147.21	232, 688
147.55	673, 727
147.133	688
148.1	536, 835
148.2	835
150A.1	536
152.7	232
154	704
154B.1	638
154B.6	638
155.26	296
155.30	296
162.8	469
169.3	181
169.7	181
170.19(6)	385
172A	76
172A.1(3)	607
173	308
174	70, 666
174.1(1)	70
174.9	70
174.10	70
174.11	70
174.12	70
176A	382
176A.3	96
176A.4	96
176A.5	96
176A.6	96
176A.7	96
176A.8(3)	96
176A.8(7)	96
176A.8(9)	96
176A.8(15)	96
176A.10	96
176A.11	96
176A.12	96
176A.13	96
189	683
190	683
191	683
192	683
192A	689
192A.13	689
202	807
204.302	296
204.401	92
217.2	417
217.3(2)	417
217.24	467
217.29	467
219.2	655
222.60	400
222.77	400
222.78	403, 711
222.80	861
222.81	403
222.82	403
224.1	878
230.24	878
230.25	503
230.26	503
231.14	736
232	419
232.33	600
232.34	600, 736
232.35	600
232.36	600
234.11	859
234.39	711
238	419
238.33	736
238.37	736
238.39	736
239.1(3)	615
242.2	439
247	415
249B.2	253
249B.4	253
249B.6	253
252.1	861
252.16	400
252.27	880
252.42	880
253	507
253.6	861
253.7	861
261.9(5)(c)	197
266.5	96
272A.2	126
272A.4	211, 255
273	229
273.3(7)(8)	381
273.9	89
274.13	744
274.37	744
274.42	744
275	78, 853
277.27	89, 830
278.1(7)	198
279.3	292, 561, 812
280A	107
280A.17	450
280A.18	450
280A.19	450
280A.22	450
280A.23(9)	126
280A.34	450
280A.35	107
281.1	382
281.2	229
281.4	804
282.2	858
282.8	229
285.1	115
285.1(3)	657, 850

	Page
285.1(14)(16)	115
294.16	462
297.22	107
301.28	830
303.2	255
303B	209
303B.6	93
303B.9	677
305.12	122
305.14	122
306.10	126, 431
306.17	431
306.41	402
307.10	519
307.10(1)	114
307.12(2)	496
307.14	519
307.25	519
307.26	646
307A.5	566
309.18	715
309.40	773
309.67	715
309.95	715
311	810
312.2	734
312.6	734
313.2	366
314A.12	461
314A.20	461
317	884
321.1	862
321.1(16)	40
321.17	631
321.18(3)	40
321.19	631
321.24	130
321.37	631
321.42	130
321.123(5)	40
321.189	815
321.190	522
321.195	522
321.216	522
321.228	746
321.277	746
321.281	660
321.283(3)	210, 624
321.285	862
321.373(5)(6)	208
321.556	812
321B.3	606
323.6	520
324.10	611
324.55	611
325.1(1)	595
325.1(2)	595
325.37	595
325.38	595
326.2(9)	435
326.15	435
327.1	595
327A.1(1)	595

	Page
330.17	541
330.21	541
331.9	540
331.13	581
331.19	334
331.19(1)	247
331.19(4)	247
331.19(5)	247
331.20	247
331.21	247
331.26	123
332.2	247
332.3	382, 470, 859
332.3(5)	247
332.3(10)	65
332.3(12)	593
332.3(13)	431
332.3(15)	576
332.3(20)	440
332.6	576
332.9	576
332.11	440
332.17	93
332.21	93
332.32	675
332.44	675
333.2	247
333.6	247
336.2	840
336.2(7)	676
336A.1	312
336A.2	312
336A.5(1)	312
337.1	247
337.11	697
337.12	697
339.7	224
339.11	224
340.4	353, 603
340.7(13)	196
340.18	341
341.1	842
341.3	842
341.6	842
341A	90
341A.7	215
345.1	166
346.26	166
346.27	166
347	489
347.8	531
347.18	474
347A	489
356.1	184, 393
356.5	184
356.15	184
356A.1	593
356A.2	593
357.10(5)	405
358B.18	93
359.18	676
359.19	676
359.38	629

	Page
359.42	109, 576, 774
359.43	109, 576
359.44	109
359.47	629
362.2(8)	298
362.2(18)(20)	39
362.2(22)	3, 623
362.4	348
362.5	81, 216, 354, 551
364	769
364.1	175, 194, 219, 310, 333, 681, 697, 844
364.2	175, 194
364.2(3)	844
364.3	681
364.3(2)	697
364.3(3)	821
364.7	724
364.12	884
366.1	697
366.2(7)	79
368	52, 473
368.7	347
372.1	324
372.2	324
372.4	39, 426, 535, 673
372.5	324
372.8	671
372.9	324
372.10	324, 681
372.13	268, 348, 671, 673, 681
372.13(2)	487, 535, 730, 732
372.13(4)	175, 426
372.13(8)	298
372.14(3)	487
376.1	322
376.2	348
376.3	681
376.4	274, 681
376.6	320
376.8	320, 322
376.9	320, 322
380.4	39, 163, 732
384.3	745
384.6(1)	779
384.12(1)	579
384.16	779
384.24	445
384.24(2)(f)	194
384.26	445
384.42	542
384.49	542
384.51	542
384.54	566
384.56	566
384.80(6)	194
384.81	194
384.84	110, 194, 884
384.91	554
384.93	194
388.2	219
388.3	219, 460, 623
388.4(2)	724
388.6	554
388.7	219
392	175
392.6	634
393.5	110
397.1	81
399.26	554
400.1	382
400.3	382
400.6	382
400.7	716
400.8(1)	779
400.9	620
400.11	501, 620, 716
400.13	382, 716
400.17	512
403.16	393
403A.2	38
403A.5	38, 465, 609
403A.6	609
403A.7	609
403A.10	38, 342, 609
403A.27	342, 609
409.1	874
409.4	874
409.5	874
409.6	874
409.7	874
409.12	874
409.14	874
409.20	126
409.31	584
409.33	553
410.1	779
411	54, 582
411.6(1)	582
411.6(2)	582
411.6(3)	582
411.6(8)(9)	831
411.6(11)	582
411.6(14)	582
411.8	779
411.8(3)	876
414.2	844
414.3	844
414.6	605
414.7	605
414.14	821
414.23	821
419	156
419.1	258
419.1(2)	129, 156, 217
419.11	548
420.137	290
422	569, 679
422.20	679
422.72	679
424.4	458
425.11(2)	125, 553
427.1	334, 846
427.1(9)	392, 373
427.1(23)	373
427.1(24)	125

	Page
427.1(32)	548
427.3	125
427.4	125
428.4	117
428A	776
441	382, 529
441.6	774
441.17	744
441.21	373, 694
442.13	648
442.14	744
443.4	179, 774
443.21	774
444.2	774
444.3	774
444.9	117
444.10	576
444.12	878
445	884
445.4	748
445.30	117
445.36	179, 748
445.37	748
450.12(1)	871
450.28	365
452.10	280
453.1	301
455.57	245
455.64	245
455A.4	220, 532
455A.5	220
455B	791
455B.10	852
455B.16	759
455B.22	801
455B.29	852
455B.30(1)	110
455B.30(5)	110
455B.30(7)	110
455B.74	721
455B.81	675
465.30	328
471.4(2)	53
471.4(6)	81
490A	116
491	360
491.1	358
496C.2	385
499	360
504	56, 109
504.2	109
504A	56
509A	333, 602
509A.12	94
514B.1	390
514B.2	390
514B.4	390
514B.5	390
514C	508
522.1	194
524.803	301
524.904	789
524.1102	789
524.1104	789
533.1	377
533.14	299
533.19	377
537	524
537.3311	636
537.5110	338
554.9405(3)	174
558.57	883
558.67	883
567	425
568	99
569.5	438
569.6	438
569.8	438, 713
595.18	168
598.26	95
600.1	419
600.2	419
600.3	419
601A	497
601A.6	261
601A.7	261
601A.8	261
601A.9	261
601B.6(9)	183
601C	769
601G.9	664
602.1	132, 736
602.3	132
602.5	322, 576
602.7	341
602.30	72
602.32	72
602.34	353
602.36	132
602.50	132
602.51	72, 132
602.55	697
602.57	132
602.59	132
602.60	833
602.61	833
602.63	86, 697
606.15	86, 697
613.17	631
613A	345, 440
614.1(4)	403, 837
617.3	614
617.10	95
617.11	95
622.10	854
622.63	697
622.68	697
622.71	697
622.73	697
622.81	574
625	697
625.11	697
625.14	697
631.2	614
631.4	614
633.3(5)	168

Page

633.219 ... 168
633.221 ... 168
633.222 ... 168
633.223 ... 168
633.410 ... 403
675.35 ... 446
675.36 ... 446
684.1 ... 813
688.1 ... 455
695.7 ... 767
696.1 ... 264
696.2 ... 264
696.4 ... 264
696.6 ... 264
696.7 ... 264
710.1 ... 69
713.11 ... 305
713.12 ... 305
725.1(1) ... 309
725.2 ... 111, 309
725.9 ... 309
726 ... 200
726.8 ... 369, 371
740.20 ... 69, 339
748.3 ... 215, 247
748.4 ... 247
749 ... 664
749.2 ... 234
749B ... 661, 668
749B.1(10) ... 671
750 ... 668
750.8 ... 356
759.24 ... 184
769.13 ... 466
772.4 ... 466
777.15 ... 234
789.16 ... 376
789A.1 ... 234
789A.1(1) ... 881
789A.6 ... 234

60th General Assembly
1st Session

Chapter 96 ... 779

62nd General Assembly
1st Session

Chapter 206, §1 ... 419

63rd General Assembly
1st Session

Chapter 165, §23 ... 859
Chapter 239, §§3 & 4 ... 342

63rd General Assembly
2nd Session

Chapter 1129 ... 566
Chapter 1266, §1 ... 168

64th General Assembly
1st Session

Chapter 34 ... 566

Page

64th General Assembly
2nd Session

Chapter 1020 ... 117
Chapter 1088 ... 81
Chapter 1088, §10 ... 309
Chapter 1088, §87 ... 779
Chapter 1088, §199 ... 175
Chapter 1088, §255 ... 734
Chapter 1092, §2 ... 342

65th General Assembly
1st Session

Chapter 62, §19 ... 784
Chapter 64, §2 ... 4
Chapter 124 ... 6
Chapter 294 ... 103

65th General Assembly
2nd Session

Chapter 1086 ... 1
Chapter 1086, §198 ... 412
Chapter 1096 ... 117
Chapter 1131, §3 ... 6
Chapter 1131, §§7, 9, 37 ... 2
Chapter 1131, §52 ... 626
Chapter 1143, §1 ... 32
Chapter 1148, §8 ... 469
Chapter 1150 ... 181
Chapter 1158, §1 ... 403
Chapter 1163, §20 ... 859
Chapter 1172 ... 78
Chapter 1172, §9 ... 106
Chapter 1180 ... 405
Chapter 1231, §128 ... 44
Chapter 1267 ... 309
House File 299, §1 ... 60

66th General Assembly
1st Session

Chapter 61 ... 604
Chapter 62 ... 574
Chapter 67, §22 ... 736
Chapter 67, §42 ... 532
Chapter 77, §2 ... 848
Chapter 80, §§1, 2 & 7 ... 665, 709, 801
Chapter 80, §§1 & 7 ... 848
Chapter 81 ... 747
Chapter 81, §25 ... 820
Chapter 81, §§2, 44 ... 348
Chapter 81, §47 ... 686
Chapter 81, §69 ... 818
Chapter 81, §§120, 150 ... 487
Chapter 101 ... 697
Chapter 129, §2 ... 368
Chapter 131, §1 ... 607
Chapter 137, §2 ... 655
Chapter 138, §49 ... 438
Chapter 139, §24(1) ... 503
Chapter 139, §§6, 7, 8(3)(a), 11, 12, 21, 22 ... 833
Chapter 139, §41 ... 878
Chapter 153 ... 807

Page

Chapter 166, §37 412
Chapter 168, §1 773
Chapter 191 603, 675
Chapter 191, §6 534
Chapter 194, §§6 & 9 440
Chapter 194, §§1, 6 & 9 550
Chapter 194, §§6 & 7 742
Senate File 74 649, 723
Senate File 85 493
Senate File 114 286
Senate File 353 323
Senate File 485, §32 262
Senate File 485, §33 262
Senate File 496, §8 200, 319
Senate File 496, §9 369, 371
Senate File 496, §13 213
Senate File 496, §14 319
Senate File 496, §20 371
Senate File 496, §21 369
Senate File 496, §22 369, 371
Senate File 526, §1 217, 258
Senate File 526, §2 258
Senate File 526, §15 347
Senate File 526, §20 324
Senate File 526, §21 324
Senate File 526, §23 298
Senate File 526, §27 194
Senate File 536 301
Senate File 555 145
Senate File 572 158
House File 215 425
House File 334 138
House File 431 149, 599
House File 455 138
House File 550 329
House File 628 657
House File 700 269, 292
House File 700, §51 318
House File 700, §122 230
House File 802 196, 294, 312
House File 898, §7 222
House File 909, §§1, 2 & 3 874
House File 913 280
House File 914 876

66th General Assembly

2nd Session

Chapter 200, §§1 & 3 716
Chapter 200, §§ 2 & 3 620
Chapter 203 426
Chapter 203, §19 535
Chapter 203, §§23 & 24 673
Chapter 203, §§22, 23 & 25 681
Chapter 203, §38 884
Chapter 205 694
Chapter 220 871
Chapter 229 621
Chapter 239, §§2, 5 & 33 490
Chapter 246 697
Chapter 248 697

Page

Senate File 367 451
Senate File 387 434, 474, 486
Senate File 1062, §17 546
Senate File 1086, §2 779
Senate File 1086, §3 716
Senate File 1092 813
Senate File 1251 800
Senate File 1261, §§11 & 15 726
Senate File 1336, §§1, 3, 5 & 9 848
House File 1010 747
House File 1010, §1 686
House File 1011, §7 818
House File 1011, §8 820
House File 1011, §§58, 59 & 69 730
House File 1011, §62 704
House File 1011, §69 732
House File 1011, §76 820
House File 1033, §1 820
House File 1277, §§3, 7 & 12 626
House File 1477 721, 791
House File 1480, §§2 & 90 646
House File 1498 844
House File 1503, §1 835
House File 1503, §§1 & 10 727
House File 1503, §§7 & 9 673
House File 1564 694, 748
House File 1583 803
House File 1590, §6 609, 646

United States Constitution

1st Amendment 455

Constitution of Iowa

Article I, §6 261
Article II, §5 493
Article III, §1 6, 132, 253, 356, 467, 474, 486, 493, 527, 749
Article III, §2 481
Article III, §4 863
Article III, §5 863
Article III, §7 863
Article III, §11 186
Article III, §16 138, 222
Article III, §21 6, 356
Article III, §22 6, 356, 791
Article III, §24 34, 138
Article III, §25 145
Article III, §29 149, 292, 405
Article III, §31 162, 290, 457, 624, 634
Article III, §38A 179, 194, 219, 769
Article IV, §16 493
Article V, §1 813
Article V, §6 736
Article V, §10 132, 813
Article V, §14 132
Article V, §15 132
Article V, §18 813
Article VII, §1 34
Article VII, §8 734

Page

SUPERVISORS

Chairman of board not restricted from making motions or voting as a member 581
County attorney; claims for stenographic work and adequate staff 267
County detention facility 593
Expenditure of funds; equipping judge's office 576
Equipping of funds; "Open House" function 470
Motion of substance recorded in minutes 334
Moving from district elected 123
Peace officers public records 247
Salary of deputy 603
Terms of office 540
Vacancy; manner of filling 63
Vacation of road 431

SUPREME COURT

Court of Appeals; eligibility 813

TAXATION

Administrative procedure; open records 569
Agriculture property valuation 546
Assessment; soil survey 529
Chain store tax 458
Disclosure of taxpayer's return 679
Documentary stamp tax 776
Fire districts; taxation of 774
Homestead and military service tax credits 125
Homestead tax credit 553
Inheritance tax appraisers hearings 365
Inheritance tax; expenses of selling property in estates 871
Military service tax exemption 44
Motor fuel tax audits; payment of audit expenses 611
Municipal support of industrial projects; pollution control property tax exemption 548
Property tax; county wide mass appraisal revaluations 694
Property tax; delinquency 748
Property tax; exemption for churches 392
Property tax; time for collection 179
Property tax exemption; use of real property by non-profit historical institution 373
Public bidders sale; assessment of fee 438
Road use tax money; municipalities 734
Surtax and boundary changes; schools 744
Tax sheltered annuities 462

TOWNSHIPS

Compensation of township clerks 629
Fire fighting companies; building housing for fire equipment 109
Fire protection 440

Page

Fire protection 576
Fire protection contracts 742
Taxation of fire districts 774
Township trustee and school board director are not incompatible 856

TRANSPORTATION, DEPARTMENT OF

Comprehensive transportation plan 114
Incompatibility; Transportation Commission and city councilman and county supervisor incompatible 189
Organization of divisions within department 519
Railroad assistance program 646
Rules governing length of trucks 405
Rule making power; effective date of rules 396

UTILITIES

Deposits and discontinuance of service 116

VETERINARY MEDICINE

Undergraduate veterinarians 181

VIETNAM VETERANS BONUS

Residency requirements 4

WEAPONS

Sheriffs issuing permits 767

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M E M O R A N D U M

RE: CONFLICTS OF INTEREST AND PUBLIC OFFICIALS

The Supreme Court of Iowa has recognized two types of conflicts of interests in which a public official may become involved: (1) A conflict arising from a private interest and a public duty; and (2) A conflict arising from the contemporaneous holding of two public positions. Neither type of conflict has been condemned by constitutional sanctions or even raised to a constitutional level. Both types of conflict have either been controlled by statutory provisions or, in the absence of such provisions, by the common law rules recognized by the Court as being the law of the state prior to enactments by the General Assembly. The major difference, as exhibited infra this memorandum, between the two types of conflict is that the Court appears to be very ready to denounce a conflict between a private interest and a public duty; whereas, the Court appears to be far more tolerant of the contemporaneous holding by one person of two public positions.

A leading case concerning the holding of two public positions at one time is Thie v. Cordell, 202 N.W. 532 (Iowa 1925). The question in this case was whether a conflict arose when a county superintendent sat on the county board of education with the possibility that he might vote on a decision which he had previously made and which was an appeal to the board. A conflict was not found because the statute provided that he should serve in both positions. Clearly controlling was the intent of the legislature:

> In this perfectly obvious situation, the Legislature has seen fit to provide, not for his disqualification by reason of his rendering the decision appealed from....and (the Legislature) must be deemed to have intended that the county superintendent should participate as a member of the board in the review of his own decisions on appeal, and to have contemplated the possibility that his might be the deciding vote. (Id., at 534.)

A more recent decision of the Supreme Court, State v. White, 133 N.W. 2d 903 (Iowa 1965), reiterates the holding in Thie, even though the legislative intent as to the statutory positions in question was not sufficiently clear to avoid the finding of a conflict:

> The legislature could provide that one person can serve on both boards here if it so desires, but in the absence of a statute expressing such intention the common law rule of incompatibility must be applied. (Id., at 906.)

The quotation from White alludes to the difficulty that arises when the legislature has not expressly provided that one person may hold two public positions. A leading opinion in this area is State ex rel. Crawford v. Anderson, 136 N.W. 128 (Iowa 1915), cited with approval in White. In Anderson, the question was whether a mayor could also be a justice of the peace. The statutes creating both positions were silent as to the question. The Court, therefore, applied the common law rule that a conflict exists if the prescribed duties of both positions make it incompatible for one person to serve in both positions. A conflict was found because the statutory plan for each position would be "thwarted" by denying the public two independent positions held by two independent individuals. The following discussion by the Court in this case further defines when the holding of two public positions by one person is incompatible:

> The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend on the incidents of the office, as upon physical inability to be engaged in both at the same time. (Cit.) But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other "and subject in some degree to its revisory power," or where the duties of the two offices "are inherently inconsistent and repugnant." (Cits.) A still different definition has been adopted by several courts. It is held that incompatibility in office exists "where the nature and duties of the two offices render it impossible, from considerations of public policy, for an incumbent to retain both. (Id., at 128, 129.)

The Supreme Court was not found to have specifically passed on a statutory prohibition against serving in two public positions, but it has stated that, absent statutory approval of the holding of two such positions, a finding of incompatibility results in the following effect:

> (I)f a person, while occupying one office, accepts another incompatible with the first, he ipso facto vacates the first office, "and his title thereto is thereby terminated without any other act or proceeding." (White, supra, at 904, quoting with approval from Anderson, supra, and Bryan v. Cattell, 15 Iowa 538.)

A more recent opinion, Wilson v. Iowa City, 165 N.W. 2d 813 (Iowa 1969), contrasts the effect of finding a common law incompatibility in holding two public positions and the effect of having a conflict between a private interest and a public duty. In this case, there was a statutory provision prohibiting city council members from voting on urban renewal resolutions in which they had a private interest. Nevertheless, the remedy fashioned for violation of the statute was discovered in the common law:

> (T)he better rule holds a vote cast in violation of a conflict of interest statute, even if immaterial, vitiates the proceeding. (Id., at 819.)

Furthermore, the opinion suggests that the common law considerations in regard to this type of conflict are simply further evidenced in statutes, unless very specifically stated to the contrary. This is also in contrast to the use of common law considerations to fill gaps in the Code of Iowa when a potential conflict exists between the holding of two public positions:

> We doubt if any rule has more longevity than that which condemns conflicts of interests between the public and private interests of governmental officials and employees, nor any which has been more consistently and rigidly applied. The high standards which the public requires of its servants were set by common law and adopted later by statute. It is almost universally held that such statutes are merely declaratory of the common law. (Id., at 822.)

The judicial rule, whether implemented by conflict statutes or in aid of conflict statutes, appears to be rooted in the concept that a person "cannot serve two masters." (Id., at 819.) As applied, it does not appear to necessarily forbid a person from holding a public and private position at the same time. However, it does seem to forbid the use of any publically-granted power in any way that even suggests the possibility of a conflict with a private interest:

> These rules, whether common law or statutory, are based on moral principles and public policy. They demand complete loyalty to the public and seek to avoid subjecting a public servant to the difficult, and often insolvable task of deciding between public duty and private advantage. It is not necessary that this advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the potential for conflicts of interests which the law desires to avoid....When one is committed to give loyalty and dedication of effort to both his public office and his private employer, when the interests of the two may conflict, one is faced with pressures and choices to which no public servant should be unnecessarily exposed. (Id., at 822, 823.)