State of Iowa
1978

FORTY-SECOND BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1978

RICHARD C. TURNER
Attorney General

Published by
THE STATE OF IOWA
Des Moines
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ATTORNEYS GENERAL OF IOWA
1853 - 1979

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	1967-1979

PERSONNEL OF THE
DEPARTMENT OF JUSTICE

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; Asst. Pottawattamie County Attorney 1954-1956; Avoca Town Clerk 1953-1960; Elected Attorney General 1966, 1968, 1970, 1972 and 1974.

RICHARD E. HAESEMEYER ..... Solicitor General
Solicitor General and First Asst. 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., New York City, 1956-1962; Monsanto Company, Textile Div. (formerly the Chemstrand Corp.), N.Y.C. 1962-1967; Appt. Solicitor General and First Asst. Atty. Gen. February 20, 1967.

JOHN E. BEAMER ..... Special Assistant Attorney General
B. August 23, 1939, Abilene, Texas; B.A., Cornell College; J.D., S.U.I.; Agent F.B.I., 1964-1970; married, two children; Appt. Asst. Atty. Gen. 1970; Appt. Spec. Asst. Atty. Gen. 1972; Term 4-28-77

ROBERT W. GOODWIN ..... Special Assistant Attorney General
B. June 25, 1943, Indianola, Iowa; B.S., J.D., Drake University; Agent F.B.I. 1967-1971; married, two children; Appt. Asst. Atty. Gen. 1970; Appt. Spec. Asst. Atty. Gen. 10-1-75

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. Asst. Atty. Gen. 1961, 1965 and 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; Appt. Asst. Atty. Gen. January 3, 1967; Secretary Executive Council of Iowa May 1, 1967; Executive Secretary Republican Party of Iowa, November 1, 1969; Appt. Asst. Atty. Gen. August 15, 1973; Appt. Spec. Asst. 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.; Appt. Asst. Atty. Gen. 1969; Appt. Spec. Asst. Atty. Gen. 1971. Term. 2-28-78

RAYMOND W. SULLINS ..... Special Assistant Attorney General
B. February 4, 1945, Princeton, Indiana; B.A., Los Angeles Baptist College; J.D., Drake University; married, Appt. Asst. Atty. Gen. 1972; Appt. Spec. Asst. Atty. Gen. 6-23-78.

RICHARD A. WILLIAMS ..... Special Assistant Attorney General
B. August 30, 1941, San Francisco, Calif., B.A., J.D., University of Iowa; married, two children; Appt. Asst. Atty. Gen. 1975; Appt. Spec. Asst. Atty. Gen. 3-3-78.

GARRY D. WOODWARD ..... Special Assistant Attorney General
B. April 18, 1926, Muscatine, Iowa; B.A., L.L.B., S.U.I.; married, one child; private practice 1954-1972; Muscatine County Magistrate 1958-1960; Muscatine County Attorney 1961-1964 and 1968-1972; Appt. Asst. Atty. Gen. 1972; Appt. Spec. Asst. Atty. Gen. 1977.

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; Appt. Asst. Atty. Gen. 1969.

WILLIAM REES ARMSTRONG ..... Assistant Attorney General
B. July 31, 1947, Muncie, Indiana; B.A., Augustana College, Rock Island, Illinois, 1969; J.D., Drake University, Des Moines, Iowa, 1973; single. Appt. Asst. Atty. Gen. 1978.

JOHN W. BATY ..... Assistant Attorney General
B. October 5, 1942, Monticello, Iowa; B.S., Iowa State University; J.D., Drake University; Asst. Marshall County Atty., 1968-1969; married, one child; Appt. Asst. Atty. Gen. 1972.

JOSEPH S. BECK ..... Assistant Attorney Genral
B. January 3, 1944, Spencer, Iowa; B.B.A., University of Iowa; J.D., Drake University; married; Appt. Asst. 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; Appt. Asst. Atty. Gen. 1976.

BARBARA E. BENNETT ..... Assistant Attorney General
B. August 25, 1953, Estherville, Iowa; B.A., Colorado Women's College; J.D., Creighton University; single; Appt. Asst. Atty. Gen. 1978.

TIMOTHY D. BENTON ..... Assistant Attorney General
B. March 12, 1951, Des Moines, Iowa; B.A., Central College; J.D., University of Iowa; single; Appt. Asst. Atty. Gen. 1977.

EDWARD M. BLANDO ..... Assistant Attorney General
B. September 29, 1938, South Dakota; B.S., J.D.; married, three children; private practice 1969-1978; State Attorney, Hughes County, South Dakota, 1972-1975; Asst. State Attorney, Hughes County, South Dakota, 1969-1972; Asst. Atty., South Dakota, 1968-1969; Appt. Asst. Atty. Gen. 1978.

LARRY M. BLUMBERG ..... Assistant Attorney General
B. September 8, 1946, Omaha, Nebraska; B.A., University of Minnesota; J.D., Drake University; married, two children; Appt. Asst. 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; Appt. Asst. Atty. Gen. 1973.

DOUGLAS R. CARLSON ..... Assistant Attorney General
B. December 6, 1942, Des Moines, Iowa; B.A., J.D., Drake University; single; Appt. Asst. Atty. Gen. 1968.

ROBERT CLAUSS ..... Assistant Attorney General
B. February 5, 1946, Peoria, Illinois; B.S., Bradley University; J.D., Drake University; married, one child; Appt. Asst. Atty. Gen. 1978.

MARIE A. CONDON ..... Assistant Attorney General
B. June 13, 1952, Casey, Iowa; B.A., M.B.A., J.D., Drake University; Appt. Asst. Atty. Gen. 1977.

BRUCE L. COOK ..... Assistant Attorney General
B. July 16, 1949, Sac City, Iowa; B.A., Buena Vista College; J.D., Drake University; married, two children; Appt. Asst. 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; Appt. Asst. Atty. Gen. 1975. Term. 5-6-77.

GEORGE COSSON ..... Assistant Attorney General
B. August 18, 1947, Des Moines, Iowa; B.A., J.D., University of Iowa; married, two stepchildren; Iowa Supreme Court law clerk 1972-1973; private practice 1973-1974; Social Services Hearing Officer 1974-1976; Appt. Asst. 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; Appt. Asst. 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; Appt. Asst. Atty. Gen. 1973. Term. 7-15-77.

THOMAS M. DONAHUE ..... Assistant Attorney General
B. January 28, 1943, Sioux Falls, S.D.; B.S., South Dakota State University; M.Ed., South Dakota State University; J.D., Drake University; married, two children; private practice, 1975-1978; Appt. Asst. Atty. Gen. 1978.

RICHARD H. DOYLE, IV. ..... Assistant Attorney General
B. August 8, 1949, Elgin, Illinois; B.A., J.D., Drake University; married; Appt. Asst. Atty. Gen. 1976. Term. 6-30-77.

EVELYN I. DRAKE ..... Assistant Attorney General
B. September 10, 1944, Claremore, Ok.; B.S., J.D., University of Arkansas; divorced, two children; private practice 1973-1976; Greers Ferry City Attorney, 1975-1976; Appt. Asst. Atty. Gen. 1977.

STEPHEN P. DUNDIS ..... Assistant Attorney General
B. July 12, 1947, Waterloo, Iowa; B.A., University of Iowa; J.D., University of Iowa; single; Appt. Asst. Atty. Gen. 1977.

JEAN L. DUNKLE ..... Assistant Attorney General
B.A., J.D., State University of Iowa; Appt. Asst. Atty. Gen. 1975.

CAROL S. EGLY ..... Assistant Attorney General
B. June 27, 1949, Creston, Iowa; B.A., St. Olaf; J.D., Drake University; Appt. Asst. Atty. Gen. 1975. Term. 11-14-78.

WILLIAM G. ENKE ..... Assistant Attorney General
B. March 22, 1947, Monett, Missouri; B.B.A., J.D., University of Iowa; married; Appt. Asst. Atty. Gen. 1975. Term. 2-25-77.

LINDA ERICKSON ..... Assistant Attorney General
B. December 19, 1951, Fort Dodge, Iowa; B.A., J.D., Drake University; Appt. Asst. Atty. Gen. 1977.

THOMAS A. EVANS, JR. ..... Assistant Attorney General
B. September 26, 1951, Schenectady, New York; B.A., University of New Hampshire, 1974; J.D., Drake University, 1977; Appt. Asst. Atty. Gen. 1977.

ANN FITZGIBBONS ..... Assistant Attorney General
B. September 5, 1951, Estherville, Iowa; B.A., S.U.I.; J.D., Drake University; single; Appt. Asst. Atty. Gen. 1977.

BRUCE FOUDREE ..... Assistant Attorney General
B. March 27, 1947, Des Moines, Iowa; B.A., J.D., Drake University; LL.M., University of Pennsylvania; married, one son; Appt. Asst. 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; Appt. Asst. Atty. Gen. 1967.

KATHRYN L. GRAF ..... Assistant Attorney General
B. October 6, 1952, Fairfield, Iowa; B.A., J.D., Drake University; single; Appt. Asst. Atty. Gen. 1978.

HARRY M. GRIGER ..... Assistant Attorney General
B. March 13, 1941, Des Moines, Iowa; B.A., J.D., S.U.I.; married; Appt. Asst. Atty. Gen. 1967.

LONA J. HANSEN ..... Assistant Attorney General
B. April 14, 1951, Cedar Rapids, Iowa; B.A., Macalester College; M.A., J.D., S.U.I.; unmarried. Appt. Asst. Atty. Gen. 7-5-77.

FRED M HASKINS ..... Assistant Attorney General
B. October 18, 1947, Des Moines, Iowa; B.B.A., J.D., University of Iowa; single; Appt. Asst. Atty. Gen. 1972.

MARK HAVERKAMP ..... Assistant Attorney General
B. May 28, 1951, LeMars, Iowa; B.A., J.D., Creighton University; married; Asst. Mills and Fremont County Attorney 1977-1978; Appt. Asst. Atty. Gen. 1978.

GARY HAYWARD ..... Assistant Attorney General
B. June 27, 1951, Mason City, Iowa; B.A., J.D., University of Iowa; single; Appt. Asst. Atty. Gen. 1976.

TERRY L. HINMAN ..... Assistant Attorney General
B. August 11, 1947, Milwaukee, Wisconsin; B.A., Simpson College; J.D., University of Iowa; married, one child; private practice 1973-1977; Appt. Asst. Atty. Gen. 1977.

DENNIS D. HOGAN ..... Assistant Attorney General
B. February 13, 1944, Des Moines, Iowa; B.A., J.D., Drake University; married, one child; Appt. Asst. Atty. Gen. 1975.

FRANCIS C. HOYT, JR. ..... Assistant Attorney General
B. June 14, 1949, Park Ridge, Illinois; B.A., J.D., University of Iowa; married; Appt. Asst. Atty. Gen. 1975.

JOHN D. HUDSON ..... Assistant Attorney General
B. February 1, 1948, Des Moines, Iowa; B.A., J.D., University of Iowa; single; Appt. Asst. Atty. Gen. 1973. Term. 1-28-77.

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; Sioux County Attorney 1968-72, Judicial Magistrate 1973-74; Appt. Asst. 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; Appt. Asst. Atty. Gen. 1976.

SARA K. JOHNSON ..... Assistant Attorney General
B. August 26, 1952, Des Moines, Iowa; B.A., University of Iowa; J.D., Drake University; single; Appt. Asst. Atty. Gen. 1977.

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; Asst. Marshall County Atty. 1969-1971; Marshall County Atty. 1972-1975; Appt. Asst. Atty. Gen. 1975.

ROBERT E. KEITH ..... Assistant Attorney General
B. November 19, 1948, Fort Dodge, Iowa; B.A., J.D., University of Iowa; Appt. Asst. Atty. Gen. 1975.

BRIAN F. KELLY ..... Assistant Attorney General
B. March 16, 1951, Des Moines, Iowa; B.A., University of Notre Dame; J.D., M.B.A., S.U.I.; Single; Appt. Asst. Atty. Gen. 1977.

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, two children; Appt. Ass't. Atty. Gen. 1974. Term. 1-29-77.

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; Asst. City Atty., Des Moines, Iowa, 1969-1970; Appt. Asst. Atty. Gen. 1971.

JACK W. LINGE ..... Assistant Attorney General
B. September 14, 1941, Ottumwa, Iowa; L.L.B., University of Iowa; married; Appt. Asst. Atty. Gen. 1974. Term. 3-24-78.

SANDRA B. LUDWIGSON ..... Assistant Attorney General
B. September 3, 1953; New York, New York; B.A., University of Arizona; J.D., Drake University; married; Appt. Asst. Atty. Gen. 1978.

KEVIN MAGGIO ..... Assistant Attorney General
B. May 25, 1949, Fort Dodge, Iowa; B.A., J.D., University of Iowa; Appt. Asst. Atty. Gen. 1975. Term. 5-31-78.

E. DEAN METZ ..... Assistant Attorney General
B. November 27, 1927, Creston, Iowa; L.L.B., Drake University; married; Employers Mutual Casualty Co. 1955-1965; private practice 1965-1978; Asst. City Atty. in Burlington, Iowa 1968-1970; Des Moines, Iowa Cty. Atty. 1970-1972; Asst. Des Moines County Atty. 1972-1978; Appt. Asst. Atty. Gen. 1978.

BRUCE D. McDONALD ..... Assistant Attorney General
B. November 29, 1952, Cherokee, Iowa; B.A., J.D., S.U.I.; married; Appt. Asst. Atty. Gen. 1978.

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; Appt. Asst. Atty. Gen. 1971.

PATRICK McNULTY ..... Assistant Attorney General
B. August 29, 1951, Jefferson, Iowa; B.A., J.D., University of Iowa; single; Appt. Asst. Atty. Gen. 1977.

RICHARD E. MULL ..... Assistant Attorney General
B. February 8, 1952, Rock Island, Illinois; B.B.A., J.D., University of Iowa; single; Deputy Clerk, Iowa Supreme Court 1977-78; Appt. Asst. Atty. Gen. 1978.

JOHN GRANT MULLEN ..... Assistant Attorney General
B. October 17, 1949, Tucson, Arizona; B.A., University of Illinois; J.D., Drake University; married; Appt. Asst. Atty. Gen. 1975. Term. 1-6-78.

MICHAEL P. MURPHY ..... Assistant Attorney General
B. January 13, 1945, Ida Grove, Iowa; B.A., J.D., University of Iowa; married; Appt. Asst. Atty. Gen. 1974. Term 5-26-77.

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; Appt. Asst. Atty. Gen. 1967.

LESTER A. PAFF ..... Assistant Attorney General
B. August 25, 1945, Norwalk, Ohio; A.B., J.D.; married, two children; Asst. Counsel, Missouri State Highway Commission 1974-1977; Appt. Asst. Atty. Gen. 1978.

JOHN R. PERKINS ..... Assistant Attorney General
B. April 1, 1943, Des Moines, Iowa; B.A., J.D., University of Iowa; married, two children; Asst. Polk County Attorney 1970-1972; Appt. Asst. 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; Appt. Asst. Atty. Gen. 1973. Term. 2-3-78.

RAYMOND D. PERRY ..... Assistant Attorney General
B. July 24, 1949, Davenport, Iowa; B.A., J.D., S.U.I.; married; Intern, H.E.L.P. Legal Aid, 1974-1975; Asst. Dickinson County Attorney 1975; Director, Muscatine Legal Services, 1975-1976; Radio Entertainer, 1976; Private practice 1977; Appt. Asst. Atty. Gen. September, 1977.

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; Appt. Asst. Atty. Gen. 1968.

JOHN JAMES PIAZZA ..... Assistant Attorney General
B. January 18, 1954, Scranton, Pa.; B.A., J.D., Drake University; married; Appt. Asst. Atty. Gen. 1978.

WILLIAM RAISCH ..... Assistant Attorney General
B. June 3, 1949, Waterloo, Iowa; B.A., Drake University; J.D., Drake University; married, two children; Securities Examiner, Iowa State Insurance Comm. 1974-1975; Appt. Asst. Atty. Gen. 1975.

CHERYL STRATTON RAMEY ..... Assistant Attorney General
B. March 25, 1948, Lamar, Missouri; B.A., Bradley University; J.D., Drake University; married; Appt. Asst. Atty. Gen. 1975. Term. 2-16-77.

RICHARD L. RICHARDS ..... Assistant Attorney General
B. July 31, 1952, Eldora, Iowa; B.A., Augustana College; J.D., Drake University; married; Appt. Asst. Atty. Gen. 1977.

JIM P. ROBBINS ..... Assistant Attorney General
B. August 29, 1949, Iowa Falls, Iowa; B.S., J.D., Drake University; married, one child; Appt. Asst. Atty. Gen. 1974. Term. 3-31.77.

CARLTON G. SALMONS ..... Assistant Attorney General
B. October 13, 1947, Beloit, Wisconsin; B.S., J.D., Drake University; married, one child; law clerk to Polk County Judge Anthony M. Critelli, 1976-1977; Appt. Asst. Atty. Gen. 1977.

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, 1966-68; married, two children; Appt. Asst. Atty. Gen. 1970.

MARK F. SCHLENKER ..... Assistant Attorney General
B. May 20, 1954, Des Moines, Iowa; B.S., Iowa State University; J.D., Creighton University; single; Appt. Asst. Atty. Gen. 1978.

FAISON T. SESSOMS, JR. ..... Assistant Attorney General
B. November 28, 1952, Silver Spring, Maryland; B.A., St. Olaf College, 1974; J.D., Drake University, 1977; married; Appt. Asst. Atty. Gen. 1977.

MICHAEL E. SHEEHY ..... Assistant Attorney General
B. December 3, 1947, New Hampton, Iowa; A.B., Marquette University; J.D., University of Iowa; married; Appt. Asst. Atty. Gen. 1976. Term. 5-15-78.

CHRISTIAN SMITH ..... Assistant Attorney General
B. February 7, 1945, Galesburg, Illinois; B.A., Dartmouth; J.D., Iowa University; married, one child; Appt. Asst. Atty. Gen. 1976. Term. 7-31-78.

GARY H. SWANSON ..... Assistant Attorney General
B. October 26, 1939; B.A., Drake University; J.D., Drake University; Asst. Des Moines City Attorney 1965-1968; private practice 1968-1972; Appt. Asst. 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; Appt. Asst. Atty. Gen. 1975. Term. 11-30-77.

ROBERT TANGEMAN ..... Assistant Attorney General
B. April 14, 1924, Hardwick, Minnesota; B.S., L.L.B., St. Paul College of Law, St. Paul, Minn.; married, five children; Minnesota Mutual Life Insurance Co., 1947-1965; Iowa State Travelers Mutual Insurance Co., 1965-1972; Appt. Asst. Atty. Gen. 1973. Term. 6-8-78.

J. E. TOBEY, III ..... Assistant Attorney General
B. June 21, 1946, Columbus, Ohio; B.A., Ohio Northern University; J.D., University of Iowa; married; Appt. Asst. Atty. Gen. 1976. Term 5-15-78.

MICHAEL PAUL VALDE ..... Assistant Attorney General
B. March 6, 1952, Story City, Iowa; B.S., Iowa State University; J.D., University of Iowa; single; Appt. Asst. Atty. Gen. 1977.

JOHN WEHR ..... Assistant Attorney General
B. January 23, 1952, Sigourney, Iowa; B.A., University of Iowa; J.D., Creighton University; married, one child; Asst. Pottawattamie County Attorney 1977-1978; Appt. Asst. Atty. Gen. 1978.

W. RICHARD WHITE ..... Assistant Attorney General
B. November 24, 1946, Newton, Iowa; B.A., University of Iowa; J.D., Drake University; married, one child. Appt. Asst. 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; Appt. Spec. Asst. Atty. Gen. 1967.

RICHARD C. TURNER

Attorney General

REPORT OF THE ATTORNEY GENERAL

January 1, 1979

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

Dear Governor Ray:

In accordance with the provisions of §§13.2(6) and 17.6, Code of Iowa, 1977, I am privileged to submit the following report of the condition of the office of the Attorney General, opinions rendered and business transacted of public interest.

CIVIL RIGHTS DIVISION

The Civil Rights Division is staffed by 2 Assistant Attorneys General. These attorneys represent civil rights complainant cases before the Iowa Civil Rights Commission at public hearings held throughout Iowa. Their cases involve allegations of discrimination based on age, race, creed, color, sex, national origin, religion and physical or mental disability in the areas of employment, housing and public accommodations.

In addition, the Civil Rights Division counsels and advises the Civil Rights Commission and the Commission's staff, advises other state officials on questions involving the Iowa Civil Rights Act, and appears in Court on behalf of the Commission. Most court work involves Judicial Appeals from administrative actions of the agency. The Division also handles appeals involving the Civil Rights Act in the Iowa Supreme Court.

Much of this Division's legal work is devoted to trying cases before the agency, preparing written briefs for submission to the Commission, to the district courts and to the Supreme Court. The Division also answers written and oral requests from the public on matters pertaining to civil rights.

During the biennium, the division completed 28 cases before the Commission, and handled approximately 30 district court cases. Eight cases went to the Supreme Court during this period, of which four are still pending.

CONSUMER PROTECTION DIVISION

During the years 1977 and 1978, the Consumer Protection Division of the Attorney General's office received 15,000 complaints and closed 14,500. In 1975-76, 10,329 complaints were received and 9,434 were closed. Thirty-one lawsuits were filed in 1977-78 and $1,600,000 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, the impact of which 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. In addition, the office attempts to inform the public 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 thwarted because the public is better informed.

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

For example, a program has been established with the news media to screen advertising to reduce fraudulent ads. In addition, ads are monitored and inquiries are made of those using advertising techniques commonly used to initiate fraudulent schemes.

Emphasis has also been placed on schemes affecting the agricultural community. Investigations have led to both criminal and civil actions against livestock dealers who 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 because of claims which could not be substantiated.

This Division has continued to monitor business opportunity ads and to warn the public through the news media.

Many questions have been answered and a number of seminars have been held regarding the Iowa Consumer Credit Code. This Division has worked to inform the business community and the consuming public of their rights and responsibilities under that Code. In addition, recommendations have been made to the Legislature, some of which have been adopted, to correct or clarify consumer credit laws and to amend the mechanic's lien law.

As in previous years, this Division has had a number of lawsuits involving the interests of thousands of Iowans under the Consumer Fraud Act, the Consumer Credit Code and other consumer laws, including but not limited to: (1) agricultural swindles; (2) investment schemes; (3) business opportunity schemes and false advertising; (4) excessive interest rates; (5) home improvements; (6) fraud in the sale of feeder cattle; (7) automobile sales; (8) insulation sales; and (9) bait-and-switch.

CRIMINAL DIVISION

In 1978, the Criminal and Special Prosecutions and Criminal Appeals Divisions were combined to create a new entity known as the Criminal Division. With this change, all criminal functions of the Attorney General's Office except the Prosecuting Training Coordinating Council are now together for administrative purposes. The staffing and activities of each section within the Division are as follows:

AREA PROSECUTORS SECTION

The basic function of the Area Prosecutor Program is to provide a cadre of experienced trial lawyers to assist county attorneys in handling those criminal matters which because of their magnitude are beyond the resources of a part-time county attorney's office.

The Area Prosecutors also handle cases which a county attorney cannot prosecute because of ethical conflicts of interest as well as investigations of public official misconduct. In addition, the Area Prosecutors have defended judges in several lawsuits filed against them by disgruntled litigants.

Two Area Prosecutors are funded by specific agencies to serve needs which arise from their operations. Prosecution of those incarcerated in State correctional facilities in Fort Madison is accomplished by an Area Prosecutor funded by the Department of Social Services. Prosecutions for violation of State tax laws are coordinated by an Area Prosecutor whose support is derived from the Department of Revenue.

At the end of this biennium, staffing of the Area Prosecutor Program has been decreased by two attorney positions due to legislative action to the present assignment of one chief attorney and five staff attorneys, including those persons supported by other agencies. This requires closer scrutiny of cases which are accepted and it is anticipated that unless some increase in the resources allocated to this section, there will be an increase in the number of criminal cases where a county must obtain specially appointed counsel at greater expense.

The case load of the Area Prosecutors Program for the years 1977-1978 was as follows:

Investigations	55
Filed Cases	163
TOTAL	218

The Area Prosecutors, among other duties, have done the following:

1. Provided legal advice to county attorneys and law enforcement officials on a regular basis.

2. Participated in ethical investigations resulting in conviction and/or removal from office of 10 public officials.

3. Completed plans, with the cooperation of the Prosecuting Attorney Coordinator and the Iowa County Attorneys Association, for an Ethics Committee within the Iowa County Attorneys Association which is now actively reviewing complaints against county attorneys.

4. Served as instructors in numerous training programs including all programs of instruction of the Iowa County Attorneys Association.

5. The chief attorney in this section has participated in programs relating to child abuse throughout the State.

CRIMINAL APPEALS SECTION

In the years 1977-1978, approximately 963 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; (3) appeals in postconviction relief cases under Chapter 663A; and (4) applications for discretionary review. During 1977-1978, there were approximately 461 final dispositions by the Iowa Supreme Court and the Iowa Court of Appeals in cases within the classifications enumerated above where briefs were filed by members of this section.

The section also represents the State of Iowa in conviction related federal habeas corpus cases. In 1977-1978, there were 27 decisions in the Federal District Court in such cases. Seven cases in this area were decided in the United States Court of Appeals. Members of the section also wrote 10 briefs for cases in the United States Supreme Court.

During 1977-1978, the Criminal Appeals Section disposed of 366 extraditions cases.

During 1977-78, members of this section wrote 75 opinions for the Iowa Beer and Liquor Control Department Hearing Board (a member of the section sits on the board).

In addition to the review of extraditions and its work in the state and federal courts, the Criminal Appeals Section 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 1977-1978, one section member devoted her entire time to work representing the Industrial Commissioner, the Second Injury Fund of Iowa, and the State of Iowa as a self-insured employer in Workers' Compensation litigation; during the last six months of this reporting period another member devoted about one-fifth of his time to the same work. Another section member sits as a member of the Iowa Law Enforcement Academy Council.

The effort to eliminate the backlog of criminal appeals in the Iowa Supreme Court continued during 1977-1978 with much progress. As of January 1, 1979, there were only 12 cases more than eight months old where the appellant's brief had not yet been filed.

PROSECUTION RESEARCH AND TRAINING SECTION

During this biennium, this section was staffed with 3 full-time attorneys and 5 part-time law clerks.

The section provides legal assistance in the form of research, memoranda and briefs to the county attorneys across the state as well as the Area Prosecutors within the Attorney General's Office. Legal advice (normally oral or in letter form) is provided State Legislators, law enforcement agencies and other state administrative agencies. This section assumes criminal law training responsibilities, particularly

with state enforcement personnel. Efforts in the training area primarily have been focused upon the new Criminal Code which became effective January 1, 1978. Particular expertise in vehicle anti-theft, gambling, and weapon laws has been developed and section personnel work closely with the State Patrol and State Vice personnel in these areas.

The section writes and distributes to prosecutors, enforcement agencies, judges and magistrates several publications and articles in an effort to keep such persons informed of the current state of the criminal law. Examples of such publications include the **Iowa Criminal Law Bulletin** which incorporates the most recent Iowa Supreme Court and selected Federal cases, and a Procedures Outline and flow chart dealing with the new criminal procedures effective January 1, 1978. Two major publications are currently being prepared for distribution in the near future, (1) the 1979 Criminal Law Dictionary, which will incorporate case law and the new criminal statutes in a single reference document, and (2) a Legislative History document compiling all legislative action taken on the Criminal Code revision.

The majority of criminal law Attorney General opinions are prepared by this section. With passage of the new Criminal Code, the opinion requests in this area have greatly increased and there are currently 27 opinions to be prepared.

The attorneys act as legal counsel to (1) Iowa Substance Abuse Authority, (2) Iowa Campaign Finance Disclosure Commission, (3) Iowa Board of Accountancy, (4) Special Vehicle Anti-theft Section, Iowa Highway Patrol, (5) Iowa Department of Revenue (gambling) and (6) Division of Vice, Iowa Department of Public Safety (gambling).

During the 1977-1978 reporting period, approximately 110 memoranda and briefs were prepared, 15 editions of the **Criminal Law Bulletin** were distributed, 12 Attorney General opinions were prepared, approximately 60 hours of instruction was given to various criminal justice agencies, and approximately 90 administrative cases and investigations were handled.

SPECIAL PROSECUTIONS SECTION

The Special Prosecutions Section was formed in 1972, with the assistance of a federal grant awarded through the Law Enforcement Assistance Administration. The section is currently operating, in part, under an antitrust grant administered by the United States Department of Justice. One attorney, a paralegal, and a secretary are now employed under the grant, and it is contemplated that an additional attorney will be hired.

Responsibilities of the section include enforcement in the areas of antitrust, securities fraud, and related economic crimes and conspiracies. In 1974, the need arose to render assistance to the Iowa Securities Department and considerable investigative and prosecutional success in the field of securities has been achieved. The section

is currently operating with five attorneys, one paralegal, two investigators, and two secretaries.

Details of the work performed by the division must remain confidential in some instances since many cases are currently in an investigative status. It is significant to note that 46 antitrust investigative files were opened in calendar year 1978, as compared with 34 in 1977, and 13 in 1976. The cases were received from a variety of resources, including consumers, informants, state and federal agencies, businesses, and those initiated by the section.

A new state antitrust statute was, during the period, enacted by the Iowa General Assembly. This law now contains substantive law of proper scope, meaningful discovery tools, and effective remedial measures. Section personnel worked closely with legislative leaders toward passage of the act, and addressed public meetings and hearings on the proposed bill. An informative pamphlet was printed and distributed to consumer organizations, Better Business Bureaus, trade associations and other interested groups to inform the public of the passage of a new antitrust statute and its substantive provisions. Members of the section addressed many civic organizations, continuing legal education programs, Iowa County Attorneys, and others in an effort to educate the public regarding anti-competitive practices.

During the two-year period of 1977-1978, the section conducted antitrust investigations in various fields of business and industry, including automobile body shops, newspapers, cemeteries, mobile home parks, real estate, bakery and dairy products, realtors, sound equipment, professional engineering services, farm equipment, and many, many others.

Substantive areas of investigations and litigation include price fixing, tie-in arrangements, requirement contacts, resale price maintenance, customer allocations, horizontal and vertical geographic allocations, bid rigging, and other antitrust violations. In the enforcement of antitrust laws many investigative files are finally closed with no resulting court action. The cases that are filed generally are quite complex and, at times, involved thousands of pieces of documentary evidence. The section has purchased a microfilm camera and a reader-printer which greatly facilitate the handling of such great number of documents.

Since passage in Congress of the Parens Patriae Act, the section is now empowered to sue in federal court for damages suffered by Iowa citizens. Until recently, all multi-district federal court litigation inhouse, and increased cooperation among antitrust divisions in the various states has been shown. A dozen or more states will now join together in consolidated litigation to the end that the states and their citizens are better protected from price-fixing predators.

Unlike most divisions in the department, the Special Prosecutions

section conducts its own investigations, handles both civil and criminal litigation in state and federal courts, and handles its own appeals to the Iowa Supreme Court and other appellate courts. Section personnel also write Attorney General's opinions relating to antitrust matters, and answer scores of inquiries from state agencies and purchasing agents regarding anti-competitive practices. Advice is rendered on a daily basis to state officials and employees on matters related to the obligations of the section. During the two-year period 1977-1978, and since the enactment of the Iowa Competition Law on January 1, 1977, the State of Iowa has been involved in more antitrust litigation than under the previous Nineteenth Century antitrust law in all the decades of its existence.

I.	Calendar Year 1977	
	Pending Cases, January 1, 1977	53
	New cases opened in 1977:	
	Antitrust	
	Investigation only	34
	For court action	18
	Securities	
	Investigations only	2
	For court action	4
	Total	58
	Antitrust Investigations closed in 1977:	
	From prior years	4
	From cases opened - 1977	26
	Antitrust Court cases closed in 1977:	
	From prior years	4
	From cases opened - 1977	6
	Securities Investigations closed in 1977:	
	From prior years	2
	From cases opened - 1977	1
	Securities Court cases closed in 1977:	
	From prior years	7
	From cases opened - 1977	2
	Total	52
	Case load gain	6
	Pending cases, December 31, 1977	59
II.	Calendar Year - 1978	
	Pending Cases, January 1, 1978	59
	New cases opened in 1978:	
	Antitrust	
	Investigation only	46
	For court action	4

Securities	
Investigation only	5
For court action	7
Total	62
Antitrust Investigation cases closed in 1978:	
From prior years	7
From cases opened - 1978	23
Antitrust Court cases closed in 1978:	
From prior years	7
From cases opened - 1978	0
Securities Investigation cases closed in 1978:	
From prior years	0
From cases opened - 1978	1
Securities Court cases closed in 1978:	
From prior years	2
From cases opened - 1978	2
Total	42
Case load gain	20
Cases pending at end of 1977-1978 biennial period:	39

ENVIRONMENTAL PROTECTION DIVISION

The Environmental Protection Division represents the Department of Environmental Quality, Natural Resources Council, State Conservation Commission, Department of Soil Conservation, Real Estate Commission, and various other state boards and officials concerned with environmental quality.

During the biennium, abstracts of title to 77 tracts of land acquired by the State Conservation Commission were examined and a total of 68 title vesting certificates were reviewed and approved. Twenty-one court cases were disposed of during the period, leaving 29 such cases pending, including 2 cases in the U.S. District Court and 2 before the U.S. Supreme Court.

Suits involving Indian Claims continue to take a great deal of time. Upon the granting of Iowa's petition for writ of certiorari 45 states (46 with Iowa) have joined Iowa in amicus curiae briefs filed in the U.S. Supreme Court seeking reversal of the 8th Circuit decision involving 2,900 acres of land claimed by the Omaha Indian Tribe. See *State of Iowa,* v. *Omaha Indian Tribe,* 575 F2d 670, 8th Circuit, 1978. A second Omaha Indian case claiming 9,000 acres more is awaiting determination of the first case before trial. Title to millions of acres of land throughout the United States could also depend upon the

decision of our nation's highest court. In 2 companion cases involving state regulation in fish and game on the Tama Indian Settlement, the 8th Circuit Court of Appeals upheld the state's victory before the trial court and the U.S. Supreme Court refused review.

Agency orders and rules relating to water quality were enforced in 19 court actions, leaving 17 such cases pending, including one case in the Iowa Supreme Court.

Agency orders and rules relating to air quality were enforced in 11 court actions, leaving 4 such cases pending. Four court cases involving solid waste disposal were disposed of during the period, leaving 7 such cases pending.

Three court cases involving the Department of Soil Conservation were pending at the end of the biennium, including one case before the Iowa Supreme Court, and one case involving the Real Estate Commission is also pending before the Iowa Supreme Court.

Four court cases involving flood plain activities regulated by the Natural Resources Council were disposed of during the period leaving 13 such cases pending.

In summary, litigation handled by this division during the period included 85 new cases opened and 59 cases closed, leaving 74 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 DIVISION

The Attorney General's Office performs a variety of legal services for the Health Department. There are currently two assistants assigned to that department, one in the Division of Health Facilities and the other in the Division of Health Planning and Development.

The Assistant Attorney General assigned to the Division of Health Facilities primarily handles litigation regarding health care facilities in the state. Pursuant to Chapter 135C of the Code, this division implemented a system of issuing citations and levying monetary fines against health care facilities for noncompliance items in the spring of 1978. Fifty-eight health care facilities were cited for noncompliance since that time. The assistant represents the department at the informal and formal hearings concerned with these citations and if an appeal is made to an administrative hearing officer, at that proceeding also. In addition, this assistant represents the department in licensure revocation and denial administrative hearings and the judicial appeals therefrom. This division has also actively sought to inform the general public as to the procedure to register a complaint about a particular

health care facility and as a consequence more complaint investigations are being conducted and more legal actions filed.

The Assistant Attorney General assigned to the Division of Health Planning and Development primarily handles all legal problems concerned with the implementation and enforcement of the state's certificate of need program. Chapter 75, Acts of the 67th General Assembly, the statutory authority for certificate of need became effective July 1, 1978. That chapter requires that a certificate of need be obtained as a condition of offering new health care services or developing certain new health care facilities in this state and establishes a state health facilities council within the Department of Health. Appeals of certificate of need decisions are taken in the manner provided by Chapter 17A of the Code. The chapter also provides the sanctions of denial of licensure and temporary or permanent injunction if action is taken without first obtaining a certificate of need. The assistant represents the department in all appellate and enforcement proceedings and advises the health facilities council and the director of certificate of need on the legality of implementation procedures. Since July 1, 1978, the Health Facilities Council has granted a certificate of need to projects totaling an amount of approximately $23 million and disapproved projects totaling approximately $2 million. There are currently five pending appeals.

Both Assistant Attorneys General provide, in addition to handling litigation, consultation on a daily basis to health department officials regarding statutes, judicial decisions, state and federal regulation, advise and aid in drafting proposed legislation, research and draft opinions of the Attorney General when assigned and assist the department in drafting and promulgating its administrative rules in accordance with Chapter 17A of the Code.

INSURANCE DIVISION

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 represents the Insurance Department in all litigation involving the Department in both state and federal courts. Currently there are 15 court cases pending, 13 in state courts and 2 in federal courts.

The Assistant also acts as general counsel to the Department by responding to daily requests for assistance and legal advice on various questions of law. The subject matter of these requests encompasses all sections of the Code relating to insurance and has involved general counseling as to what action the Department should or should not take in specific situations.

The Attorney General, by law, is required to approve various insurance transactions such as articles of incorporation, amendments to articles, agreements of reinsurance, and consolidations. Numerous

official documents involving these transactions have been approved each year. The assistant has also participated in reviewing and drafting documents to be used by the department in its regulatory capacity or in agency contested case proceedings under Chapter 17A. The total of the above documents reached approximately 70 each year.

The handling of citizen requests for information has also been a part of the assistant's work. Approximately 400 of these occurred per year. The subject which generated the largest number of inquiries was Health Care Insurance to cover the cost of care in skilled nursing facilities.

Finally, the assistant generally writes Attorney General's opinions involving the subject of insurance. Two opinions were issued during the period.

OPINIONS

During 1977 and 1978, the Iowa Department of Justice prepared for various state officers and county attorneys requesting the same, pursuant to §13.2(4), Code of Iowa, 1977, 422 written legal opinions. Of these 186 were furnished in response to requests from members of the general assembly, 123 in response to questions from state officers and 113 in answer to inquiries from county attorneys.

PROSECUTING ATTORNEYS TRAINING COORDINATOR COUNCIL

The Prosecuting Attorneys Training Coordinator Council was created by the 66th General Assembly on July 1, 1975. 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 the more than 170 assistants. The objectives of the office are as follows: (1) to provide a center for communications which 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; (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 throughout the state; (7) to develop and maintain current procedural manuals, forms, pleadings, and outlines to be incorporated with the pre-service basic informational manual; (8) to coordinate technical assistance from the state level (i.e., expert witnesses, directories of state departments, their assigned responsibilities, personal 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 provide input from county attorneys regarding legislation affecting the counties and the criminal justice system; (11) to participate in national associations such as the National Association of Prosecutor Coordinators and the National District Attorneys Association in a productive and meaningful way, gaining benefit of systems and techniques used in other states.

The Council provides a minimum of 30 hours of formal continuing legal education training to the county attorneys and assistants during the year. Two training conferences are scheduled each year, one in June and the other in November. An average of 134 prosecuting attorneys and law enforcement personnel have attended the conferences 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 tape presentations on highly specialized methods of training. Each registrant at the conference receives a conference notebook consisting of outlines of speakers' presentations, resource materials, and various forms. The conference notebooks are designed to be used on a daily basis by the county attorneys for reference purposes.

A monthly newsletter is published by the Council with approximately 400 copies being mailed to the county attorneys, their assistants, 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 procedures 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 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 Attorneys Council has been used by the legislature as a clearinghouse for information, and requests for information are handled as expeditiously as possible.

The Council has published several manuals since its inception. The Iowa Prosecutor Deskbook was published in June, 1976. It consists of four principal sections: Civil, Administrative, Criminal Law and Trial Tactics. The two-volume deskbook is updated twice yearly. Every county attorney office in the state has the deskbook and multiple copies are located in larger offices. This publication serves as a basic primer for many newer officeholders.

Another publication, the Iowa Charging Manual, was published in December, 1977. This manual was developed to assist both county attorneys and law enforcement personnel in drafting proper charges. The manual consists of the code sections, elements of the particular crime, the model indictment, sentencing provisions and case annotations. The book is identical to the new Criminal Code in its organization and quick reference cross indexes are included. Over 500 copies have been distributed throughout the state to both prosecutors and law enforcement personnel.

A five-day Orientation School was conducted in December, 1978, to train newly-elected county attorneys and their staffs prior to the commencement of their terms. The School provided over 34-1/2 hours of continuing legal education on the civil, administrative, criminal law, and trial tactics aspects of the office. Traditionally the School was conducted after the term started and for only two days. Nationally known speakers were retained, an exhaustive conference book and six carefully selected reference books were distributed to all participants. The reviews indicated that the conferees went back to start their terms armed with a wealth of knowledge and a firm grasp of their responsibilities.

The Council also provides county attorneys with a 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.

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 materials, trial tactics information, trial tactics cassettes and video tapes and many other resource materials obtained from other training coordinator offices around the country.

PUBLIC SAFETY DIVISION

The Attorney General, pursuant to §80.1, Code of Iowa, 1977, provides legal assistance to the Iowa Department of Public Safety. The Assistant Attorney General assigned to the Iowa Department of Public Safety provides legal advice and counsel to the Department in regard to legal action concerning the Department and on matters that involve integrating policy with agency statutory responsibilities.

During the biennium, counsel was provided to all divisions within the Department; Administration, Communications, Iowa Highway Safety Patrol, Bureau of Criminal Investigation, Narcotic and Drug Enforcement, Vice and Fire Marshall, on numerous legal issues. The functions of the Attorney General in providing legal counsel are far-ranging and include contracts and leases (50), court cases (16 District Court; 3 Supreme Court) and administrative law matters concerning private detective licenses, fire safety regulations, and other matters within the scope of the jurisdiction of the Department. This service of providing advice on administrative law matters has resulted in the revision of the Department's rules and regulations which should take place in the near future.

A significant effort is given to providing counsel to the Department regarding employee relationships and employment functions. This effort, directed to assure sound employment practices, is forward-looking, non-discriminatory and has resulted in changes in some hiring criteria to further the Department's desire to reach as many individuals as possible and make the work force representative of Iowa's population.

Another major function of this office is the prosecution of Beer and Liquor violations under Chapter 123, Code of Iowa, 1977, in cases involving agents of the Department of Public Safety. This involves approximately 30-40 administrative hearings per year.

REVENUE DIVISION

The Attorney General performs a variety of legal services for the Iowa Department of Revenue involving 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.

In the past 2 years, 191 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 730-7.11, IAC. Along with 132 other protests pending from the last

biennium, a total of 323 such protests were pending during the present biennium. Of these, informal proceedings under Rule 730.7.11 were completed for 233, leaving 90 pending. Of the 233 informal proceedings completed, 65 proceeded to the status of contested case proceedings before Revenue Department Hearing Officers, of which 48 have been tried or settled and 17 are pending. Both the informal and contested case proceedings have been as time consuming as court cases. In addition, 18 Revenue Department declaratory rulings issued pursuant to the Iowa Administrative Procedure Act were drafted or developed.

Sixteen administrative contested case proceedings were disposed of by the State Board of Tax Review during the past two years, of which 10 were won by the department, 2 were lost and 4 were settled.

A total of 79 civil tax cases were tried or settled at the Iowa district court level. Of the 38 cases tried, 28 were won by the department, 10 were lost, and 41 cases were settled. An additional 27 cases are pending trial. In addition, the staff handled 101 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, 9 did require substantial work, resulting, at times, in collection of taxes. Three bankruptcy cases arose and were resolved in Federal Bankruptcy Courts. An additional 3 cases arose in Federal District Courts of which 2 were won and one was settled. Twelve cases were submitted in the Iowa Supreme Court of which 7 were won and 5 were lost. Only one case is pending decision.

The United States Supreme Court upheld this division's brief and oral argument supporting the constitutionality of the Iowa single sales factor corporation income tax apportionment formula in *Moorman Mfg. C. v. Bair,* 1978, ___U.S.___, 98 S.Ct. 2340, 57 L.Ed.2d 197. Had the state lost this case, tax revenue lost pertaining to tax assessments outstanding and potential refund claims would have exceeded 50 million dollars.

By its aforementioned activities on behalf of the Revenue Department, this division has contributed to the collection of $3,096,739 tax revenue during this biennium.

In addition to informal and contested case administrative proceedings and court litigation, a substantial amount of time was spent 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 DIVISION

The Attorney General performs legal services for the Department of Social Services pursuant to §13.6, Code of Iowa, 1977, requiring a Special Assistant Attorney General to serve in such capacity. In addition, there are eight 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) defending suits brought against the Department of Social Services, commissioner or employees of the department in state and federal courts, including prisoner litigation; (2) 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; (3) representing the department in all matters involving the mental health and correctional state institutions; (4) representing the department in appeals to the district courts from administrative hearings; (5) consultations on a daily basis with respect to statutes, judicial decisions, policy and state and federal regulations; (6) advising with regard to proposed legislation, manual materials, and regulations; (7) inspecting and approving contracts and leases, and handling real estate matters involving the department; (8) researching and preparing drafts of proposed Attorney General opinions; and (9) 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.

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

Eighth Circuit Court of Appeals	8
United States District court (Iowa)	50
Iowa District Courts	213
Iowa Supreme Court	35
Miscellaneous Tribunals	2

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

Estates	$143,778.26
Collections	66,796.37
Nursing Home Overpayments	81,317.47
TOTAL	$291,892.10

Authority is vested in Chapter 252B, Code of Iowa, 1977, for the Attorney General to perform legal services for the Child Support Recovery Unit, a division of the Department of Social Services.

The Attorney General trains and supervises the county attorneys and assistant county attorneys charged with prosecuting child support cases. This work includes: (1) conducting training seminars; (2) drafting form pleadings; (3) handling all appeals; and (4) prosecuting special cases. Each Assistant Attorney General carries a caseload. Over two hundred paternity suits are filed each year. Over two thousand collection cases are monitored annually.

State child support collections, principally from the absent parents of welfare recipients, have increased by approximately twenty per cent per year. Nearly nine million dollars was recovered for the

taxpayers in the last fiscal year. The Attorney General's current emphasis is on mandatory wage assignments for payment of child support obligations. Over fifty such assignments are obtained each month.

TORT CLAIMS DIVISION

The Tort Claims Division handles tort claims under chapter 25A of the Iowa Code and general claims under Chapter 25 of the Iowa Code. Both tort claims and general claims are presented to and ultimately approved or denied by the State Appeal Board after examination by Special Assistant Attorney General for claims. Investigation of claims and negotiations pertaining to claims (with approval of the Board of Appeals) are conducted by this division.

The Tort Claims Division presented tort claims to the State Appeal Board totaling $30,338,912.76 in 1977, and $24,847,434.20 in 1978, for a total of $55,186,346.96 for this biennium.

The Appeal Board approved and payment was made on tort claims filed in the sum of $126,703.44 in the year 1977, and the sum of $92,750.38 in the year 1978. A total of $219,453.82 was paid on these claims before suit was instigated in this biennium.

The Tort Claims Division presented general claims totaling $725,010.51 in 1977, to the State Appeal Board. In 1978, general claims presented totaled $809,500.00. The total general claims presented for both years total $1,534,510.60.

General claims approved by the Appeal Board and paid in 1977, were in the sum of $607,472.29. In 1978, the amount approved by the board of appeal and paid reached a total of $490,404.95. The total paid on general claims for the biennium is $1,097,877.24.

Tort lawsuits handled by the division are usually commenced in Iowa District Courts, but more recently such actions have been brought in Federal District Courts. Although such lawsuits may be handled for trial by outside counsel (particularly where there is insurance coverage) or by another division of the Department of Justice, most are handled by personnel of this division.

There are presently 138 tort lawsuits pending, praying for over $136 million dollars in damages. Suits believed to be entirely frivolous were not included in the total and no sum was attributed to cases where the damages were left unspecified. In 1977, a total of 74 tort cases were opened and in 1978, cases filed totaled 67.

In 1977, the State paid $3,118,504.22 to satisfy settlements and judgments in tort cases. Tort suits settlements and judgments paid in 1978, totaled $540,766.61.

This division represents a number of State agencies and handles certain other non-tort cases seeking damages from the State or its employees. This division also commences some cases on behalf of the State. In the biennium approximately $71,000.00 in damages were

recovered by the State.

Presently a total of 176 cases are pending with 38 of these cases being non-tort cases. Of these cases, 8 cases are now pending in the Iowa Supreme Court and 7 cases are pending in the U.S. District Court. The remainder are in Iowa district courts.

DEPARTMENT OF TRANSPORTATION DIVISION

Legal services are furnished to the Iowa Department of Transportation by the Attorney General through a staff of 9 attorneys and one investigator, with offices at the DOT headquarters in Ames.

The DOT division has 174 pending district court actions involving condemnation appeals as well as miscellaneous litigation, tort claim actions and damage suits being defended by the staff.

A total of 72 cases were disposed of during the biennium with $68,070.14 being recovered in damages for the State to property under its jurisdiction, and a savings of $4,075,000.00.

The staff is also active in providing advisory opinions to the DOT Commissioners, and the Commission departments and offices, as well as reviewing proposed legislation, preparing rules and regulations and aiding in the implementation of new laws, rules and regulations. Three of the attorneys on our staff represent the state in driver license revocation hearings. There are approximately 3,000 administrative hearings on driver license revocation matters and 227 appeals from administrative decisions brought to district court.

MISCELLANEOUS STATE DEPARTMENTS DIVISION

During 1977 and 1978, the emergence of expanded credit union activity culminated in proceedings in the Iowa Supreme Court in *Iowa Credit Union League et al vs. Iowa Department of Banking* to determine the limitations on the powers of credit unions with respect to the issuance of share drafts. Subsequently, the legislature enacted Chapter 1169, Acts of the 67th G.A. establishing a credit union department separate from the banking department. The Superintendent of Banking's authority to approve or deny bank offices was also litigated several times in this biennium with the court upholding the Superintendent's decision in *Uni-Bank v. Huston. Security Bank v. Huston* has been tried and submitted and is awaiting decision.

A power of the Executive Council to approve amendments of savings and loan association articles to authorize branch offices was also challenged during this time in *Citizen's State Bank of Corydon vs. Executive Council.* This case went to the Supreme Court on an interlocutory appeal and the main case is still pending in Polk County District Court.

In the Department of Public Instruction current attention has been given to charges of violation of a H.E.W. regulation promulgated under Title IX concerning inequality of insurance benefits to female employees. The State Department was also made a party to litigation testing special education provisions of the *Sioux City Community School District in Barkley v. Board of Directors for the Sioux City Community School District* and was named Respondent in several petitions for judicial reviews of administrative decisions made during the biennium which have subsequently been affirmed in the district court.

The State Radio and Television Facility Board has proceeded during this period to expand the operation of Iowa Public Broadcasting Network and to acquire the necessary facilities including satellite antenna and transmitter and translator tower sites. One court action was instituted against the Board by a former employee alleging violation of constitutionally protected civil rights in the denial of promotion, claiming invidious reverse discrimination. The case, *Boofter v. IPBN* is pending in the U.S. District Court for the Southern District of Iowa.

Major changes in the operation of the Higher Education Facilities Commission, now the Iowa College Aid Commission provided new areas of work for this office. Assistance was given in developing the appropriate documents for a new student loan guarantee program and assistance was given in collecting medical tuition loans.

This office continued to receive the filing of a growing number of charitable trusts and foundations. To date, no concerted effort has been made to obtain legislation to require specific information on reports of charitable trusts as is done in many other states. It is expected that the work relating to the monitoring of charitable trust activity will increase in the near future.

With respect to escheats, this office recovered $30,392.38 in 1977, and $3,249.00 in 1978, for the benefit of the school fund.

In addition to the foregoing, more than eighty (80) opinions of the Attorney General were prepared and issued through this division during the 1977-78 biennium.

CONCLUSION

Summary of Years in Office

During the past 12 years, while I served as Attorney General, the staff of the Department of Justice increased approximately threefold from about 25 lawyers to nearly 80. During that interval, the workload increased more than five times. Among the thousands of cases we handled during those years are many of the most important ever decided by the Iowa Courts. Some of them, such as *Moorman Mfg. Company v. Bair,* 254 N.W.2d 737 (Iowa 1977), which was recently upheld by the United States Supreme Court, and *Chicago and N.W. Railway Company v. Prentis,* 161 N.W.2d 84 (Iowa 1968) have saved the state and its counties millions of dollars in taxes it might not have

been able to collect.

The Department of Justice has also saved or recovered millions of dollars for the State through its Consumer Protection Division and its Special Prosecutions Section, which latter handles the antitrust cases. In one price fixing case involving tetracycline, a broad spectrum antibiotic drug, Iowa's share of the recovery in a nationwide settlement was in excess of $1,800,000. Some of the recovery was returned to the pockets of Iowa consumers and part was awarded to the University Hospital in Iowa City.

Also, during my 5 terms, we were successful in obtaining a rehearing of the Federal Power Commission's decision to allow the merger of the Iowa Power and Light Company with the Iowa-Illinois Gas and Electric Company, whereupon the merger proceedings were abandoned.

Some of our consumer protection work made use of our antiquated Iowa monoply law for virtually the first time when we obtained convictions against a large number of Iowa farm implement dealers for the price fixing of parts for farm machinery. *State v. Blyth,* 226 N.W.2d 250 (Iowa 1975). We drafted and promoted the new Iowa Competition Law, Chapter 553, Code of Iowa, which became effective January 1, 1977.

Other consumer related cases involved fraudulent sales techniques including "bait and switch" sales of merchandise and cattle, and "referral" and "pyramid" sales techniques. See *State ex rel Turner v. Koscot Interplanetary, Inc.,* 191 N.W. 2d 624 (Iowa 1970). We also recovered hundreds of thousands of dollars from foreign corporations for fraudulent sales of land located outside Iowa, primarily in Arizona and Florida, and in 1973, after four years of lobbying, persuaded the General Assembly to enact the Iowa Subdivided Land Sales Act, Chapter 117A of the Code, to protect Iowa buyers in the purchase of land outside Iowa.

State ex rel Turner v. Younker Brothers, Inc., 210 N.W. 2d 550 (Iowa 1973) was perhaps our most important single victory in the area of consumer protection. That case defined usury and held that a so-called "finance charge" in a consumer credit sale, although based on a "time-price differential" was usurious. But, alas, it also resulted in enactment of the Iowa Consumer Credit Code, Chapter 537, a source of continuing problems for the people of Iowa.

Still another consumer victory brought about by the Department of Justice, with help of the Iowa Automobile Dealers' Association, was enactment of an odometer law (Section 321.71) prohibiting the setting back of an odometer on a motor vehicle so as to show a lower mileage than the true mileage driven by the vehicle. And still another consumer law we helped to pass was the Door-to-Door Sales Act, Chapter 713B of the Code, giving consumers the right to cancel a door-to-door sales contract within 3 days after the contract of purchase is entered.

The age of consumerism flooded our department with many thousands of complaints and many difficult and complex issues. We had several cases involving fraud in the sale of securities and settled one with General Motors involving the substitution of Chevrolet automobile engines for the regular engines in many Oldsmobiles and in some Buicks and Pontiacs.

During my years as Attorney General, we had considerable litigation involving gambling, pornography, massage parlors, narcotics, rock festivals and other vices. A raid on the annual parish picnic of the Immaculate Conception Church at North Buena Vista in Clayton County in September, 1971, resulted in the arrest and conviction of a Catholic priest, as the keeper of a gambling house, for conducting such Las Vegas style gambling as craps, roulette, black jack and poker, as well as bingo, for the church's fund raising purposes. That raid led to attempts by fairs and carnivals throughout the state to enjoin me from enforcing the gambling laws to stop so-called "harmless" gambling games, involving skill, in their activities. In 1972, the people of Iowa voted to repeal the constitutional prohibition against lotteries and in 1973 the legislature legalized bingo and other types of gambling.

After the rock festival in Wadena in the late 1960's, we were successful in enjoining or limiting other rock festivals so that the patrons would not stay overnight. As a consequence, most of the problems from rock festivals have subsided and they are now usually conducted in large halls so that the noise therefrom does not create a public nuisance, and drug law enforcement is made easier.

We found injunction to be the most effective remedy for massage parlors conducted as fronts for houses of prostitution. Nevertheless, problems of proof are difficult and where prostitution was not proved, mere "lewdness" was held unconstitutionally vague. *State ex rel Clemens v. ToNeCa, Inc.,* 265 N.W.2d 909 (Iowa 1978). We, therefore, advise regulation of massage parlors by city and county ordinance.

Another and important case demonstrating the usefulness of injunction to stop repeated violations of the criminal law was *State ex rel Turner v. United Buckingham Freight Lines, Inc.,* 211 N.W.2d 288 (Iowa 1973), in which we successfully enjoined a trucking company from repeatedly driving overlength trucks across Iowa. The company had willingly risked arrest and paid hundreds of fines, most of which were the maximum allowed, for the offense. But after the injunction, the violations ceased.

In several cases we had the unfortunate duty of having to prosecute or remove public officers for bribery or corruption. For example, see *State v. Prybil,* 211 N.W.2d 308 (Iowa 1973) and *State ex rel Turner v. Buechele,* 236 N.W.2d 322 (Iowa 1976). Such cases were almost invariably controversial and politically disruptive.

Many of the cases in which we did not prevail nevertheless established important precedents. Thus in *In Re Legislative Districting of General Assembly,* 193 N.W.2d 784 (1972), supplemented in 196

N.W.2d 614 (1972) and amended in 199 N.W.2d 614 (1972), an original proceeding pertaining to a plan for the reapportionment of the legislature, a 3.8% deviation in population between higher and lower population districts was held unconstitutional when it was determined that a *de minimis* standard was used by the 64th General Assembly in its reapportionment plan. In the second of these opinions, the Iowa Supreme Court established a reapportionment of the legislature which provided a deviation in the house district of 1.0009 to 1 or 1/11th of 1%, and in the senate districts of 1.0005 to 1 or 1/20th of 1%, between the most and the least populous districts. This was the first judicially developed legislative reapportionment in Iowa history.

In *State ex rel Turner v. Scott,* 269 N.W.2d 828 (Iowa 1978), we sought, by *quo warranto,* to remove a state senator from his seat on the ground that he was not qualified because he had not been an inhabitant of the state for one year immediately preceding his election as required by the constitution. But the court held this was a "nonjusticiable political question, the resolution of which is properly left to senatorial prerogative."

In *State ex rel Turner v. Iowa State Highway Commission,* 186 N.W. 2d 141 (Iowa 1971) we challenged the Governor's exercise of his item veto power and it was determined that the attorney general is not a judicial officer and was "not clothed with the common law power to maintain this suit." Intervenors were held to have standing as taxpayers and the court held that the provision questioned could properly be vetoed. Cf. *Welden v. Ray,* 229 N.W.2d 706 (Iowa 1975).

Finally, in *Redmond v. Carter,* 247 N.W.2d 268 (Iowa 1977), another original action in the Iowa Supreme Court, we joined in an atack on the constitutionality of permitting district court judges to be appointed to the new Iowa Court of Appeals despite a constitutional prohibition (Art. V, §18, Const. Iowa) against judges of the Supreme Court and District Court holding any other office "while serving on said court and for two years thereafter, except that District Judges shall be eligible to the office of Supreme Court Judge." This provision of the Iowa Constitution was held to be unconstitutional as an invidiously discriminatory disqualification in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Of course, the great bulk of our appellate work consisted of the hundreds of criminal appeals we handled in the Iowa Supreme Court, as well as many others in the Federal courts. While no summary of even the most important of these is possible here, *State v. Williams,* 182 N.W.2d 396 (Iowa 1970) is perhaps the most memorable. The Iowa Supreme Court, in a 5 to 4 decision, upheld the jury's verdict convicting defendant of the kidnap-murder of 10 year old Pamela Powers at the Des Moines YMCA on Christmas Eve, 1968. Defendant surrendered in Davenport and, during the two-hour trip with police back to Des Moines, voluntarily directed them to Pamela's body in a ditch along a country road, a fact presented to the jury over objection. The conviction was set aside by the Federal District Court, the U.S. Court

of Appeals and ultimately by a 5 to 4 decision of the United States Supreme Court on the ground that defendant had not waived his rights to counsel under the Sixth and Fourteenth Amendments. The Attorneys General of 21 states joined the Americans for Effective Law Enforcement, Inc., and the National District Attorneys Association, Inc., in an amicus curiae brief supporting the conviction. The decision prompted seven separate opinions. Chief Justice Burger, in his lengthy and bitter dissent, termed the result "bizarre" and one which "ought to be intolerable in any society which purports to call itself an organized society." Justice White, with whom Justice Blackmun and Justice Rehnquist joined in dissenting, termed the result "utterly senseless." Justice Blackmun, in a separate dissent, agreed with Judge Webster's dissent in the United States Circuit Court of Appeals (509 F.2d at 237) that "The evidence of Williams' guilt was overwhelming. No challenge is made to the reliability of the fact-finding process." *Brewer v. Williams,* 430 U.S. 387 (1977).

Throughout my tenure, I vigorously opposed the exclusionary rule particularly as it was extended in *Miranda v. Arizona,* 384 U.S. 436 (1966) to prevent the admission in evidence of certain voluntary confessions made in police custody. In my view, the Constitution of the United States should be amended to provide that every person is presumed to know his rights thereunder and nothing should prevent comment upon the exercise of those rights in any criminal case. I hoped the *Williams* case would overturn *Miranda* but it did not.

I promoted wiretapping legislation as authorized by the Omnibus Crime Control and Safe Streets Act of 1968. A wiretapping bill with strict controls was enacted by the General Assembly in 1970 but vetoed by the Governor. I was also a strong advocate for capital punishment both as a deterrent to, and a needed catharsis for, premeditated murder.

While I generally opposed the new Criminal Code Revision as unnecessary, we proposed dozens of amendments which were adopted and which helped improve the new act, including provisions for witness immunity and joint trials of more than one defendant where all defendants joined were alleged to have participated in the same crime.

Over the years, the Department of Justice conducted training schools for, or participated in the training of, justices of the peace and county attorneys. It also acted to educate and disseminate information to the public about crime and, particularly, consumer fraud. We also actively participated in the National Association of Attorneys General.

In 1977 and 1978, joined by my brother Attorneys General in the states of Idaho, Indiana, Louisiana and Nebraska, we attempted, by two original actions in the United States Supreme Court against the President and the Secretary of State, to prevent the giving away of the Panama Canal by treaty and without an act of Congress, in violation of Article IV, §3, Clause 2 of the Constitution of the United States which provides that "the Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States..." We were unsuccessful.

Over the 12 years, 1967 to 1978, we issued 2,965 written legal opinions in response to requests from state officers and county attorneys. Many of the questions answered were of a controversial nature. Among the most important were those involving fundamental constitutional questions such as one to Code Editor Wayne Faupel (1967 OAG 379) as to when a bill is "passed," "approved," "becomes a law" and "takes effect." Another of importance was to Senator Plymat (1975 OAG 6) holding that a state senator cannot constitutionally serve as a public officer on certain boards and commissions and cannot hold any other "civil office of profit" or "lucrative office." Others of little real or lasting legal significance caused political consternation at the time merely by applying the words of a statute to a hypothetical factual situation. For example, an opinion that said that a legislator might violate the new bribery law by accepting a thing of value, even a cup of coffee, from a constituent who was attempting to influence him, dampened the social activities of many legislators and other public officers. It seems to be hard for some people to believe a law means what it says and an attorney general often finds himself in trouble for merely repeating words of a statute or constitutional provision that they hope he will rationalize or overlook. Thus, if it isn't plenty hot in the kitchen, an attorney general is not doing much cooking.

In sum, my experience has been interesting and rewarding. I was especially pleased about being able to persuade 45 fellow state attorneys general to join in supporting Iowa in amicus curiae briefs in the land claim of the Omaha Indian Tribe now pending before the United States Supreme Court and mentioned earlier herein. But above all, I am deeply grateful that the people of Iowa elected me to this great constitutional office on five separate occasions. It has been an honor and a pleasure to serve and I shall miss it.

Sincerely,

RICHARD C. TURNER

AGRICULTURE

HF 561 Changes the name of the state sealer to the state metrologist and provides that the state primary standard of weights and measures will conform to the standards of the National Bureau of Standards. (Effective January 1, 1979.)

HF 2021 Defines the terms "nonresident alien" and "beneficial ownership" for purposes of Chapter 172C on corporate farming, Chapter 558 on recordation of conveyances of real property and Chapter 567 on restrictions on alien ownership of land.

HF 2022 Increases the charges allowed for keeping estrays and trespassing animals from $.50 to $2.00 for each head taken on a distraint; from $1.00 to $2.00 for destraining a stallion, jack, boar, bull, or buck; for keeping animals $2.00 per day; and for taking up as an estray $2.00 per head.

SF 321 Relates to authority of the Commerce Commission over stored grain.

SF 365 Adopts the 1976 edition of the Federal Food and Drug Administration Food Service Sanitation Ordinance as the Iowa Food Service Sanitation Code.

SF 389 Redefines grain dealer to exclude persons selling agricultural seeds, persons buying and selling grain as farm managers, executors or administrators of an estate, and bargaining agents.

SF 2020 Provides that not more than $300,000 of funds available from the soybean promotion fund may be used to relocate the American Soybean Association within Iowa. (Effective August 15, 1978.)

SF 2176 Requires the Department of Agriculture to approve all methods of probing for foreign material content in any type of grain.

SF 2180 Establishes standards for prodution and processing of cottage cheese dry curd, cottage cheese and low fat cottage cheese. (Effective January 1, 1979.)

CITIES

HF 557 Creates an Iowa Rural Community Development Committee in the Community Betterment Division of the Iowa Development Commission.

HF 2010 Allows cities to establish fees for inspection of multiple dwellings.

HF 2040 Relates to granting employees of political subdivisions leaves of absence for olympic competition.

HF 2074 Relates to the revision of the Iowa open meetings law.

HF 2128 Provides that a second public hearing is required for a proposed budget of a local political subdivision for the fiscal year beginning July 1, 1978.

HF 2219 Authorizes a city treasurer to invest police and fire retirement system funds in securities, bonds, certificates and other evidences of indebtedness guaranteed by the United States of America.

SF 356 Changes the number of local representatives appointed when a petition for boundary adjustment of a city involves territory in more than one county.

SF 2151 Authorizes the creation of more than one trust and agency fund in a city and the use of the trust and agency fund to finance and account for pension and related employee benefits as provided by rules of the City Finance Committee.

SF 2221 Clarifies the definition of territory, defines qualified elector, requires the city development board to be notified of annexation moratorium agreements and hearings.

COMMERCE, CORPORATIONS, AND UTILITIES

HF 232 Prohibits the charging by a public utility for telephone directory assistance.

HF 2023 Authorizes a local governmental unit to issue public bonds which exceed the existing maximum amount of $10,000 each if the purchaser and the local government unit so agree and if the purchaser is an agency of the federal government.

HF 2069 By Svoboda, Connors, Chiodo, Smalley, Thompson, Junker, Jochum, and Poncy. Simplifies and clarifies statutory requirements concerning the inspection of boilers and similar vessels by the Bureau of Labor. Most of the current inspection intervals remain unchanged except boilers of 100,000 pounds per hour or more capacity must be inspected externally at least once every two years while under pressure, internal inspection of sectional cast iron steam and cast iron hot water heating boilers must be conducted as deemed necessary while external inspection of the same must be conducted annually, and internal inspections of steel hot water boilers must be conducted every six years, with annual external inspections. It also provides that special inspectors representing insurance companies must hold a commission from the Commissioner of Labor to conduct inspections and pay a ten dollar annual fee.

SF 321 Provides for standards for the grading of grain, imposes a financial responsibility requirement for persons seeking to be licensed as bonded warehousemen.

SF 389 Relates to regulation of grain dealers and bargaining agents by the Iowa State Commerce Commission.

COUNTIES

HJR 9 Proposes a constitutional amendment to provide home rule powers to counties and joint county-municipal corporation governments, not inconsistent with the laws of the General Assembly.

HF 2164 Relates to the status and salaries of full-time and part-time county attorneys, assistant county attorneys, and full-time county prosecutors.

SF 397 Increases the recording fee for documents or instruments from $2.50 for the first page and $2 for each subsequent page to a uniform $3. The minimum fee for any real estate mortgage or deed recording is also increased to $3.

SF 2107 Provides contract and bidding procedures for the construction or repair of county buildings.

SF 2115 Authorizes the board of supervisors to temporarily transfer unobligated funds from the general fund of the county to the county conservation fund.

COURTS AND THE JUDICIAL PROCESS

HF 248 Provides a complete revision of the substantive and procedural provisions of the law dealing with juveniles.

HF 299 Provides that information on file with the court for the purpose of securing an arrest warrant or a search warrant must be treated as confidential.

HF 433 Provides the time of termination of a tenancy granted by a life tenant who dies during the tenancy.

HF 2116 Relates to the legal name one may take upon marriage.

HF 2175 Changes the method of appointment of the Adjutant General by deleting the recommendations of a majority of the members of the National Guard Advisory Council and requiring approval of the Governor's appointee by two-thirds of the members of the Senate.

HF 2223 Provides that termination of parental rights in cases of step-parent adoptions may be accomplished during the adoption by the filing of a consent on the part of the parent whose rights are being terminated.

HF 2382 Provides that it is a class D felony to flee the state to avoid prosecution for a felony, aggravated misdemeanor or serious misdemeanor.

SF 44 Provides that records and evidence in dissolution cases, other than court orders, decrees and judgments, may be sealed by the court upon motion by a party.

SF 99 Requires the Chief Justice of the Iowa Supreme Court to communicate by message to the Iowa General Assembly during each regular session, the condition of the Judicial Department and to recommend such matters as the Chief Justice deems expedient.

SF 106 Allows the filing of multiple counts in a single information, indictment, or complaint charging false use of a financial instrument.

SF 149 Permits courts to issue binding wage assignment orders for amount of court-ordered child support, as an alternative to punishment for contempt, when a parent defaults on support payment.

SF 2100 Establishes a depository library center within the Iowa Library Department for the collection and distribution of state publications to libraries in the state.

SF 2181 Provides for the destruction of certain court records of civil and criminal actions heard in the municipal court, of dissolution of marriage, of small claims, and of uniform traffic citations after a set length of time.

SF 2208 Abolishes the requirement that the Iowa Crime Commission be composed of representatives of certain named interests and requires only that they be concerned with and knowledgeable about problems of criminal justice.

DRUGS, CONTROLLED SUBSTANCES, AND ALCOHOL

HF 112 Raises the legal drinking age from 18 to 19 years of age, allows 18 year olds to sell and serve beer and alcoholic beverages for consumption on the premises, and allows persons 18 years of age on or before June 30, 1978, to continue to purchase and consume beer and alcoholic beverages.

SF 2440 See Health. Appropriates funds to the Iowa Department of Substance Abuse and imposes a tax on beer and liquor.

SF 333 See courts and the Judicial Process. Relates to the hospitalization of the mentally ill and the commitment of drug and alcohol abusers.

HF 2198 See Criminal Offenses and Law Enforcement. Relates to the presence of minors in a billard hall where beer is sold.

EDUCATION

HF 463 By Committee on Education. Makes numerous changes to the financing and administration of the area eduation agencies.

HF 2137 Sets the property tax levy for operating the area schools at 20 and 1/4 cents per thousand dollars of assessed valuation in the merged area.

HF 2277 Grants the board of an area school the authority to sell student-constructed buildings and the property on which the building is located by any procedure adopted by the board. Such buildings were formerly sold by bidding procedure.

HF 2359 By Committee on Education. Relates to school district reorganization procedures.

HF 2361 By Committee on Education. Makes changes in the operation and financing of school districts. It defines and provides for a community education program and allows school districts to use their recreation levy for community education programs.

HF 2368 Repeals the authority of the special education division of the Department of Public Instruction to establish standards, give examinations, and issue certificates to special education teachers.

SF 2228 By Committee on Education. Changes the name of the Higher Education Facilities Commission to the College Aid Commission.

ENERGY

HF 187 Requires a minimum deposit of five cents on beverage containers sold in Iowa which contain alcoholic liquors, beer, soda water or carbonated soft drinks.

SF 182 Prohibits the sale in this state of new gas ranges, clothes dryers, air conditioners, and residential and commercial furnaces up to a specified capacity, that are equipped with a pilot light.

SF 2209 Imposes a moratorium on valuation of solar energy systems and methane gas production systems until January 1, 1985, for property tax purposes.

FINANCIAL INSTITUTIONS AND INSURANCE

HF 545 Creates a Risk Management Division within the Department of General Services to be headed up by a risk manager.

HF 2273 Establishes that it is an unfair or deceptive act to sell insurance policies providing primary or supplemental benefits for health care rendered in a skilled nursing facility or to sell policies covering skilled nursing care in

an intermediate care facility unless included in a policy covering costs of all care in that facility, except that existing policies may be renewed.

SF 137 Establishes a Credit Union Department and a Credit Union Review Board appointed by the Governor with the approval of the senate.

HF 2467 Relates to the Iowa usury rate, red-lining, prepayment penalties on certain mortgage loans, finance charges on mobile home purchase loans, and the use of share drafts by credit unions.

HEALTH

HF 33 Requires autopsies of children under the age of two years when circumstances of the death are unknown or indicate the possibility of sudden infant death syndrome.

HF 82 Gives the State Department of Health the authority to regulate the installation and use of radiation emitting equipment and materials, with the exception of some pharmaceuticals.

HF 547 Provides a procedure by which an adopted foreign born person who is a resident of Iowa can obtain a new birth certificate.

SF 2022 Prohibits the smoking of tobacco in certain places frequented by the public. It provides for a civil penalty of $5 for the first offense and between $10 and $100 for each subsequent offense.

SF 2076 Prescribes required training and establishes procedure for certification by the Board of Medical Examiners of emergency medical technicians and paramedics.

HOUSING

HF 602 Amends the Iowa Housing Finance Authority Act to extend eligibility for loans to adults who are less than sixty-two years of age and otherwise qualified by income, disability or handicap and to redefine housing to include modular or mobile homes which are permanently located and assessed as real estate.

HF 2135 Establishes a mobile home parks residential landlord and tenant Act.

HF 2244 Adopts the uniform landlord and tenant Act with some modifications.

HF 2295 Increases the income level from $5,000 to $10,000 for a person who is a veteran of the armed forces of the United States and is disabled and by virtue of the disability is entitled to federal assistance for remodeling a home to make it functional for the disabled person.

HUMAN RESOURCES — CORRECTIONAL INSTITUTIONS

HF 2018 By committee on State Government. Provides that the law on accumulation of "good time" and "honor time" reducing the sentences of inmates at the Men's Reformatory and Penitentiary also applies to the inmates of the Women's Reformatory.

HF 2180 By Committee on Budget. Appropriates from the general fund of the state to the Department of Social Services an emergency appropriation of $470,000 to supplement funds previously appropriated for the inmate

employment program and to establish half-way houses at Ames and Marshalltown. It allows the Department to establish three new positions by converting existing positions that are vacant. (Emergency: Effective March 31, 1978.)

SF 2042 By Committee on Judiciary. Removes a sheriff's specific authorization to chain a disorderly prisoner in a jail, and it removes a sheriff's authorization to feed a prisoner only bread and water.

SF 2103 By Kelly. Authorizes the work release committee to place an inmate on work release for longer than six months in any twelve-month period upon unanimous approval by the committee. (Effective January 1, 1979.)

SF 2133 By Committee on Judiciary. Limits claims of inmates injured while working to workers' compensation. It also makes an inmate an "employee" for the purpose of the occupational safety and health chapter of the Code when the inmate works in connection with the maintenance of the institution, in an industry maintained in the institution, or while otherwise on detail to perform services for pay.

SF 2163 See Human Resources — General. Relates to appropriations to correctional institutions.

SF 2202 By Committee on Commerce. Specifies that good and honor time earned and not forfeited in a penal institution will apply to reduce a mandatory minimum sentence being served pursuant to the criminal code revision. It also authorizes a judge to impose consecutive sentences on a person sentenced for two or more separate offenses. (Effective January 1, 1978.)

HUMAN RESOURCES — GENERAL

HF 2404 Expands the definition of child abuse by setting forth specific acts or omissions on the part of any person responsible for the care of a child, including sexual abuse.

SF 2158 Vests authority to administer federally-funded food stamp program in the Department of Social Services (program was formerly administered largely at county level), and defines as fraudulent practices under Iowa law certain types of misuse of food stamps which are also prohibited by federal law.

SF 2190 By Committee on Human Resources. Provides that the Department of Social Services shall have the right of subrogation to recover payments made by the Department on behalf of a recipient of assistance under the federal Title XIX medical assistance program from any person, including an insurance company, public or private agency, or tort feasor, who is liable to the recipient for the same medical care or expenses.

LABOR AND EMPLOYMENT

HF 606 Requires the Labor Commissioner to set standards for protective clothing and equipment worn or used by fire fighters in the state.

HF 2040 Requires the state and any political subdivision of the state to grant employees leave from employment to participate in olympic competition for a maximum of 90 days per year and it provides an appropriation to reimburse political subdivisions for the cost incurred by a political subdivision in granting such leaves.

SF 164 Allows state officers and employees to contribute to any charitable organization through the payroll deduction system if contributions to the organization are deductible on the contributor's Iowa individual income tax return and if a specified number of state officers and employees request to contribute to the organization.

SF 2124 Provides that for negotiations on public employment collective bargaining agreements effective for the 1978-1979 fiscal year and for those public employers and certified employee organizations who have requested impasse procedures by April 15, 1978, the Public Employment Relations Board shall, upon the request of either party, arrange for arbitration which shall be final and binding on both parties.

SF 2270 Makes changes in the unemployment compensation program law in order to insure continued federal funding.

LAW ENFORCEMENT

HF 616 Amends the criminal code revision to define "incendiary device" as a device, contrivance or material causing or designed to cause destruction of property by fire.

SF 380 Clarifies the unified law enforcement district establishment and administration enacted in 1976.

SF 2198 Repeals the prohibition against allowing minors in a billiard hall where beer is sold.

SF 2205 Makes it a class C felony for a person to photograph a child involved in certain prohibited sexual acts.

SF 2213 Amends the weapons chapter of the criminal code revision. It removes some items from the definition of offensive weapons.

NATURAL RESOURCES

HF 127 Includes abandoned or inactive surface mines in the limitations on the liability of a landowner who allows public use of private land for recreational purpose without charge.

HF 356 Increases the following hunting and fishing licenses: resident fishing license, from $4 to $6; nonresident fishing license, from $10 to $12; resident hunting license, from $5 to $6; nonresident hunting license, from $25 to $35; deer license, from $10 to $15; wild turkey license, from $10 to $15; combined resident hunting and fishing license, from $8 to $11.

HF 544 Changes snowmobile registration to a two-year registration period.

HF 2212 Makes several changes regarding water withdrawal and flood plain permits granted by the Iowa Natural Resources Council.

HF 2284 Requires that all traps, except those placed entirely under water, be checked every twenty-four hours.

HF 2331 Provides a procedure for agents of the Department of Soil Conservation to obtain administrative search warrants to enter upon private property to classify land by soil sampling or determine if soil erosion is occurring on the property in violation of the soil conservancy district's regulations.

HF 2335 Provides for the selection of alternate members for the Temporary

State Land Preservation Policy Commission who would serve upon the death, resignation or disqualification of a regular member.

HF 2354 Allows the Department of Soil Conservation to revoke, suspend or refuse to renew a mining permit for willful violation of the provisions of the initial regulatory program under the federal Surface Mining Control and Reclamation Act of 1977.

STATE GOVERNMENT

HF 32 Increases the membership of the Capitol Planning Commission from nine to eleven members. The State Architect is removed from the Commission and three persons representing the general public are added.

HF 207 Creates a citizens privacy task force appointed by the Governor to study state confidentiality statutes, state administration of state and federal privacy and confidentiality statutes and rules and to project future needs for a state response to federal rules and statutes in this area.

SF 264 Creates an Iowa Department of Veteran's Affairs and a Commission on Veteran's Affairs. It repeals the bonus board and transfers the board's duties and property to the Department and the Commission.

HF 2074 Rewrites the Iowa Open Meetings Law. Governmental bodies which are created by statute or executive order, are a governing body of a political subdivision or tax-supported district, are directly created by one of the preceding governmental bodies, or are state university athletic councils are subject to the requirements of the Act.

HF 2176 Provides that the Claims Appeal Board of the Iowa Department of Job Service shall be a permanent board and fixes the salary range of board members from $18,900 to $26,600.

HF 2390 Makes numerous changes in the Iowa civil rights law.

SF 72 Provides that fine art be integrated in newly-constructed state buildings with not less than one-half of one percent of the total estimated costs of the building to be included in the plans for the building's fine art elements and requires the contracting officer or principal user to coordinate the fine art with the Iowa State Arts Council.

SF 244 Transfers the Code Editor from the judicial to the legislative branch. The Code Editor would serve at the pleasure of the Legislative Council.

SF 2170 Advances latest date for political parties to hold precinct caucuses in general election years from second Monday in May to second Monday in February.

SF 2230 Directs the Executive Council to sell the Valley Bank Building by a sealed bid procedure. Funds from the sale are to be deposited in the general fund.

SF 2247 Provides that a person who retires from state employment after July 1, 1977, will be credited with the number of days of his or her accrued sick leave and provides an appropriation of $35,000 to the State Comptroller for an actuarial study of alternative methods to compensate employees for accrual of sick leave.

TAXATION

HF 68 Increases the time period during which the Director of Revenue may extend the payment of inheritance taxes for hardship cases from three years to ten years. (Retroactive to January 1, 1978.)

HF 411 Provides that the inheritance tax due on life estates in real and personal property shall be paid not later than fifteen months after the death of the decedent.

HF 415 Prohibits the deduction of certain debts for inheritance tax purposes in cases where the debts are attributable or secured by property which is not subject to inheritance tax. Also allows deduction of property taxes computed on fiscal year basis rather than calendar year basis.

HF 491 Raises the motor fuel tax from 7 cents per gallon to 8-1/2 cents per gallon on July 1, 1978, and to 10 cents per gallon on July 1, 1979. The special fuel tax is raised from 8 cents per gallon to 10 cents per gallon on July 1, 1978 and 11-1/2 cents per gallon on July 1, 1979.

HF 2190 Provides that for valuations established as of January 1, 1979, for agricultural property and residential property, if the growth in assessed value is less than six percent for either class of property, then the assessed valuations of both classes of property shall be increased by the same percentage. If the growth in the assessed value of agricultural and residential property is six percent or more, then the assessed valuations of both classes of property shall be increased by six percent.

HF 2356 Provides authority for the Director of Revenue to obtain records necessary to determine the fair and reasonable market value of industrial property and requires owners of industrial property to file reports listing machinery with the assessors.

HF 2438 Increases the reimbursement percentages for the extraordinary property tax relief for elderly and disabled persons.

SF 336 Authorizes cities and counties to impose, after approval at a referendum, a hotel and motel tax of up to seven percent on the gross receipts from the renting of rooms.

SF 2043 Allows the partial payment of special assessments without interest if made within thirty days after the certification of the special assessment and allows payment to be made to the city clerk if the property is within an incorporated area.

SF 2056 Provides for a business-nonbusiness distinction in allocating and apportioning corporate net income.

SF 2137 Imposes a tax on generation skipping transfers in an amount equal to the maximum federal estate tax credit allowed for state estate, inheritance, legacy or succession tax paid in respect of property included in any generation skipping transfer.

SF 2173 Provides that persons purchasing tangible personal property or services which are exempt from the sales tax shall do so subject to an exemption certificate issued by the Department of Revenue.

SF 2184 Imposes a tax upon freight line and equipment car companies based on the loaded miles traveled within the state, eliminates the previous

property tax, makes an appropriation to the railroad assistance fund of $1,700,000 and requires the Department of Transportation to conduct a study of the feasibility and methods of establishing a state authority for the bonding, purchase and lease of railroad cars.

SF 2194 Authorizes the spouse of a claimant to sign for the claimant for the homestead property tax credit and military exemption and allows filing for homestead property tax credit by mail.

SF 2209 Relates to property tax incentives for solar energy and methane gas production systems.

TRANSPORTATION — GENERAL

HF 2283 Defines railroad spur track and provides procedures before the Transportation Regulation Board for regulation of the construction, operation or termination of such tracks.

HF 2296 Provides that the cost of energy for operation of freeway lighting systems within the corporate boundaries of cities, shall be paid from the primary road fund.

SF 2068 Provides a procedure for the transfer of title and interest to road rights-of-way owned by a jurisdiction that is not responsible for the road to the jurisdiction that is responsible for the road.

TRANSPORTATION — VEHICLES

HF 2216 Specifies new duties for the Railroad Division of the Department of Transportation to evaluate railroad trackage. It replaces the penalty provisions of the railroad laws with a uniform schedule of violations.

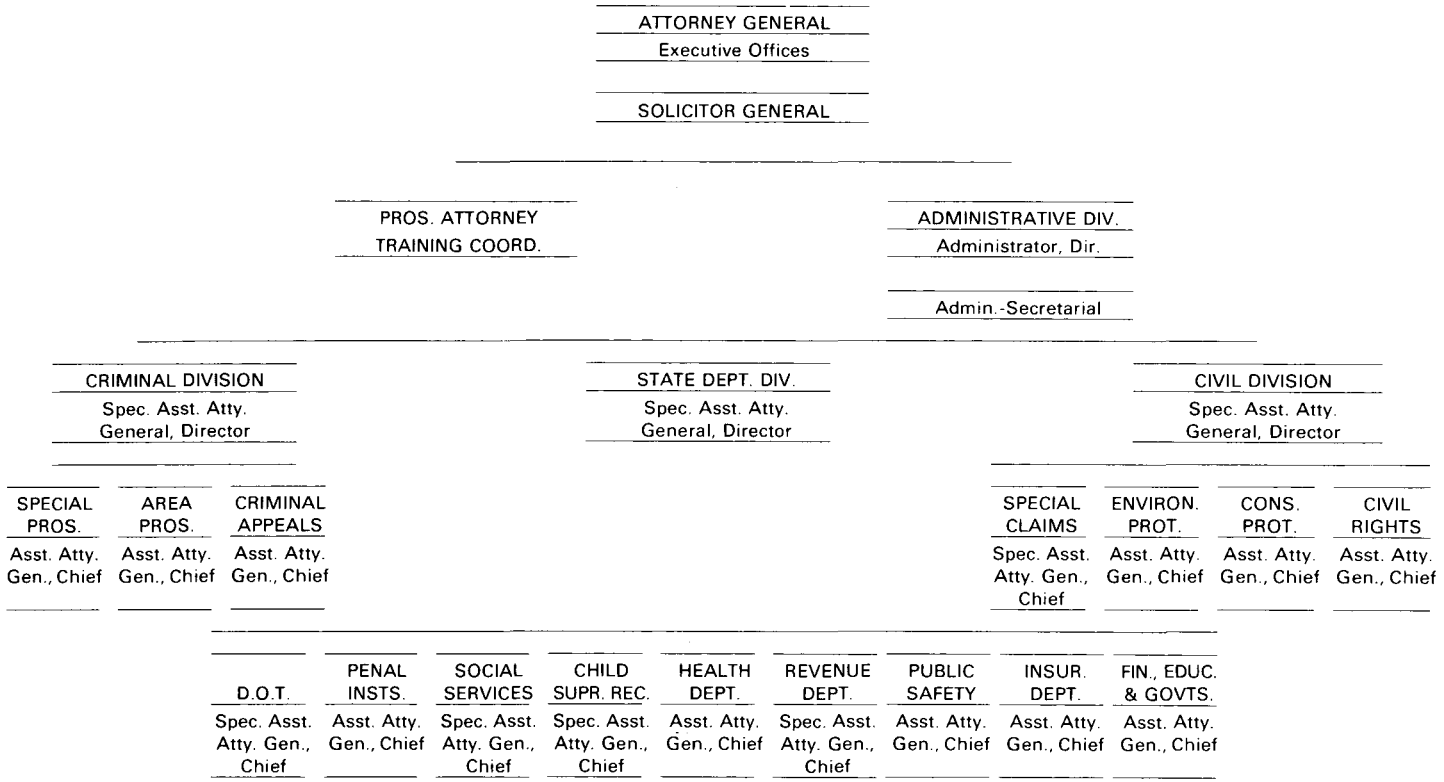
SF 2187 Establishes a new chapter providing for the registration of authorized vehicle recyclers upon payment of a fee of $35.00.

SF 2215 Provides for the posting of a bond to pay for the costs of modifying a motor vehicle franchise.

WOMEN AND MINORITIES

HJR 12 Proposes an amendment to the Constitution of Iowa providing that equality of rights of men and women under the law shall not be denied or restricted on the basis of gender by the state or by any of its political subdivisions. (NOTE: This Joint Resolution must be passed by the next General Assembly in 1979 or 1980 and then must be approved by the people of Iowa in 1980 before the amendment becomes part of the Constitution of Iowa.)

IOWA DEPARTMENT OF JUSTICE
Proposed Reorganization Chart



State of Iowa
1978

FORTY-SECOND BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1978

RICHARD C. TURNER
Attorney General

Published by
THE STATE OF IOWA
Des Moines
H6465

ATTORNEYS GENERAL OF IOWA
1853 - 1979

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	1967-1979

PERSONNEL OF THE
DEPARTMENT OF JUSTICE

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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; Asst. Pottawattamie County Attorney 1954-1956; Avoca Town Clerk 1953-1960; Elected Attorney General 1966, 1968, 1970, 1972 and 1974.

RICHARD E. HAESEMEYER ..... Solicitor General
Solicitor General and First Asst. 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., New York City, 1956-1962; Monsanto Company, Textile Div. (formerly the Chemstrand Corp.), N.Y.C. 1962-1967; Appt. Solicitor General and First Asst. Atty. Gen. February 20, 1967.

JOHN E. BEAMER ..... Special Assistant Attorney General
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B. June 25, 1943, Indianola, Iowa; B.S., J.D., Drake University; Agent F.B.I. 1967-1971; married, two children; Appt. Asst. Atty. Gen. 1970; Appt. Spec. Asst. Atty. Gen. 10-1-75

GEORGE W. MURRAY ..... Special Assistant Attorney General
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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; Appt. Asst. Atty. Gen. January 3, 1967; Secretary Executive Council of Iowa May 1, 1967; Executive Secretary Republican Party of Iowa, November 1, 1969; Appt. Asst. Atty. Gen. August 15, 1973; Appt. Spec. Asst. 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.; Appt. Asst. Atty. Gen. 1969; Appt. Spec. Asst. Atty. Gen. 1971. Term. 2-28-78

RAYMOND W. SULLINS ..... Special Assistant Attorney General
B. February 4, 1945, Princeton, Indiana; B.A., Los Angeles Baptist College; J.D., Drake University; married, Appt. Asst. Atty. Gen. 1972; Appt. Spec. Asst. Atty. Gen. 6-23-78.

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GARRY D. WOODWARD ..... Special Assistant Attorney General
B. April 18, 1926, Muscatine, Iowa; B.A., L.L.B., S.U.I.; married, one child; private practice 1954-1972; Muscatine County Magistrate 1958-1960; Muscatine County Attorney 1961-1964 and 1968-1972; Appt. Asst. Atty. Gen. 1972; Appt. Spec. Asst. Atty. Gen. 1977.

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; Appt. Asst. Atty. Gen. 1969.

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B. January 3, 1944, Spencer, Iowa; B.B.A., University of Iowa; J.D., Drake University; married; Appt. Asst. 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; Appt. Asst. Atty. Gen. 1976.

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B. August 25, 1953, Estherville, Iowa; B.A., Colorado Women's College; J.D., Creighton University; single; Appt. Asst. Atty. Gen. 1978.

TIMOTHY D. BENTON ..... Assistant Attorney General
B. March 12, 1951, Des Moines, Iowa; B.A., Central College; J.D., University of Iowa; single; Appt. Asst. Atty. Gen. 1977.

EDWARD M. BLANDO ..... Assistant Attorney General
B. September 29, 1938, South Dakota; B.S., J.D.; married, three children; private practice 1969-1978; State Attorney, Hughes County, South Dakota, 1972-1975; Asst. State Attorney, Hughes County, South Dakota, 1969-1972; Asst. Atty., South Dakota, 1968-1969; Appt. Asst. Atty. Gen. 1978.

LARRY M. BLUMBERG ..... Assistant Attorney General
B. September 8, 1946, Omaha, Nebraska; B.A., University of Minnesota; J.D., Drake University; married, two children; Appt. Asst. Atty. Gen. 1971.

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B. June 13, 1952, Casey, Iowa; B.A., M.B.A., J.D., Drake University; Appt. Asst. Atty. Gen. 1977.

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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; Appt. Asst. Atty. Gen. 1970.

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B. January 15, 1947, Denver, Colorado; B.A., Colorado College; J.D., Drake University; married, four children; Appt. Asst. Atty. Gen. 1973. Term. 7-15-77.

THOMAS M. DONAHUE ..... Assistant Attorney General
B. January 28, 1943, Sioux Falls, S.D.; B.S., South Dakota State University; M.Ed., South Dakota State University; J.D., Drake University; married, two children; private practice, 1975-1978; Appt. Asst. Atty. Gen. 1978.

RICHARD H. DOYLE, IV. ..... Assistant Attorney General
B. August 8, 1949, Elgin, Illinois; B.A., J.D., Drake University; married; Appt. Asst. Atty. Gen. 1976. Term. 6-30-77.

EVELYN I. DRAKE ..... Assistant Attorney General
B. September 10, 1944, Claremore, Ok.; B.S., J.D., University of Arkansas; divorced, two children; private practice 1973-1976; Greers Ferry City Attorney, 1975-1976; Appt. Asst. Atty. Gen. 1977.

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B. August 27, 1949, New York City, N.Y.; B.A., University of Iowa; J.D., Drake University; married, two children; Appt. Ass't. Atty. Gen. 1974. Term. 1-29-77.

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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; Asst. City Atty., Des Moines, Iowa, 1969-1970; Appt. Asst. Atty. Gen. 1971.

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B. September 3, 1953; New York, New York; B.A., University of Arizona; J.D., Drake University; married; Appt. Asst. Atty. Gen. 1978.

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RICHARD E. MULL ..... Assistant Attorney General
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MICHAEL P. MURPHY ..... Assistant Attorney General
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ELIZABETH A. NOLAN ..... Assistant Attorney General
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CARLTON G. SALMONS ..... Assistant Attorney General
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B. February 16, 1941, Central City, Iowa; B.A., J.D., S.U.I.; private practice, 1966; U.S. Army, 1966-68; married, two children; Appt. Asst. Atty. Gen. 1970.

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MICHAEL E. SHEEHY ..... Assistant Attorney General
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CHRISTIAN SMITH ..... Assistant Attorney General
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GARY H. SWANSON ..... Assistant Attorney General
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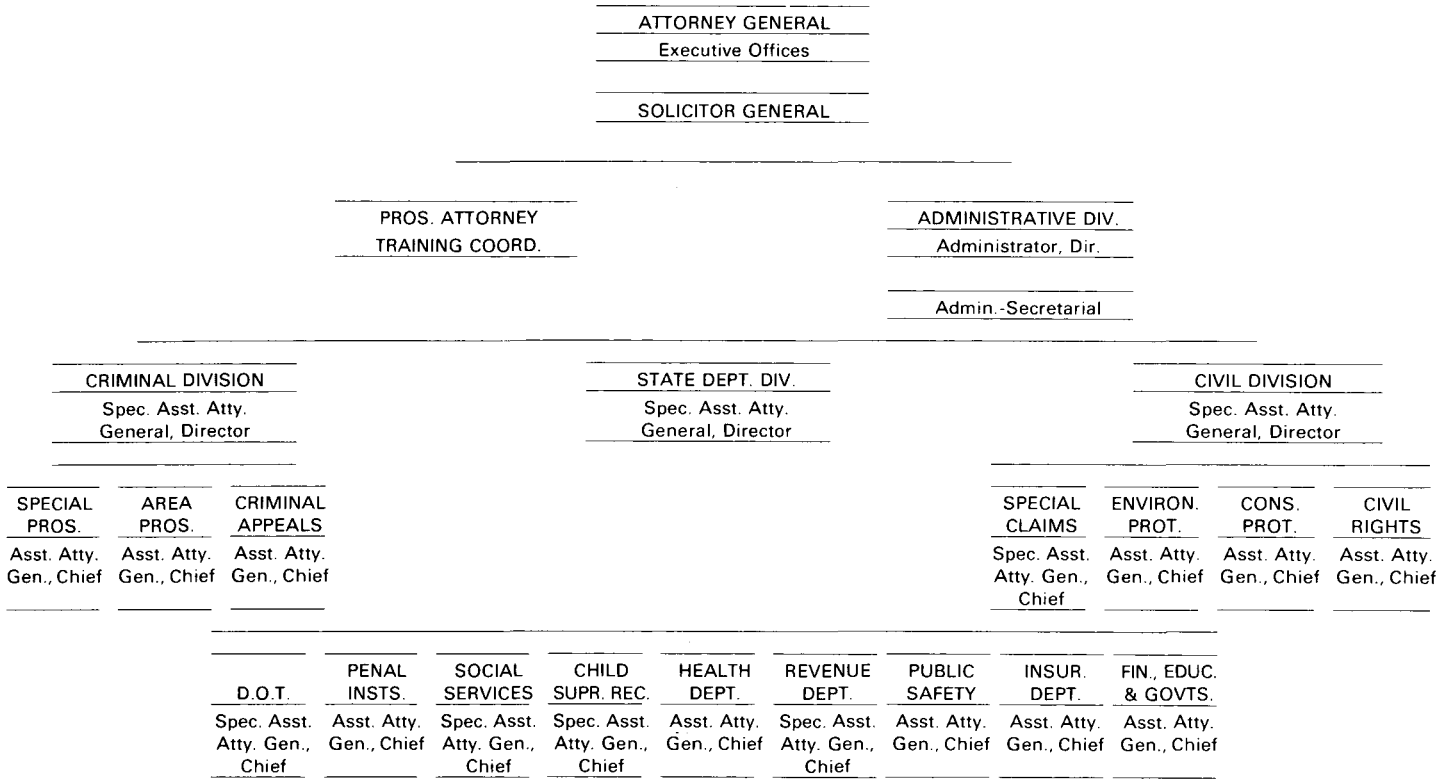
IOWA DEPARTMENT OF JUSTICE
Proposed Reorganization Chart



THE

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

FOR

BIENNIAL PERIOD

1977 - 1978

January 4, 1977

COUNTIES AND COUNTY OFFICERS: Mental Health; Liens and claims; auditor's duties; board of supervisors' powers. §§125.26, 125.28, 222.78; Ch. 224; §§225.22-.23, 230.15, 230.17, 230.20(5) and (6), 230.21, 230.25, 271.15-.16, 332.3(2), 444.12, 1975 Code of Iowa; Ch. 1131, Acts of the 65th G.A.; Ch. 1103, §14, Ch. 1104 (H.F. 292), §§1, 3, 5, 10, 11, 12, 13, 15, 16, and Ch. 1132, §9, Acts of the 66th G.A. Mental health liens, which result only from certain mental health, drug addict or alcoholic treatment at certain institutions, are abolished as of January 1, 1977, unless the county board of supervisors determines that the lien is collectable and the county attorney initiates a foreclosure proceeding prior to that date. Although said statutory liens are abolished, the underlying obligation is still collectable after January 1, 1977. County auditors must maintain an account of the cost of mental health care for each individual and must maintain a separate record, or index, of county board of supervisors' determinations of the ability to pay of persons potentially liable for such treatment. Said board determinations are to be made each time the county is billed for treatment, under any standards and procedures which are necessary, and which directly tend, to accomplish its duty to determine ability to pay, and which are not otherwise inconsistent with law. (Murphy to Readinger, Iowa State Representative, 1-4-77) #77-1-1

Honorable David M. Readinger, Iowa State Representative: Your request for an opinion of the Attorney General on various questions that arise from the operation of H.F. 292 as passed by the 1976 Session of the General Assembly (Ch. 1104, Acts of the 66th G.A.), has been received by this office. Generally, H.F. 292 abolished "mental health liens" and provided for new procedures for determining liability for payment of charges for care and treatment under programs dealing with alcoholism, mental retardation and mental health. Your request indicates that local officials are having difficulty in reconciling the various provisions of H.F. 292, and with integrating the new law into existing administrative procedures.

This opinion will set out the eleven specific questions you have asked, and respond to each in turn.

1. What liens are included in the scope of H.F. 292?

Section 11 of H.F. 292 repeals Section 230.25, 1975 Code of Iowa, which created a statutory lien; a new Section 230.25 was inserted which does not provide for any lien. Section 15 of H.F. 292 provides:

"All liens created under section two hundred thirty point twenty-five (230.25), as that section appeared in the Code of 1975 and prior editions of the Code, are abolished effective January 1, 1977, except as otherwise provided by this Act. The board of supervisors of each county shall, as soon as practicable after July 1, 1976, review all liens resulting from the operation of said section two hundred thirty point twenty-five (230.25), Code 1975, and make a determination as to the ability of the person against whom the lien exists to pay the charges represented by the lien, and if they find that the person is able to pay those charges they shall direct the county attorney of that county to take immediate action to enforce the lien. If action is commenced under this section on any lien prior to the effective date of the abolition thereof, that lien shall not be abolished but shall continue until the action is completed."

Clearly only liens created under the former Section 230.25 are affected by H.F. 292. Section 230.25, 1975 Code of Iowa provided:

"Any assistance furnished under this chapter shall be and constitute a lien

on any real estate owned by the person admitted or committed to such institution or owned by either the husband or the wife of such person. Such lien shall be effective against the real estate owned by the husband or wife of such person only in the event that the name of the husband or the wife of such person is indexed by the auditor. No lien imposed by this statute against any real estate of a husband or wife of such person prior to July 4, 1959, shall be effective against the property of such husband or wife unless prior to July 4, 1960, the name of such husband or wife of such person shall be indexed."

To say that it is clear that only liens created under the former Section 230.25 are affected, does little in fact to answer your question, I realize. This office has received information indicating that charges for all sorts of institutional treatment have purportedly been indexed as liens on real estate, possibly against persons not subject to the statutory lien of former Section 230.25. In light of this, I will attempt to delineate the charges that did give rise to a "230.25" lien, and those which did not.

Although all of the facts have not been presented, it appears that some county officials may have gone so far as to index all expenditures from the county mental health and institution's fund, Section 444.12, 1975 Code of Iowa, as statutory liens under former Section 230.25. Section 444.12 expenditures include charges to the county from state mental health institutions, for mental retardation treatment (Chapter 222, 1975 Code of Iowa), from psychopathic hospital at Iowa City (now "psychiatric hospital" as changed by Ch. 1136 [H.F. 1436], Acts of the 66th G.A., 2d Session), for tuberculosis treatment, for alcoholic treatment, from Iowa juvenile home, and from other institutions, or facilities, or for other treatment, specified in Section 444.12, 1975 Code of Iowa.

Section 444.12, 1975 Code of Iowa, does not create any liability to the persons so cared for or treated, or to other persons liable for their support. There must be independent statutory authority for such liability, for example Section 230.15, 222.78, 225.22-.23, 271.15-.16, and 125.26, 1975 Code of Iowa.

Given such independent statutory rights of recovery against certain persons, it becomes necessary to emphasize that such rights of recovery are not liens on property. A lien, if one exists, is an incident of a right of recovery and simply a form of security for payment of the debt. 51 Am. Jur.2d, *Liens,* §§1 and 2, pp. 142-44. A lien is created only by contract, statute or fixed rule of law. *In re Frentress' Estate,*249 Iowa 783, 89 N.W.2d 367 (1958). The type of lien under discussion, that created by former Section 230.25, is a statutory lien.

As stated in 51 Am.Jur.2d, *Liens,* §38, pp. 176-77:

"A lien created by statute is limited in operation and extent by the terms of the statute, and can arise and be enforced only in the event and under the facts provided for in the statute."

By the terms of the former 230.25, a statutory lien existed only against the real estate of the person receiving assistance *under Chapter 230,* 1975 Code of Iowa, and of the person's spouse if the spouse's name was indexed by the auditor. No lien was created against the property of other persons liable for the support of the person receiving treatment under Chapter 230. By opinion of the Attorney General dated August 25, 1967, the "230.25" lien also existed for care and treatment of drug addicts under Chapter 224, 1975 Code of Iowa. Until July 1, 1974, alcoholics were included within Chapter 224. Chapter 1131, Acts of the 65th G.A. removed alcoholics from the drug addicts provisions of the Code and established separate statutory provisions for alcoholics in Chapter

125, 1975 Code of Iowa. Section 125.26, 1975 Code of Iowa, explicitly states that no lien on real estate is created by the former Section 230.25.

I find no other statutory provision referring to Section 230.25 which would create a lien. It is common knowledge that charges to counties for mental retardation services, for example, were often indexed as statutory liens. Without expanding further, I note that such practice was clearly improper and no lien resulted.

In summary, the former Section 230.25 created statutory liens on real estate of persons receiving mental health services under Chapter 230 of the Code, and drug addict services under Chapter 224 of the Code, which until July 1, 1974, included alcoholic services; liens also were created against the real estate of spouses of such persons if properly indexed. H.F. 292 affects only the above-mentioned statutory liens. Other liens such as judgment liens, or possibly contractual liens, are unaffected.

2. If the board of supervisors has not acted before January 1, 1977, to determine ability to pay and initiated action to collect are all existing liens abolished?

As provided by Section 15 of H.F. 292, quoted above, the liens created under Section 230.25 are abolished effective January 1, 1977, unless the board of supervisors does three things and the county attorney thereafter commences action to enforce such liens, prior to January 1, 1977. The board must (1) review all "230.25" liens after July 1, 1976; (2) make a determination as to the ability of the person against whom the lien exists to pay the charges represented by the lien; and (3) if it is found that such person is able to pay, direct the county attorney to take immediate action to enforce the lien. If the county attorney timely "takes action" (discussed below) the lien will continue in effect until the action is completed. Otherwise the lien is abolished.

3. What constitutes initiation of action to collect or enforce a lien?

The language used in Section 15 of H.F. 292 has created particularly troublesome problems to the counties. The county attorney is "to take immediate action to *enforce the lien*" and "[i]f action is *commenced*" on a lien prior to January 1, 1977, the lien continues until the action is completed. Although the italicized words are words of relatively common usage, they are also words with particular legal significance.

It is clear that it was the intent of the legislature to clear up the liens existing under former Section 230.25 either by forgiving those that are presently not worth pursuing or by immediately enforcing those that are presently worth pursuing, i.e. where the person against whom the lien exists is "able to pay" as determined by the board of supervisors.

The language used and the purpose of the legislation indicate that court action is to be initiated to enforce the lien, if the county wants *the statutory lien* to remain in effect. In a previous opinion of the Attorney General, 1962 OAG 151, it was stated that a foreclosure proceeding was the proper method of enforcing the lien created by Section 230.25, as it read prior to the enactment of H.F. 292. The former Section 230.25 did not provide a specific remedy for enforcing the lien, thus an equitable action to foreclose on the lien would be the appropriate method of enforcement. 51 Am.Jur.2d *Liens* §65, p. 194. Such an action would be "commenced" by filing a petition in the district court. R.C.P. 48.

We are aware that in some cases the counties and the persons against whom the statutory lien exists would rather forego immediate collection and let the lien continue on the books. Nothing herein would require counties to take immediate action to collect on the underlying obligation; that is only necessary if resort to enforcing the "security" of the statutory lien is felt to be necessary by the county. The lien may fall, but the county may still take other measures to collect or preserve the underlying debt, as discussed below.

4. If a lien is abolished may the county still maintain an account and then file an action through the small claims or district court to recover costs for treatment?

As indicated in response to your first question, above, a lien is an incident to and dependent on the debt it secures; however it does not follow that an underlying debt or right of recovery is extinguished or affected when a lien is lost. 51 Am.Jur.2d, *Liens* §2, Note 18, p. 144; §41, Note 2, p. 180. Only the liens created by former Section 230.25 are abolished, and the right of the county to recover against persons liable under Section 230.15, 1975 Code of Iowa, is unaffected by Section 15 of H.F. 292.

Section 230.15, 1975 Code of Iowa, which establishes personal liability for mental health services, was not itself amended by H.F. 292. However, H.F. 292 provides a new procedure for determining personal liability to the county. Basically, the counties are billed at least each quarter, and possibly monthly, for individuals receiving treatment at the state mental health institutions; certified statements list the unpaid account for each person for which the county is initially liable. Section 230.20(5), (6), Code of Iowa, as amended by Ch. 1132 (S.F. 1314), §9, Acts of the 66th G.A., 2d Session. Upon receipt of such statements, county officials immediately pay the state, and the county auditor furnishes the board of supervisors with a list of the names of persons certified. Section 230.21, Code of Iowa, as amended by Section 10 of H.F. 292.

Section 11 of H.F. 292 strikes Section 230.25 (former lien provision) and replaces it with additional procedures for determining individual liability. When the board of supervisors receives the list of names from the auditor, it is to investigate to determine the ability of each person listed, and others liable for him or her pursuant to Section 230.15, 1975 Code of Iowa, to pay the charges. If no one who may be liable is found to be able to pay the charges, their names are not to be indexed in the account book maintained by the county auditor—the current charges would be absorbed by the county and no one would be personally liable for them. Of course in determining ability to pay, the provisions of Section 230.17, 1975 Code of Iowa, which allow the board to compromise claims, are still in force. In addition, a current determination of inability to pay does not necessarily affect future charges and liability therefor. Each new billing on persons previously determined unable to pay may be reviewed as outlined above, and it may be found that persons are able to pay and are thus liable for the new charges.

Thus the new statutory scheme clearly contemplates that maintaining accounts will continue, under the limitations stated above. If I interpret your question correctly, the crucial issue is whether Section 230.25, as amended by Section 11 of H.F. 292, applies to accounts accrued prior to the effective date of that portion of H.F. 292, July 1, 1976. That is, does the board have to determine ability to pay with regard to accounts on the books prior to July 1, 1976, and if it is determined that persons liable are unable to pay, are the accounts

wiped out?

It is fundamental that legislation, including the amendment of existing statutes, is presumed to be prospective rather than retrospective, unless a contrary intent is clearly manifested by the legislature. Section 4.5, 4.13(1) and (2), 1975 Code of Iowa.

It would be facile to say that, looking at H.F. 292 as a whole, the intent of the legislature was to clean up all of the accounts by forgiving presently uncollectable accounts, collecting those that are collectable, and initiating a pay-as-you-go system. That is not what the legislature clearly said, however, and we must conclude that obligations accrued prior to July 1, 1976, remain as collectable debts despite the operation of Section 11 of H.F. 292.

The language of the sections in the current Chapter 230 relating to determination of liability does not disclose an intent to give retrospective application in dealing with accounts. The county auditor receives a statement from the institution, the names of persons certified as recently receiving treatment are referred to the board of supervisors, and the board investigates to determine ability to pay. If the persons liable are unable to pay, the only result is that their names are not then indexed in the auditor's account book. The determinations made relate only to the statements received after July 1, 1976.

The legislature clearly gave retrospective effect, albeit conditionally, to its treatment of liens. Similarly, the legislature in dealing with claims in estates inserted a requirement that there be a board determination of ability to pay on record before such claim is valid. Sections 5 and 13 of H.F. 292. Section 16 of H.F. 292 then gave retrospective effect to the provisions of H.F. 292, to claims already filed in estates and not satisfied prior to July 1, 1976. These provisions were all Senate amendments to the legislation initially passed in the House, indicating the legislature's close attention to these particular provisions.

The issue of retrospective effect of amending or repealing enactments is not new to the legislature. See Section 249.10, 1975 Code of Iowa, as amended by Ch. 149, §1, Acts of the 66th G.A. In light of the legislature's prior experience in this area, its specific dealings with retrospective provisions in H.F. 292, and the lack of a manifest intent to affect prior accrued accounts in H.F. 292, we must conclude that such accounts are to remain on the books as obligations due the county.

5. If someone against whom a lien exists acknowledges the lien through agreeing with the board of supervisors to pay a mutually satisfactory sum, does the lien still continue or is it voided with only an account remaining.

Consistent with our responses to your above questions, the *statutory* lien of former Section 230.25 would become void on January 1, 1977, with only an account remaining, under the circumstances described. It might be possible that the county could obtain some prospective security in the form of a contractual lien, but we express no opinion on that question. The legislation deals with a statutory lien, and that lien is abolished absent the commencement of a foreclosure action prior to January 1, 1977.

6. County auditors have maintained lien books under the old law, must lien books be maintained under H.F. 292 in the auditor's office?

As previously stated, Section 12 of H.F. 292 requires that the county auditor

maintain an account book or index and that such book or index have *no* reference to a lien. However, it is clear that a few liens will remain valid after January 1, 1977, if properly acted upon pursuant to Section 15 of H.F. 292. It seems necessary and proper that a separate lien book would continue to be maintained insofar as any of the liens are kept alive. An integral part of the validity of liens that continue would be proper indexing under the prior statute, to provide proper notice. 1962 OAG 143.

Thus, it would seem that the reasonable course would be for the county attorney to notify the county auditor after January 1, 1977, which liens are still effective as statutory liens. All other liens of record in the auditor's book or index should be expunged and the remaining liens should be cleared out through litigation.

7. In those cases where liens are abolished but accounts are considered "open" what records must be maintained and by which office?

We can understand the confusion created by the various provisions of H.F. 292 when it comes to determining what records must be kept.

Section 3 of H.F. 292 provides that Section 125.33, Code 1975, is amended to read as follows:

"The auditor of each county shall keep an accurate account of the total cost to the county of the care, maintenance, and treatment of any alcoholic *and* keep an index of the names of *the alcoholics* admitted from such county." (Emphasis added)

Section 1 of H.F. 292 modifies said provision in that persons determined to be presently unable to pay their liablility for alcoholic treatment certified each month, under Section 125.28, 1975 Code of Iowa, as amended by Ch. 1103, §14, Acts of the 66th G.A., are not to be indexed "as would otherwise be required" by Section 125.33 of the Code. Similar provisions in H.F. 292 relate to accounts of persons treated under Chapter 230 of the Code, mental health. Sections 11 and 12 of H.F. 292.

The difficulty arises in reconciling the provisions dealing with the auditor's accounting duties, the board's duties related to periodic determinations of ability to pay, and the recording of the latter. It seems clear that the "accounting" and "indexing" are separate and distinguishable and the county records should reflect this. A reasonable method would be to maintain two sets of books for alcoholic treatment and two sets of books for mental health treatment. Pursuant to Sections 125.33 and 230.26 as amended, the auditor should maintain an account of the total cost to the county of each individual's maintenance under the respective programs. In addition the auditor should maintain an "index" reflecting the board's determinations of ability to pay. Moreover, there would seem to have to be separate "indexes" for the separate billing periods for which certified statements are received.

The situations which may arise to complicate the bookkeeping required by H.F. 292 are mindboggling, but the above statements indicate what appear to be the legal requirements of H.F. 292. We will leave up to the accountants to come up with the most workable form of record-keeping.

8. What formal actions must be taken by the board of supervisors to determine ability to pay?

The legislation contains no specific standards or procedures directing the

county board of supervisors in performing its duties to periodically determine ability to pay. Section 332.3(2) provides that the board "at any regular meeting shall have power...[t]o make such rules not inconsistent with law, as it may deem necessary for its own government, the transaction of business, and the preservation of order." The board also has implied powers which are essential and which tend directly to accomplish the purposes of express powers or duties. 1950 OAG 158.

It is our opinion that the board may establish procedures and standards which are necessary, and which directly tend, to accomplish the purposes of its duty to determine ability to pay, and which are not otherwise inconsistent with law.

9. May the ability to pay be reviewed from time to time to establish a lien on then outstanding accounts?

As stated above, the ability to pay is to be determined with each billing, if the county wishes to establish personal *liability*. No *lien* is established by such determination or review! There is no statutory lien on new accounts, and *former* liens are to be either abolished or enforced.

10. What constitutes an active account?

This term is not found in the legislation in question, but it may have some relevance to the resulting legislative scheme, if it can be called a scheme. As originally introduced in the House, H.F. 292 basically called for a one-shot determination of ability to pay. If the person, or persons, potentially liable were able to pay, an account would be kept, but it was the intent of the legislature that collection of such account would be kept as current as possible. (See "explanation" of H.F. 292 as introduced in House on Feb. 21, 1975). If no one potentially liable was able to pay, no account would be kept. Thus the auditor's books would be uncluttered with uncollectable accounts, to a great extent.

After several amendments this rather simple scheme became the rather complicated system discussed above. As stated above, it must be concluded that the auditor is to keep an "account" book, listing total charges to the county for an individual's care at the particular institutions or facilities. This record does not per se constitute evidence of any legal liability of the persons or others responsible for him or her. This of course is much different from the pre-H.F. 292 statutory scheme whereby the properly kept auditor's records evidenced a lien and an "open account", which could be recovered from persons legally liable, within the statute of limitations.

Under the new scheme, a board of supervisor's determination of ability to pay is a requisite of personal liability, which would be evidenced by authorized indexing of the patient's name in records kept by the auditor. Moreover, in accordance with H.F. 292 as it finally passed the legislature, it appears that the board of supervisors must make a determination of ability to pay with each billing in order to establish any personal liability. With this in mind, we would conclude that an active account would be the record of charges that are indexed from board determinations of ability to pay. To the extent periodic, indexed charges remain uncollected, an "open account" would result which is recoverable from persons liable within the statute of limitations, which runs from the date of the last indexed entry in the account. It should be noted that the clear intent of the legislature remains that counties should diligently attempt to collect on charges immediately or else write them off, but such practice is not

mandated.

11. In determining the ability to pay, may the supervisors require those potentially responsible for payments to produce income tax and other reports to verify their ability?

Yes.

The above opinions deal with specific questions on rather complex legislation, and it has been inferred that the questions relate primarily to the effect of H.F. 292 on the mental health laws. H.F. 292 also deals with alcoholism and mental retardation laws, but unless the above opinions specify otherwise, they relate only to the mental health aspect.

Finally, in the course of attempting to deal with the questions you have asked, many hypothetical questions of a more specific nature occurred to us. In some instances, especially where this office was aware of current problems, unasked questions were dealth with in the context of your questions. Many more questions come to mind which are not discussed fully in the above opinions.

January 5, 1977

MUNICIPALITIES: Civil Service—Sick Leave—§§400.8, 400.9, 400.11, 400.13, 411.6 and 411.15, Code of Iowa, 1975. The chiefs' civil service eligibility lists expire when an individual is chosen from them. Chapter 411 does not control an employee's sick leave. (Blumberg to Redmond, State Senator, 1-5-77) #77-1-2

Honorable James M. Redmond, State Senator: We have received your opinion request of November 24, 1976, regarding Chapters 400 and 411 of the 1975 Code of Iowa. With regard to Chapter 400 you ask how long the chiefs' civil service eligibility lists are valid. Regarding Chapter 411 you ask whether an employee must use his or her sick leave while off duty because of an injury of the heart or lung.

Section 400.13 of the Code provides that the chiefs of the police and fire department shall be selected from the chiefs' civil service eligibility lists. These lists are determined by original examination open to all those applying. Section 400.11, as amended by §3, Ch. 200, Acts of the 66th G.A. (1975) provides in pertinent part:

"Except where such preferred list exists, persons on the certified eligible list for promotion shall hold preference for promotion two years following the date of certification, after which said lists shall be canceled and no promotion to such grades shall be made until a new list has been certified eligible for promotion."

At first glance this section appears to answer your question. However, there is a difference between a promotional and original examinations. Section 400.8 concerns the original examination. Section 400.9 speaks to promotional examinations. The first paragraph of §400.11 provides that the commission shall, within ninety days after each competitive examination for *original appointment or* promotion, certify a list. The paragraph first quoted from §400.11 speaks only to promotional examinations. Section 400.13 provides that the *original* examinations for the chiefs' lists shall be open to all persons applying "whether or not members of the employing city." Because this is termed an original examination, the third paragraph of §400.11 does not apply. There are other reasons just as compelling why §400.11 does not apply, but we need not discuss

them. Therefore, the only logical interpretation that can be applied to §400.13 is that once a chief is selected the list expires.

Your second question concerns sick leave under Chapter 411. You make reference to §§411.6 and 411.15. Section 411.6 concerns retirement benefits. Subsections 3 through 7 speak to disability retirement. You make reference to the third paragraph of subsection 5. That paragraph appears only to apply to §411.6. Thus, where the legislature speaks to a disability retirement for a disease, "disease" is defined by that third paragraph. If one operates under §411.6, it is presumed that the disability is permanent and the employee is retired with benefits. Under those circumstances sick leave would not come into play.

We assume that you are referring to an individual who suffers from a disease as defined in §411.6(5), but is not permanently disabled. The fact that the city pays the hospital and medical expenses is not controlling. First, §411.15 speaks only to an injury. Second, there is nothing in that section or any other which provides that the payment of medical expenses by a city relieves the employee from having to use sick leave. Chapter 411 does not speak to the availability or use of sick leave. A city, however, could set up a system whereby employees injured while on the job do not have to use their sick leave.

Accordingly, we are of the opinion that the chiefs' civil service eligibility lists expire when an individual is chosen from them. There is nothing in Chapter 411 which controls an employee's sick leave.

January 7, 1977

CONSTITUTIONAL LAW: GENERAL ASSEMBLY: QUALIFICATIONS OF MEMBERS. Art. III, §7, Const. of Ia.; §2.6, Code of Iowa, 1975. Either house of the General Assembly may, at any time, during the term of office of one of its members, pass on the qualifications of the member, and this power cannot be limited by statute. That paragraph of OAG Turner to Executive Council, 12-3-76 (#76-12-2) in conflict herewith is hereby withdrawn. (Turner to Senator Hill, 1-7-77) #77-1-3

The Honorable Philip B. Hill, State Senator: You have questioned, and asked me to reconsider, a portion of my opinion to the Executive Council dated December 3, 1976, in which I decided that it was 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, and in which I stated, *inter alia*:

"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."

Thereafter, I cited Article III, §7, Constitution of Iowa, which 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."

You point out that mere statutes such as Chapters 57 and 59 of the Code, cannot limit the power of a house of the General Assembly to judge the qualifications of its members. Of course, you are correct. In fact, I said as much in an opinion to Representative Varley, *1974 OAG 459*. See also *Bond v. Floyd,* 385

U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966); *Powell v. McCormack,* 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); 34 A.L.R.2d 155, 171 and other authorities cited at pages 463 to 469 of 1974 OAG.

Section 2.6, Code of Iowa, 1975, provides:

"The members reported by the committee as holding certificates of election from the proper authority shall proceed to the permanent organization of their respective houses by the election of officers *and shall not be challenged as to their qualifications during the remainder of the term for which they were elected."* (Emphasis added.)

72 Am.Jur.2d 443, States §44 provides:

"At any time, and at all times during the term of office, each house is empowered to pass on the present qualifications of its own members."

See also *State v. Gilmore,* 20 Kan. 551 (1878) and *Wixson v. Green,* 521 P.2d 817 (Okla. 1974).

State v. Gilmore, supra, says *inter alia:*

"It [either house] may appoint a committee to examine and report, but the decision must be by the house itself." 20 Kan. at 554.

From these authorities, it is my opinion that the *italicized* language of §2.6, cited above, is unconstitutional and the paragraph of my opinion which you question is hereby withdrawn.

In addition to the foregoing authorities, there seem to be cases which hold that the courts will entertain an action in *quo warranto* to test the title of a legislator to his office, or the very validity of a legislative body. *Attorney General ex rel. Wertz v. Rogers,* 56 N.J.L. 480, 28 Atl. 726, 29 Atl. 173, 23 L.R.A. 354 (1894).

January 10, 1977

MUNICIPALITIES: Incompatibility — The positions of city attorney and part-time magistrate are incompatible. (Blumberg to Rabedeaux, State Senator, 1-10-77) #77-1-4

Honorable W. R. Rabedeaux, State Senator: We have your opinion request regarding a possible conflict of interest and apologize most deeply for the delay in this response. Under your facts, an individual is serving as both city attorney and part-time magistrate. As the magistrate he hears cases concerning his city's ordinances. The city, at times, hires another attorney to prosecute the city cases. However, the full-time city attorney does sit as magistrate at these proceedings. You ask whether he can continue to occupy both positions.

The issue is whether an incompatibility of positions exists. The case of *State ex rel. Crawford v. Anderson,* 1912, 155 Iowa 271, 273, 136 N.W. 128, sets forth the criteria for incompatibility:

"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,* (15 Iowa 538). 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.' ... 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 consideration of public safety, for an incumbent to retain both'." (citations omitted)

See also, *State ex rel. Le Buhn v. White,* 1965, 257 Iowa 660, 133 N.W.2d 903.

Our office has held that a city attorney cannot also occupy the position of county attorney. See #76-7-8, issued July 14, 1976. We do not see any difference between the situation in that opinion and the one that now confronts us. At the very least, public policy must dictate that this individual should not be both city attorney and magistrate at the same time. The reasons are obvious.

Even if this was not an incompatibility, it would still constitute a very serious conflict of interest. When sitting as magistrate he should not have heard cases involving the city if he was also city attorney. These reasons are also quite obvious. Accordingly, we are of the opinion that an individual cannot occupy the positions of city attorney and part-time magistrate at the same time. Because this is an incompatibility he *ipso facto* vacates the prior position by accepting the latter one.

January 10, 1977

WORKMEN'S COMPENSATION: §86.8, Code of Iowa, 1975. Pursuant to the duties specified in §86.8, the Industrial Commissioner may employ an actuarial student to produce probability tables in a form useful to the intended purpose of §85.45(4). (Jackwig to W. C. Wellman, Secretary, Executive Council of Iowa, 1-10-77) #77-1-5

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: In your letter dated December 16, 1976, you request an opinion in regard to the following request made by Milton L. Test, Assistant Industrial Commissioner, in a letter dated December 9, 1976, and addressed to the Executive Council of Iowa:

"Iowa Code Section 85.45(4) indicates the Iowa Industrial Commissioner shall designate probability tables for death and remarriage for use in computation of claims of widows and widowers. We have been unable to locate reliable probability tables in a form useful to the intended purpose. We have, however, located sufficient data to actuarially build such tables. Additionally, we have been in contact with a fourth year actuarial student at Drake University who has agreed to produce the required probability tables at a cost of $125."

"The purpose of this letter is to seek approval of this payment as provided in Code Section 86.8."

Section 86.8, Code of Iowa, 1975, provides the Industrial Commissioner with the following duties and authority:

"86.8 Duties. It shall be the duty of the commissioner:

"1. To establish and enforce all necessary rules not in conflict with the provisions of this chapter and chapters 85, 85A and 87 for carrying out the puposes thereof.

"2. To prepare and distribute the necessary blanks relating to computation, adjustment, and settlement of compensation arising thereunder.

"3. To prepare and publish statistical reports and analysis regarding the

cost, occurrence and sources of employment injuries. * * *

"5. In general to do all things not inconsistent with law in carrying out said provisions according to their true intent and purpose. * * *

"In carrying out the duties and responsibilities under this chapter, the industrial commissioner may...employ experts and consultants or organizations in order to empeditiously, efficiently, and economically effectuate the purposes of this chapter. The provisions of this paragraph are subject to approval by the executive counsel where required by law. ..."

Iowa case law makes it clear that the Industrial Commissioner possesses powers that are expressly granted and those that are necessarily implied, that the legislature intended to place administration of the Workmen's Compensation Act very largely in the Industrial Commissioner, and that the terms and provisions of the statute should be liberally construed to effectuate the purposes of the Act. *Brauer v. J. C. White Concrete Co.*, 253 Iowa 1304, 115 N.W.2d 202 (1962); *Tebbs v. Denmark Light & Telephone Corp.*, 230 Iowa 1173, 300 N.W. 328 (1941); *Comingore v. Shenandoah Artificial Ice, Power, Heat & Light Co.*, 208 Iowa 430, 226 N.W. 124 (1929).

It is the opinion of the Attorney General that the Industrial Commissioner may employ the fourth year actuarial student to produce the probability tables for death and remarriage, which the Industrial Commissioner may then designate for use in computation of claims of widows and widowers.

January 10, 1977

STATE OFFICERS AND DEPARTMENTS: IOWA EGG COUNCIL; Egg Checkoff. §§196A.15, 196A.17, 196A.18 and 196A.23, Code of Iowa, 1975. The expression "payment of tax" as found in §196A.18 refers to the time when the tax is paid to the Egg Council rather than the time when the purchaser withholds the tax from the producer. (Haesemeyer to Wells, Executive Director, Iowa Egg Council, 1-10-77) #77-1-6

Mr. Russell D. Wells, Executive Director, Iowa Egg Council: You have requested an opinion of the Attorney General relative to refunds of egg excise tax assessments paid under §196A.18, Code of Iowa, 1975, in cases where remittance of the assessment has been delayed in violation of §196A.15.

Specifically you state:

"We realize that violation of Section 196A.15 by failure to pay the tax is described as a misdemeanor; and also that refunds must be paid by the Egg Council if properly requested by the taxpayer within sixty days of the date of payment. Our question is whether there is any other provision in the Code which would relieve the Council of a need to honor requests for refund of assessments paid long after due by a taxpayer who has knowingly, willfully and repeatedly violated Section 196A.15 and who has paid the tax only after his violations have been noted and brought to his attention.

"We would also like to request an Attorney General's opinion or interpretation of the meaning to be applied to the expression, 'payment of the tax', line six Section 196A.18, Code of Iowa. Is an assessment to be considered 'paid' when it is received by the Iowa Egg Council as a remittance from an egg processor who had previously withheld it from his payment to a producer for purchase(s) of eggs; or at the time it is withheld from the processor's payment to the producer; or at some other time?

"This question is related to the matter of refunds. Typically, and as provided

by Section 196A.15, an egg processor remits to the Egg Council at the end of each calendar quarter the assessments he has withheld from his payments to producers during the immediately preceding three months. If such assessments are considered 'paid' on the date the Council receives the processor's remittance, then a producer who wishes to request and receive a refund of his assessments would have sixty days from the date of such receipt in which to file a valid request for refund.

"If, however, each individual assessment is considered 'paid' at the time of the sale and the withholding of the assessment, then an assessment could readily be outlawed for refund by passage of more than sixty day's time before the money is received by the Egg Council. (Producers may normally sell eggs and be subject to an assessment as often as seven days per week or as infrequently as once per week or only one time to a particular processor in a calendar quarter.)
* * *"

Sections 196A.15, 196A.17 and 196A.18, Code of Iowa, 1975, provide respectively:

§196A.15

"Tax. If approved by a majority of voters at a referendum, a tax to be set by the council at not more than five cents for each thirty dozen eggs sold by a producer will be imposed on the producer at the time of delivery to a purchaser who will deduct the tax from the price paid to the producer at the time of sale. If the producer sells eggs to a purchaser outside the state of Iowa, the producer shall deduct the tax from the amount received from the sale and shall forward the amount deducted to the council within thirty days following each calendar quarter. If the producer and processor are the same person, then he shall pay the tax to the council within thirty days following each calendar quarter."

§196A.17

"Egg fund. Subject to the provisions of section 196A.15, the tax imposed by this chapter shall be remitted by the purchaser to the Iowa egg council not later than thirty days following each calendar quarter following collection of the tax. Amounts collected from the tax shall be deposited in the office of the treasurer of state in a separate fund to be known as the Iowa egg fund."

§196A.18

"Refunds. A producer who has paid the tax may, by application in writing to the council, secure a refund in the amount paid. The refund shall be payable only when the application shall have been made to the council within sixty days after payment of the tax. Each application for refund by a producer shall have attached thereto proof of tax paid. The proof of tax paid may be in the form of a duplicate of certified copy of the purchase invoice by the purchaser."

In our opinion, the expression "payment of tax" as found in §196A.18 refers to the time when the tax is paid to the Egg Council. It is to be observed that a processor has up to thirty days after the end of each calendar quarter within which to remit the tax to the Council on purchases during such calendar quarter. To conclude otherwise then we would have present situations wherein producers would be filing applications for and receiving refunds of taxes which had not yet been received by the Egg Council. In answer to you first question, we are unaware of any other provision in the Code which would relieve the Egg Council of its duty to make a refund to a purchaser who has violated §196A.15 by failing to timely remit the tax. However, such violation is punishable as a misdemeanor under §196A.23.

January 11, 1977

HIGHWAYS: Indivisible Loads. §§321.454 and 321E.9, Code of Iowa, 1975; §17, Ch. 171, Acts, 66th G.A., First Session. Two 5 foot bales of hay formed into one 10 foot wide unit does not become an indivisible load for purposes of receiving a permit for movement of an overwidth load. (Schroeder to Lounsberry, Secretary of Agriculture, 1-11-77) #77-1-7

The Honorable R. H. Lounsberry, Secretary of Agriculture: By your letter of December 13, 1976, you have requested an opinion of the Attorney General with respect to the following question:

"If two 5 foot wide bales of hay were wired, speared or otherwise fastened together after being loaded on the transporting vehicle, thus forming a 10 foot width, would the load be sufficiently 'indivisible' to qualify for a single trip permit?"

Section 321.454, Code of Iowa, 1975, as amended by §17 of Ch. 171, Acts of the 66th G.A., First Session, provides to-wit:

"321.454 Width of vehicles. The total outside width of any vehicle or the load thereon, [except loose hay or straw], shall not exceed eight feet. *However, if hay, straw, or stover moved on any implement of husbandry and the total width of loan of the implement of husbandry exceeds eight feet in width, the implement of husbandry shall not be subject to the permit requirements of chapter three hundred twenth-one E (321E) of the Code. If hay, straw, or stover is moved on any other vehicle subject to registration, such moves shall be subject to the permit requirements for transporting load exceeding eight feet in width as required under chapter three hundred twenty-one E (321E) of the Code."* (Words in brackets donate deletion)

That portion of Section 321E.9, Code of Iowa, 1975, pertinent to the question is quoted as follows:

"Except as provided in section 321E.3 and subject to the discretion and judgement provided for in section 321E.1, single trip permits shall be issued in accordance with the following provisions:

"1. Vehicles with *indivisible loads* having an overall width not to exceed 12 feet, five inches...may be moved for unlimited distances." (emphasis added)

You have stated drought conditions in northern Iowa make it imperative that hay be transported from other sections of the State. You have also stated that much of the available hay is baled into 5 foot widths, and unless 2 bales can be formed into a single 10 foot unit, it is not economically feasible to move the hay.

Blacks Law Dictionary defines indivisible as follows: Not susceptible of division or apportionment, inseparable, entire.

With this definition in mind, and in view of the nature of the product involved, I do not believe fastening two bales of hay together results in an indivisible unit. Each could be readily separated from the other without loss of value or utility. The unit would not be formed because its use required it, but rather because its difficulty of transportation would be eased.

Even if one were to assume the bales could be so joined, the unit formed is but one of many separate units which will make up the entire load. Clearly each unit is separable from the others.

It is therefore my opinion that fastening two 5 foot wide bales of hay together (however done) does not constitute an indivisible load, within the meaning

of §321E.9 of the Code of Iowa, 1975.

January 11, 1977

TOWNSHIPS: Fire Protection—§359.43, Code of Iowa, 1975. The tax for fire protection must be uniform throughout a township, except for those areas within a city or benefited fire district. (Blumberg to Peckosh, Jackson County Attorney, 1-11-77) #77-1-8

Thomas F. Peckosh, Jackson County Attorney: We have your opinion request regarding tax levies for township fire protection. You ask whether the township trustees may divide the township and then tax each division a different amount.

We have previously held that a township may be divided for fire protection. See, opinions #76-2-11 and #76-9-11. In 1968 O.A.G. 641 this office held that townships could be divided with different tax levies for each division. At that time §359.43 provided that townships could levy an annual tax on the taxable property "in the township, *or portion thereof*...." [Emphasis added]. That section, as amended by §7, Ch. 194, 66th G.A. (1975), is similar except that "or portion thereof" was stricken. Therefore, even though a township can be divided for fire protection, the tax shall be uniform throughout the township, except for those portions within a city or benefited fire district.

January 11, 1977

MUNICIPALITIES: Civil Service; Civil Rights — §§80B.11, 400.7, 400.9 and 601A.7, Code of Iowa, 1975. Employees not having civil service status may be "blanketed in" by action of the civil service commission. Employees not having civil service status are not blanketed in merely by the length of their employment. An employee with civil service status may not fill a vacancy in a lower position except by an entrance examination pursuant to §400.9(3). Minimum age requirements for policemen must not be in conflict with the eighteen year old provision in §80B.11. Maximum age requirements are violative of the Iowa Civil Rights Act unless reasonably based upon the nature of the position. (Blumberg to Bina, State Representative, 1-11-77) #77-1-9

Honorable Robert F. Bina, State Representative: We have received your opinion request regarding civil service. Under your facts, it appears that a question exists whether the city employees of Davenport have civil service status. From 1963 to 1971 there was little, if any, testing done for civil service positions except for police, fire and clerical positions. In 1971 tests were given for housing and building inspectors. In 1974 the civil service commission blanketed positions in all city departments except those under boards and commissions. In June, 1976, the only board or commission employees blanketed were those in the Parks and Public Service departments. You ask the following questions:

"A. With the proceeding as background, the Commission has the following questions:

"1. Do the employees who have been given Civil Service status by the 'blanket' procedures just described have Civil Service status?

"2. Are the employees of the other boards and commissions or employees who have been hired for the different departments without going through the Civil Service Commission, who have served more than six months, lawfully

entitled to Civil Service status even though the official 'blanket' order has not been made by the Commission?

"3. Can an employee who has been promoted to a higher class position and has retained that higher position for several years, request a transfer and receive an appointment to the former lower class position without retesting and recertification? What would the answer be if there is a current certified list of Civil Service employees eligible for promotion to the same position?

"B. The Commission has attempted to give Civil Service examinations when requested to do so but hiring is being done without notifying the Commission. Does the Commission have the authority to prevent this practice and if so, how can the Commission implement it?

"C. The Iowa Law Enforcement Academy has set minimum standards of age for entry into the Police Department. Its rules also allow the establishment of additional recruitments standards. The only age requirement that the Davenport Civil Service Commission has set is that the applicant must be at least 18 years of age at the time of examination. If the Commission were to change the age requirement of 18 to 35 or 21 to 35, is this a violation of the Iowa Civil Rights Act?"

We are under the assumption that your city has been subject to civil service for some time but has not subjected your employees to civil service until recently.

Your problem appears to be unique. The employees should have been hired pursuant to civil service. However, for some reason they were hired without being made subject to civil service. Your first question actually is whether those employees have civil service status since they were not made subject to civil service at the time they were hired, at which time your city was subject to civil service. There is nothing in Chapter 400 of the Code which speaks to this situation. Section 400.7 provides for original civil service appointments when the chapter becomes applicable to a city.

"Any person regularly serving in or holding any position in the police or fire department, or a nonsupervisory position in any other department, which is within the scope of this chapter on April 16, 1937, in any city, who has then five years of service in a position or positions within the scope of this chapter, shall retain his position and have full civil service rights therein.

"Persons in nonsupervisory positions, appointed without competitive examination, who have served less than five years...on such date, shall submit to examination by the commission...."

This differs somewhat from the 1946 Code (§365.7) when it read in part:

"Any person regularly serving in or holding any position in the police or fire department, or a nonsupervisory position in any other department, which is within the scope of this chapter *on the date this act becomes effective in any city,* who has then five years of service in a position...within the scope of this chapter, shall retain his position...." [Emphasis added]

Section 400.7 is the general provision to blanket in employees when a city becomes subject to civil service. We have recently issued an opinion on the blanketing of positions in a reclassification. See #76-8-15, issued August 30, 1976. There we stated that in the absence of a statute, a city or commission has the discretion whether to blanket in employees when a new or reclassified position is made. Unfortunately, that does not solve your problem.

McAdams v. Barbieri, 1956, 143 Conn. 405, 123 A.2d 182, is an analogous case. There a former employee was appealing his discharge. He had been hired in 1946, purportedly on a temporary basis, without qualifying under civil service. The city charter at that time mandated civil service qualifications for employment. Three years later a new charter provision was enacted revising the civil service administration. Classifications were not changed, however. Eight years after the initial hearing the employee was discharged. The court stated:

"The charter at the time the plaintiff was appointed provided that an appointment made in violation of it was null and void, and the controller was charged with the responsibility of enforcing conformance with the civil service provisions. New Haven Charter, §271 (1928). It is true that an employment not in conformance with civil service law and regulations can never become lawful by virtue of the unlawful occupation of a permanent position. *Howe v. Civil Service Commission,* 128 Conn. 35, 37, 20 A.2d 397. Furthermore, the plaintiff's invalid appointment could not be made valid ab initio by subsequent legislative enactment. *Montgomery v. Town of Branford,* 107 Conn. 697, 705, 142 A. 574; Shay's Appeal, 51 Conn. 162, 164." 123 A.2d at 189.

However, the new charter had the following provision: (1) All non-professional employees holding permanent positions who were appointed at least one year previous to the effective date of the new charter, whose positions are included in the classified service by the new charter, shall immediately become members of the classified service with full civil service status; (2) All persons appointed under civil service prior to the effective date of the new charter are confirmed as having full civil service status; (3) All persons provisionally appointed within one year of the new charter shall be examined by the board within ninety days. The court held that the first part of the provision "froze" the plaintiff in and gave him full civil service status.

Your city appears to have done the same thing. In 1974, when many employees were finally brought under civil service, the commission entered an order that: (1) Employees hired prior to November 15, 1973, will be certified and their probationary period will end on May 15, 1974; (2) Employees hired between November 15, 1973, and January 18, 1974, will be certified and their probationary period will be six months from the date of hiring; (3) Employees hired after January 18, 1974, are temporary, subject to an examination. This attempt at "blanketing in" those employees of long standing appears to solve the problem. You also mention a similar action taken in 1976. Without seeing the order we cannot state that those employees are covered. However, if it is similar to the earlier one the employees have probably been "blanketed."

You also mentioned that some employees still have not been certified. Pursuant to *McAdams,* they might be in a position where they could be discharged because their appointments were not lawful. It is incument upon the city to rectify this situation as soon as possible. If hiring is being done by city employees or officials without notifying the civil service commission, the commission should insist that it be notified. Although it is difficult to imagine that a civil service commission would not be able to ascertain if any new employees have been hired, when it finds out that such a situation exists it should immediately rectify it pursuant to its rules. We do not know what the ordinances of your city prescribe on civil service. The commission should ascertain from them if any penalty exists for violation.

Your third question concerns an employee who, after being promoted to a higher class and having worked in that higher class for some time, desires to

transfer to a lower class position. You ask whether that employee must qualify for placement in that lower position by examination. Section 400.9 prescribes promotional examinations. Under your facts the employee would not be seeking a promotion in the normal sense of that word. However, subsection three of §400.9 provides:

"3. Hereafter, all vacancies in the civil service grades above the lowest in each shall be filled by promotion of subordinates when such subordinates qualify as eligible, and when so promoted, they shall hold such position with full civil service rights in the position. If, however, a current employee does not pass one of two successive promotional examinations and otherwise qualify for the vacated position, an entrance examination for the vacated position may be used to fill it."

It appears from this section that vacancies are filled by promotion of *subordinates.* The only exception is when no subordinate qualifies and the position is filled by an entrance examination. Since the employee in question is not a subordinate, he or she would not be able to fill that lower position. That employee may be allowed to take the entrance examination for that position.

Finally, you ask whether the city can legally set age requirements for the police department of 18 to 35 or 21 to 35. In a prior opinion, 1974 O.A.G. 132, we held that a city could not set an age requirement higher than that set by §80B.11 of the Code, which sets the age at eighteen. Maximum age requirements present a different problem as evidenced by several cases found in the Employment Practices Decisions: *Judson v. Apprenticeship and Training Council,* 4 EPD paragraph 7769 [Ore. Ct. App. 1972]; *Hodgson v. Greyhound Lines, Inc.,* 7 EPD paragraph 9286 [U.S.C.A. 7th Cir. 1974]; and a decision of the Connecticut Commission on Human Rights, 1 Employment Practices paragraph 5114.

Our office has issued a recent opinion regarding your city and maximum age requirements. See #76-3-9 to Cusack. There, we stated:

"On May 2, 1973, this office issued an opinion (1973 OAG 116) in which maximum age limits for employment were 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) [sic], 1975 Code of Iowa."

The 1973 opinion held that §601A.7 of the Code does not permit age limits for entry into law enforcement positions unless the limit is based upon the nature of the particular position. We still adhere to these prior opinions. Although we cannot state that the age of 35 is or is not violative of the Iowa Civil Rights Act, we must caution that any maximum age limit must bear a reasonable relation to the duties and requisites of the position.

Accordingly, we are of the opinion that the employees mentioned in your first question are probably "blanketed in," although those employees mentioned in question two are not. An employee, as mentioned in you third question would only be able to fill a lower position pursuant to an entrance examination. We have no sure-fire method by which your civil service commission can prevent the city from hiring employees without going through civil service procedures. Finally, a minimum age requirement for law enforcement must be in

compliance with §80B.11. A maximum age requirement will violate the civil rights act unless it is reasonably based upon the nature of the position.

January 11, 1977

COUNTIES: LAW ENFORCEMENT: Agreements. Senate File 1210, 66th G.A. (1976); Chapter 28E and §312.8, Code of Iowa, 1975. A county cannot enter into agreements in which unincorporated communities or business corporations would pay for law enforcement. (Linge to Svoboda, State Representative, 1-11-77) #77-1-10

The Honorable Linda A. Svoboda, State Representative: You requested an opinion of the Attorney General on questions about possible agreements between certain public and private agencies regarding law enforcement services.

Your first question states:

"Can an unincorporated community contract with a county Board of Supervisors for law enforcement services under Chapter 28E? That is, the community population is more dense than the normal rural area and is in need of a sheriff's deputy or peace officer to provide more than the normal patrol that is provided an ordinary rural area."

Chapter 28E, Code of Iowa, 1975, grants to public and private agencies the authority to enter into agreements for joint and cooperative action (section 28E.4).

Section 28E.2 defines private and public agencies wherein it states, in relevant part:

"For the purposes of this chapter, the term 'public agency' shall mean any political subdivision of this state.... The term 'private agency' shall mean an individual and any form of business organization authorized under the laws of this or any other state."

A county would appear to be a public agency since it is a political subdivision of the State. It is assumed that an unincorporated community is a group of houses and, perhaps, businesses located relatively close together. The people therein have not chosen to incorporate as a municipality nor otherwise organize as a governmental entity separate or distinct from the county. The community has no separate political existence.

An earlier opinion of the Attorney General, Blumberg to Brandt, et al., November 9, 1976, provides a comprehensive compilation of criteria characterizing a political subdivision. A review of those criteria requires the conclusion that an unincorporated community is not a political subdivision. It would not, therefore, be a public agency as defined in Section 28E.2. The community does not appear to be a business organization and, thus, not a private agency either. Therefore, the unincorporated community would not be authorized by Chapter 28E to enter into the kinds of agreements anticipated by that Chapter.

Your second question asks if a business corporation could execute a Chapter 28E agreement with a public agency in which the corporation would pay for the cost of a law enforcement officer that would be assigned to protect the corporation's property.

The Legislature has enacted several statutes prohibiting persons from giving, and public officials from receiving, valuable consideration for the performance of public acts. Section 739.9, Code of Iowa, 1975, makes the receipt of any

money or other valuable thing by the sheriff, *et al.*, from any person, "as a consideration or inducement for omitting or delaying to arrest any defendant," a criminal offense. Section 739.11, Code of Iowa, 1975, makes the giving of a gift, or an offer or promise of a gift, by any person intended to influence a public officer's official acts, a criminal offense. Section 741.1, Code of Iowa, 1975, makes the receipt by a public official of, and the offer, promise or giving by a person of, a "gift, commission, discount, bonus or gratuity," connected with a business transaction, a criminal offense.

The purpose of these enactments is discussed by the Iowa Supreme Court in *State v. Prybil,* 1973, 211 N.W.2d 308. In interpreting the scope and purpose of Section 741.1, the Court quoted with approval the language of a decision interpreting similar federal statutes:

" 'The awarding of gifts thus related to an employee's official acts is an evil in itself, even though the donor does not corruptly intend to influence the employee's official acts, because it tends, subtly or otherwise, to bring about preferential treatment by Government officials or employees, consciously or unconsciously, for those who give gifts as distinguished from those who do not.*** The iniquity of the procuring of public officials, be in intentional or unintentional, is so fatally destructive to good government that a statute designed to remove the temptation for a public official to give preferment to one member of the public over another, by prohibiting all gifts 'for or because of any official act,' is a reasonable and proper means of insuring the integrity, fairness and impartiality of the administration of the law.' *United States v. Irwin,* 354 F.2d 192, 196, (2 Cir. 1965), cert. denied, 383 U.S. 967...."

Although Section 28E.4 authorizes agreements between "one or more public or private agencies for joint or co-operative action," we do not believe the Legislature intended to authorize agreements whereby public officials would be given compensation by a private corporation to perform their official duties. The arguments leading to the conclusion that such an agreement would be against public policy are well put in an early decision of the United States Supreme Court:

"Indeed, the law is general that agreements upon pecuniary considerations, or the promise of them, to influence the conduct of officers charged with duties affecting the public interest, or with duties of a fiduciary character to private parties, are against the true policy of the State, which is to secure fidelity in the discharge of all such duties. Agreements of that character introduce mercenary considerations to control the conduct of parties, instead of considerations arising from the nature of their duties and the most efficient way of discharging them. They are, therefore, necessarily corrupt in their tendencies. As we said in *Tool Company v. Norris,* 2 Wall. 48, 56, 'that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution,' so we say of agreements like the one in this case; they are against public policy because of their corrupt tendency, whether lawful or unlawful means are contemplated or used in carrying them into execution." *Woodstock Iron Co. v. Extension Co.,* 129 U.S. 643, 662-663 (1889).

The iniquity of the type of agreement you suggest is its possibility of affecting the board of supervisors' and sheriff's administration of law enforcement services. In making budget allocations, the board would be bound to consider the interests of the corporation, perhaps preferentially, rather than the interests of the county as a whole; in making funding requests, the sheriff might

"consciously or unconsciously" consider the needs of the corporation rather than the needs of the sheriff's department. By introducing such considerations into the administrative decision-making process, such an agreement "corrupts" the entire decision-making process.

Such agreements are void, whether or not they can be shown to actually corrupt the public decision-making process they are void because of their tendency to corrupt. *State v. Prybil, supra* at 312. Therefore, no matter what provisions are specified in the agreement to protect against preferential treatment of the private business corporation, the agreement itself would be unenforceable as against public policy.

It is our opinion that an agreement between a county and a private business corporation providing for the payment by the corporation for law enforcement services is not authorized by Chapter 28E of the Iowa Code.

You further ask whether an unincorporated community may participate in a county wide "unified law enforcement district" established pursuant to Senate File 1210, 66th G.A. (1976).

Section 1 of Senate File 1210 provides:

"DEFFINITION. For the purpose of this Act, the term 'unified law enforcement district' means a district established by agreement under the provisions of chapter twenty-eight E (28E) of the Code by counties, or portions thereof, or cities to provide law enforcement within the boundaries of the member political subdivisions."

Since an unincorporated community does not have the legal capacity to enter or approve an agreement under the provisions of Chapter 28E, it would therefore be unable to do so under Senate File 1210.

Other questions you raised regarding the manner in which an unincorporated community would contribute its share of funding to such a district exemplifies the problems inherent in a finding that an unincorporated community has the authority to enter into an agreement to form such a district. It is asked if the unincorporated community could be taxed as a town or if the auditor can "define the boundaries of the unincorporated community." In fact, such a community appears not to be a town and has no boundaries. It seems only an undefined portion of the entire unincorporated area of the county and can only contribute to the funding of such a district on the basis of its identity with the county government. The county is the "public agency" which would represent the unincorporated community's interest in the creation of a law enforcement district and any taxation must be apportioned over all the unincorporated area of the county under the provisions of Senate File 1210.

You also question whether legal authorization for the levying of a tax against the unincorporated community, as a separate entity, can be found in the inclusion of "or portions thereof" in Section 1 of Senate File 1210, that speaks of agreements "by counties, or portions thereof, or cities."

A basic rule of statutory construction is that all parts of a statute must be construed together, and that the words of a statute must be interpreted in a "sensible, practical, workable and logical" manner. *Northern Natural Gas Co. v. Forst*, 1973 205 N.W. 2d 692.

All sections of Senate File 1210, other than Section 1, speak only of the capacity of counties or cities to establish the terms of any such agreement. The

interpretation of "or portions thereof" which is consistent with other sections of the statute is the following:

When a city's boundary extends into two or more counties, the city may enter an agreement with one of the counties of which it is a part to create a unified law enforcement district even though the boundary of the newly created district might include a "portion" of a county not a party to the agreement.

This would appear to be a sensible and practical construction of the Act as a whole. To interpret "or portions thereof" as a recognition of the capacity of unincorporated communities to make agreements with the county would, in effect, be saying the county can make an agreement with itself; the unincorporated community as stated above, has no identity other than as part of the county.

You next ask if the statute that provides that certain unincorporated communities are to be considered incorporated cities for the purpose of distributing road use tax funds authorizes the use of Chapter 28E or Senate File 1210 by such communities. This statute, Section 312.8, Code of Iowa, 1975, provides, in part:

"Where a tract of land is owned by a corporation organized under the provisions of Chapter 491 with assets of the value of one million dollars or more, and having one or more platted villages located within the territorial limits of said tract of land, all of the territory within the plats of said villages with their addition or subdivisions shall, for the purposes of this chapter, be deemed to be one incorporated city. All funds to become due to said villages so consolidated shall be paid to the county auditor of the county in which said tract of land and said villages are situated. Said fund shall, thereupon, be administered and expended by the county board of supervisors of said county for the construction, reconstruction, repair, and maintenance of roads and streets within the plats of such villages in the same manner and with the same powers and duties as city councils in cities."

Although this statute[1] permits the establishment of the boundaries of an unincorporated community and grants such areas the designation of unincorporated cities, it does so only "for the purposes of this chapter," Chapter 312. The criteria necessary to create a political subdivision are not found. In fact, this statute specifically recognizes the county as the proper political entity to supervise the manner in which the fund shall be administered and expended. These entities are not granted the authority to enter into Chapter 28E and Senate File 1210 agreements.

Your final question asks if a person living in an unincorporated community could vote to join a unified law enforcement district as a member of the unincorporated community or only as a "rural citizen of the county."

Since, as stated above, Senate File 1210 authorizes the creation of a unified law enforcement district by counties and cities, the people within an unincorporated community may participate in the creation of such a district only as residents of the county, i.e., as "rural citizens of the county."

An unincorporated community that needs additional law enforcement services should be able to obtain such services from its government, the county, within the existing democratic processes. Receiving basic services by paying more money, through a contract, runs counter to public policy because all should receive equal treatment by government. Those who have more money should not, for that fact alone, receive more or better services. The pressure

this kind of arragement could put on other communities and people is obvious and this pressure can easily create cynicism and mistrust of government.

The General Assembly could enact a statute that would allow the creation of law enforcement districts for such areas, not whole counties, or cities, but has chosen not to do so.

January 18, 1977

SCHOOLS: Special Education. The articles of incorporation of the Society for Hope Haven School enunciate a purpose of a Christian mission of education for handicapped children and thus disqualify the institution from educational aid paid from public funds. (Nolan to DenHerder, State Representative, 1-18-77) #77-1-11

The Honorable Elmer H. DenHerder, State Representative: On November 29, 1976, you submitted a letter requesting an opinion on certain questions submitted by Attorney Tom McGill of Rock Valley, Iowa, regarding the "Society of Hope Haven School for Handicapped Children, Inc." The letter which accompanied your request stated that the Society for Hope Haven School for Handicapped Children is a corporation which operated a school in Rock Valley and sells its special educational services for handicapped to private individuals, as well as to public agencies responsible for special education of the handicapped. Effective July 1, 1976, the question has been raised as to whether or not the Department of Public Instruction can purchase these services from Hope Haven under the existing articles of incorporation. The letter further goes on to state that with the knowledge and acquiescence of the Department of Public Instruction, an opinion on two questions is requested:

"(1) Does ARTICLE III titled 'Purpose' and ARTICLE IV titled 'Membership' of the Articles of Incorporation of the said corporation, a copy of which is attached hereto, preclude or make unlawful the purchase of and payment for special educational services by the Iowa Department of Public Instruction from the said corporation?

"(2) If purchase of and payment for special educational services is unlawful or illegal under the said articles of the Articles of Incorporation, what specifically is objectionable?"

We have examined the Articles of Incorporation and find that in Article III, stating the purpose of the organization, is as follows:

"A purpose of this society shall be to provide not for profit Christian special education for children, who by reason of mental or physical handicap, are unable to benefit from regular instruction given in schools for normal children. This education shall be based on the Word of God as interpreted by the Belgic Confession, the Heidelberg Catechism, and the Cannons of Dort and provided regardless of race, color or creed. The purposes of this society and all of its activities are exclusively religious and charitable.

"The same spirit of Christian commitment and service, a further purpose of this society shall be to provide not for profit personnel services and facilities for the habilitation and rehabilitation of handicapped persons regardless of race, color or creed to render them fit to engage in gainful occupation."

We find Article IV, entitled "Membership" to provide:

"Section I

"Membership in this organization is open to all individuals of reformed

persuasion who subscribe to the purpose above set forth, and who contribute toward the maintenance of an institution in furtherance thereof.

"Section II

"Membership in this organization is limited and voting privileges attendant thereto shall be to members contributing annually a specific amount established by the board, and which amount may be varied annually."

The United States Supreme Court in *Meek v. Pittenger,* 1975, 421 U.S. 349, ruled that the state and/or local school districts are precluded from using any appropriation of tax monies to purchase educational services from church connected institutions. *Meek,* citing *Everson v. Board of Education,* 330 U.S. 1-16, states that "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." The Court there struck down a Pennsylvania statute providing direct aid to predominantly church-related nonpublic elementary and secondary schools, even though the aid was "ostensively limited to wholly neutral, secular instructional material and equipment" because the result inescapeably is a "direct and substantial advancement of religious activity which is impermissable under the establishment clause of the United States Constitution."

The answer to your first question then is affirmative. The answer to the second question lies in the provision of the articles which enunciate a Christian mission of education for children who are unable to benefit from regular instruction given in schools for normal children. The articles of incorporation go beyond a mere statement of the class of members in the society and in fact prescribe that all children, regardless of race, color or creed shall be educated according to "the word of God as interpreted by the Belgic Confession, the Heidelberg Catechism, and the Cannons of Dort." Such statement of purpose, no matter how worthy, disqualifies an institution as a public tax-supported school. *Knowlton v. Baumhover,* 1918, 182 Iowa 691, 166 N.W. 202.

January 18, 1977

TAXATION: Property Taxes Levied for Fiscal Year. H.F. 1200, Acts, 66th G.A., Second Session. House File 1200 does retroactively change the property tax year in Iowa from a calendar year to a fiscal year. Taxes payable in the extended fiscal year constitute taxes levied for the period January 1, 1973, through June 30, 1974. (Griger to Kopecky, Linn County Attorney, 1-18-77) #77-1-12

Mr. Eugene J. Kopecky, Linn County Attorney: You have requested the opinion of the Attorney General concerning H.F. 1200, Acts of the 66th G.A., Second Session, enacted by the legislature in 1976. As a prerequisite for understanding your questions, it is necessary to set forth the events which preceded the enactment of H.F. 1200.

Prior to the enactment of Chapter 1020, Acts of the 64th G.A., Second Session, in 1972, Iowa property taxes were levied for a calendar year period (tax year) and payable during the next calendar year i.e. 1972 taxes payable in 1973. O.A.G. Capotosto to Redmond, May 28, 1975; 1974 O.A.G. 501. The provisions of Chapter 1020 have been considered by this office in various opinions. 1974 O.A.G. 501; 1974 O.A.G. 504; 1974 O.A.G. 547; 1974 O.A.G. 585; O.A.G. Capotosto to Redmond, May 28, 1975. In the latter opinion, the Attorney General opined with reference to the tax on real estate:

"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. Section 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 §85, 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 64th G.A., 1972 Sess." * * *

"Thus, to answer your first question, it is the opinion 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." (emphasis supplied)

The above conclusion was also reached by the Attorney General with reference to the tax on personal property. 1974 O.A.G. 501. However, the legislature modified that conclusion under certain circumstances which need not be detailed herein. See §56 of Chapter 1096, Acts of 65th G.A., Second Session. The other opinions of the Attorney General also considered that Chapter 1020 did not change the property tax year from a calendar year to a fiscal year. Rather, Chapter 1020 changed the budget year for political subdivisions from a calendar year to a fiscal year.

In 1976, the legislature enacted H.F. 1200, a primary purpose of which was to expressly state that the property tax year for which the taxes were levied constitute a fiscal year rather than a calendar year. Section 1 of H.F. 1200 provides:

"The three installments of property taxes which became delinquent on April 1, 1974, October 1, 1974, and April 1, 1975, pursuant to the provisions of Chapter four hundred forty-five (445) of the Code, were the property taxes for the period beginning January 1, 1973, and ending June 30, 1974.

"The two installments of property taxes which became delinquent on October 1, 1975, and April 1, 1976, were the property taxes for the fiscal year beginning July 1, 1974, and ending June 30, 1975."

H.F. 1200 also provides in §4 thereof that the valuation of property as of January first constitutes the assessment date for an assessment year period which is a calendar year. It also states that all property tax statutes providing that claims be filed for tax exemptions or credits are to be construed to require such filing during the assessment (calendar) year. See e.g. §425.2 (homestead tax credit), §427.6 (military service tax exemption), §427A.4 (personal property tax credit), Code of Iowa, 1975. In the event no claim is required to be filed

to procure such exemption or credit, §4 states that the status of the property on the levy date of the fiscal year commencing during the assessment year determines eligibility for exemption or credit. Section 4 of H.F. 1200 then provides:

"The assessment date for property taxes for the fiscal period beginning January 1, 1973 and ending June 30, 1974, and which became delinquent during the fiscal period beginning January 1, 1974 and ending June 30, 1975, was January 1, 1973. The assessment date for property taxes for the fiscal year beginning July 1, 1974 and ending June 30, 1975 and which became delinquent during the fiscal year beginning July 1, 1975 and ending June 30, 1976 was January 1, 1974. Thereafter, the assessment date is January first for taxes for the fiscal year which commences six months after the assessment date and which become delinquent during the fiscal year commencing eighteen months after the assessment date."

The aforementioned provisions of §4 with reference to assessment dates, assessment years, and tax exemptions and credits do not alter any property tax principles existing prior to the adoption of H.F. 1200.

Section 445.36, Code of Iowa, 1975, is amended by §5 of H.F. 1200 to provide in relevant part:

"1. For fiscal years after July 1, 1975, the property taxes which become delinquent during the fiscal year shall be for the previous fiscal year."

Pursuant to §6 of H.F. 1200, the provisions of §1 are retroactive to January 1, 1973, those of §4 are retroactive to January 1, 1976, and those of §5 are retroactive to July 1, 1975.

You have posed two questions, both of which concern the effect which H.F. 1200 has upon the property taxes payable during the extended fiscal year (January 1, 1974 to June 30, 1975) and which taxes, as previously noted, were opined by this office to have been levied for the calendar year 1973.

Your first question is whether the legislature has in the enactment of H.F. 1200 provided that the taxes payable in the extended fiscal year were for the period beginning January 1, 1973 and ending June 30, 1974. You state that H.F. 1200 purports to be a clarification of Chapters 1020 and 1096 and you inquire whether the legislature "by declaring their intent" in H.F. 1200 can change the meaning of Chapters 1020 and 1096. Actually, a careful reading of the prior opinions of this office cited herein will disclose that the legislature, by adopting Chapters 1020 and 1096, did not change the meaning of the concept of a property tax year in Iowa which both prior and subsequent to the enactment of such legislation was and continued to constitute a calendar year. The opinions carefully distinquished between the tax year and the year the taxes were paid. Hence, your question is based upon an erroneous assumption. However, it is clear that §1 of H.F. 1200 did expressly change the tax year from the calendar year 1973 to a fiscal period commencing January 1, 1973 and ending June 30, 1974. Because of this legislation, the prior opinions of the Attorney General opining that the tax year constituted a calendar year are now rendered inoperative.

Your second question is whether H.F. 1200 has a retroactive effect for property taxes payable during the extended fiscal year and, as a consequence, are such taxes levied for the period January 1, 1973 through June 30, 1974. The answer is clearly yes as the provisions of §6 of H.F. 1200 state that the provisions of §1 are retroactive to January 1, 1973. Obviously, the legislature's purpose

is enacting H.F. 1200 was to change the concept of tax year from that of a calendar year to that of a fiscal year to coincide with the change and transition of the budget year for political subdivisions from a calendar year to a fiscal year, without disrupting the machinery of taxation. While it is true that the 1973 taxes have been collected during the extended fiscal year, H.F. 1200 did not increase nor decrease anyone's property taxes and the county treasurers would not collect any additional taxes levied for the period January 1, 1973 through June 30, 1974. These conclusions are fortified by the only judicial opinion on this subject which this office is aware of. In *Beaman v. Adams,* Small Claims No. SC1-385-0676, District Court of Adair County, July 30, 1976, a copy of which is attached to this opinion, the Hon. John E. Wietzke stated in relevant part with reference to the language in §1 of H.F. 1200:

"Interestingly it has come to the Courts attention that the Iowa legislature in its most recent session did pass and the Governor signed into law June 10, 1976, House File 1200 which is retroactive and in Section 1 states that the three installments of property taxes delinquent April 1, 1974, October 1, 1974, and April 1, 1975 were taxes for the 18 month period January 1, 1973 to June 30, 1974 and the ones delinquent October 1, 1975 and April 1, 1976 are for fiscal year July 1, 1974 to June 30, 1975. *This not only confirms that the change was not the assessment of an additional payment but a mere renaming to change over to a fiscal year basis...*" (emphasis supplied).

January 20, 1977

STATE OFFICERS & DEPARTMENTS: Executive Council; employment of counsel. §§13.2 and 13.3, Code of Iowa, 1975. The Executive Council has no authority to employ legal counsel at public expense to defend an individual named as a defendant in a quo warranto proceeding brought by the state to test such individual's title to the office of state senator. (Haesemeyer to Wellman, Secretary, Executive Council of Iowa, 1-20-77) #77-1-13

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: By your letter of January 17, 1977, you have requested an opinion of the Attorney General and state:

"Under date of January 12, 1977, the Honorable John Scott, State Senator, addressed a letter to the members of the Executive Council advising them of the action in 'quo warranto' brought against Senator Scott by you in Polk County District Court.

"Senator Scott asked the Executive Council, pursuant to the provisions of Section 13.3, Code of Iowa, 1975, to appoint Mr. Lee Gaudineer, Attorney at Law, Des Moines, Iowa, to represent him in this action as detailed in Senator Scott's letter, a copy of which is attached hereto.

"The Executive Council, in meeting held this date, directed this office to request of you a letter in which is stated that personnel on your staff cannot represent Senator Scott because the office of the Attorney General of Iowa has brought the action in 'quo warranto' against Senator Scott in the Polk County District Court, and that the Executive Council has the legal right to employ the services of Counsel to represent Senator Scott."

Section 13.3, Code of Iowa, 1975, as amended by §2, Chapter 1059, 66th G.A., Second Session (1976) provides:

"Disqualification—Substitute. If, for any reason, the attorney general be disqualified from appearing in any action or proceeding, the executive council shall appoint some suitable person for that purpose and defray the reasonable

expense thereof from any unappropriated funds in the state treasury. The department involved in the action or proceeding shall be required to recommend a suitable person to represent it and when the executive council concurs in the recommendation the person recommended shall be appointed."

Plainly, since the Attorney General has brought this action in *quo warranto* to test the title of Senator Scott to the office of State Senator, personnel on the staff of the Attorney General are disqualified from defending the action on behalf of Senator Scott, and we so state.

However, for reasons which we shall set forth herein, it is our opinion that the Executive Council does not have a legal right to employ the services of counsel to represent Senator Scott notwithstanding the disqualification of the Attorney General to do so. The reference to "any action or proceeding" found in §13.3, in our opinion refers back to such actions and proceedings as are described in §13.2, which provides in relevant part:

"It shall be the duty of the attorney general, except as otherwise provided by law to: * * *

"2. Prosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in his judgment, the interest of the state requires such action, or when requested to do so by the governor, executive council, or general assembly.

"3. Prosecute and defend all actions and proceedings brought by or against any state officer in his official capacity. * * *"

Thus, where the Attorney General is disqualified from appearing in any action or proceeding, the Executive Council is authorized to appoint some suitable person for that purpose only if the action or proceeding is one in which the state may be a party or interested or where the action or proceeding is brought by or against a state officer in his official capacity. The action against Senator Scott is brought against him in his individual and not his official capacity. It is brought to test his title to the office of State Senator. In effect it asks the question, by what right do you claim to hold the office you occupy. In other words, it is not an action brought against Senator Scott because of any official action he has taken as a State Senator but to determine the more fundamental question of whether or not he, as an individual, is a State Senator at all.

If the court should ultimately determine that Senator Scott failed to meet the constitutional requirement that he shall have been an inhabitant of the state one year next preceding his election (Article III, §§4 and 5, Constitution of Iowa) and for that reason was not entitled to hold the office of State Senator, the state would be in the untenable position of having used public funds to defend the title to office of one who is not entitled to such office but was instead a mere intruder into such office. If, on the other hand, it should ultimately be determined by the courts that Senator Scott holds a valid title to his office, the General Assembly could at that time, if it sees fit to do so, by two-thirds vote of each branch of the General Assembly, enact a bill to reimburse him for his expenses of defending this suit. To withhold public funds from Senator Scott to pay for his defense is consistent with the presumption and burden of proof in *quo warranto* proceedings. As stated in Mechem, Public Officers, §493, p. 322:

"When the respondent is called upon at the suit of the State to show by what

warrant he assumes to exercise the functions of a public office, the burden of proving this title rests upon the respondent. As has been seen, the State on its part is not required in the first instance to show anything, and the respondent must either disclaim or justify. The burden of proof is, therefore, upon him. * * *"

Thus, it is our opinion that there is no statutory authority for the Executive Council to employ attorneys to defend Senator Scott in this *quo warranto* action since the suit is brought against him not as a state officer but in his individual capacity and because the state has no interest, at least at this time, in the defense of this suit. As stated in 26 Am.Jur.2d p. 177, *Elections,* §363:

"In the absence of express statutory authority, a court or other tribunal deciding an election contest may not render judgment for costs in favor of the prevailing party or order that he be reimbursed for expenses he has incurred in the contest."

In addition to the foregoing, reference is made to a number of cases involving expenses of election contests found in 106 A.L.R. 928, 933. Apart from the fact that a proceeding in *quo warranto* is different in a number of respects from an election contest, it appears that in the cases cited in this annotation there were specific provisions for the imposition of costs and that the contestant seeking reimbursement had been successful in the contest. In the case of *Hull v. Eby,* 123 Iowa 257, 98 N.W. 774, a judgment that the state pay the costs of the proceedings (contest and *quo warranto* consolidated) was held unwarranted since the contestant was chargeable therewith under a statute. The statute referred to in this case was essentially the same as present Rule of Civil Procedure 304, which provides:

"Costs.

"(a) Judgment against any defendant or intervenor shall include judgment for the costs of the action. Judgment against a pretended corporation shall adjudge the costs against the person or persons acting as such.

"(b) If the action fails, the court may adjudge the costs against any private individual who brought it; otherwise they shall be paid as provided by the statutes governing costs in criminal cases."

Perhaps more in point than the annotation found in 106 A.L.R. 928 is an annotation entitled "Payment of attorney's services in defending an action brought against officials individually as within power or obligation of public body." 130 A.L.R. 736, 742. Cited therein among other cases in *McCredie v. Buffalo,* 2 How. Pr. N.S. (N.Y. 1885). In that case, it was found that a municipality had power to indemnify a city official for expenses incurred by him in defending a suit brought to remove him from office. However, in that case, the court found that the complaint challenged not only his title to the office but every act he had performed in such office, thus furnishing the necessary element of governmental interest. Other cases cited in this annotation and in supplemental decisions lend no support for the proposition that the Executive Council should in the present case agree in advance to pay from public funds for the defense of Senator Scott's title to his office.

In Florida, there have been a number of cases involving the authority of public bodies to use taxpayer funds to pay for the defense of public officials. *Peck, et al. v. Spencer,* 26 Fla. 23, 7 So. 642 (1890); *Williams v. City of Miami,* 42 So.2d 582 (Fla. 1949); *Miller v. Carbonelli,* 80 So.2d 909 (Fla. 1955); *Duplig v. City of South Daytona,* 195 So.2d 581 (Fla. App. 1st Dist. 1967); and *Estes*

v. City of North Miami Beach, 227 So.2d 33 (Fla. 1969). In some of these cases, the legality of using public funds to defend public officials was upheld while in others it was not. Moreover, not all of these cases were *quo warranto* proceedings. *Estes v. City of North Miami Beach, supra,* the last of the foregoing Florida cases, was an action to enjoin the city council from paying from city funds a special counsel employed to defend four of the seven members of the city council in a suit charging election law violations and seeking an injunction to prevent the councilmen from performing any of their duties other than legislative. In reaching its conclusion that the expenditure of the public funds was proper, the court noted that the action which had been defended was brought against a *majority* of the city council and that if the injunction sought had been granted, the city would have been prevented from continuing the operation of its business affairs during the pendency of the litigation. The court in *Estes* then went on to observe:

"Being concerned about the chaotic condition which might ensue and be confronted with the effect of such an injunction on the public welfare and property of the municipality, it was not an abuse of discretion for the city council to determine that the city had an interest which would be affected by the outcome of the proceedings."

The *Estes* court distinguished the decision in *Peck v. Spencer, supra,* an action in which a taxpayer sought a declaration that the town council was without authority to authorize the acting mayor to employ counsel to defend, at the town's expense, a suit which had been filed against the acting mayor by the defeated candidate to test the legality of the town election, noting that the election contest in the *Peck* case did not affect the ability of the town council to perform their functions and the city had no interests in the outcome. The *Estes* court also distinguished *Williams v. City of Miami, supra,* noting that the court in that case found that the city commission had no interest in a suit involving the stay of a recall election of one commissioner. *Miller v. Carbonelli, supra,* and *Duplig v. City of South Daytona, supra,* were both found by the court in *Estes* to be not in conflict with its decision, because in *Miller quo warranto* proceedings directly affected the proper governance and administration of village affairs and because in *Duplig,* a defamation suit, the court found that the city had a pecuniary interest in seeing that the mayor brought to the attention of the council information concerning the conduct of officials serving at the pleasure of the council. It is evident from *Estes* and the other Florida cases, that the rule in that state would seem to be that attorneys' fees will be allowed out of public funds where the action being defended directly affects the operation of the governmental body involved and that where the action is brought against a majority of the members of the body such affect on governmental operations is more likely to be present than the situation where it is brought against only one member. See also *Chandler v. Saena,* 315 S.W.2d 87 (Texas, Civ. App. 1958).

In the case of the *quo warranto* proceedings against Senator Scott, it can hardly be said that the functioning of the Iowa Senate will be affected by the suit. He continues to function as a senator during the pendency of this litigation and no injunction has been sought to prevent him from doing so. Moreover, in all of the cases we have found, the litigation for the defense of which indemnification was being sought had been concluded. In the case of Senator Scott, the litigation has barely begun. To agree to pay his legal fees at this juncture would be premature and could be urged as a finding by the Executive Council that he holds valid title to office.

Under all these circumstances, it is our opinion that the Executive Council is without authority to employ counsel to defend Senator Scott in the *quo warranto* proceeding presently pending against him in the Polk County District Court.

January 14, 1977

STATE OFFICERS AND DEPARTMENTS: Department of Transportation; Bicycle Paths. §§307A.2(13), 308A, 312.1, 312.2, 313.3, 313.4 and 321.1, Code of Iowa, 1975. The road use tax money may be used for bikeway construction where the path will be built on the same right of way as a motor highway since it would provide not only for the safety of the bicyclist, but also serve as a mode of removing a hazard to the motorist. A bikeway could also probably be constructed with these funds on a separate right of way if it could be shown that bike traffic would be diverted from a neighboring motor highway. (Haesemeyer to Welden, State Representative, 1-14-77) #77-1-14

The Honorable Richard W. Welden, State Representative: You have requested an opinion of the Attorney General with respect to the following:

"1. Is the authority of the Transportation Commission to spend money from the road use tax fund limited to appropriations made by the legislature and money from the primary road fund used for the establishment, construction, and maintenance of the primary road system as authorized in Sec. 313.4?

"2. Sec. 306.3, paragraph 2, defines the primary road system as being 'those roads and streets, both inside and outside of municipalities, classified under Sec. 306.1 as freeway-expressway, arterial and arterial connector.'

"Paragraph 1 of this section 306.3 defines as 'road or street' for the purpose of the code as the 'entire width between property lines — of every way or place of whatever nature when any part of such way or place is open to the public, as a matter of right, for the purposes of vehicular traffic.'

"Chapter 321.1, paragraph 1, states 'Vehicle means every device in, upon or by which any person or property is or may be transported or drawn upon a highway.' Then the first of several exclusions is 'any device moved by human power.'

"The second question is, Under existing Iowa law can a separate right-of-way designated for use only by bicycles and snowmobiles qualify as a 'road or street' which can be classified under 306.1 as a portion of the primary road system and thus be eligible for funding from the primary road fund under Sec. 313.4?"

I am not entirely certain that I fully understand your first question. If you are asking if Department of Transportation (DOT) expenditures are limited to money received by appropriations and money from the primary road fund, the answer is yes. If you are asking if the authority to choose the objects of the expenditures is limited by the cited statute, §313.4, Code of Iowa, 1975, the answer again is yes.

Article VII, §8 of the Constitution of Iowa, as added by the amendment of 1942, provides:

"Motor vehicle fees and fuel taxes. 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 contruction, 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."

Section 312.1, Code of Iowa, 1975, provides:

"Fund created. There is hereby created, in the state treasury, a road use fund. Said road use tax fund shall embrace and include:

"1. All the net proceeds of the registration of motor vehicles under chapter 321.

"2. All the net proceeds of the motor vehicle fuel tax or license fees under chapter 324, except those net proceeds allocated to the primary road fund under section 324.79.

"3. All revenue derived from the use tax, under chapters 423 on motor vehicles, trailers, and motor vehicle accessories and equipment, as same may be collected as provided by section 423.7.

"4. Any other funds which may by law be credited to the road use tax fund."

DOT controls the road use tax fund thus created in two ways: through the primary road fund, under the authority of §312.2(1) and §313.3(1); and through the five hundred thousand dollars "to be used for paying expenses incurred by the secondary and urban road departments and the commission other than expenses incurred for extensions of primary roads in cities", as stated in §312.2(5). All of the other road use tax fund allocations made in §312.2 are subject to the control of some other body (§312.2(2)(3)(4)), or go to some special project. (§312.2(5)(6)(7). Such §§312.2 and 313.3 provide:

§312.2

"Allocations from fund. The treasurer of the state shall, on the first day of each month, credit all road use tax funds which have come into his hands, to the primary road fund, the secondary road fund of the counties, the farm-to-market road fund, and the street construction fund of cities in the following manner and amounts:

"1. To the primary road fund, forty-seven percent.

"2. To the secondary road fund of the counties, twenty-nine percent.

"3. To the farm-to-market road fund, nine percent.

"4. To the street construction fund of the cities, fifteen percent.

"5. The treasurer of state shall before making the above allotments credit annually to the highway grade crossing safety fund the sum of two hundred forty thousand dollars, credit annually to the primary road fund the sum of one million four hundred thousand dollars for carrying out subsection 12 of section 307A.2, the last paragraph of section 313.4 and section 307A.5, and credit annually to the primary road fund the sum of five hundred thousand dollars to be used for paying expenses incurred by the secondary and urban road departments of the commission other than expenses incurred for extensions of primary roads in cities. All unobligated funds provided by this subsection, except those funds credited to the highway grade crossing safety fund, shall at the end of each year revert to the road use tax fund. Funds in the highway grade crossing safety fund shall not revert to the road use tax fund except to the extent they exceed five hundred thousand dollars at the end of any biennium.

"6. The treasurer of state shall before making the above allotments credit annually to the primary road fund the sum of two million five hundred thousand dollars or an amount equal to one-ninth of the federal allotment whichever

is the smaller, said sum to be used for matching the federal allotment to the state of Iowa for the use of the interstate and national defense highways in the state of Iowa.

"7. The treasurer of state shall before making the allotments provided for in this section credit monthly to the division of motor vehicle registration of the department of public safety funds sufficient in amount to pay the costs of purchasing supplies and materials and for the cost of prison labor used in manufacturing motor vehicle registration plates, decalcomania emblems, and validation stickers at the prision industries."

§313.3

"Primary road fund. There is hereby created a primary road fund which shall include and embrace:

"1. All road use tax funds which are by law credited to the primary road fund.

"2. All federal aid primary and urban road funds received by the state.

"3. All other funds which may by law be credited to the primary road fund.

"4. All revenue accrued or accruing to the state of Iowa on or after January 26, 1949, from the sale of public lands within the state, under Acts of Congress approved March 3, 1845, supplemental to the Act for the administration of the states of Iowa and Florida into the Union, chapters 75 and 76 (Fifth Statutes, pages 788 and 790), shall be placed in the primary road fund."

The primary road fund is managed by the DOT under the authority of §313.4 (disbursement of fund) and §306.2 (defining "department" as used in §313.4).

Section 313.4, Code of Iowa, 1975, provides:

"Disbursement of fund.

"1. Said primary road fund is hereby appropriated for and shall be used in the establishment, construction and maintenance of the primary road system, including the drainage, grading, surfacing, construction of bridges and culverts, the elimination or improvement of railroad crossings, the acquiring of additional right of way, all other expense incurred in the construction and maintenance of said primary road system and the maintenance and housing of the department.

"2. Such fund is also appropriated and shall be used for the construction, reconstruction, improvement and maintenance of state institutional roads and state park roads and bridges on such roads as provided in subsection 12 of section 307A.2, for restoration of secondary roads used as primary road detours and for compensation of counties for such use, for restoration of municipal streets so used and for compensation of cities for such use, and for the payments required in section 307A.5.

"3. It is further provided that there is appropriated to the department which would otherwise revert to the primary road fund pursuant to the provisions of the Act appropriating the funds or chapter 8, an amount sufficient to pay the increase in salaries, which increase is not otherwise provided for by the general assembly in an appropriation bill, resulting from the annual review of the merit pay plan as provided in subsection 2 of section 19A.9. The appropriation herein provided shall be in effect from the date of approval by the executive council to the end of the fiscal biennium in which it becomes effective."

It may be you are inquiring as to whether the legislature can determine specific projects to be undertaken through designated appropriations. In this

connection, it should be noted that §307A.2 imposes certain duties upon the DOT. Specifically, §307A.2(13) requires the Commission to adopt a 5 year program for the primary system which is to be reviewed annually. If the legislature were to select projects through its appropriation process, it would nullify this portion of the Code, and bring on the pork barrel.

Turning to your second question concerning the use of the primary road fund for trails or paths for bicycles and snowmobiles, we should point out that your reference to the definition of "vehicle" set forth in §321.1 is not well taken. The definitions found in that section are by the terms of such §321.1 applicable only to occasions where they are used in Chapter 321.

In our opinion, bikeways and snowmobile trails could be built by road use tax funds where they would be built on the same right of way as the motor highway, or on a separate right of way where it could be shown that bicycle traffic would be diverted from a motor highway. The Anti-Diversion Amendment would not prohibit the use of funds for this purpose, since it has been interpreted to allow "all things necessary to the completed accomplishment of a highway for all uses properly a part thereof." *Edge v. Brice,* 253 Iowa 710, 113 N.W.2d 755, 759 (1962); See *Slapnicka v. City of Cedar Rapids,* 258 Iowa 382, 139 N.W.2d 179 (1965). (preliminary engineering surveys held within expenditures allowed by statute limiting municipal road use tax funds solely to "construction" of roads and streets).

A bikeway accompanying a motor highway could be said to be a part of the highway needed to keep bicyclists out of the way of the motorists. The bikeway is analagous to a sidewalk, and since the latter has been deemed to be a permissable use of road use tax funds where bordering a highway, see 1970 OAG 508, a bikeway could also be constructed with those funds in such a situation. But see, 1962 OAG §13.2 at 254, holding contra to the 1970 opinion; however, the older opinion was written December 13, 1961, before the somewhat broader interpretation of *Edge v. Brice, supra,* was handed down, on March 6, 1962. See also, 1968 OAG 494 (safety rest areas deemed within "construction") and 1972 OAG 362 (Anti-Diversion Amendment prohibits acquisition of billboards, signs, and junk yards with road use funds).

In a recent Massachusetts case, the Supreme Judicial Court of Massachusetts has held that motor vehicle use and fuel tax revenues may be used to fund a state senate bill providing for establishment of bikeways and bicycle parking facilities, despite a constitutional limitation that such funds be used for highway and mass transportation purposes. The Court found such use of the funds to be proper in view of the facts that the bill was intended to provide alternative means of travel to commuters, that the bikeway was intimately related to traditional highway uses and to interests of motorists, and that the bicycle parking facilities would be construed at or adjacent to mass transit facilities. *Opinion of the Justices to the Senate,* 352 N.E.2d 197 (Mass. 1976).

Chapter 308A of the 1975 Code also is applicable here, for it gives the Conservation Commission power to build recreational bikeways with funds coming from private donations, federal grants, or appropriations by the legislature. This chapter could be deemed to be an indication that the funds for bikeways may *only* come from the sources provided for in §308A.2, but the chapter itself refers only to *recreational* bikeways, and does not limit funds available for bikeways, which have as a primary purpose transportation or motor highway safety.

To summarize the above, it is our opinion that road use tax money may be used for bikeway construction where the path will be built on the same right of way as a motor highway since it would be nothing more than a glorified sidewalk, existing not only for the safety of the bicyclist, but as a mode of removing a hazard to the motorist. A bikeway could also probably be constructed with these funds on a separate right of way if it could be shown that bike traffic would be diverted from a neighboring motor highway.

January 25, 1977

CONSTITUTIONAL LAW: GENERAL ASSEMBLY: QUALIFYING: OATH. Art. III, §§2, 3, and 32, Const. of Iowa, §§2.1, 2.3, 2.4, 2.6, 2.8, 63.1, 63.3, 63.7 and 63.8, Code of Iowa, 1975. An incumbent State Representative, elected to succeed herself, adequately qualifies by taking the oath of office within 20 days after the second secular day of January of the first year of the term for which she was elected. (Turner to Harper, State Representative, 1-25-77) #77-1-15

The Honorable Mattie Harper, State Representative: You have requested an opinion of the Attorney General as to whether, being an incumbent State Representative reelected in November, 1976, you failed to qualify within the time limit required by law when, because of illness, you were prevented from taking your oath of office until Saturday, January 22, 1977, more than ten days after the legislature convened, Of course, members of the General Assembly ordinarily qualify by taking the oath on the second Monday in January, the day the General Assembly convenes. Art. III, §§2, Constitution of Iowa as amended in 1968 and §§2.1, 2.3, 2.4, 2.6 and 2.8, Code of Iowa, 1975.

Article III, §3, Constitution of Iowa, provides:

"The members of the House of Representatives shall be chosen every second year, by the qualified electors of their respective districts, and their term of office shall commence on the first day of January next after their election, and continue *two years, and until their successors are elected and qualified.*" (Emphasis added).

You are your own successor and there appears to be no constitutional time limit which would create a vacancy by reason of your failure to take the oath until January 22. The Constitution says that your term is for two years *and* until your successor is elected and qualified. Thus, constitutionally speaking, you serve until you succeed yourself by taking the oath for your new term.

Chapter 63, Code of Iowa, 1975, provides by statute for the time and manner of qualifying for elective or appointive office. Assuming, without deciding, that this chapter applies to legislators notwithstanding Art. III, §3, you have nevertheless qualified within the time limit therein provided. The relevant sections are as follows:

"63.1 *Time.* Each officer, elective or appointive, before entering upon his duties as such, shall qualify by taking the prescribed oath and by giving, when required, a bond, which qualification shall be perfected, unless otherwise specified, before noon of the second secular day in January of the first year of the term for which such officer was elected. * * *

"63.3 *Unavoidable casualty.* When on account of sickness, the inclement state of the weather, unavoidable absence, or casualty, an officer has been prevented from qualifying within the prescribed time, he may do so within ten days after the time herein fixed. * * *

"63.7 *Officer holding over.* When it is ascertained that the incumbent is entitled to hold over by reason of the nonelection of a successor, or for the neglect or refusal of the successor to qualify, he shall qualify anew, within the time provided by section 63.8.

"63.8 *Vacancies—time to qualify.* Persons elected or appointed to fill vacancies, and officers entitled to hold over to fill vacancies occurring through a failure to elect, appoint, or qualify, as provided in chapter 69, shall qualify within ten days from such election, appointment, or failure to elect, appoint, or qualify, in the same manner as those originally elected or appointed to such offices."

It seems clear from §63.8 that the ten days prescribed for the requalification of an officer, entitled to hold over to fill a vacancy on account of the failure of a newly elected officer to qualify, is in addition to the ten days provided in §63.3 for a person who is prevented from qualifying because of inclement weather, unavoidable absences or casualty.

Even assuming that §63.1 applies, and that technically a legislator *should* qualify on the second secular day of January of the first year of the term for which he was elected (which is January 3 this year), you qualified on January 22, 1977, within the 20 days permitted you as an incumbent entitled to hold over until you successor is qualified. But it seems unlikely to us that §63.1 applies because of the aforesaid provisions of Chapter 2 which indicate that a legislator properly qualifies on the first day of the session rather than the second secular day of January. If legislators were sworn in on the second secular day of January, their filing of certificates of election on the opening day of the session, as provided in §2.4, would be an empty formalism, without any real significance, a fact we cannot assume in statutory construction. See also Art. III, §32, 1956 OAG 29 and 1974 OAG 396.

Finally, it is questionable whether the time which Art. III, §3, gives an incumbent legislator in which to qualify (until his successor is elected and qualified) can be limited by law. But we need not decide that question here because of our determination that you have qualified within the time provided by the statutes.

January 27, 1977

COUNTIES: Brucellosis Fund Claims. Chapter 164, Code of Iowa, 1975. The Board of Supervisors should allow claims to indemnify owners of animals slaughtered under authority of the law only if there is money available in the fund to pay the claim. (Nolan to Tullar, Sac County Attorney, 1-27-77) #77-1-16

Mr. Lon R. Tullar, Sac County Attorney: We have received your letter requesting an opinion of this office regarding a claim made upon Sac County, Iowa, pursuant to Chapter 164 of the 1975 Code of Iowa. The facts as set out in your letter are as follows:

"Cattle of a local farmer were condemned under the provisions of I.C.A. Chapter 164. The Department of Agriculture of the State of Iowa certified the amount of the claim and filed the same with the Sac County Board of Supervisors. The amount of the claim is now in dispute (see I.C.A. Section 164.28 and Op. Atty. Gen. June 4, 1974). A dispute has risen in that the claim is well in excess of the monies presently in the Sac County Brucellosis Fund (hereinafter called Fund); the claim is for approximately $231, 000.00 , while the Fund has less than $2,500.00 in it presently and its annual maximum levy is approximately $49,000.00."

We then proceed to attempt to answer the specific questions raised in your letter in the order in which they were presented.

"1. Does I.C.A. Chapter 164 set a limitation on the total amount of indemnity to be paid a Claimant; see specifically Sections 164.21 and 164.27?"

Section 164.21, as amended by Chapter 127, Laws of the 66th G.A., 1975 Session, provides:

"The department shall certify the claim of the owner for each animal slaughtered in accordance with this chapter. An infected herd may be completely depopulated and indemnity paid on individual animals when, in the opinion of the officials of the department and officials of the animal research service of the United States department of agriculture, the disease cannot be adequately controlled by routine testing.

"Indemnity can only be paid if money is available in the county or origin and if indemnity payment is also made by the United States department of agriculture.

"In the case of individual payment, all animals shall be individually appraised and the amount of indemnity shall be equal to the difference between the slaughter value and the appraisal price, less the amount of indemnity paid by the United States department of agriculture. The total amount of indemnity paid by the county of origin for a grade animal or a purebred animal shall not exceed two hundred dollars. However, if a purebred animal is purchased and owned for at least one year before testing and the owner can verify the actual cost, the board of supervisors of the county of origin may, by resolution award the payment of an additional indemnification not to exceed five hundred fifty dollars or the actual cost of the animal when purchased, whichever is less."

Section 164.27 provides:

"Whenever the balance of such fund becomes less than twenty-five hundred dollars, the county auditor shall notify the department in writing of such fact, and no expense shall be incurred in such account in excess of the cash available in such fund."

It is our view that the provisions of §164.21 do provide a limitation on the total amount of indemnity which a claimant may receive. This amount is generally limited to $200 per animal, plus the lesser of the amounts of $550 or the actual cost of the animal when purchased, when authorized by resolution of the board of supervisors, upon verification by the owner of the actual cost of the animal purchased and owned for at least one year before testing.

"2. If not, is the Claimant entitled to approval of his claim only as the Fund increases under I.C.A. Sections 164.23 and 164.24?"

Section 164.23 provides:

"In each county in the state, the board of supervisors shall each year, when it makes the levy for taxes, levy a tax sufficient to provide a fund to pay the indemnity, as set out in section 164.21, and other expenses provided in this chapter, and expenses of the inspection and testing program provided in Chapter 163A, and such levy shall not exceed in any year thirteen and one-half cents per thousand dollars of assessed value of the taxable value of all the property in the county."

Section 164.24, as amended by Chapter 127, Acts of the 66th G.A., 1975 Session, provides:

"Such levy shall be placed upon the tax list by the county auditor and

collected by the county treasurer in the same manner and at the same time as other taxes of the county. The money derived from such levy shall be placed in a fund to be known as the 'County Brucellosis Eradication Fund', and shall be used only for the payment of claims as provided in this chapter, and for payment of the expenses of the inspection and testing program provided in Chapter 163A. However, the board of supervisors may transfer any unexpended funds from the county brucellosis eradication fund to the county tuberculosis eradication fund to meet any unpaid obligations of the county tuberculosis eradication fund."

Section 164.27, as set out above, prohibits paying any amount in excess of the cash available in the brucellosis eradication fund. Section 343.10, Code of Iowa, 1975, prohibits the allowance of any claim which will result "during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous year".

Accordingly, it is our view that the claimant is entitled to approval of this claim only if there are funds available in the eradication fund to pay such claim. In this connection, it may be noted that §7 of Chapter 127, 66th G.A., 1975 Session, also amends §165.19, Code of Iowa, 1975, to provide authority for the board of supervisors to "transfer any unexpended funds from the county tuberculosis eradication fund to the county brucellosis eradication fund to meet any unpaid obligations of the county brucellosis eradication fund". Also, there were appropriated, under Chapter 127, an amount of $50,000 for the 1975-1976 fiscal year to make grants to counties to pay indemnity and expenses incurred where the board of supervisors had levied the maximum levy for the county brucellosis fund and all such funds have been expended.

"3. Or, is the Claimant entitled to approval of his claim in total, now, and an order for a warrant for payment?"

It is our opinion that in light of all of the statutory provisions set out above, that the claimant is entitled to approval only of such portion of his claim as can be paid from the available monies in the county brucellosis eradication fund. Accordingly, it would be inappropriate for the supervisors to approve a claim in total and order a warrant for payment.

"4. If so, is the Claimant entitled to the warrant being endorsed 'unpaid for want of funds' upon which interest must be paid by the County pursuant to I.C.A. Chapter 74 and specifically Section 74.2?"

Based on our answer set out above, our response to this question must be a negative one.

"5. Additionally, may the Sac County Board of Supervisors order the issuance of Anticipatory Warrants to pay any portion of the claim not payable due to insufficient funds?"

It is the opinion of this office that the answer to this question is no. For the provisions of Chapter 74 allowing for anticipatory warrants to be applicable, the warrant must be legally drawn. If a claim in excess of the amount of available funds is not authorized by statute, it would be improper to order such claim to be paid.

January, 1977

CONSTITUTIONAL LAW

General Assembly; Qualifying; Oath. Art. III, §§2, 3 and 32, Constitution

of Iowa; §§2.1, 2.3, 2.4, 2.6, 2.8, 63.1, 63.7 and 63.8, Code of Iowa, 1975. An incumbent State Representative, elected to succeed herself, adequately qualifies by taking the oath of office within 20 days after the second secular day of January of the first year of the term for which she was elected. (Turner to Harper, State Representative, 1-25-77) #77-1-15

General Assembly; Qualifications of Members. Art. III, §7, Constitution of Iowa; §2.6, Code of Iowa, 1975. Either house of the General Assembly may, at any time, during the term of office of one of its members, pass on the qualifications of the member, and this power cannot be limited by statute. That paragraph of OAG Turner to Executive Council, 12-3-76 (#76-12-2) in conflict herewith is hereby withdrawn. (Turner to Hill, State Senator, 1-7-77) #77-1-3

COUNTIES

Brucellosis Fund Claims. Chapter 164, Code of Iowa, 1975. The board of supervisors should allow claims to indemnify owners of animals slaughtered under authority of the law only if there is money available in the fund to pay the claim. (Nolan to Tullar, Sac County Attorney, 1-27-77) #77-1-16

Mental Health; Liens and Claims; Auditor's Duties; Board of Supervisors' Powers. §§125.26, 125.28, 222.78; Ch. 224; §§225.22-23, 230.15, 230.17, 230.20(5) and (6), 230.21, 230.25, 271.15-16, 332.3(2), 444.12, 1975 Code of Iowa; Ch. 1131, Acts, 65th G.A.; Ch. 1103, §14, Ch. 1104 (H.F. 292), §§1, 3, 5, 10, 11, 12, 13, 15, 16, and Ch. 1132, §9, Acts, 66th G.A. Mental health liens, which result only from certain mental health, drug addict or alcoholic treatment at certain institutions, are abolished as of January 1, 1977, unless the county board of supervisors determines that the lien is collectable and the county attorney initiates a foreclosure proceeding prior to that date. Although said statutory liens are abolished, the underlying obligation is still collectable after January 1, 1977. County auditors must maintain an account of the cost of mental health care for each individual and must maintain a separate record, or index, of county board of supervisors' determinations of the ability to pay of persons potentially liable for such treatment. Said board determinations are to be made each time the county is billed for treatment, under any standards and procedures which are necessary, and which directly tend, to accomplish its duty to determine ability to pay, and which are not otherwise inconsistent with law. (Murphy to Readinger, Iowa State Representative, 1-4-77) #77-1-1

Law Enforcement; Agreements. Senate File 1210, 66th G.A. (1976); Chapter 28E and §312.8, Code of Iowa, 1975. A county cannot enter into agreements in which unincorporated communities or business corporations would pay for law enforcement. (Linge to Svoboda, State Representative, 1-11-77) #77-1-10

HIGHWAYS

Indivisible Loads. §§321.454 and 321E.9, Code of Iowa, 1975; §17, Ch. 171, Acts, 66th G.A., 1st. Two 5 foot bales of hay formed into one 10 foot wide unit does not become an indivisible load for purposes of receiving a permit for movement of an overwidth load. (Schroeder to Lounsberry, Secretary of Agriculture, 1-11-77) #77-1-7

MUNICIPALITIES

Civil Service; Civil Rights. §§80B.11, 400.7, 400.9 and 601A.7, Code of Iowa, 1975. Employees not having civil service status may be "blanketed in" by action of the civil service commission. Employees not having civil service status are not blanketed in merely by the length of their employment. An employee with civil service status may not fill a vacancy in a lower position except

by an entrance examination pursuant to §400.9(3). Minimum age requirements for policemen must not be in conflict with the eighteen year old provision in §80B.11. Maximum age requirements are violative of the Iowa Civil Rights Act unless reasonably based upon the nature of the position. (Blumberg to Bina, State Representative, 1-11-77) #77-1-9

Incompatibility. The positions of city attorney and part-time magistrate are incompatible. (Blumberg to Rabendeaux, State Senator, 1-10-77) #77-1-4

Civil Service; Sick Leave. §§400.8, 400.9, 400.11, 400.13, 411.6 and 411.15, Code of Iowa, 1975. The chiefs' civil service eligibility lists expire when an individual is chosen from them. Chapter 411 does not control an employee's sick leave. (Blumberg to Redmond, State Senator, 1-5-77) #77-1-2

SCHOOLS

Special Education. The articles of incorporation of the Society for Hope Haven School enunciate a purpose of a Christian mission of education for handicapped children and thus disqualify the institution from educational aid paid from public funds. (Nolan to Den Herder, State Representative, 1-18-77) #77-1-11

STATE OFFICERS AND DEPARTMENTS

Executive Council; Employment of Counsel. §§13.2 and 13.3, Code of Iowa, 1975. The Executive Council has no authority to employ legal counsel at public expense to defend an individual named as a defendant in a quo warranto proceeding brought by the state to test such individual's title to the office of state senator. (Haesemeyer to Wellman, Secretary, Executive Council of Iowa, 1-20-77) #77-1-13

Department of Transportation; Bicycle Paths. §§307A.2(13), 308A, 312.1, 312.2, 313.3, 313.4 and 321.1, Code of Iowa, 1975. The road use tax money may be used for bikeway construction where the path will be built on the same right of way as a motor highway since it would provide not only for the safety of the bicyclist, but also serve as a mode of removing a hazard to the motorist. A bikeway could also probably be constructed with these funds on a separate right of way if it could be shown that bike traffic would be diverted from a neighboring motor highway. (Haesemeyer to Welden, State Representative, 1-14-77) #77-1-14

Iowa Egg Council; Egg Checkoff. §§196A.15, 196A.17, 196A.18 and 196A.23, Code of Iowa, 1975. The expression "payment of tax" as found in §196A.18 refers to the time when the tax is paid to the Egg Council rather than the time when the purchaser withholds the tax from the producer. (Haesemeyer to Wells, Executive Director, Iowa Egg Council, 1-10-77) #77-1-6

TAXATION

Property taxes levied for fiscal year. House File 1200, Acts, 66th G.A., 2nd. House File 1200 does retroactively change the property tax year in Iowa from a calendar year to a fiscal year. Taxes payable in the extended fiscal year constitute taxes levied for the period January 1, 1973, through June 30, 1974. (Griger to Kopecky, Linn County Attorney, 1-18-77) #77-1-12

TOWNSHIPS

Fire Protection. §359.43, Code of Iowa, 1975. The tax for fire protection must be uniform throughout a township, except for those areas within a city or benefited fire district. (Blumberg to Peckosh, Jackson County Attorney, 1-11-77) #77-1-8

WORKMEN'S COMPENSATION

§86.8, Code of Iowa, 1975. Pursuant to the duties specified in §86.8, the Industrial Commissioner may employ an actuarial student to produce probability tables in a form useful to the intended purpose of §85.45(4). (Jackwig to Wellman, Secretary, Executive Council of Iowa, 1-10-77) #77-1-5

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CONSTITUTION OF IOWA

Art. III, §§2, 3 and 32 77-1-15
Art. III, §7 77-1-3

February 2, 1977

BANKING: Statutory Construction. §§4.1(3), 524.806, Code of Iowa, 1975. The general rule that the use of the singular number includes the plural does not control with respect to §524.806 which specifically relates to bank deposits in the name of two individuals and contemplates that there will be but one survivor. (Nolan to Harbor, State Representative, 2-2-77) #77-2-1

The Honorable William H. Harbor, State Representative: We have received your letter with states as follows:

"A constituent friend of mine has posed a concern regarding the Iowa Banking Code, Section 806. This section deals with the definition of 'joint accounts'. It refers to a 'survivor' and not 'survivors' as some people interpret. Some financial institutions construe survivors as meaning in the plural and do accept several names on the deposit cards as people who could conceivably control an account.

"The question is whether or not this type of action is legal or whether the wordage contained in Section 806 means a surviving spouse or some other survivor."

The answer to your inquiry is contained in §4.1(3), Code of Iowa, 1975, which provides as follows:

"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:

* * *

"3. Number and gender. Unless otherwise specifically provided by law the singular includes the plural, and the plural includes the singular. Words of one gender include the other genders."

The language of §524.806 of the 1975 Code of Iowa clearly does not contem-

plate a situation in which there would be more than one survivor. The statute provides:

"When a deposit shall be made in any state bank in the names of *two individuals,* payable to either, or payable to either or the survivor, such deposit, including interest or any part thereof, may be paid to either of such individuals whether the other be living or not, and the receipt or acquitance of the individual so paid shall be a valid and sufficient release and discharge to the state bank for any payment so made." [emphasis added]

Accordingly, it is our view that §524.806 is specific legislation which contemplates that when only two persons are named on a joint account, there would be but one survivor.

February 2, 1977

STATE OFFICERS AND DEPARTMENTS: Contracts; Authority; Limitations. Acquisition of office space by Department of Transportation, for driver's license office, in store of merchant, even though traffic induced through store by persons attending driver's license office might give merchant in which office located advantage over competing merchant, not a violation of any state law. (Tangeman to Redmond, State Senator, 2-3-77) #77-2-2

The Honorable James M. Redmond, State Senator: You have requested an Attorney General's Opinion in response to the following question:

"Does the receipt of goods and services by the State, a State agency, board, or commission, or a State political subdivision which operates to the competitive advantage of a specific person or persons in the private sector vs. others similarly situated in a relevant market and with respect to the business dealings with these individuals with the general public constitute a violation of state law?"

Your question was accompanied by correspondence indicating that the question arose out of a situation in which one merchant had complained about the advantage another merchant had gained by having a driver's license office of the Department of Transportation located in the second merchant's store. The merchants consider the walk-in traffic developed from the driver's license office to be a commercial advantage.

Your letter and the attachments gave no accusation or information suggesting any specific misconduct of which any of the parties might have been guilty in the transaction which resulted in the placement of the driver's license office in its present location.

Our careful review of the Iowa Code, the Iowa Constitution and the Iowa Administrative Code discloses no apparent violation of law by the Department of Transportation personnel in taking the action which resulted in the placement of the subject driver's license station in its present location.

February 2, 1977

MUNICIPALITIES: State Employees on City Council. §§19.18, 123.17, Code of Iowa, 1975; IV IAC Ch. 570. Merit employee's political activities are restricted. Beer and Liquor Control employees are prohibited from occupying a seat on a city council. (Blumberg to Higgins, State Representative, 2-2-77) #77-2-3

Honorable Thomas J. Higgins, State Representative: We have received your opinion request of December 22, 1976 regarding state employees running

for a city council. We assume that the employee is under the state merit system.

Section 19.18, 1975 Code of Iowa, provides in pertinent part:

"No person holding a position in the classified service shall, during his working hours or when performing his duties or when using state equipment or at any time on state property, take part in any way in soliciting any contribution for any political party or any person seeking political office, nor shall such employee engage in any political activity that will impair his efficiency during working hours or cause him to be tardy or absent from his work. The provisions of this section do not preclude any employee from holding any office for which no pay is received or any office for which only token pay is received.

. . .

"The commission shall adopt any rules necessary for futher restricting political activities of persons holding positions in the classified service, but only to the extent necessary to comply with federal standards in order that the present Iowa merit system council shall be absorbed by the Iowa merit employment department. In any event all employees shall retain the right to vote as they please and to express their opinions on all subjects."

The rules of the Merit Department, found in IV IAC Ch. 570, provide:

"570—16.1(19A) Restrictions on political activity of employees. Classified employees, whether full-time or part-time, temporary, provisional, intermittent, probationary or permanent, shall be prohibited from:

"16.1(1) Engaging in any partisan political activity during scheduled working hours, while on duty, when using state equipment, or on state property;

"16.1(2) Neglecting his or her assigned duties or responsibilities or being absent from or tardy to work because of permitted political activities;

"16.1(3) Wearing badges or other representation of political preference during working hours, while on duty, when using state equipment or on state property;

"16.1(4) Using his or her office, public position, public property or supplies to secure contributions or to influence an election for any political party or any person seeking political office;

"16.1(5) Soliciting or receiving anything of value as a partisan political contribution or subterfuge for such contribution from any other person for any political party or any person seeking political office during scheduled working hours, while on duty, when using state equipment or on state property (Also see section 740.13);

"16.1(6) Promising or using influence, to secure public employment or other benefits financed from public funds as a reward for political activity;

"16.1(7) Discriminating in favor of, or against, an officer, employee, or applicant on account of his or her political contribution or permitted political activity at any level of state government;

"16.1(8) Being a candidate for any partisan elective office for remuneration while on active duty. This does not prohibit a classified employee from holding any office which is not paid or for which token pay is received.

"570—16.2(19A) Application of Hatch Act. In addition to 16.1(19A), employees of the federal grant-aided agencies such as employment security commission, department of health, certain areas of social services and civil defense and others, shall be subject to the applicable provision of the federal Hatch

Act, when required, by the granting federal agency. These provisions shall be made known to employees of such agencies by the appointing authorities concerned and compliance adhered to."

Section 123.17 of the Code provides that employees of the Beer and Liquor Control Department shall not hold any other position or office under the laws of this state, any other state or territory of the United States. Without knowing all the facts of your situation we cannot state whether the employee in question can be on a city council. However, you should be able to determine from the above statutes and rules whether the employee in question will be able to serve on the city council.

February 4, 1977

MUNICIPALITIES: Airports—§330.12 and 330.21, Code of Iowa, 1975. An airport commission has the power to lease airport land under its control not needed for a public purpose. (Blumberg to Griffee, State Representative, 2-4-77) #77-2-4

Honorable William B. Griffee, State Representative: We have your opinion request of January 10, 1976, concerning the powers of an airport commission. You stated that a city constructed an airport on part of a larger parcel of land owned by the city. An airport commission was then created. The commission takes the position that it has control of all the land adjoining and surrounding the airport, and therefore has the right to rent the land for farming. The city asserts that the mere fact the commission controls the airport does not confer jurisdiction on it over all the surrounding land, recognizing the authority of the commission over such land as the federal or state agencies may require. You therefore ask the following questions:

"(A) Who has jurisdiction and control of the farm land which surrounds the airport and is not being used for airport purposes;

"(B) Who has the right to the rents from the farm land of this non-aviation facility real estate; and

"(C) Which municipal government unit, the City Council or the Airport Commission, has the right to enter into the lease with the County Conservation Board, so that the Conservation Board can turn this portion unrelated to the airport but as part of the farm land into a County Park? And as a further point, I would state to you that the City is aware of the requirements of the Home Rule law with regard to public notice and hearing prior to a lease extending over three years duration."

Section 330.21, 1975 Code of Iowa, provides that the commission "has all of the powers granted to cities, counties and townships under this Chapter, except powers to sell the airport." Section 330.12 permits counties and townships to lease all or any portion of airport property when not needed for public use. The fact that only counties and townships are mentioned in most of Chapter 330 does not exclude a city or its airport commission from exercising any of the enumerated powers because of home rule.

Your last two questions are governed by the first, and that one can only be determined by facts. If, as you indicate the surrounding land is not used for any airport purpose, and was never intended by the city to be given to the commission for airport purposes, then the answers to all three questions would be that the city controls the surrounding land. However, if any part of that land is used for the airport (e. g. areas at either end of the runways for take-offs

and landings), then, that part would be under the control of the commission and, pursuant to §§330.12 and 330.21, the commission would determine any leases. Because this is a fact question which we are unable to answer, we cannot give you a definite answer to your questions. However, the facts should permit the proper authorities to determine the answer to your first question. The other answers will then follow.

February 4, 1977

SCHOOLS: Sharing Instructors and Classrooms. §§275.1, 280.15, Code of Iowa, 1975. A school district may share instructors and classrooms with another school district pursuant to §280.15 but cannot send all of the pupils in a given grade to another district without being in conflict with §275.1 and subjecting itself to possible merger or attachment. (Nolan to Priebe, State Senator, 2-4-77) #77-2-5

The Honorable Berl E. Priebe, State Senator: You have requested an opinion as to the legality of certain action of the Lakota and Ledyard Community Districts whereby all the students from one grade of the Ledyard school may be sent to Lakota where they are combined with the same grade students under one teacher in one classroom, and where all the students of another class from Lakota may be sent to Ledyard to form one class. Your letter states that a constituent has contended that his tax monies are being used to educate his children in a school district other than their district of residence. The question which your letter poses is whether this is a legal exercise of the "joint employment and sharing" provisions of §280.15, Code of Iowa.

Code of §280.15 provides:

"Any two or more public school districts may jointly employ and share the services of any school personnel, or acquire and share the use of classrooms, laboratories, equipment and facilities."

While the language set out above appears to provide broad general authority for the combination of classes, it should also be noted that when there are not sufficient pupils in any one grade to maintain a class in the district for that grade, the provisions of §275.1 will come into operation. The language of §275.1, which we deem pertinent, and to be read in para materia, is as follows:

"...All area of the state shall be in school districts maintaining twelve grades. If any school district ceases to maintain twelve grades, it shall merge with a contiguous school district within six months or the state board shall attach the school district not maintaining twelve grades to a contiguous district."

Accordingly, if it is necessary to move a whole grade to a neighboring school district, the requirements of §275.1 (i.e. maintaining twelve grades) would not be met. On the other hand, if the local school district maintains twelve grades, and in addition, enters into an agreement with a neighboring district to obtain classes such as special education, vocational training, drivers' education or some similar class, then such a change of students would be authorized under a joint sharing provision. We have noted that within the various school districts of this state, there are numerous instances of sending all the children within the district in a single grade to one attendance center and the children of another grade to another attendance center. However, in such instances, the school district complies with the provisions of §275.1 by maintaining all twelve grades within the district.

February 10, 1977

STATE OFFICERS AND DEPARTMENTS: Spanish Speaking Peoples Commission; Investigatory Powers. Chapter 1061, §§6 and 7 G.A., 1976 Session. The duties and powers of the Spanish Speaking Peoples Commission do not include subpoena power. Moreover, while all departments, divisions, agencies and offices of the state are required to make pertinent information available to the Commission, there is no such duty on the part of private federally funded groups. Thus, while the Commission could investigate a migrant program it can neither compel the production of witnesses and documents nor require the cooperation of the program being investigated. (Haesemeyer to Sanchez, Executive Director, Spanish Speaking Peoples Commission, 2-10-77) #77-2-6

Mr. Hector O. Sanchez, Executive Director, Spanish Speaking Peoples Commission: You have requested an opinion from this office on the following question:

"Whether this agency, the Spanish Speaking Peoples Commission as a Statutory Commission of the State of Iowa created by Chapter 1061, Section 1 of the Sixty-Sixth (66th) General Assembly, has the power, authority and or jurisdiction to conduct an investigation concerning the conduct, operations and administration of the Migrant Program within the State of Iowa pursuant to a request for an investigation by a group, organization, or individual from Iowa."

The Migrant Action Program is a nonprofit corporation which was established pursuant to the "Comprehensive Employment and Training Acts of 1973." (Pub. L. 93-203) It derives its funds federally under the *U.S. Code,* title 29, §873. It is not an agency of the State of Iowa.

The duties and powers of the Spanish Speaking Peoples Commission are set forth in §§6 and 7 of Chapter 1061, 66th G.A., 1976 Session, as follows:

"Sec. 6. NEW SECTION. Duties. The commission shall:

"1. Coordinate, assist, and cooperate with the efforts of state departments and agencies to serve the needs of Spanish-speaking persons in the fields of education, employment, health, housing, welfare, and recreation.

"2. Develop, coordinate, and assist other public organizations which serve Spanish-speaking persons.

"3. Evaluate existing programs and proposed legislation affecting Spanish-speaking persons, and propose new programs.

"4. Stimulate public awareness of the problems of Spanish-speaking persons by conducting a program of public education and encouraging the governor and the general assembly to develop programs to deal with these problems.

"5. Conduct training programs for Spanish-speaking persons to enable them to assume leadership positions on the community level.

"6. Conduct a survey of the Spanish-speaking people in Iowa in order to ascertain their needs.

"7. Work to establish a Spanish-speaking information center in the state of Iowa.

"Sec. 7. NEW SECTION. Powers. The commission shall have all powers necessary to carry out the functions and duties in this Act, including, but not limited to the power to establish advisory committees on special studies, to

solicit and accept gifts and grants, promulgate rules according to chapter seventeen A (17A) of the Code, and to contract with public and private groups to conduct its business. All departments, divisions, agencies and offices of the state shall make available upon request of the commission information which is pertinent to the subject matter of the study and which is not by law confidential."

These powers and duties of the Spanish Speaking Peoples Commission are quite broad, however, they do not include subpoena power. Moreover, while all departments, divisions, agencies and offices of the state are required to make pertinent information available to the Commission, there is no such duty on the part of private federally funded groups. Thus, while the Commission could investigate a migrant program it can neither compel the production of witnesses and documents nor require the cooperation of the program being investigated.

February 11, 1977

COUNTIES: Library Levy. Chapters 1067 and 1160, Acts, 66th G.A., 1976 Session. The provisions of Chapters 1067 and 1160 are not irreconcilable and a levy of 6¾ cents per $1,000 assessed valuation should be levied where the increase in the aggregate of all county levies enumerated does not exceed the limitation imposed by Chapter 1067. Where that limitation is reached funds from other sources may be employed to satisfy Chapter 1160 requirements. (Nolan to Holschlag, Chickasaw County Attorney, 2-11-77) #77-2-8

Mr. Frank H. Holschlag, Chickasaw County Attorney: This is written in response to your letter of January 20, 1977 requesting an opinion of the Attorney General reconciling if possible, an apparent conflict between the provisions of Chapter 1067 and Chapter 1160, Acts of the 66th General Assembly, 1976 Session, as they apply to Chickasaw County. The facts as stated in your request are as follows:

"(1). Chickasaw County, Iowa has, for many years past, made payments to Municipal Library Boards within this County for use of Library services by Rural residents of the County. The payments in question were made under written Contract authorized by the Provisions of Code of Iowa Section 358B.18. Present Contract payments are in the amount of Nine Thousand, Seven Hundred Dollars, ($9,700.00).

"(2). The existing Contract between Municipal Library Boards and the Chickasaw County, Iowa Board of Supervisors is soon to expire.

"(3). The present assessed value of rural property in Chickasaw County, Iowa is One Hundred and Sixty-Eight Million, Five Hundred Thousand, Seven Hundred and Fifty-five Dollars, ($168,500,755.00).

* * *

"Based upon existing assessed valuation of property within unincorporated areas of Chickasaw County, the minimum tax levy required by Senate File 1191 would create a tax levy fifteen percent, (15%), greater than the tax levy during the existing fiscal year... The Regional Library Board has taken appropriate action to require Contribution at the level of levy effective July 1st, 1973: and has joined with local Library Boards in requesting Contributions at a rate of Six and Three-Fourths cents per Thousand Dollars of assessed valuation of property in unincorporated areas effective July 1st, 1977."

The pertinent language of the statutes in question is as follows:

Chapter 1067, Sec. 3

"County levy limitation. The maximum amount in dollars which may be levied by a county over the amount in dollars levied for the base year shall be limited to an aggregate increase of nine percent for the fiscal year beginning July 1, 1976 and seven percent for the fiscal years, beginning July 1, 1977 and July 1, 1978, for the following designated property tax levies, except as otherwise provided in this division:

* * *

"19. The tax levy for the entering of contracts for the use of city libraries authorized pursuant to section three hundred fifty-eight B point eighteen (358B.18) of the Code."

We interpret Chapter 1067, §3 to be a limit on the total county levy for all of the purposes enumerated in subparagraphs 1-24 thereof. The statute refers to "an aggregate increase". Thus, the amount to be levied under paragraph 19 must be figured in relation to other levies.

It should also be noted that in §1 of Chapter 1067, supra, base year is defined to mean the preceding fiscal year. Accordingly, it appears that for the fiscal year beginning July 1, 1977, the total county levy may be increased an amount of 7% over the amount currently raised by property tax.

Section 2 of Chapter 1160, Acts of the 66th G.A., 1976 Session, amends §303B.9, Code of Iowa, 1975, to read as follows:

"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 purpose of providing financial support to the public library which provides library services within the respective jurisdictions."

It is a well-established rule that the statutes should not be construed to produce an unreasonable result and accordingly, it is the view of this office that the language of §303B.9, as amended, permits the county to raise the required amount of six and three-fourths cents per thousand dollars of assessed valuation on property to support the library system by a tax levy subject to the limitations contained in Chapter 1067. In the event this cannot be done without exceeding the aggregate county tax limitation, then the requirement of §303B.9 may be satisfied by utilizing funds obtained from a source other than taxation. In reaching this result we have applied the statutory rule of construction set out in §4.7, Code of Iowa, 1975, which states: "If a general provision conflicts with 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."

Accordingly, it is our view that these statutes are not irreconcilable. However, even if they might be deemed to be irreconcilable, Section 4.8 provides: "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." Chapter 1067 became effective on May 4, 1976, pursuant to emergency publication. Chapter 1160 was approved on June 10, 1976 and became effective on July 1, 1976. The later statute provides for the six and three-fourths cents per thousand levy.

February 11, 1977

TAXATION: INHERITANCE TAX: INDIVIDUAL EXEMPTION. §450.9(2), Code of Iowa, 1975, as amended by Chapter 1106, Acts of the 66th G.A., second session. The provisions of Chapter 1106 allowing increased exemptions for children in computing the net estate for Iowa inheritance tax purposes would not be applicable to estates of decedents dying prior to July 1, 1976. (Kerwin to DeKoster, State Senator, 2-11-77) #77-2-9

The Honorable Lucas J. DeKoster, State Senator: You have requested an opinion of the Attorney General as to whether the amendatory provisions enlarging individual exemptions for children are to be used for computing the net estate subject to Iowa inheritance tax where the statutory amendments were not in effect on the date of decedent's death.

The example which you presented is as follows: The decedent died on June 1, 1976 with Iowa inheritance tax due in the estate on June 1, 1977.

In your opinion request, you refer to Chapter 1106 (House File 1590), Acts of the 66th G.A., second session, §8(2) of which amended §450.9(2), Code of Iowa, 1975 to allow a $30,000 exemption in computing the tax on the net estate passing to children of the decedent, thereby replacing the former such exemption in the amount of $15,000.

Chapter 1106 was passed by the legislature prior to July 1, 1976 and signed by the Governor on June 27, 1976. Therefore, §8(2), which, is not provided with an express effective date, is effective as of July 1, 1976 according to §3.7, Code of Iowa, 1975. The precise question then, is whether §8(2) of Chapter 1106 is applicable to the estates of decedents dying before July 1, 1976.

The Iowa inheritance tax is specifically imposed upon the transfer of property by the decedent, either 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 accrues immediately at 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 the property of the decedent vests immediately at death in the decedent's beneficiaries, subject to possession by the executor or administrator during the probate proceedings. *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. Hence, it is consistent to conclude that the Iowa inheritance tax is to be computed according to the statutes in effect when the decedent died where the legislature has not provided otherwise.

Statutes are presumed to be prospective unless expressly made retroactive. See §4.5, Code of Iowa, 1975. The Iowa Supreme Court has held that statutes imposing the inheritance tax were not to be construed as applying retroactively to estates of decedents dying before such 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.

An opinion of the Attorney General, OAG Griger to Redmond, issued December 3, 1976, a copy of which is attached, provides that the sections of

Chapter 220 authorizing a deduction for costs of the sale of property in an estate in computing the Iowa inheritance tax would not be applicable to estates of decedents dying prior to the effective date of the statute.

The Courts in several other jurisdictions have held that a statute creating an exemption, in the absence of an express provision otherwise, will not affect taxes which are due and payable at the time the amendatory statute becomes effective, *State ex rel. Marion County v. Certain Lands,* 1882, 40 Ark. 35; *Appeal Tax Court v. Baltimore Academy of Visitation,* 1878, 50 Md. 437; *People ex rel. Jones v. Feitner,* 1898, 157 N.Y. 363, 51 N.E. 1002, nor will it apply to taxes which are a lien at the time the amendatory provision becomes effective even where such taxes are not yet due and payable. *People ex rel. McCullough v. Deutsche E. L. J. Gemeinde,* 1911, 249 Ill. 132, 94 N.E.162. The Iowa inheritance tax becomes a lien upon the estate property at the time of decedent's death. See §450.7(1). Hence, the reasonable conclusion is that a statutory enactment enlarging an individual exemption does not affect taxes which are due and payable or taxes which are a lien, even though not yet due and payable, prior to the effective date of the statutory amendment.

In the case of *In Re Ingraham's Estate,* 1944, 106 Utah 337, 148 P.2d 340, the Court, in holding that a statutory amendment to the inheritance tax law did not apply to estate of decedents dying before the effective date of the amendment gave the following reasoning 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."

The foregoing rationale, along with the authorities previously cited, indicate no sound reason which would justify a construction that the relevant sections of Chapter 1106 retroactively apply to estates of decedents dying before July 1, 1976.

Therefore, it is the opinion of this office that the provision of Chapter 1106 allowing increased exemptions for children in computing the net estate for Iowa inheritance tax purposes would not be applicable to estates of decedents dying prior to July 1, 1976.

February 11, 1977

MOTOR VEHICLES: Unattended. §321.362, Code of Iowa, 1975. Stopping the engine of an unattended motor vehicle does apply to public places, such as, municipally owned parking lots. (Hogan to Mosher, Deputy Citizens' Aide, 2-11-77) #77-2-10

Mrs. Ruth L. Mosher, Deputy Citizens' Aide: Reference is made to your letter of January 14, 1977, in which you state the following question:

Does..."§321.362, Code 1975, apply to municipally owned parking lots"?

Section 321.362, Code of Iowa, 1975, states:

"*Unattended* motor vehicle. No person driving or in charge of a motor vehicle

shall permit it to stand *unattended* without first stopping the engine, or when standing upon any perceptible grade without effectively setting the brake thereon and turning the front wheels to the curb or side of the highway." (emphasis added)

The first clause of the sentence from §321.362 does not limit itself to highways. The second part of the same sentence does limit itself by the word "highway." Iowa Code Supplement 1913, §1571m18, subd. 16 stated: "It shall be unlawful for the operator of any motor vehicle or person in charge thereof to leave unattended *upon any street or highway* a motor vehicle while any part of the machinery is in motion." (emphasis added)

The 1975 Code has dropped "upon any street or highway." It is assumed the Legislature intended to expand the statute by the removal of the restrictive words "upon any street or highway." We must look to what the Legislature said, rather than what it should or might have said. Rule 344(f)(13), Iowa Rules of Civil Procedure.

Next, a question rises as to how far the governmental power may be utilized to control such vehicles. Under the government's police power and the power to control and regulate streets and public places, the government may by statute or ordinance control the use and operation of motor vehicles on the streets and *public places* thereof. 60 C.J.S. Motor Vehicles §14 p. 180 (1969). A municipally owned parking lot is a public place.

In conclusion, stopping the engine of an unattended motor vehicle, Iowa Code Section 321.362, Code of Iowa, 1975, does apply to municipally owned parking lots.

February 11, 1977

CRIMINAL PROCEDURE: Duties of County Attorney. §§336.2 and 336.3, Code of Iowa, 1975. A county attorney who is engaged in the performance of official duties pursuant to Chapter 336 is under no duty to appear and prosecute nonindictable misdemeanors nor may the judicial magistrate appoint a special prosecutor to appear in the county attorney's stead pursuant to §336.3, unless exigent circumstances require the judicial magistrate to exercise the inherent power of the court to appoint a special prosecutor in the interests of the due administration of justice. (Raisch to Locher, Jones County Attorney, 2-11-77) #77-2-11

Stephen E. Locher, Jones County Attorney: You have requested an opinion from this office on the following questions of law:

"1. Who is to determine when the county attorney is 'otherwise engaged in the performance of official duties'; the magistrate before whom the county attorney does not appear, or the county attorney himself?

"2. Does the phrase 'otherwise engaged in the performance of official duties' refer only to the appearance of the county attorney in another court on official business?

"3. If the county attorney is 'otherwise engaged in the performance of official duties', is that an 'absence' under Section 336.3, of the Code?

"4. Does Section 336.2(4), being a specific statute, take precedence over Section 336.3, of the Code?"

Section 336.2(2), Code of Iowa, 1975, provides in part that it shall be the duty of the county attorney to:

"Appear for the state and county in all cases and proceedings in the courts of this county to which the state or county is a party...."

Section 336.2(4), Code of Iowa, 1975, provides that it shall be the duty of the county attorney to:

"Appear and prosecute misdemeanors whenever he is not otherwise engaged in the performance of official duties."

On November 9, 1961, the Attorney General issued an opinion concerning the relation of Section 336.2(2) and Section 336.2(4), Code of Iowa, 1958, Report of the Attorney General, 1962, pp. 155-158. The respective Sections of the law remain substantially unchanged to date. Reprinted below are the pertinent portions of that opinion regarding appearance of the county attorney in nonindictable misdemeanor actions:

"Section 336.2(2), 1958 Code, provides that it shall be the duty of the county attorney to:

" 'Appear for the state and county in all cases and proceedings in the courts of his county to which the state or county is a party, except cases brought on by change of venue from another county, and to appear in the supreme court in all cases in which the county is a party, and also in all cases transferred on change of venue to another county, in which his county or the state is a party.'

"The use of the word 'shall' when addressed to public officials will ordinarily be given the 'imperative' construction. *Hansen v. Henderson,* 244 Iowa 650, 56 N.W.2d 59 (1953); however, in the instant case, the subsection in question is followed by subsection (4) of 336.2 is specific in its reference to justice of peace courts, and provides that it shall be the duty of the county attorney to 'appear and prosecute misdemeanors before justice of the peace whenever he is not otherwise engaged in the performance of official duties.'

"In the construction of statutes, those on the same subject are to be considered with relation to each other, *Rhode v. Bank* et.al., 52 Iowa 375 (1879), and the specific provisions will control general provisions on the same subject, *McBride v. Railway Company,* 134 Iowa 398 (1907). Subsection (4) of §336.2 is specific and must necessarily control subsection (4), the county attorney is commanded to appear and prosecute only when he is not 'otherwise engaged in the performance of official duties.' " (at 156).

See also Section 4.7, Code of Iowa, 1975, (conflicts between general and specific statutes—give effect to both if possible, otherwise specific statute controls).

"The county attorney is the chief law enforcement officer in the county, and §336.2(1), Code 1958, imposes a duty upon the county attorney to 'diligently enforce or cause to be enforced in his county, all of the laws of the state, actions for a violation of which may be commenced or prosecuted, in the name of the State of Iowa, or by him as county attorney, except as otherwise specifically provided.'

"The State of Iowa, through its official representative is entitled to know of all violations in which it may be interested in prosecuting. It is only logical that the chief law enforcement officer of the county be kept fully informed of transgressions of law, which may demand his presence in the prosecution of the same, and so that he may diligently perform his duties in enforcing or causing to be enforced the laws which it is his obligation to uphold. Certainly it does not rest within the discretion of the justices of the peace to determine whether or not the state wishes to appear through its representative, but this necessarily resides within the discretion of the county attorney. Although §336.2

is considered to be only an outline of the county attorney's duties by this Department, they necessarily constitute the duties which he is obligated to perform. Obviously, performance cannot be achieved if one has no knowledge of the need for the same. It has been said that the mere presence of the county attorney or knowledge that the county attorney is available for prosecution results in numerous defendants' election to plead quilty. An absurdity would result if the county attorney, being clothed with law enforcement obligations, were compelled to operate in the obscure shadows, of non-information as to where and when a case is to be docketed. Such a lack of information would lend itself to possibilities of frivolous changes of venue, ultimate dismissal for want of prosecution, and numerous violators escaping the sanctions of the law. Justice is not to be administered in a veil of secrecy. We believe that is an obligation of the justice of the peace to inform the county attorney having jurisdiction over his court whenever a violator is to be brought before the court, within sufficient time to enable the county attorney to exercise his duties in appearing, rendering advice, directing that his appearance be entered, or appearing and prosecuting if not otherwise engaged in the performance of official duties.

"It is also our belief that, not only is it the justice's duty, but it is a legal right of the county attorney to appear or appear and prosecute. Without means of information, this legal right would be denied.

"Your attention is invited to *Clark & Grant v. Lyon County,* (1873), 37 Iowa 469, where the trial court refused the district attorney the right to appear on behalf of the defendant county of his district. On appeal, the Supreme Court stated:

" 'It is the right as well as the duty of the district attorney to appear for any county in his district, in any and all actions pending in the district court in which said county is a party. The duty thus positively enjoined upon the district attorney must of necessity be accompanied with the right to do the thing required. If it is a positive duty, resting upon the district attorney to appear in district court for the respective counties in his district, it is just as much a duty for the board of supervisors to permit him when he so desires. A refusal to allow him to appear denies a legal right.'

"We are of the opinion that it is the duty of the county attorney to appear or appear and prosecute when he is not otherwise engaged, *and it is the county attorney solely who can determine whether or not other official duties will preclude his entering an appearance in the case.* Consequently, the justice of the peace has a duty to inform the county attorney of all cases before his court whenever the State of the county is a party to the action." (emphasis added). (at 158).

Chapter 762, Section 762.12, Code of Iowa, 1975, imposes a duty on the presiding magistrate to inform the county attorney of the trial date when a defendant enters a plea other than guilty, to a non-indictable misdemeanor.

The procedure set forth in Chapter 762 does not require the presence of the county attorney at any stage in the proceeding unless he is the prosecuting witness (See Section 762.34, failure to appear — prosecuting witness or by his attorney or agent). Hence trials of nonindictable misdemeanors can be conducted in the absence of the county attorney.

Section 336.2(4) does not impose a duty on the county attorney to appear and prosecute misdemeanors "whenever he is engaged in the performance of official duties." We have previously stated that only the county attorney can determine "whether or not other official duties will preclude his entering an

appearance in the case." Report of Attorney General, 1962, pp. 155-158. However, should the county attorney not be engaged in the performance of "official duties" a duty is imposed upon him to appear and prosecute all misdemeanors, Section 336.2(4). Section 336.3, Code of Iowa, 1975, provides the court "before whom it is his duty to appear" with the discretionary power to appoint a special prosecutor in his (the county attorney's) stead in instances where the county attorney is not otherwise engaged in his official duties.

Hence as much as we implied that the court had a duty to inform the county attorney of cases pending in the district court, in the opinion cited above, the county attorney, likewise, has an implied duty to inform the court as to whether or not he shall appear at the trial of a non-indictable misdemeanor or if not, that his absence is due to the performance of official duties. Otherwise, the court may assume that the county attorney is absent, sick, or disabled under Section 336.3, and may appoint a special prosecutor in his stead.

The Court also has the inherent power to appoint special prosecutors when public business can not be left unattended. See *Seaton v. Polk County,* 1882, 59 Iowa 626, 13 N.W. 725, *Davis v. Linn County,* 1868, 24 Iowa 508 (but does not give justice of peace such inherent power); *White v. Polk County,* 1864, 17 Iowa 413; *State v. Tyler,* 1904, 122 Iowa 125, 97 N.W. 983 (appointment of special prosecutor in addition to county attorney, citations omitted); *State v. Olson,* 1957, 249 Iowa 536, 86 N.W.2d 214. The Court in exercising such inherent power must presume that the county attorney is competent and available to handle the prosecution of cases before the court. *Seaton v. Polk County,* 1882, 59 Iowa 626, 13 N.W. 725. Absence of county attorney due to performance of official duties should not be in itself grounds for the Court to exercise its inherent power rather the Court should be faced with exigent circumstances that demand the exercise of its inherent power else the administration of justice be thwarted.

The "official duties" of the county attorney extend beyond mere appearances of the county attorney before the court. See Section 336.2(7) (write opinions), Section 336.2(8) (attend grand jury), Section 336.2(9) (give receipts), Section 336.2(10) (reports), Section 336.2(11) (other). A great deal of the county attorney's time is spent on welfare cases thereby affecting the effectiveness of the county attorney in the criminal justice system. See, *Contemporary Studies Projects: Perspectives on the Administration of Criminal Justice* in Iowa, 57 Iowa L. Rev. 598, 623 (1972). Should the official duties of the county attorney prevent him from appearing before the court in the trial of a nonindictable misdemeanor and this having been communicated to the court the county attorney and the court should make arrangements to have the trial continued should the county attorney wish to participate or the matter tried without the presence of the county attorney should he desire not to participate.

February 23, 1977

MUNICIPALITIES: Police and Fire Pensions — §§411.1 and 411.6, Code of Iowa, 1975; §§18, 29, Ch. 1089, Acts of the 66th G.A. (1976). Step increases based upon merit are not to be used in the recomputation of pensions. Items such as green fees, club memberships, night duty premiums, insurance premiums and educational pay are not to be included as earnable compensation. (Blumberg to Nealson, State Representative, 2-23-77) #77-2-7

Otto Nealson, State Representative: We have your opinion request of October 8, 1976 regarding "earnable compensation" in Chapter 411 of the

Code. Since then, we received a similar request from Representative Byerly on October 14, 1976, and one from Mr. Sutton, Floyd County Attorney on January 28, 1977. We will attempt to answer all three requests in this opinion. It is apparent from these three requests that the Legislature's attempt to clarify the applicable provisions of Chapter 411, on which several of our opinions have been issued, has not ultimately resolved the prior questions.

Section 411.1(14), 1975 Code, and earlier Codes, defined "earnable compensation" as the regular compensation earned during one year on the basis of the stated compensation for the rank or position. In an opinion found in 1974 OAG 152, we held that "earnable compensation" did not include fringe benefits. In OAG 75-2-14, we held that a cost of living increase applied across the board was within "earnable compensation".

Thereafter, the Legislature attempted to clarify §411.1(14) and amended it by §18, Ch. 1089, Acts of the 66th G.A. (1976) to now read:

" 'Earnable compensation' or 'compensation earnable' shall mean the regular compensation which a member would earn during one year on the basis of the stated compensation for his rank or position *excluding any amount received for overtime compensation, meal and travel expenses, and uniform allowances and excluding any amount received upon termination or retirement in payment for accumulated sick leave.*" [Emphasis added]

The emphasized portion indicates that which was added in 1976. You ask whether an individual on pension who retired at a level which was the top of his rank, should receive increases in his pension since there has been a reclassification and his former level in now only the third of five steps in the rank. The other questions are whether specific items such as green fees, YMCA membership, longevity, health insurance, night shift premiums, holiday pay, and educational pay are fringe benefits outside of earnable compensation.

In the 1975 opinion, we also held that the mere fact a member moves up a step within the rank for merit does not require pension recomputations for all those that retired at that particular rank or step. We still adhere to that position. The reclassification did not abolish the individual's rank or step, but merely placed two more levels above it. We do not believe that the Legislature intended automatic increases in the pension based upon step increases rather than cost of living and the like within a step. The pension initially is based, in part, on the member's average final compensation, §411.6(2)(b), which consists of the average earnable compensation over the five years of highest salary, §411.1(16). The annual recomputation of the pension is found in §411.6(14), as amended by §29, Ch. 1089, Acts of the 66th G.A. (1976):

"a. 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 shall be used in the recomputation *except the pension compensation shall be used in lieu of the average final compensation* 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 recomputated 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 added]

"Pension Compensation" is defined in §411.1(25) as the member's average final compensation adjusted in the ratio of earnable compensation *to an active member having the same or equivalent rank or position as the retired member held at the time of retirement* to the earnable compensation of such member at the retirement. In other words, the "pension compensation" used to recompute the pension is the average final compensation adjusted by the ratio of the earnable compensation of an active member to the earnable compensation of a member at the time of retirement.

The above underlined portion indicates a legislative intent that the recomputation is based upon earnable compensation of an active member with the *same* or *similar* rank or position. Nowhere in Chapter 411 is there any indication that a recomputation is based upon merit step increases. Accordingly, we adhere to our prior opinion and hold that recomputations of pensions are not to be based upon step increases such as indicated by your request.

. The answer to the question of fringe benefits is more difficult. We find it hard to believe that the Legislature, in its infinite wisdom, intended that free golf, YMCA memberships and the like were to be included within earnable compensation and not be considered fringe benefits. However, the recent amendment to §411.1(14) only lists overtime, meal and travel expenses, uniform allowances, and payments for accumulated sick leave as being excluded from "earnable compensation." The key to this question is the phrase "stated compensation for his rank or position." "Stated Compensation" is not defined and we can only guess at its meaning.

"Compensation" is defined in Black's Law Dictionary, 354 (4th ed. 1951), as remuneration or wages given to an employee; salary, pay or emolument; remuneration in whatever form; includes other remuneration such as travel expenses and reimbursements for amounts spent. It is also stated there that the word is not always synonymous with "salary". "Salary" is defined, on page 1053, as:

"SALARY. A reward or recompense for services performed.

"In a more limited sense a fixed periodical compensation paid for services rendered; a state compensation, amounting to so much by the year, month, or other fixed period, to be paid to public officers and persons in some private employments, for the performance of official duties or the rendering of services of a particular kind, more or less definitely described, involving professional knowledge or skill, or at least employment above the grade of menial or mechanical labor. *State v. Speed,* 183 Mo. 186, 81 S.W. 1260. A fixed, annual, periodical amount payable for services and depending upon the time of employment and not the amount of services rendered. In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 351 Ill. 206, 184 N.E. 332, 359. It is synonymous with 'wages,' except that 'salary' is sometimes understood to relate to compensation for official or other services, as distinquished from 'wages,' which is the compensation for labor. *Walsh v. City of Bridgeport,* 88 Conn. 528, 91 A. 969, 972, Ann. Cas. 1917B, 318."

These definitions provide no assistance in our determination of what the Legislature intended by the term "stated Compensation." It seems reasonable that "stated compensation" refers solely to wages, and we will work from that assumption. We do advise, however, that the Legislature re-examine Chapter 411 with a view to further clarify these terms.

We have previously held that holiday and longevity pay are included within

earnable compensation, OAG 65-12-16, and hold so now. However, night shift premiums, insurance and educational pay appear to be items other than normal wages. Night shift premiums are in the same category as overtime. Insurance should not be included since not all policies offered are the same and the premiums will differ between individuals. Educational pay, if that term means payments made as reimbursement for education while employed, is normally not included within a wage. Finally, these items, including green fees and YMCA Memberships, have no bearing on rank or steps or the normal wages within those positions. Pensions are based upon past and current compensation per each step or rank. We do not believe that the Legislature intended such variables as education or insurance costs to play a part in determining yearly pensions.

Lastly, it can be said that the express mention of certain items is the exclusion of all others. That is a rule of statutory construction used by the Courts in determining Legislative intent. The legislature can rule by omission as well as inclusion. *State v. Flack,* 1960, 251 Iowa 529, 101 N.W.2d 535. However, such a rule is only an auxiliary rule of statutory construction to be applied with caution, nor is it conclusive as to the meaning of a statute. It should be applied only as a means of discovering legislative intent, and should never be permitted to defeat the plainly indicated purpose of the legislation. It is applicable only where the contrast between a specifically expressed matter and one not mentioned leads to an inference that the latter was not intended to be included. Thus, where there is some reason for mentioning one thing and none for mentioning another which is otherwise within the statute, the rule is inapplicable. 82 C.J.S., *Statutes* §333(b) (1953). The fact that only four items are expressly excluded from earnable compensation does not lead to the conclusion that all other similar items are automatically included within earnable compensation. Thus, the rule of *expressio unius est exclusio alterius,* as set forth above, is applicable.

Accordingly, we are of the opinion that step increases, such as those based upon merit, are not included in the pension recomputation under Chapter 411. Items such as night duty premiums, green fees, club memberships, insurance premiums and educational pay are not to be included as earnable compensation.

February 23, 1977

STATE OFFICERS AND DEPARTMENTS: Department of Transportation; truck length rules regulatory; legislative approval or disapproval §307.10(5), Code of Iowa, 1975. The general assembly may approve, disapprove or take no action with respect to Department of Transportation rules regulating truck lengths. It may not modify or amend such rules. (Haesemeyer to Drake, State Senator, 2-23-77) #77-2-12

The Honorable Dick Drake, State Senator: Reference is made to your letter of February 22, 1977, in which you state:

"House Concurrent Resolution 4, a copy of which is attached disapproves of a rule proposed by the Department of Transportation on January 17, 1977, which would establish a 60 foot maximum legal length for double bottom trucks. The measure which passed the House was amended by the Senate (S 3085) to add the words 'insofar as it applies to interstate highways and to highways within five miles of interstate highways.' "

Section 307.10, Code of Iowa, 1975 provides in relevant part:

"307.10 Duties of Commission. 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 no action is taken by the general assembly on the proposed rules, such rules shall become effective May 1 and thereafter all laws in conflict herewith shall be of no further force and effect." (Emphasis added.)

The foregoing statutory language is clear, plain and free from ambiguity. Proposed rules submitted to the general assembly by the transportation commission relative to truck lengths may be either (1) approved, (2) disapproved or (3) no action taken with respect thereto. If approved or no action is taken within the 60 days of their submission, the rules become effective May 1. If disapproved the rules do not become effective at all. Under this statute the general assembly has no power to amend or modify in any respect the rule submitted to it by the Transportation Commission. In our opinion the additional language added by the Senate to HCR 4 would be ineffective to achieve the result desired. The Senate should either approve or disapprove HCR 4 and not attempt to add qualifying language to it as it has no statutory authority to do so.

February 23, 1977

MUNICIPALITIES: Housing Code — Ch. 413, Code of Iowa, 1975. A municipal housing code is not applicable to State owned housing. (Blumberg to Harkin, Story County Attorney, 2-23-77) #77-2-13

Ms. Ruth R. Harkin, County Attorney, Story County: We have your opinion request of February 10, 1977, regarding a proposed housing code. The city of Ames is adopting a new housing code pursuant to Chapter 413 of the 1975 Code of Iowa. You ask whether that housing code would be applicable to Iowa State University's student housing. By "student housing" you mean those houses owned by the University and rented to the students.

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 expressly allowed by statute. 1970 O.A.G. 353. See also, *Paulus v. City of St. Louis,* 446 S.W.2d 144 (Mo. 1969), where that court held 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 upon it.

Chapter 413 of the Code is very general in its application. We are unable to find anything in that chapter which indicates any legislative intent that the State or its agencies are to be included. If a statute cannot be construed to include the State, then neither may an ordinance based upon that statute.

Accordingly, we are of the opinion that a municipal housing code is not applicable to State owned housing.

February 23, 1977

COUNTIES: Sheriff's Deputies Grievance Procedures. Chapter 341A, Section 341A.6, §341A.12, Chapter 20, Section 20.3(1), §20.3(2), and §20.4(20), Section 20.8 and Section 20.9, Code of Iowa, 1975. Rules and regulations approved by the Civil Service Commission could be superceded by the terms of a collective bargaining agreement if the terms are not reserved to the Commission in §20.9. The grievance procedure in Section 341A.12 prevails over the grievance procedures of a collective bargaining agreement. The sheriff is a supervisor of deputy sheriffs, but not the employer. (Beamer to Redmond, State Senator, 2-23-77) #77-2-14

The Honorable James M. Redmond, State Senator: You have submitted for an opinion by this office two questions pertaining to Chapter 341A, entitled "Civil Service for Deputy County Sheriffs". The material submitted with your letter indicates that the deputy sheriffs are authorized to sign a union contract with their employer. The questions are:

1. Does the union contract prevail in disciplinary rules and regulations approved by the Civil Service Commission?

2. Is the Sheriff or the Board of Supervisors the employer of Deputy Sheriffs?

Analytically, your first question is susceptible of several interpretations. The question specifically refers only to rules and regulations. However, in the broader context, your question may well be whether the Civil Service Commission statutes prevail over grievance procedures in a collective bargaining agreement.

Directing our attention to the limited question pertaining to rules and regulations, we refer to Chapter 341A, 1975 Code of Iowa, "Civil Service for Deputy County Sheriffs". Subject to an alternative plan established in §341A.4, there is created a civil service commission in each county. Thus, Chapter 341A is applicable to all sheriffs offices throughout the state. Section 341A.6 confers authority on the Civil Service Commission in the following areas:

"To adopt and amend if necessary, rules pursuant to the provisions of this chapter, which shall specify the manner in which examinations are to be held and appointments, promotions, transfers, reinstatements, demotions, suspensions, and discharges are to be made. The rules may make such other provisions regarding personnel administration and practices as are necessary or desirable in carrying out the purposes of this chapter. The commission rules, and their amendments, shall be printed and made available without cost to the public."

A possible conflict arises in regard to your question when Chapter 341A.6 is viewed in light of Chapter 20, 1975 Code of Iowa, the "Public Employment

Relations Act". Deputy sheriffs are included within the provisions of Chapter 20, since they are not expressly excluded under §20.4. Accordingly, as public employees, they are entitled to the rights enumerated in §20.8, which include joining or assisting any employee organization and negotiating collectively through representatives of their own choosing. Hence, deputy sheriffs could be covered by a collective bargaining agreement which includes procedures for the processing and adjudication of their grievances. The issue then is whether, in the event of contradictory provisions, the rules and regulations of the Civil Service Commission would prevail over the provisions of a collective bargaining agreement.

The answer to this narrow question of rules and regulations appears to be in §20.9, which provides in relevant part that:

"Nothing in this section shall diminish the authority and power of the merit employment department, board of regents' merit system, educational radio and television facility board's merit system, *or any civil service commission* established by constitutional provision, statute, charter or special act *to recruit employees, prepare, conduct and grade examinations, rate candidates in order of their relative scores for certification for appointment or promotion or for other matters of classification, reclassification or appeal rights in the classified service of the public employers served.*" (Emphasis added)

Clearly, this language of §20.9 precludes negotiations on a collective bargaining agreement from intruding upon certain authority and powers of the Civil Service Commission. Notably, however, the protection of §20.9 is limited; it protects from diminution only certain delineated powers of the Civil Service Commission, and not necessarily all those powers set forth in §341A.6. *Expressio unus est exclusio alterius.* Therefore, it is our opinion that rules and regulations approved by the Civil Service Commission could be superceded by the terms of a collective bargaining agreement negotiated under Chapter 20.

In the broader context of your first question, since it is clear deputy sheriffs are public employees as contemplated by Chapter 20, and entitled to the rights enumerated in §20.8, it is possible that deputy sheriffs would be covered by a collective bargaining agreement which would include grievance procedures for the appeal and adjudication of disciplinary actions. However, as we have stated, §20.9 of the Code, which directs the public employer to meet and negotiate in good faith on such matters as set out in that section, also does contain limitations regarding "appeal rights in classified service of the public employer served", reserving these powers to the Civil Service Commission.

Section 341A.12 of the Code set forth the procedures for disciplinary hearings as follows:

"Discipline-hearing. No person in the classified civil service who has been permanently appointed or inducted into civil service under provisions of this chapter shall be removed, suspended, or demoted except for cause, and only upon written accusation of the county sheriff, which shall be served upon the accused, and a duplicate filed with the commission. Any person so removed, suspended, or reduced in rank or grade may, within ten days after presentation to him of the order of removal, suspension or reduction, appeal to the commission from such order. The commission shall, within two weeks from the filing of such appeal, hold a hearing thereon, and fully hear and determine the matter, and either affirm, modify, or revoke such order. The appellant shall be entitled to appeal personally, produce evidence, and to have counsel. The finding and decision of the commission shall be certified to the sheriff, and shall be enforced and followed by him, but under no condition shall the employee who has

appealed to the commission be permanently removed, suspended, or reduced in rank until such finding and decision of the commission is certified to the sheriff pursuant to the rules of civil procedure.

"If the order of removal, suspension, or demotion is concurred in by a majority of the commission the accused may appeal therefrom to the district court of the county where he resides. Such appeal shall be taken by serving upon the commission within thirty days after the entry of its order, a written notice of appeal, stating the grounds thereof, and demanding that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to it order, be filed by the commission with the court. The commission shall, within ten days after the filing of the notice make, certify, and file such transcript with the court. The court shall proceed to hear and determine the appeal in a summary manner. Such hearing shall be confined to the determination of whether the order of removal, suspension, or demotion made by the commission was made in good faith and for cause, and no appeal shall be taken except upon such grounds. The decision of the district court may be appealed to the supreme court."

The problem you pose was discussed in a Drake Law Review article entitled an "*Analysis of the Iowa Public Employment Relations Act,* 24 Drake L.Rev. 1. At pages 49-50, the author stated:

"Harmonizing the various merit systems and the Public Employment Relations Act is no easy task....

* * *

"In upholding the concept of collective bargaining in conjunction with merit systems, it should be noted that the Act takes note of the existence of merit systems. The General Assembly was not unaware of their existence. Had the General Assembly chosen to do so, they could have eliminated merit system employees from the Act. The fact that the General Assembly chose not to do so should convey an intent that collective bargaining is not antithetical to merit employment, and that the two concepts can co-exist."

In *Local 1344, Council No. 4, American Fed. of State, County and Municipal Employees v. Connecticut State Bd. of Labor Relations,* 30 Conn. Sup. 259, 309 A.2d 696 (Ct. of C.P. 1973), the facts were as follows:

"On May 1, 1972, there was a collective bargaining agreement in effect between the East Haven board of education and the union covering all custodial and maintenance employees. The agreement covered the period from July 1, 1970, to June 30, 1972. Article II (c), (d) and (e) of the agreement covered procedure for filling a vacancy, and prior to May 1, 1972, pursuant to the agreement, the board of education complied with these provisions. The civil service commission of the town of East Haven, effective May 1, 1972, amended its rules and regulations to include all non-professional employees of the board of education in the competitive classified service and made them subject to the rules and regulations of civil service. The board of education, effective May 1, 1972, substituted civil service rules and regulations in place of the agreement's provisions for filling a vacancy." 309 A.2d 696, 697.

The issue presented before the Connecticut Court was whether the board of education, pursuant to a municipal statute, was prohibited by the collective bargaining agreement from changing procedures provided in that agreement. The court did not find a conflict, but noted that the contested areas were reserved by statute to the board. The Connecticut Municipal Employee Relations Act, 7-474(f) and (g) does not provide for resolution of disputes between statutes and collective bargaining agreements should they arise:

"* * *

"(f) Where there is a conflict between any agreement reached by a municipal employer and an employee organization and approved in accordance with the provisions of sections 7-467 to 7-477, inclusive, on matters appropriate to collective bargaining, as defined in said sections, and any charter, special act, ordinance, rules or regulations adopted by the municipal employer or its agents such as a personnel board or civil service commission, or any general statute directly regulating the hours of work of policemen or firemen, or any general statute providing for the method or manner of covering or removing employees from coverage under the Connecticut municipal employees' retirement system or under the policemen or firemen survivors' benefit fund, the terms of such agreement shall prevail, provided, if participation of any employees in said system or said fund is effected by such agreement, the effective date of participation in said system or said fund, notwithstanding any contrary provision in such agreement, shall be the first day of the third month following the month in which a certified copy of such agreement is received by the retirement commission, or such later date as may be specified in the agreement.

"(g) Nothing herein shall diminish the authority and power of any municipal civil service commission, personnel board, personnel agency or its agents established by statute, charter or special act to conduct and grade merit examinations and to rate condidates in the order of their relative excellence from which appointments or promotions may be made to positions in the competitive division of the classified service of the municipal employer served by such civil service commission or personnel board. The conduct and the grading of merit examinations, the rating of candidates and the establishment of lists from such examinations and the appointments from such lists and any provision of any municipal charter concerning political activity or municipal employees shall not be subject to collective bargaining."

In two more recent decisions by the Supreme Court of Connecticut, the union successfully argued that there was no serious conflict between charter provisions empowering the police department with the authority to discipline employees and a collective bargaining agreement which provides for arbitration of discharge grievances. *Board of Police Commissioners of New Haven, et al. v. William White, et al.*, Conn. S.Ct., March Term, 1976, September 14, 1976, and *Board of Police Commissioners of New Haven, et al. v. John Maher, et al.*, Conn. S.Ct. June Term, 1976 September 14, 1976. However, in the *Board of Police Commissioners of New Haven, et al. v. William White, et al., supra,* the Court specifically noted that a municipal statute controlled the question:

"In any event, any conflict or inconsistency which may exist between the charter provisions and the collective bargaining agreements is clearly resolved by that portion of §7-474(f) of the General Statutes which provides that '(w)here there is a conflict between any agreement reached by a municipal employer and an employee organization and approved in accordance with the provisions of sections 7-467 to 7-477, inclusive on matters appropriate to collective bargaining, as defined in said sections, and any charter, special act, ordinance, rules or regulations adopted by the municipal employer...the terms of such agreement shall prevail.' This was the conclusion reached by the trial court and in so concluding it was not in error." *GERR* 681, B-7 (11-1-76)

This rather lengthy discussion of Connecticut's municipal law serves to highlight the fact that where specific statutory authority exists it is controlling regarding areas reserved to merit or civil service commissions. As we have noted, §20.9, 1975 Code of Iowa, reserves to the civil service commission not only areas such as recruiting employees, grading examinations and rating candidates, but "appeal rights in the classified service of the public employer

served."

Accordingly, it is our opinion that the provisions of §341A.12, pertaining to disciplinary hearings for persons, in the classified services, is unaffected by the provisions of Chapter 20, and that, therefore, the provisions of §341A.12 would prevail over the grievance procedures of a collective bargaining agreement.

With respect to your second question, it is clear that the county as an entity is the "public employer" under §20.3(1); as the Public Employment Relations Board has stated, neither the Board of Supervisors, not an elected county official such as the sheriff, is a political subdivision and, therefore, neither can be classified as a public employer. *Dubuque County,* PERB Case No. 831 (Declaratory Ruling, November 24, 1976). The board of supervisors, however, is the "governing body" within the meaning of §20.3(2) and is thus the body empowered to act on behalf of the county in collective bargaining matters. While not a public employer or a member of the governing body, the sheriff is clearly a supervisor of deputy sheriffs within the meaning of §20.4(20).

February 23, 1977

MOTOR VEHICLES: Registration, Joint Tenancy, §§4.1(3), 321.50(1) and 557.15, Code of Iowa 1977. "The owner" as used in §321.50(1) means all the owners of a vehicle having two or more owners. (Tangeman to Preisser, Director D.O.T., 2-23-77) #77-2-15

Mr. Victor Preisser, Director, Iowa Department of Transportation: You have requested an Attorney General's Opinion in regard to the interpretation of §321.50(1), Code of Iowa 1977 and more specifically the meaning of the words "the owner". Your specific question reads as follows:

"Procedures developed prior to the formation of the Department of Transportation required *every* owner, as listed on the certificate of title, to sign the application for notation of a security interest. It is our interpretation that *any one owner* of the vehicle can sign the application for notation of a security interest, regardless of whether such person is a joint or common owner. We are requesting your confirmation that our interpretation is correct according to the intent of the law."

It is stated in §4.1(3), Code of Iowa 1977:

"3. Number and gender. Unless otherwise specifically provided by law the singular includes the plural and the plural includes the singular. * * *"

My research discloses no other statutory provision which would satisfy the "Unless otherwise specifically provided..." of the language of the above quoted statute. Therefore, it would appear that according to the aforesaid subsection 3, the words "the owner" about which you inquire mean both singular and plural and consequently where joint owners are involved, the signatures of both are required.

At 20 Am.Jur. 2nd 102, §11 provides:

"The joint estate is not favored in this country; the policy of the American law is opposed to the creation of a joint tenancy with the entire property going to the survivor, at least unless the parties clearly demonstrate that that is the intent, and accordingly, the commonlaw rule—that a conveyance to two or more persons is deemed to create a joint tenancy with survivorship unless a contrary intent appears, has been generally discarded or abrogated, and

legislation modifying, or limiting, or abolishing the doctrine of the acquisition of the property of a joint tenant by survivorship has been enacted in most states."

Section 557.15, Code of Iowa 1977 states:

"557.15 Tenancy in common. Conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed."

Several annotations to that statute provide as follows:

"The estate of joint tenancy is disfavored by the state of Iowa." *Albright v. Winey,* 1939, 226 Ia. 222, 284 N.W. 86

and

"There is no presumption that conveyances of real estate or transfers of personality to two or more persons create a joint tenancy with right of survivorship; rather, the presumption is that they create a tenancy in common unless a contrary intent is expressed." In re: Staments Estate, 1967, 260 Ia. 93, 148 N.W.2d 468.

According to the above citations a joint tenancy ownership cannot be established except through a designation that clearly and specifically indicates that intent. The mere use of the term *or* in naming two persons as titleholder of a piece of property does not, in my opinion, satisfy that requirement.

The following early citation is also of interest in regard to this question.

"One joint owner of personal property cannot sell or pledge the interest of his co-owner, although the former is in possession of the chattel, and the purchaser or pledgee has no knowledge of the joint ownership." 1868, *Franz v. Young,* 24 Ia. 375.

That relatively ancient case is cited favorably in 1966, *Keokuk Savings Bank and Trust Co. v. Desvaux,* 143 N.W.2d 296 at page 301.

In view of the state of the law in Iowa as indicated by the above citations, my answer to your question is that the requirement of the signature of "the owner" as provided in §321.50(1), Code of Iowa, 1977, means the signatures of all the owners of a vehicle where there is multiple ownership and the signature of only one such owner is not sufficient and does not comply with the requirement of the statute.

February 23, 1977

STATE FAIR BOARD: Delegation of Powers—§§173.1 and 173.2, Code of Iowa, 1975. The Legislature may delegate to the county fair boards the power to participate in the election of the State Fair Board directors. (Condon to Rush, State Senator, 2-23-77) #77-2-16

The Honorable Bob Rush, State Senator: This letter is in response to your request for an opinion on the following questions:

"Pursuant to Section 173.1(2) of the Iowa Code, nine directors are elected to the State Fair Board by convention consisting of delegates selected in a variety of ways. Certain delegates are selected by Section 173.2(2) which provides in part for agricultural societies making such determinations.

"This is to request your opinion regarding the following specific questions:

"1. The propriety of the Legislature delegating responsibility to a private

organization which has the power to select delegates who in turn elect members of the State Fair Board.

"2. The propriety of having private county fair board corporations make the selection of delegates on the basis of membership in said corporation."

Regarding your questions as to the propriety of the delegation of authority by the Legislature, I shall assume that you are requesting an evaluation of the legality of the delegation. Therefore, in response to your first question, it is legal for the Legislature to delegate responsibility to agricultural societies or county fair boards to select delegates to a convention at which the members of the State Fair Board are elected as set forth in Section 173.2, Code of Iowa, 1975.

Recently, the Iowa Supreme Court examined the broad range of powers that the General Assembly may exercise, and concluded that the Legislature need not find express constitutional authorization to act, but that it may exercise any power not expressly prohibited by the Federal or State Constitutions. The Legislature has the broadest discretion as to what is a public purpose. *Bechtel v. City of Des Moines,* 1975, 225 N.W.2d 326; *Farrell v. State Board of Regents,* 1970, 179 N.W.2d 533.

The Court addressed the issue of delegation of legislative authority in *State v. Steenhoek,* 1970, 182 N.W.2d 377, 380, *appeal dismissed,* 404 U.S. 878, 92 S.Ct. 195, 30 L.Ed.2d 159. The Court stated:

"Before the court may be justified in holding a statute unconstitutional as a delegation of legislative powers it must clearly appear that the power involved is purely legislative in nature—that is, one appertaining exclusively to the legislative department....

...

"If power delegated be properly restricted so that it carries out the plan after the legislature has layed down an intelligible goal and complete declaration of policy which is definite in describing the subject to which it relates or the field wherein it shall apply, then there is a proper delegation of powers."

Thus, the Legislature has the ability to delegate authority to others. The issue that faces us regarding Sections 173.1 and 173.2 is if the election of State Fair Board directors may be delegated and if the power can be delegated to county fair board members.

The Legislature cannot delegate purely legislative powers—that is, the Legislature cannot delegate its power to make a law. *Spurbeck v. Statton, Commissioner of Public Safety,* 1960, 252 Iowa 279, 106 N.W.2d 660, 664, quoting from *Locke's Appeal,* 72 Pa. 491 and *Field v. Clark,* 143 U.S. 649, 12 S.Ct. 495, 505, 36 L.Ed. 294. An oft-cited rule is:

"The true distinction is between the delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." 1 *Sutherland on Statutory Construction,* §88; *State v. Rivera,* 1967, 149 N.W.2d 127, 131; *Goodlove v. Logan,* 217 Iowa 98, 251 N.W.39; *McLeland v. Marshall County,* 199 Iowa 1232, 201 N.W. 401, 404.

The election of State Fair Board directors is not a purely legislative, law-making power, so the Legislature may delegate that power if the delegation is accompanied by "an intelligible goal and complete declaration of policy."

State v. Steenhoek, supra. In *State v. Rivera,* 1967, 149 N.W.2d 127, 131, the Iowa Supreme Court held:

"[I]t is for the legislature to determine what laws shall be, to create rights and duties and to provide rules of conduct. This does not necessarily mean that the Legislature must lay down a strict rule that must be followed by an administrative officer, but that an executive or commission may be vested by the legislative branch of the government with discretion, within certain limits, in carrying out provisions of a statute."

In Section 173.2, the Legislature has given little direction to the county fair boards, but it has established as a goal of the statute that county fair boards and other agricultural associations send delegates to an annual convention at the state capitol for the purpose of electing the State Fair Board members.

The Iowa Supreme Court has not required that a great deal of direction be provided in statutes delegating legislative authority. In a 1976 decision, *Warren County v. Judges of Fifth Jud. Dist.,* 243 N.W.2d 894, 900, the Court revealed that it will look for either standards or safeguards. An important safeguard is the review of the actions of administrative officers provided by Section 17A.19 of the Iowa Administrative Procedure Act. As a further insight into the criteria considered in judicial scrutiny of legislative delegation, the Court noted:

"We look to the practical necessities of public interest and will consider as an important factor the difficulty or impossibility of calling for the legislature to function in a given area.

"[We have] recognized the modern tendency toward greater liberality in permitting grants of discretion to administrative officials as the complexity of government and economic conditions increases * * * (Authorities)."

Further evidence that a court would be unlikely to find Section 173.2 an unconstitutional delegation of authority, is the Court's statement in *State v. Rivera, supra,* at p. 131, "It must be assumed that public officers will act fairly and impartially, and a statute vesting them with discretion will not be held unconstitutional because of a supposed possibility that they will not do so."

Regarding delegation to the county fair boards, the question arises if they are public or private corporations. You have characterized them as private corporations. An opinion issued by the Attorney General's Office on November 18, 1966, characterized the county fair board as an agency or instrumentality of state government. (1966 OAG 447). The opinion was supported by the Iowa Supreme Court's determination that a county fair society is "a sort of arm or branch of the State." *Williams v. Dean,* 134 Iowa 216, 220, 111 N.W. 931. The county fair board was found to be a public corporation in *Excise Board v. Kansas City Southern Ry. Co.,* 47 P.2d 580 and in *People v. San Joaquin Valley Agricultural Assn.,* 91 Pac. 740. The county fair board would fit within the purview of a public corporation defined by the Court as "an agency or instrumentality created for the administration of a portion of the powers of government, delegated to it for that purpose" in *Harris v. City of Des Moines,* 202 Iowa 53, 57, 209 N.W. 454.

The Legislature may delegate to county fair boards the power to participate in the election of State Fair Board directors because the Legislature has broad discretion as to whom it may delegate powers. The Iowa Supreme Court has held that the Legislature can delegate powers even to private corporations or individuals. *State v. Ronek,* 1970, 176 N.W.2d 153, *Koelling v. Board of*

Trustees of Mary Frances Skiff Memorial Hospital, 1966, 259 Iowa 1185, 146 N.W.2d 284; *Bulova Watch Co. v. Robinson Wholesale Co.,* 1961, 252 Iowa 740, 108 N.W.2d 365.

Perhaps, the characterization of the county fair board as a public corporation is dispositive of the second question you pose since it alleviates the controversy that may be engendered by the selection of delegates on the basis of membership in a private corporation. Any further response to the second question would entail a determination if it is wise that delegate status be based on membership. In Section 173.2 the Legislature provided that delegates be selected thusly. I have discovered no new law which says that it may not be so. I can offer no other answer to the question because to do so would only be a comment on the wisdom of the legislative enactment, and such an evaluation is not within the scope of an Attorney General's opinion.

February 25, 1977

STATE OFFICERS AND DEPARTMENTS: Military Leave; Intermittent Employees. Intermittent employees of the Iowa Department of Social Services who work more than 180 days, as temporarily allowed by Chapter 1066, Acts 66th G.A. (1975), are entitled to a leave of absence for military service without loss of pay under §29A.28, Code of Iowa, 1975. (Foudree to Burns, Commissioner, Department of Social Services, 2-25-77) #77-2-17

Mr. Kevin J. Burns, Commissioner, Department of Social Services: In your letter you ask whether an Iowa Department of Social Services' intermittent employee who has been employed for more than 180 days as now allowed by Chapter 1066, Acts 66th G.A. Second Session (1975) (previously S.F. 1285), is entitled to a leave of absence for military service without loss of pay or status as provided by §29A.28, Code of Iowa, 1975:

29A.28 Leave of absence of civil employees. All officers and employees of the state, or a subdivision thereof, or a municipality other than employees employed temporarily for six months or less, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active state or federal service, be entitled to a leave of absence from such civil employment for the period of such active state or federal service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence.

Chapter 1066, Acts 66th G.A. Second Session (1975), provides:

SECTION 1. Section nineteen A point nine (19A.9), subsection nine (9), Code 1975, is amended to read as follows:

9. For emergency employment for not more than sixty calendar days in any twelve-month period without examination, and for intermittent employment for not more than one hundred *twenty* calendar days in any twelve-month period. For intermittent employment the employee must have had a probationary, permanent, or temporary appointment.

SEC. 2. The provisions of section nineteen A point nine (19A.9), subsection nine (9), of the Code restricting employment of intermittent employees to not

more than a specified number of calendar days in any twelve-month period shall not apply, during the period beginning on March 15, 1976 and ending on June 30, 1977, to intermittent employees who are employed in field offices by the department of social services. It is the intent of the general assembly to authorize the continued employment during fiscal 1977 of persons employed to assist in meeting the current high demand for income maintenance and related services and thereby to permit the department to avoid the cost of training new employees.

This amends the previous provisions of the Iowa Code in Section 19A.9(9), which reads:

9. For emergency employment of not more than sixty calendar days in any twelve-month period without examination, and for intermittent employment for not more than one hundred eighty calendar days in any twelve-month period. For intermittent employment the employee must have had a probationary, permanent, or temporary appointment.

Chapter 1066 thus has the effect of reducing the maximum number of days which an intermittent employee may work in a twelve month period from 180 to 120. However, it does not apply to Department of Social Services' employees from March 15, 1976 to June 30, 1977. You also ask which portion of Section 29A.28 controls: "temporarily" or "for six months"?

Both "temporarily" and "for six months" should be read together. In other words, Section 29A.28 simply says that all state officers and employees, including temporary employees who have worked more than six months, are entitled to military leave without loss of status, rating, and pay during the first thirty days. Temporary employees who have worked six months or less are excluded from receiving such leave. And since Department of Social Services' employees are temporarily exempted from the provisions of Chapter 1066, they may work more than 120 days and even more than the 180 days set out in Section 29A.28 until June 30, 1977. That is the case here, where an intermittent employee, whose status is temporary, has worked over six months because of Chapter 1066. He thus is in the category of those temporary employees who qualify for military leave as provided by Section 29A.28.

February 25, 1977

COUNTIES: Emergency building repair contracts—Chapter 1178, Acts, 66th G.A., 1975, require that all contracts for construction or repair of buildings be let for bids. In emergency situations, the supervisors, to avoid further damage, should use available materials and help without contracting therefore until the requirements of the statute can be met. (Nolan to Smith, Auditor of State, 2-25-77) #77-2-18

The Honorable Lloyd R. Smith, Auditor of State: We have your letter of November 12, 1976, requesting an opinion on the following:

" 'During this last session, the legislature passed S.F. 1203 requiring that contracts for the construction or repair of buildings, the probable cost of which does not exceed $5,000, shall be let either through formal bidding procedures specified herein or through informal bidding by notifying in writing at least three qualified bidders at least two weeks prior to letting the contract.'

"It appears to this office that the above quoted provision means that *any* repair undertaken to any county building would be required to be delayed at least two weeks while the informal bidding procedure for letting contracts

was used. This provision in law seems to be categorical, and does not provide an exception for emergency repairs. In the case of storm damage, accidents, or a breakdown, some buildings would suffer greater damage if the boards of supervisors were required to wait two weeks to meet the informal bidding procedures outlined in S.F. 1203.

"S.F. 1203 creates a conflict for board of supervisors who have a responsibility to take action in making immediate emergency repairs to stop further damage from resulting in the event of natural storms, accidents or structural breakdown. Going through the informal bidding procedure required in S.F. 1203 could well lead to charges of malicious and willful damage to public property or defacing of public buildings as provided in Section 714.1 and 714.3. It is also possible that a charge of neglect of duty as provided in Section 740.19 could also be levied against the board members.

"The key question to this conflict is: May the board of supervisors considering the greater public benefit and duty imposed upon them make emergency repairs without being required to use the formal or informal bidding procedures specified in S.F. 1203? If so, how may they proceed?"

The act which has been questioned in Chapter 1178, Acts of the 66th G.A., 1976 Session, which is an amendment to §332.7, Code of Iowa, 1975, and reads as follows:

"No building shall be erected or repaired when the probable cause thereof will exceed five thousand dollars, except under an express written contract and upon proposals therefore, invited by advertisement for three weeks in all the official newspapers of the county in which the work is to be done.

"Contracts for the construction or repair of buildings, the probable cost of which does not exceed five thousand dollars, shall be either through the formal bidding procedure specified herein, or through informal bidding, by notifying in writing at least three qualified bidders at least two weeks prior to letting the contract. The informal bids received, together with a statement of the reasons for use said informal procedure and bid acceptance, shall be entered in the minutes of the board of supervisors meeting at which such action was taken."

It is the opinion of this office that the language of Senate File 1203, until further amended, is binding upon the board of supervisors. Under the Dillon Rule, which still prevails in this state, for all political subdivisions except cities, the governmental bodies of political subdivisions are authorized to do only what the statute expressly provides, or what may be necessarily implied therefrom. The language of the statute, in our opinion, clearly precludes contracting for emergency repair of county buildings without a two week notice of possible bidders. However, we do not see the statute as creating any limitation upon the county board of supervisors utilizing the custodial staff and such materials as it may have on hand in making emergency repairs when the need arises. Such procedures would, in our view, logically follow for the prevention of further damage, which might otherwise result in the event of natural storms or structural breakdown.

We do not view the other arguments presented in your letter as overcoming the presumption that the legislature, when it acts, acts with wisdom and reason. Accordingly, while §332.7, as amended stands, no building repair contract should be made without complying with the notice and bidding requirements set forth therein.

February 25, 1977

CORPORATIONS: Liability—§§504.5 and 504A.101, Code of Iowa, 1975; §§1 and 2, Ch. 235, 66th G.A. (1975). Employees of nonprofit corporations and corporations not for pecuniary profit are not exempted from liability for their acts or omissions, unless they commit such acts or omissions as directors, officers and the like, and they fall within their duties as directors, officers and the like. (Blumberg to Rodgers, State Senator, 2-25-77) #77-2-19

Honorable Norman Rodgers, State Senator: We have your opinion request of February 3, 1977, regarding a recent amendment to Chapters 504 and 504A of the Code. You ask whether, pursuant to those amendments, there is liability of the directors, officers and employees of such a corporation. The corporation in question is a mental health center.

Chapters 504 and 504A, 1975 Code of Iowa, regulate corporations not for pecuniary profit and nonprofit corporations. Sections 1 and 2, Ch. 235, Acts of the 66th G.A. (1975), add the following to §§504.5 and 504A.101: "Directors, officers, members or other volunteers shall not be personally liable for any claim based upon an act or omission of such persons performed in the reasonable discharge of their lawful corporate duties." You make reference to employees in your request. The amendments do not use that word. It appears those persons covered do not include employees. Thus, physicians, nurses, orderlies, nurses aides, and the like would not fall within these amendments in the course of their duties in the care facility. If they are also directors, officers, members or other volunteers, they may not be held liable for certain acts or omissions, but only as to their duties as directors, officers and the like. In other words, if a physician commits a negligent act while treating a patient at such a facility, those amendments would not waive any liability even if that physician is a director.

The amendments use the term "reasonable discharge." A question has arisen whether this term, in effect, nullifies any exception to liability granted by the amendments. It has been said that the use of this term renders the amendments useless since tort law is based upon unreasonableness, and the use of the word "reasonable" does not except liability for unreasonable acts. While the wording of the amendments is not altogether clear, and does to some extent, create a question whether they were meant to excuse liability for negligent acts, we cannot say that the amendments are useless. There may be claims asserted on a basis other than tort for which directors, officers and the like would not be held liable because of the reasonable discharge of their corporate duties.

Finally, in the letter from the health center attached to your request, there appears to be concern whether the amendments are of value since an attorney might have to be retained on any claim. The amendments are not intended to prevent claims from being filed. They merely provide a defense to liability which is a fact question. They were not meant to preclude the need of legal assistance.

February 25, 1977

APPROPRIATIONS: MEDICAL SCHOOL: PRIVATE OR PUBLIC PURPOSE—Article III, §31, Const. of Iowa. An appropriation to the College of Osteopathic Medicine and Surgery of Des Moines conditioned upon an agreement with the college that 30 percent of the entering class be Iowa residents, is an appropriation for a public, rather than a private, purpose and a two-thirds vote in each house of the General Assembly is not

required. (Turner to Pelton, 2-25-77) #77-2-20

The Honorable John Pelton, State Representative: You have requested an opinion of the attorney general in answer to the following question:

"Is it constitutionally permissible for the Iowa Legislature to appropriate public funds to a private educational corporation under an agreement that said private educational corporation will guarantee a specific percentage of admissions to Iowa residents?

"I speak specifically of the proposed $1,200,000 appropriation to the College of Osteopathic Medicine and Surgery of Des Moines, Iowa, and their agreement in return that 30 per cent of their entering class consist of Iowa residents."

In *1971 OAG 266,* it was our opinion that an appropriation to a private college of osteopathic medicine and surgery was for a public, rather than a private, purpose and that a two-thirds vote in each house of the General Assembly was not required. See Article III, §31, Constitution of Iowa and *Dickinson v. Porter,* 240 Iowa 393, 35 N.W.2d 66, 79-81 (1948).

In that opinion we noted that it is a matter of common knowledge that there is a serious shortage of doctors in Iowa and that the College of Medicine at the University of Iowa was unable to train enough medical doctors who would stay in the state to improve the situation. Today, it is a matter of common knowledge that there is still a shortage of doctors in Iowa. The appropriation you are considering is obviously remedial and we see no reason why the appropriation cannot be conditioned upon an agreement that 30 per cent of the entering class be Iowa residents.

February, 1977

APPROPRIATIONS

Medical School; Private or Public Purpose. Article III, §31, Constitution of Iowa. An appropriation to the College of Osteopathic Medicine and Surgery of Des Moines conditioned upon an agreement with the college that 30 percent of the entering class be Iowa residents, is an appropriation for a public, rather than a private, purpose and a two-thirds vote in each house of the General Assembly is not required. (Turner to Pelton, 2-25-77) #77-2-20

BANKING

Statutory Construction. §§4.1(3), 524.806, Code of Iowa, 1975. The general rule that the use of the singular number includes the plural does not control with respect to §524.806 which specifically relates to bank deposits in the name of two individuals and contemplates that there will be one survivor. (Nolan to Harbor, State Representative, 2-2-77) #77-2-1

CORPORATIONS

Corporations. Liability—§§504.5 and 504A.101, Code of Iowa, 1975; §§1 and 2, Ch. 235, 66th G.A. (1975). Employees of nonprofit corporations and corporations not for pecuniary profit are not exempted from liability for their acts or omissions, unless they commit such acts or omissions as directors, officers and the like, and they fall within their duties as directors, officers and the like. (Blumberg to Rodgers, State Senator, 2-25-77) #77-2-19

COUNTIES

Emergency Building Repair Contracts. Chapter 1178, Acts, 66th G.A., 1975, require that all contracts for construction or repair of buildings be let for bids. In emergency situations, the supervisors, to avoid further damage,

should use available materials and help without contracting therefore until the requirements of the statute can be met. (Nolan to Smith, Auditor of State, 2-25-77) #77-2-18

Sheriff's Deputies Grievance Procedures. Chapter 341A, §341A.6, 341A.12, Chapter 20, §20.3(1), 20.3(2), 20.4(20), 20.8 and 20.9, Code of Iowa, 1975. Rules and regulations approved by the Civil Service Commission could be superceded by the terms of a collective bargaining agreement if the terms are not reserved to the Commission in §20.9. The grievance procedure in §341A.12 prevails over the grievance procedures of a collective bargaining agreement. The sheriff is a supervisor of deputy sheriffs, but not the employer. (Beamer to Redmond, State Senator, 2-23-77) #77-2-14

Library Levy. Chapters 1067 and 1160, Acts, 66th G.A., 1976. The provisions of Chapters 1067 and 1160 are not irreconcilable and a levy of 6¾ cents per $1,000 assessed valuation should be levied where the increase in the aggregate of all county levies enumerated does not exceed the limitation imposed by Chapter 1067. Where that limitation is reached funds from other sources may be employed to satisfy Chapter 1160 requirements. (Nolan to Holschlag, Chickasaw County Attorney, 2-11-77) #77-2-8

CRIMINAL PROCEDURE

Duties of County Attorney. §§336.2, 336.3, Code of Iowa, 1975. A county attorney who is engaged in the performance of official duties pursuant to Chapter 336 is under no duty to appear and prosecute non-indictable misdemeanors nor may the judicial magistrate appoint a special prosecutor to appear in the county attorney's stead pursuant to §336.3, unless exigent circumstances require the judicial magistrate to exercise the inherent power of the court to appoint a special prosecutor in the interests of the due administration of justice. (Raisch to Locher, Jones County Attorney, 2-11-77) #77-2-11

MOTOR VEHICLES

Registration, Joint Tenancy. §§4.1(3), 321.50(1) and 557.15, Code of Iowa, 1977. "The owner" as used in §321.50(1) means all the owners of a vehicle having two or more owners. (Tangeman to Preisser, Director, D.O.T., 2-23-77) #77-2-15

Unattended, §321.362, Code of Iowa, 1975. Stopping the engine of an unattended motor vehicle does apply to public places, such as, municipally owned parking lots. (Hogan to Mosher, Deputy Citizens' Aide, 2-11-77) #77-2-10

MUNICIPALITIES

Police and Fire Pensions. §§411.1 and 411.6, Code of Iowa, 1975; §§18, 29, Chapter 1089, Acts, 66th G.A., 1976. Step increases based upon merit are not to be used in the recomputation of pensions. Items such as green fees, club memberhips, night duty premiums, insurance premiums and educational pay are not to be included as earnable compensation. (Blumberg to Nealson, State Representative, 2-23-77) #77-2-7

Housing Code. Chapter 413, Code of Iowa, 1975. A municipal housing code is not applicable to state owned housing. (Blumberg to Harkin, Story County Attorney, 2-23-77) #77-2-13

Airports. §§330.12 and 330.21, Code of Iowa, 1975. An airport commission has the power to lease airport land under its control not needed for a public

purpose. (Blumberg to Griffee, State Representative, 2-4-77) #77-2-4

State Employee on City Council. §§19.18, 123.17, Code of Iowa, 1975; IV IAC Ch. 570. Merit employees' political activities are restricted. Beer and Liquor Control employees are prohibited from occupying a seat on a city council. (Blumberg to Higgins, State Representative, 2-2-77) #77-2-3

SCHOOLS

Sharing Instructors and Classrooms. §§275.1, 280.15, Code of Iowa, 1975. A school district may share instructors and classrooms with another school district pursuant to §280.15 but cannot send all of the pupils in a given grade to another district without being in conflict with §275.1 and subjecting itself to possible merger or attachment. (Nolan to Priebe, State Senator, 2-4-77) #77-2-5

STATE OFFICERS AND DEPARTMENTS

Department of Transportation, Truck Length Rules Regulatory Legislative Approval or Disapproval. §307.10(5), Code of Iowa, 1975. The general assembly may approve, disapprove or take no action with respect to Department of Transportation rules regulating truck lengths. It may not modify or amend such rules. (Haesemeyer to Drake, State Senator, 2-23-77) #77-2-12

Military Leave; Intermittent Employees. Intermittent employees of the Iowa Department of Social Services who work more than 180 days, as temporarily allowed by Chapter 1066, Acts, 66th G.A., 1975, are entitled to a leave of absence for military service without loss of pay under §29A.28, Code of Iowa, 1975. (Foudree to Burns, Commissioner, Dept. of Social Services, 2-25-77) #77-2-17

Spanish Speaking Peoples Commission; Investigatory Powers. Chapter 1061, §§6 and 7, 66th G.A., 1976. The duties and powers of the Spanish Speaking Peoples Commission do not include subpoena power. Moreover, while all departments, divisions, agencies and offices of the state are required to make pertinent information available to the Commission, there is no such duty on the part of private federally funded groups. Thus, while the Commission could investigate a migrant program it can neither compel the production of witnesses and documents nor require the cooperation of the program being investigated. (Haesemeyer to Sanchez, Executive Director, Spanish Speaking Peoples Commission, 2-10-77) #77-2-6

Contracts; Authority; Limitations; Acquisition of Office space by Department of Transportation for driver's license office, in store of merchant, even though traffic induced through store by persons attending driver's license office might give merchant in which office located advantage over competing merchant, not a violation of any state law. (Tangeman to Redmond, State Senator, 2-3-77) #77-2-2

State Fair Board; Delegation of Powers. §§173.1 and 173.2, Code of Iowa, 1975. The Legislature may delegate to the county fair boards the power to participate in the election of the State Fair Board directors. (Condon to Rush, State Senator, 2-23-77) #77-2-16

TAXATION

Inheritance Tax; Individual Exemption. §450.9(2), Code of Iowa, 1975, as amended by Chapter 1106, Acts, 66th G.A., 1976. The provisions of Chapter 1106 allowing increased exemptions for children in computing the net estate for Iowa inheritance tax purposes would not be applicable to estates of

decedents dying prior to July 1, 1976. (Kerwin to DeKoster, State Senator, 2-11-77) #77-2-9

STATUTES CONSTRUED

Code, 1975	Opinion
4.1(3)	77-2-1
4.1(3)	77-2-15
19.18	77-2-3
20.3(1)	77-2-14
20.3(2)	77-2-14
20.4(20)	77-2-14
20.8	77-2-14
20.9	77-2-14
29A.28	77-2-17
123.17	77-2-3
173.1	77-2-16
173.2	77-2-16
275.1	77-2-5
280.15	77-2-5
307.10(5)	77-2-12
321.50(1)	77-2-15
321.362	77-2-10
330.12	77-2-4
330.21	77-2-4
336.2	77-2-11
336.3	77-2-11
341A	77-2-14
341A.6	77-2-14
341A.12	77-2-14
411.1	77-2-7
411.6	77-2-7
413	77-2-13
450.9(2)	77-2-9
524.806	77-2-1
557.15	77-2-15

66th GENERAL ASSEMBLY

Ch. 1061, §§6 & 7	77-2-6
Ch. 1066	77-2-17
Ch. 1067	77-2-8
Ch. 1089, §§18 & 29	77-2-7
Ch. 1106	77-2-9
Ch. 1160	77-2-8
Ch. 1178	77-2-18

CONSTITUTION OF IOWA

Art. III, §31	77-2-20

March 1, 1977

CONSTITUTIONAL LAW: Income Tax, Active Duty Military Personnel, Delegation of Power. Article VII, §7, Constitution of Iowa. A bill imposing

the income tax on active duty military personnel is not unconstitutional because it conditions termination of the tax on congressional action reimposing universal military service or declaring war. (Turner to Hultman, State Senator, 3-1-77) #77-3-1

The Honorable Calvin O. Hultman, State Senator: You have requested an opinion of the attorney general as to whether the House amendment to Senate File 61, Acts of the 67th G.A., an Act providing for the taxation of active duty military income of Iowa residents and making the Act retroactive, is an unconstitutional delegation of legislative power.

Said amendment (S-3107) provides that the taxes imposed under the Act shall be terminated upon either of two conditions:

1. When universal compulsory military service is reinstated by the United States Congress, or

2. When a state of war is declared to exist by the United States Congress.

The provisions of the Act are also made retroactive to January 1, 1977, although it appears questionable whether the General Assembly intends a future termination of the tax, upon the occurrence of the conditions, to be retroactive, and perhaps this should be clarified.

In my opinion, it is not unconstitutional to condition termination of the taxes imposed upon the happening of the events which depend upon an act of Congress. While it is true that the General Assembly cannot delegate to the Congress the power to fix the Iowa Income Tax, (Art. VII, §7, Const. of Iowa), it can nevertheless condition the applicability of the tax upon a future occurrence, even one which Congress determines. *Ballard-Hassett Co. v. Local Board of Review in and for City of Des Moines,* 215 Iowa 556, 246 N.W. 277 (1933); *City National Bank of Clinton v. Iowa State Tax Commission,* 251 Iowa 603, 102 N.W.2d 381 (1960).

March 3, 1977

ENVIRONMENTAL PROTECTION—Operation and maintenance agreement for watershed structural measures. Muscatine-Louisa Drainage District No. 13 is the contracting party responsible for maintenance and operation of a floodwater retarding and sediment control structure in the Leutzinger-Lowe Run Watershed in Muscatine County in accordance with a May 27, 1970, operational and maintenance agreement. (Coriden to Greiner, Director, Iowa Department of Soil Conservation, 3-1-77) #77-3-2

Mr. William H. Greiner, Director, Iowa Department of Soil Conservation: Receipt is hereby acknowledged of your letter of November 9, 1976, wherein you request a formal legal opinion of the Attorney General as to which contracting party to a May 27, 1970, operational and maintenance agreement for structural measures in the Leutzinger-Lowe Run Watershed in Muscatine County has the responsibility for maintenance and operation of the M-1 structure in said watershed.

The contracting parties to the agreement are the Soil Conservation Service, United States Department of Agriculture (hereinafter referred to as Service), and as co-sponsors the Muscatine County Soil Conservation District (hereinafter referred to as Conservation District) and Muscatine-Louisa Drainage District No. 13 (hereinafter referred to as Drainage District). The subject of the agreement concerns four structures listed on page one of the agreement

as follows: M-1, a floodwater retarding and sediment control structure; M-2, a drop spillway structure; M-3, a drop spillway structure; and M-101, a channel improvement structure. The M-1 structure was accepted from the contractor in November, 1971, but the other three structures in the watershed have not been built.

In construing the operation and maintenance agreement, the rules for construction of contracts enunciated by the courts must be followed. The primary rule for construction of contracts in Iowa, and quite generally, is that the court must if possible ascertain and give effect to the mutual intention of the parties; the contract must be construed as a whole, and the intention of the parties must be collected from the entire instrument, *Harrison Sheet Steel Co. v. Morgan,* 1959, 268 F.2d 538. Furthermore, it is also a well-established rule of construction that where in a contract there are special and general provisions, referring to the same subject, the special provision controls. *Schlosser v. Van Dusseldorf,* 1960, 251 Iowa 521, 101 N.W.2d 715.

Paragraph I of the operation and maintenance agreement states that the sponsor will be responsible for and will operate without cost to the Service the structural measures listed in the agreement. The term "sponsor" refers to the Conservation District and Drainage District as co-sponsors. Paragraph II of the agreement states that the sponsor will be responsible for and promptly perform without cost to the Service except as provided in Paragraph III, Establishment period, all maintenance of the structural measures determined by either the sponsor or the Service to be needed. Paragraph III states that during the Establishment Period, as defined in Paragraph III, the Service will bear such part of the cost of any needed major repairs as is proportionate to the original construction of the structural measures. Paragraph III specifies that certain maintenance costs will not be paid by the Service. The Service is only responsible for sharing the costs of major repairs with the sponsor during the Establishment Period which is defined for structural measures as a period of three years ending at midnight on the third anniversary of the date on which the structural measure was accepted. A note should be made that the agreement refers to acceptance of structural measure in the singular, not in the plural as structural measures. Since the M-1 structure was accepted in November, 1971, the Establishment Period during which the Service was responsible for a portion of the costs of any major repairs of the M-1 structure ended in November, 1974. After November, 1974, all operation and maintenance costs of the M-1 structure became the total responsibility of the sponsor.

Although paragraphs I and II of the agreement state that as sponsors the Conservation District and the Drainage District are responsible for the operation and maintenance of the structural measures, including the M-1 structure, the parties of the operation and maintenance agreement set forth in the special provisions of Paragraph VII the actual responsibilities of the Conservation District and of the Drainage District. Paragraph VII quite clearly states that the Drainage District is totally responsible for the operation and maintenance of the structural measures, including M-1, and must provide funds in its regular budget for the operation, repair, alteration, and maintenance of the M-1 structure. Since special provisions control over general provisions, Muscatine-Louisa Drainage District No. 13 has the total responsibility for the operation and maintenance of the M-1 structure and has had that responsibility, except for the exceptions concerning costs of major repairs during the Establishment Period, from the date of acceptance of the M-1 structure in November, 1971.

March 3, 1977

SCHOOLS: Punishment for Misbehavior; Transportation of Students. §285.10, Code of Iowa, 1975. Where pupils are retained after the normal class hours for disciplinary measures, the school is not responsible to see that the pupil is transported to his home after the disciplinary action has been completed. (Haesemeyer to Halvorson, State Representative, 3-3-77) #77-3-3

Honorable Roger A. Halvorson, State Representative: You have requested an opinion as to the validity of a school policy which says,

"Punishment for misbehavior shall be the retention of a student after school hours, and transportation home for the student shall be provided for that student by his/her family."

It is our opinion that this school policy is valid under Iowa law.

The conduct of pupils directly relating to and affecting the management of the school and its efficiency is within the proper regulation of the school authorities. *Kinzer v. Independent School District,* 129 Iowa 441, 105 N.W. 686 (1902), which has never been so much as modified in Iowa. The school authorities are invested with a broad discretion in the management of pupils with which the courts will not interfere unless it has been illegally or unreasonably used. Retention of a student after school hours for misbehavior then, is within the teachers' discretion.

Section 285.10, Code of Iowa, 1975, provides in pertinent part:

"The powers and duties of the local school boards shall be to:

"1. Provide transportation for each pupil who attends public school, and who is entitled to transportation under the laws of this state. . . ."

In the case of *Flowers v. Independent School District of Tama,* 235 Iowa 332, 16 N.W.2d 570 (1944), the Supreme Court said that provisions of the statute to provide transportation for children to and from school was mandatory but within limits so as not to afford an unnecessary burden to the school district and to provide transportation as nearly complete as reasonably possible. Thus, the discretion of the board under this set of facts will not be interfered with by the court if it imposes no unreasonable result.

Section 285.10, Code of Iowa, 1975, therefore, does not apply to those pupils who are retained after the normal class hours for disciplinary measures, and the school is not responsible to see that the pupil is transported to his home after the disciplinary action has been completed.

March 7, 1977

ELECTIONS: Campaign Finance Disclosure Commission; Political Party Tax Checkoff Proceeds. §§56.22(1), 56.19, and 8.15, Code of Iowa, 1975. A political party may request that the state treasurer invest checkoff proceeds and these proceeds are to be paid out at the discretion of the party chairpersons pursuant to claims filed with the comptroller. (Haesemeyer to Murray, State Senator, 3-7-77) #77-3-4

Honorable John S. Murray, State Senator: On February 7, 1977, you requested an opinion from this office as to:

"Whether a political party may request that the state treasurer invest checkoff proceeds for a given time."

Your letter referred specifically to Iowa Code §56.22(1) (1975), as amended by the 66th General Assembly, which reads:

"The money accumulated in the Iowa election campaign fund to the account of each political party in the state shall be remitted to the party on the first day of each month by warrant of the state comptroller drawn upon the fund in favor of the state chairperson of that party * * *"

Presently the State Comptroller interprets this section as being mandatory that the income tax checkoff proceeds be paid over to the party on the first business day of each month with no possibility of investment.

It is our opinion that this section is clearly discretionary and that the political parties may request that the money in the respective funds be invested until claimed.

Iowa Code §56.22(1) cannot be read as ministerial when effect is to be given to all provisions of the Code. First, the issuance of a warrant is required. Before a warrant may be issued, a voucher must be tendered pursuant to Iowa Code §8.15 (1975), which reads:

"Before a warrant or equivalent shall be issued for any claim payable from the state treasury, there shall be filed an itemized voucher which shall show in detail the items of service, expense, thing furnished, or contract upon which payment is sought. There shall be attached the claimant's original invoice to a department's approved voucher which shall indicate in detail the items of service, expense, thing furnished, or contract upon which payment is sought."

"Vouchers for postage, stampted envelopes, and postal cards may be audited as soon as an order therefor is entered."

This section, then, means that withdrawal of funds is at the discretion of the party chairperson and if and when vouchers are issued for monthly warrants, the comptroller shall remit to the party on the first business day of each month.

Second, Iowa Code §56.19 (1975), as amended by the 66th General Assembly, provides:

"The 'Iowa election campaign fund' is created within the office of the treasurer of state. The fund shall consist of funds paid by persons having an Iowa income tax liability as provided in section 56.18. The director of revenue shall remit funds collected as provided in section 56.18 to the treasurer of state who shall deposit such funds in the appropriate account within the Iowa election campaign fund. Any interest income received by the treasurer of state from investment of moneys deposited in the fund shall be deposited in the Iowa election campaign fund. Such funds shall be subject to payment to the chairperson of the specified political party by the state comptroller in the manner provided by section fifty-six point twenty-two (56.22) of the Code."

This section, when given effect, clearly indicates that moneys may be invested. If §56.22(1) is read to be ministerial, this becomes practically impossible. This, then, is further supportive of the discretionary intent of §56.22(1).

Thirdly, the Campaign Finance Disclosure Commission Rules are indicative of the intention to allow funds to be invested by the state treasurer. Section 190-2.3(56), provides:

"Funds—application and transfer. Iowa election campaign funds shall be applied for by and transferred to political parties eligible to receive such funds in a manner which substantially complies with the following:

"2.3(1) In order to receive Iowa election campaign funds, each state chairman of a political party as defined by section 43.2 shall apply to the comptroller for its share of the Iowa election compaign fund on forms provided by the commission. The application may be made at any time up to midnight of the sixty-fifth day prior to the general election. Only one such application shall be submitted for each general election.

"2.3(2) Upon the comptroller's receipt of the party's application for funds and upon certification by the state commissioner of elections that the party has qualified to have candidate names placed on the official general election ballot, the party may submit one claim voucher per month to the comptroller in which the party may request the transfer of all or any part of the election campaign funds to which it is presently entitled. However, the last claim voucher for a year in which a general election occurs should be submitted to the comptroller prior to the tenth day of December. The last warrant written by the comptroller in a general election year should be issued to the political party no later than December 24.

"2.3(3) The comptroller shall after making such last payment, commence to accumulate any additional funds received by that office from the department of revenue and shall hold them for distribution according to these rules for the next succeeding general election. Such accumulation of funds shall not be construed to include any funds not utilized by a political party which according to section 56.24 revert to the general fund of the state.

"2.3(4) Each year the treasurer of state shall submit to the comptroller and commission a statement detailing the amount of interest income credited to the state account of each political party the twelve-month period ending November 30."

Pursuant to these lines of reasoning, it becomes clear that the legislature and commission intended withdrawal of the funds to be discretionary and have simply set the first business day of each month as warrant date when vouchers are received from the parties chairpersons.

March 10, 1977

TAXATION: Property Tax: Failure to Appeal To Local Board of Review: §441.37, Code of Iowa, 1971, §§446.7 and 446.18, Code of Iowa, 1975. Failure of taxpayers to appropriately appeal assessment for real property taxes to local board of review precludes collateral attack on assessment and county treasurer should proceed to collect the taxes pursuant to §446.7 and 446.18, Code of Iowa, 1975. (Griger to Johansen, Asst. Franklin County Attorney, 3-10-77) #77-3-5

Mr. Randy D. Johansen, Assistant Franklin County Attorney: You have requested an opinion of the Attorney General with reference to the following situation:

Prior to April 17, 1970, a husband and wife (hereinafter referred to as taxpayers) were the owners of a lot with buildings thereon located in the City of Hampton, Iowa. On April 17, 1970, the lot was sold by the taxpayers, on contract, to the City of Hampton to be used as a parking lot. Title to the buildings was specifically reserved to the taxpayers. In June of 1971, the buildings were removed by the taxpayers and relocated on land situated outside the City of Hampton, and the contractual obligations pertaining to the sale of the lot were completed so that the City received a deed for the lot. The Franklin County assessor did not assess for taxation, in 1971, the lot but did assess as real property the buildings and an assessment roll was sent to the taxpayers who

did not file any protest, pursuant to §441.37, Code of Iowa, 1971, with the Franklin County board of review. The 1971 property taxes on the buildings, payable in 1972, have not been paid. The buildings have been offered for sale for the unpaid taxes by the Franklin County treasurer for the past several years and remain unsold. You inquire whether these buildings should be offered at the "scavenger" tax sale on the third Monday in June 1977. The county treasurer has informed this office that the taxpayers claim that the buildings should not have been assessed to them in 1971 and, therefore, they claim the tax sale would be invalid. Taxpayers claim that in 1971 the buildings should have been assessed to the city as buildings erected upon land of another pursuant to §428.4, Code of Iowa, 1971. 1970 O.A.G. 320.

There is no question but that the buildings belonged to the taxpayers. After they received the assessment roll from the assessor in 1971, the taxpayers had an opportunity to appeal to the Franklin County board of review pursuant to §441.37, Code of Iowa, 1971, but they did not do so. Moreover, the buildings were used by the taxpayers in 1971 for their own private purposes and, as such, the buildings were subject to taxation. Unless a tax is illegal because levied without statutory authority, levied upon property not subject to taxation, by some officer or officers having no authority to levy the tax, or in some other similar respect illegal, the exclusive remedy of the taxpayer is to appeal to the board of review and, if denied relief, then appeal to district court. *Griswold Land & Credit Co. v. County of Calhoun,* 1924, 198 Iowa 1240, 201 N.W. 11. In the instant situation, there was clearly statutory authority imposing Iowa real property taxes, the buildings were taxable, and the assessment was made by an officer (assessor) authorized to do so. The assessment of the buildings to the taxpayers was not void and in view of the fact that taxpayers failed to pursue the statutory remedy of appeal to the board of review, it becomes unnecessary to further consider whether the buildings were assessable to the city or the taxpayers.

It is the opinion of this office that the buildings in question, having been offered for sale at regular tax sale for several years past pursuant to §446.7, Code of Iowa, 1975 and remaining unsold, should be offered at scavenger sale in June, 1977, pursuant to §446.18, Code of Iowa, 1975.

March 11, 1977

LIQUOR, BEER & CIGARETTES: Sunday Liquor Sales. Chapter 39, §§123.36, 362.2 and 364.2, Code of Iowa, 1975. (1) A conflict is not presented by a bar owner/councilman voting on the issue of Sunday liquor sales. §123.36, Code, 1975. (2) Election on Sunday liquor sales: The city council must determine whether the locality is to have Sunday liquor sales, and a popular community election is foreclosed. (McGrane to Anstey, Appanoose County Attorney, 3-11-77) #77-3-6

W. Edward Anstey, Appanoose County Attorney: You have requested an opinion of this office on two questions. First, is it a conflict of interest for a bar owner/councilman to vote on the question of the issuance of Sunday Sales Permits pursuant to §123.36(7) to enable a qualifying fraternal organization to sell liquor on Sunday, and, second, can a public election be held under Home Rule powers on the question of Sunday liquor sales.

1.) The situation in which the bar owner/councilman finds himself does not present a conflict of interest. The liquor control law provides that the local governing body is to determine whether liquor sales under §123.36 are to be

permitted in the area of the governing body's jurisdiction. This is strictly a legislative function of a city council and not an executive or judicial function under the police power. By this, it is distinguished from the letting of a contract to certain parties or the determination of the propriety of a license to be issued. The legislative function is less subject to problems of conflict of interest than are the other functions. *See* Annotation: Municipal Ordinance, Motive, 35 A.L.R. 1517 (1952).

In the instant situation, it is apparent that the bar owner/councilman will not be directly, immediately or definitely affected by the action of the council. He will merely be a member of a class affected—and the effect on him will be no different than other members of the class. Also, the class, bar owner, is not limited but may be joined by anyone who can afford to, and find a place to, open a bar. The bar owner/councilman gains no special benefit.

The indirect effect on the bar owner because he is already a member of the class is not sufficient to present a conflict of interest. His business or a benefit to his business is not before the council. He is in much the same position as one of the councilmen in *Wilson v. Iowa City,* 165 N.W.2d 813 (Iowa 1969), in that he may benefit by his vote, but benefit is indirect and speculative. In *Wilson* the issue was an urban renewal project and the ownership of certain property in the affected area by members of the council. The Court voided council action affecting the area which included the councilmen-owned property. However, one councilman owned property outside of the affected area but so near to it that he would clearly be affected by the use of the project property. The Supreme Court found that he did not come within the conflict of interest statute involved even though, because of the proximity of his property, he would have the privilege of objecting, as a property owner, to any proposed zoning of the project area and could be assessed for street improvements in the area. Also, any decrease or increase in value of the project property could be assumed to carry over to his property.

It is the opinion of this office that there is no conflict of interest under any Iowa statute, nor under any other law. The bar owner/councilman may properly vote yea or nay on the Sunday liquor sales question.

2.) Section 123.36 provides that a vote is to be made by the governing body of the local area affected. The governing body of the city is the council in Centerville. It is the vote of that body that determines whether Sunday liquor sales are to be permitted.

The home rule provisions of the Iowa law permit cities to make their own determination as to only certain things within the city and does not give the city complete autonomy separate from the power of the legislature to control it. Even where the city may decide what it is going to do, the State law provides how that determination is to be made. *See,* e.g. §380.2, 380.3, 368.2 and 364.2(4)(a) and (4)(b).

Section 364.2, Code of Iowa, 1975, specifies that the power of a city is in the council unless otherwise specified. Section 362.2(3) says that the city council is the governing body. As noted earlier, the legislature has provided that the governing body is to make the determination as to whether Sunday sales are allowed.

The Iowa Code previously provided for referendums and initiatives on ordinances before the council where petition therefore was made. *See,*

§§416.75, 416.80, 416.81 and 416.82, Code of Iowa, 1946, repealed by Acts 1951 (54th G.A.) Chapter 163, §29. (See, I.C.A., Volume 22, §416.73 to 416.99). The Iowa Supreme Court, in interpreting the right to hold initiatives or referendums under those provisions, held invalid an ordinance passed after such election because the question was one which was to be decided by the council since it did not fall within the category of questions which could be presented to the voters. *Murphy v. Gilman,* 20 Ha. 58, 214 N.W. 679 (1927).

Likewise, the question regarding Sunday sales is to be decided by the council since that is explicitly provided, and no provision is made for any type of popular election on the question. See Chapter 39, Code of Iowa, where the types of special elections allowed are set out. It is therefore the opinion of this office that the question cannot be submitted to the public.

Your attention is also called to earlier opinions of this office regarding city elections at 1972 OAG 263, 1972 OAG 520 and to unpublished Opinion of the Attorney General dated July 30, 1976, to William J. Thatcher.

March 11, 1977

SCHOOLS: Products Liability — §§554.2104(1); 554.2313; 554.2314; 554.2315; 554.2316; 554.2318; 554.2607(5); 554.2719(3); 613A.(3); 613A.8, Code of Iowa, 1975. The school district may be liable for injury caused by negligence or breach of warranty in the manufacture of defective products in a vocational technical education course. (Condon to Benton, Superintendent of Public Instruction, 3-11-77) #77-3-7

Mr. Robert D. Benton, Superintendent of Public Instruction: This letter is in response to your request for an opinion regarding the potential liability of school districts arising from products liability litigation. The questions you posed are as follows:

"1. To what degree are secondary schools and area community colleges, their instructors, administrators, and boards of directors liable for accident or injury to individuals for whom goods are produced or services performed by students of vocational technical education classes?

"2. If a person seeking the services of a vocational technical center is asked to sign a waiver of liability before such services are rendered, can such a document be used to relieve the school district and its agents from liability if subsequent accident or injury is sustained?

"3. If a waiver of liability is legally defensible for the individual for whom services are performed, to what extent does this waiver extend to a second or third owner of the vehicle or object upon which the services were performed."

Extensive research in the area of products liability litigation revealed that there is no case law on point involving school districts and area schools. Therefore, as a caveat to this opinion, it must be emphasized that predicting potential liability is an uncertain endeavor. One may never state absolutely what will be the result of litigation, particularly when there is a complete dearth of case law. Consequently, your opinion request must be answered with the application by analogy of the general law of products liability. It would seem reasonable to assume that a valid analogy may be drawn between the school and any other manufacturer of products as both would be responsible for the construction of the product whether it be made from "scratch" or an assembly of component parts.

Products liability litigation, as addressed in your first question, may be

predicated on four theories — strict liability in tort, express warranty, implied warranty or merchantability or of fitness for a particular purpose, or negligence. Strict liability is the newest theory and the one that has created the greatest ramification in the field of products liability.

Strict liability was introduced to Iowa law in *Hawkeye Security Insurance Co. v. Ford Motor Co.*, 1972, 199 N.W.2d 373. The Iowa Supreme Court held Ford strictly liable as the assembler of a truck. Apparently, the faulty part was defective when it came into Ford's possession. Ford made no changes or alterations in the defective piece prior to its installation. Thus, this case indicates that the assembler takes full responsibility for defective parts as if he had manufactured them himself.

The general principles of strict liability are set out in Restatement (Second) of Torts, §402A, which was adopted by the Iowa court in *Hawkeye Security Insurance Co., supra.* It provides:

"§402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

"(a) the seller is engaged in the business of selling such a product, and

"(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold

"(2) The rule stated in Subsection (1) applies although

"(a) the seller has exercised all possible care in the preparation and sale of his product, and

"(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

In *Kleve v. General Motors Corp.*, 1973, 210 N.W.2d 568, the Iowa Supreme Court enumerated the criteria considered in the application of strict liability: 1) product sold by defendant; 2) product in defective condition; 3) defective condition unreasonably dangerous to user or consumer; 4) seller engaged in business of selling such a product; 5) product expected to and did reach user or consumer without substantial change in condition; 6) defect was proximate cause of personal injuries or property damage suffered by user or consumer; and, 7) damage was suffered by user or consumer.

Generally, a governmental body cannot be held strictly liable. Negligence is an essential element of an action in tort. A long line of cases, headed by *Dalehite v. United States,* 1953, 346 U.S. 15, have held that the strict liability doctrine does not apply to the federal government. Chapter 25A of the Code of Iowa, 1975, the Tort Claims Act, requires a finding of a negligent or wrongful act to establish liability against the state.

However, Chapter 613A, the Municipal Tort Claims Act, does not predicate a municipality's liability upon the ascertainment of negligence. A municipality is liable for the torts of its agents, officers, and employees. A tort is defined in §613A.1(3) as:

"[E]very civil wrong which results in wrongful death or injury to a person

or injury to property or injury to personal or property rights and *includes but is not restricted to actions based upon negligence,* error or omission; nuisance; breach of duty, whether statutory or other duty or denial or impairment of any right under any constitutional provision, statute, or rule of law." [Emphasis added]

This broad definition of tort conceivably could include the sale of a defective product giving rise to a strict liability action. However, the school district could be saved from strict liability if its sale of products is limited because strict liability does not arise from an isolated sale situation. Restatement (Second) of Torts, §402A, comment f (1965). The doctrine of strict liability does not apply "to the occasional seller who is not engaged in that activity as part of his business." *Hyman v. Gordon,* 1974, 111 Cal. Rptr. 262, 265. As yet, case law has provided no clear definition of "the occasional seller." Apparently, the courts will examine the facts and circumstances of each case to determine if the seller is actually engaged in the business of selling products. Where there is a single sale, it is clear that the seller is not in business. *Conolly v. Bull,* 1968, 65 Cal. Rptr. 689; *Speyer, Inc. v. Humble Oil & Ref. Co.,* 1967, 275 F.Supp. 861 (W.D. Pa.); *Conroy v. 10 Brewster Ave. Corp.,* 1967, 234 A.2d 415 (N.J.). In *Price v. Shell Oil Co.,* 1970, 85 Cal. Rptr. 178, 466 P.2d 722, the court held where there were ten separate leases concerning a truck, defendant would be considered engaged in said business.

What damage may be awarded in a strict liability action is also open to question. The leading strict liability case allowed damages only for personal injuries. *Greenman v. Yuba Power Products, Inc.,* 1963, 27 Cal. Rptr. 697, 377 P.2d 897. Property damage caused by the defective product was compensated in *Suvada v. White Motor Co.,* 1965, 210 N.E.2d 182 (Ill.). Recovery for commercial loss — the economic loss of the product itself — was allowed in *Santor v. A. & M. Karagheusien, Inc.,* 1965, 207 A.2d 305 (N.J.), but denied in *Seely v. White Motor Co.,* 1965, 45 Cal. Rptr. 17, 403 P.2d 145. Although the school district may escape strict liability if it is only an occasional seller, an isolated sale can cause the school district to be liable for negligence or breach of warranty. [Action in breach of warranty and in negligence allow recovery for personal injuries, property damage, and commercial loss.] A seller may be liable for the breach of an express warranty and an implied warranty. The school district can safeguard against breach of an express warranty by a careful analysis of what is to be said or indicated about the product. Section 554.2313, Code of Iowa, 1975, provides that an express warranty may arise as follows:

"554.2313. Express warranties by affirmation, promise, description, sample.

"1. Express warranties by the seller are created as follows:

"a. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

"b. Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

"c. Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

"2. It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific

intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

The Uniform Commercial Code, adopted by the Iowa legislature as Chapter 554 of the Code of Iowa, 1975, recognizes two implied warranties from the sale of goods. A warranty of merchantability (§554.2314) is an implied warranty that goods are reasonably fit for the general purpose for which they are sold. A warranty of fitness for a particular purpose (§554.2315) is an implied warwanty that goods are suitable for a special purpose of the buyer. The purpose for which an article is acquired is frequently communicated to the seller or can be imputed to him simply because most products have only one logical use. A warranty that goods are merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Merchantability does not apply if the seller is not a merchant with respect to goods of that kind. A merchant is defined in §554.2104(1) as:

"1. 'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or borker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

The implied warranty of merchantability would not apply to the school district, because it is unlikely that the school could be considered a merchant as defined in the U.C.C. However, the implied warranty of fitness for a particular purpose could be applied to products sold by a school because §554.2315 does not require that the seller be a merchant. The section provides:

"Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

The fitness for a particular purpose warranty applies when the buyer can establish that he has relied on the judgment of a seller who knows the purpose for which the product is purchased. *Hunt Truck Sales and Services, Inc. v. Omaha Standard,* 1960, 187 F.Supp. 796 (D. Iowa).

A buyer can maintain an action for breach of an implied warranty even if there is no privity between the buyer and the seller. *State Farm Mutual Automobile Insurance Co. v. Anderson-Weber, Inc.*, 1961, 252 Iowa 1289, 110 N.W.2d 449. An innocent bystander who is injured by a defective product cannot use the breach of an implied warranty theory, *Hahn v. Ford Motor Co.*, 1964, 256 Iowa 27, 126 N.W.2d 350, but a third party can recover if he is a person naturally expected to use the machine and not outside the perimeter of the manufacturer's liability. *Bengford v. Carlem Corp.*, 1968, 156 N.W.2d 855 (Iowa). The same privity requirements, or absence thereof, apply to actions founded on negligence. *Wagner v. Larson,* 1965, 257 Iowa 1202, 136 N.W.2d 312; *Thompson v. Burke Engineering Sales Co.*, 1960, 252 Iowa 146, 106 N.W.2d 351.

The school could be liable for a breach of warranty if a component part installed in a product made by students is defective. The manufacturer of a product which causes injury is liable for his breach of warranty, notwithstanding the fact that the defective nature of the product was caused by a

component made by another and incorporated by the manufacturer into the product. *Rauch v. America Radiator & Standard San. Corp.*, 1960, 104 N.W.2d 607 (Iowa).

The leading case on liability for a defective component is based on negligent inspection by the manufacturer. In *MacPherson v. Buick Motor Co.*, 1916, 111 N.E. 1050, the court held that a manufacturer or assembler who incorporates into his product a component made by another has a responsibility to test and inspect each component, and his negligent failure to do so renders him liable for injuries proximately caused.

Negligence in the manufacture of the product, besides negligent inspection, which causes injury to a person will render the school district liable to the person injured whether the injured party be the buyer or a third person. The school may avoid liability if the buyer of the defective product had knowledge of the defect at or before the time the third party was injured using it. Restatement (Second) of Torts, §§393, 396.

When discussing the liability of the school district for negligent acts, it is necessary to consider for whose negligent acts the school is liable. The school district is a municipality, according to Section 613A.1(1) of the Code of Iowa, 1975. The Iowa Supreme Court held in *Larsen v. Pottawattamie County*, 1970, 173 N.W.2d 579, 581, that municipalities are "liable for the negligence of their respective officers, agents and employees acting within the scope of employment."

In a California case involving an accident caused by the student of a flight instruction school, it was argued successfully that a student is not an employee or agent of a school. In *Johnson v. Central Aviation Corp.*, 1951, 229 P.2d 114, the plaintiff alleged the defendant corporation (that operated the flying school) was negligent under the doctrine of respondeat superior, alleging that the student as "the agent, servant, or employee of defendant Central Aviation Corp. * * * was acting within the course and scope of his employment as such." The California court held:

"As a student taking instruction he was neither the servant nor the agent of the flying school while doing those things properly within his course of instruction. By what occured we hold he did not change that status so as to make the school liable for his acts on the basis of respondeat superior." 229 P.2d, at 120.

However, it should not be assumed that a court would rule on the strength of the above case that a student cannot be an agent of a public school. After all, the student constructing a product in a vocational technical education course is fulfilling course requirements imposed by the school. Furthermore, a student acts pursuant to intructions and assignments by the teacher. The class instructor, an employee of the school district, bears a great responsibility to supervise the activities of the students in making or servicing products, such that negligent construction could reflect the instructor's negligence in the capacity of a supervisor, placing the liability with the school.

Cases which discuss the supervisory duty of a teacher in a classroom situation involve personal injuries to a student or a third party. When viewed in that light, courts have held that the school is liable for a teacher's negligent supervision. A school may be liable for personal injuries to a student resulting from the misconduct of a fellow student where school personnel were negligent with respect thereto, such as failing to exercise proper supervision in directing or

permitting a pupil to engage in conduct which might reasonably be foreseen to result in injuries to another student. *Ferraro v. Board of Education,* 1961, 212 N.Y.S.2d 615; *McLeod v. Grant County School Dist.,* 1953, 255 P.2d 360.

Negligent supervision could be found in the situation addressed here if it was shown that the reasonably prudent person would foresee that in the absence of supervision, mistake in construction was likely to occur. Therefore, if the teacher participates negligently in the construction or service of a product, or if he supervises the activity negligently, the school would be liable for injuries which result from the defective product.

If the students service rather than manufacture a product, the school may face liability. A number of courts have recognized an implied warranty of serviceability that services will be performed in a workmanlike manner. *Pepsi-Cola Bottling Co. v. Superior Burner Service Co.,* 427 P.2d 833 (Alaska); *Aced v. Hobbs-Sesack Plumbing Co.,* 12 Cal. Rptr. 257, 260 P.2d 897. Also, one who negligently makes, rebuilds, or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattels. *S. H. Kress & Co. v. Goodman,* 515 P.2d 561 (Idaho). Strict liability does not apply to services. *La Rossa v. Scientific Design Co.,* 402 F.2d 937 (3d Cir.); *Magrine v. Krasnica,* 227 A.2d 539 (N.J.); *Barbee v. Rogers,* 425 S.W.2d 342 (Texas).

As to your question regarding the liability of school board directors, it is generally maintained that they are not personally liable for the negligence of persons rightfully employed by them in behalf of the school district, or for the negligence or other wrong of the board itself. 78 C.J.S., Schools and School Districts, §129(d), p. 931. However, this general principle should not be construed as a legal conclusion by this office that under certain factual situations a director could not be held personally liable. Under such circumstances if the administrators and instructors as employees of the school district were the subject of legal action, they are entitled to defense and indemnification pursuant to Section 613A.8 of the Code of Iowa, 1975, which provides as follows:

"The governing body shall defend any of its officers, employees and agents, whether elected or appointed and, except in cases of malfeasance in office, willful and unauthorized injury to persons or property, or willful or wanton neglect of duty, shall save harmless and indemnify such officers, employees and agents against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occuring within the scope of their employment or duties. 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 its officers, employees and agents against such tort claims or demands.

"The duty to defend, save harmless, and indemnify shall apply whether or not the municipality is a party to the action and shall include but not be limited to cases arising under title 42 United States Code section 1983."

The second question you pose concerns the effectiveness of a waiver in products liability litigation. Section 554.2316(2) of the Code of Iowa, 1975, takes the position that the implied warranties of merchantability and of fitness for the particular purpose may be excluded or modified only under circumstances whereby the buyer is sufficiently informed, at the time of the purchase, of the exclusion or modification. *Iowa Elec. Light & Power Co. v. Allis-*

Chalmers Mfg. Co., 1973, 360 F.Supp. 25 (D. Iowa). It is advisable that the clause disclaiming warranty be set off from other provisions on the form and appears in bold face, all capital letters. Also, a merger clause that this is the entire agreement between parties regarding warranty may be included. Section 554.2316(2) provides:

"2. Subject to subsection 3, to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof'."

Implied warranties may also be excluded by circumstances other than formal language, such as a sale "as is," a sale wherein the buyer has an opportunity to examine the goods and discover any defects, and a course of dealing, course of performance, or usage of trade in connection with the sale. Section 554.2316(3) provides:

"3. Notwithstanding subsection 2

"a. unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

"b. when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

"c. an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade."

However, Section 554.2302 provides that a disclaimer may not be effective if it is deemed void as against public policy, contrary to statute, or unconscionable. Moreover, a manufacturer is precluded ordinarily from asserting the existence of a contractual disclaimer provision as a valid defense to an action based on strict liability or negligence. *Sterner Aero AB v. Page Airmotive Inc.*, 1974, 499 F.2d 709 (10th Cir.); *United States v. Kelly*, 1956, 236 F.2d 233 (8th Cir.).

Section 544.2719(3) permits the contractual modification or limitation of remedy for consequential damages, damages resulting from injury to person or property proximately resulting from any breach of warranty. Section 554.2715(2)(b). Of course, consequential damage cannot be limited or excluded if to do so would be unconscionable. Section 554.2719(3) provides, "Limitation of consequential damages for injury to the person in the case of consumer goods is prima-facie unconscionable but limitation of damages when the loss is commercial is not."

The school can disclaim implied warranties, but if the buyer or any person who may reasonably be expected to use the product is injured, the court may hold that the disclaimer is ineffective as unconscionable to the extent of consequential damages for personal injury. The defendant has the burden of showing that a contractual limitation of liability was not unconscionable. *Walsh v. Ford Motor Co.*, 298 N.Y.S.2d 538.

As for your third question, regarding extension of a waiver of liability to third parties, Section 554.2318 prohibits the exclusion or limitation of a warranty to third parties as follows:

"A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends."

If the original buyer resells the product and warrants it, the original buyer may vouch-in the original seller if the seller is answerable for the breach of warranty. Section 554.2607(5). But it has been held, that if the warranty between the original buyer and the second buyer is greater in scope than that between the original seller and the original buyer, the second warranty will not work to enlarge the original seller's obligation. *Hampton Guano Co. v. Hill Livestock Co.,* 84 S.E. 774 (N.C.). So, if the original seller disclaimed effectively the implied warranties, the original buyer should not be able to vouch-in the original seller if the buyer is sued by the second buyer for breach of warranty. Since the majority view is that the seller may not disclaim effectively liability for negligence and strict liability, it would seem that the original buyer could recover from the original seller if the second buyer successfully maintained an action in negligence or strict liability against the original buyer.

As the opinion is lengthy and detailed, I shall attempt to summarize for you what I have concluded. The school district may be liable for injury caused by defective products manufactured in a vocational technical education course if the action is brought pursuant to the theories of negligence or breach of warranty. An implied warranty of fitness for a particular purpose may attach to the products. Section 554.2315. Since the school is not a merchant as defined in Section 554.2104(1), the implied warranty of merchantability would not apply. Section 554.2314. The school could be held to express warranties as made pursuant to Section 554.2313.

The modern view is that privity of contract between seller and buyer is not required for maintenance of actions in either breach of warranty or negligence. If the students service rather than manufacture a product, the school still may face liability from negligence or under an implied warranty of serviceability.

The school may disclaim an implied warranty pursuant to Section 554.2316 provided the disclaimer is not unconscionable. Sections 554.2302 and 554.2719(3). The school cannot exclude or limit a warranty to third parties who may be reasonably expected to use the product. Section 554.2318. The majority view is that a seller may not disclaim liability arising from negligence. The school may be vouched in by an original buyer who is being sued by a second buyer to the extent that the seller would be liable to the original buyer. Section 554.2607(5).

March 14, 1977

COUNTIES: Mental Health. Boards of Directors of community mental health centers incorporated under Chapter 504A are covered under the provisions of Chapter 504A.101, Code of Iowa, 1975, as amended by Chapter 235, Acts, 66th G.A., First (1975) (H.F. 816). In the event the issue of coverage is litigated, for those centers established under Chapter 230A.3(1), the county does owe the Board a defense. (Wilson to Shirley, Dallas County Attorney, 3-14-77) #77-3-8

Mr. Alan Shirley, Dallas County Attorney: Reference is made to your letter of February 15, 1977, requesting an opinion on the following questions:

1) Are the Board of Directors of a community mental health center, such as the West Central Mental Health Center, Inc. of Adel, Iowa, covered under the provisions of H.F. 816, Ch. 235, Acts 66th G.A., First Session (1975)?

2) In the event the issue of coverage is litigated, does the county owe the Board a defense?

Before addressing your specific questions it is significant to point out Chapter 230A.10, Code of Iowa, 1975, with regard to the powers and duties of trustees. Section 230A.10 states:

"The community mental health center board of trustees *shall:*

"4. Procure and pay premiums on insurance policies required for the prudent management of the center, *including* but not limited to public liability, professional malpractice liability, workman's compensation and vehicle liability, any of which may include as additional insureds the board of trustees and employees of the centers." (Emphasis added)

It is our opinion that §230A.10(4) mandates in the interest of prudent management, the procurement of liability insurance for the members of boards of directors and other employees of community mental health centers.

Community mental health centers are established in one of two ways. Section 230A.3 with regard to "Forms of organization" states:

"Each community mental health center established or continued in operation by section 230A.1 shall be organized and administered in accordance with one of the two alternative forms prescribed by this chapter. The two alternative forms are:

"1. Direct establishment of the center by the county or counties supporting it and administration of the center by an elected board of trustees, pursuant to sections 230A.4 to 230A.11.

"2. Establishment of the center by a nonprofit corporation providing services to the county or counties on the basis of an agreement with the board or board of supervisors pursuant to section 230A.12 and 230A.13."

The West Central Mental Health Center, Inc. was established in accordance with number two above, under Chapter 504A, Nonprofit Corporation Act.

With regard to question one, Section 504A.101 as amended by H.F. 816, Ch. 235, Acts 66th G.A., First Session (1975) states:

"Personal liability. Except as otherwise provided in this chapter, the directors, officers, employees and members of the corporation shall not, as such, be liable on its debts or obligations and directors, officers, members or other volunteers shall not be personally liable for any claim based upon an act or omission of such person performed in the reasonable discharge of their lawful corporate duties."

It is our opinion that those community health centers incorporated under Section 504A and its predecessor are covered under the above section.

The primary problem addressed by this opinion is the proper construction to be given to the words "reasonable discharge" as used in H.F. 816. It is our opinion that the legislative intent in enacting H.F. 816, as it relates to community mental health centers established under Section 230A, was to insulate

board members, who serve without compensation, from personal liability for acts or omissions by them while in the performance of their corporate duties. To interpret the section in any other way would nullify the salutary purposes for which the section was enacted and would defeat its legislative intent.

In judicial construction of statutes, the polestar is unquestionably legislative intent. *Iowa Department of Revenue v. Iowa Merit Employment Commission,* 243 N.W.2d 610 (Iowa 1976). Further, as stated in *Matter Of Estate Of Bliven,* 236 N.W.2d 366 (Iowa 1975).

"...We must thus determine the legislative objective and in doing so proceed upon the premise our General Assembly intended its enactments be accorded a practical application leading to a reasonable result which will accomplish, not defeat, their purpose..."

With regard to your second question Section 613A.1(2) states:

" 'Governing body' means the council of a city, county board of supervisors, board of township trustees, local school board *and other boards and commissions* exercising quasi-legislative, quasi-executive, and quasi-judicial power over territory comprising a municipality." (Emphasis added)

Section 613A.8 states:

"The governing body shall defend any of its officers, employees and agents, whether elected or appointed and, except in cases of malfeasance in office, willful and unauthorized injury to persons or property, or willful or wanton neglect of duty, shall save harmless and indemnify such officers, employees and agents 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. 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 its officers, employees and agents against such tort claims or demands."

Therefore, it is our opinion that in the event the issue of coverage is litigated, for those institutions established under Section 230A.3(1), the county owes the board or its members a defense. For those institutions established under Section 230A.3(2), such institution owes the board or its members a defense.

March 16, 1977

STATE DEPARTMENT OF SOCIAL SERVICES: Administrative Costs: Title XX Appropriation. Chapter 1042; Chapter 1132, Section 1, 66th G.A., 1976 Session. Pay raises for Department of Social Services' employees are considered as administrative costs which may not be paid from funds appropriated by Chapter 1042, Acts 66th G.A., Second Session. (Cosson to Ashcraft, State Senator, 3-16-77) #77-3-9

The Honorable Forrest F. Ashcraft, State Senator: By your letter of March 1, 1977, you asked for an opinion of the Attorney General as to whether pay raises or any portion thereof constitute "administrative costs" in the following language of Chapter 1042, Acts 66th G.A., 1976 Session:

"...It is further the intent of the general assembly that no funds appropriated by this Act be used for administrative costs of the department of social serivces."

Initially I must observe that your question seems to assume that Chapter 1042 funds have been used for pay raises. I have been informed by Department

of Social Services officials that no Department of Social Services employees have received pay raises from Chapter 1042 funds. I will address your question hypothetically, however.

The above statute was a bill appropriating one million dollars to the Department of Social Services for use in helping to fund the Department's Title XX program. As the bill itself gave no definition of "administrative costs", we must go elsewhere for the answer.

It should first be pointed out that pay raises are or become a part of salaries. It should also be noted that Chapter 1042 was not the main appropriations bill for the Department of Social Services. The main appropriations' bill is found at Chapter 1132, Acts 66th G.A., 1976 Session.

Where separate statutes pertain to the same subject matter, the concept of *pari materia* comes into play. All relevant legislative enactments must harmonize, each with the other, so as to give meaning to all if possible. *Matter of Estate of Bliven,* 236 N.W.2d 366, 369 (Iowa 1975).

"The rule that statutes *in pari materia* shall be construed together applies with peculiar force to statutes passed at the same session of the legislature." *Iowa Farm Serum Co. v. Board,* 240 Iowa 734, 740, 35 N.W.2d 848 (1949), quoting from *Iowa Motor Vehicle Assn. v. Board of Railroad Comrs.,* 207 Iowa 461, 465, 221 N.W. 364, 366 (1929).

Section 1 of Chapter 1132 provides funds for the administration of the Department of Social Services both at the state and local level. Included under the costs of administration are salaries for Department of Social Services employees. I therefore conclude that salaries were considered administrative costs by the legislature, and considering Chapters 1042 and 1132 *in pari materia,* it is also obvious that pay raises for Department of Social Services employees would be considered as adminsitrative costs within the meaning of Chapter 1042, Acts 66th G.A., 1976 Session. As mentioned previously, however, it is my understanding that Chapter 1042 funds have not been used for pay raises to Department of Social Services employees.

Nothing in this opinion should be construed to apply to pay raises for employees of the private agencies and individual providers of services with which the Department of Social Services has contracted to purchase services.

March 16, 1977

ENVIRONMENTAL PROTECTION — Administrative rules for certification of pollution-control property — §427.1(32), Code of Iowa, 1975; Ch. 1226, Acts 65th G.A., §1. For purposes of implementing §427.1(32), the Iowa Department of Environmental Quality's adminstrative rules 400-12(455B) IAC and 400-23(455B) IAC are both reasonable and necessary. (Coriden to Hutchins, State Senator, 3-16-77) #77-3-10

Honorable C. W. Hutchins, State Senator: Receipt is hereby acknowledged of your letter of January 27, 1977, wherein you request a formal legal opinion of the Attorney General as to the legality of the Iowa Department of Environmental Quality's administrative rules 400-12 (455B) Iowa Administrative Code (IAC) and 400-23 (455B) IAC which are intended to implement Section 427.1(32), 1975 Code of Iowa.

Section 427.1(32), 1975 Code of Iowa, states that pollution-control property as defined by that section shall be exempt from taxation for the periods and

to the extent provided by that section, upon compliance with the specific provisions of that section. Section 427.1(32) subparagraph five (5) requires that application for this exemption shall be filed with the assessing authority not later than the first of February of the year for which the exemption is requested. Subparagraph six (6) of Section 427.1(32) states that the first annual application for any specific pollution-control property shall be accompanied by a certificate of the executive director of the Department of Environmental Quality stating that the Air Quality Commission or the Water Quality Commission has directed the Department of Environmental Quality to certify that the primary use of the pollution-control property is to control or abate pollution of any air or water of this state or to enhance the quality of any air or water of this state. Subparagraph seven (7) of Section 427.1(32) states that a taxpayer may appeal a determination of the Air Quality Commission or the Water Quality Commission in accordance with the provisions of Sections 455B.19 and 455B.39, 1975 Code of Iowa. Subparagraph eight (8) of Section 427.1(32) directs the Air Quality Commission and the Water Quality Commission to adopt rules relating to certification under Section 427.1(32) and information to be submitted for evaluating pollution-control property for which a certificate is required. Section 427.1(32) also defines the words "pollution-control property," "pollution," "water of the state," and "enhance the quality."

The Iowa Supreme Court has stated that the legislature can delegate to an administrative body the right to make rules and regulations for the purpose of carrying out the objectives of a statute. *State v. Watts,* 1971, 186 N.W.2d 611. The Iowa Supreme Court has also held that in determining the propriety of delegation of legislative power to administrative bodies, the test 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. *Elk Run Telephone Company v. General Telephone Company,* 1968, 160 N.W.2d 311. In the case of *Cedar Rapids Human Rights Commission v. Cedar Rapids Community School District,* 1974, 222 N.W.2d 391, the Iowa Supreme Court stated that the most important consideration is not whether the statute or ordinance delegating power to an administrative agency expresses standards but whether the procedure established for the exercise of the power furnishes adequate safeguards to those who are affected by the administrative action. The presence or absence of procedural safeguards is the most important consideration in determining whether the delegation of power is reasonable.

Since Section 427.1(32) explicitly directs the Air Quality Commission and the Water Quality Commission to adopt rules relating to certification of pollution-control property and information to be submitted for evaluating the pollution-control property for which a certificate is required, defines essential words such as "pollution-control property," and provides for appeal from the decision of the commission, Section 427.1(32) properly delegates power to the Department of Environmental Quality to determine what property can be certified as "pollution-control property."

In order to implement Section 427.1(32), the Department of Environmental Quality adopted and published administrative rules for the Air Quality Commission, 400-12.1 (455B) to 400-12.6 (455B) IAC, and for the Water Quality Commission 400-23.1 (455B) to 400-23.6 (455B) IAC. Whether these administrative rules are proper or not can only be determined by examination of court

decisions on this point.

In *Holland v. State,* 1962, 253 Iowa 1006, 115 N.W.2d 161, the Iowa Supreme Court held that administrative rules cannot go farther than the law permits and that rules are not to be taken as law in themselves but must be reasonable and used for the purpose of carrying out legislative enactments. The Iowa Supreme Court has also stated that it is necessary and proper for administrative departments of state government to adopt rules of procedure as to matters coming under jurisdiction of commissions. *Bruce Motor Freight, Inc. v. Lauterbach,* 1956, 247 Iowa 956, 77 N.W.2d 613.

The adminstrative rules adopted by the Department of Environmental Quality in order to implement Section 427.1(32) are nearly identical for both the Air Quality Commission and the Water Quality Commission, differing only in technical words used in discussing air pollution as opposed to water pollution. Rules 400-12.1 (Air) and 400-23.1 (Water) state what specific information must be included in the taxpayer's request for certification. This information is necessary in order that the commission, be it Air or Water, can be fully apprised of all the necessary facts before making a decision on the request for certification. Rules 400-12.2 (Air) and 400-23.2 (Water) state that a taxpayer's request may be submitted at any time. These two rules also state that any requests received ten or more days prior to a scheduled commission meeting will be considered at that meeting, but any requests received less than ten days prior to the scheduled commission meeting may or may not be considered at that meeting. These rules also warn the taxpayer that failure to make the request sufficiently in advance of a scheduled meeting (particularly the January meeting) may cause the taxpayer to miss the February 1 deadline for filing with the assessing authority. These two rules are procedural in nature and are designed to allow the staff of the two commissions sufficient time to evaluate the application and prepare recommendations to the commission. Rules 400-12.3 (Air) and 400-23.3 (Water) state that the pollution-control property must be operated to meet existing pollution-control standards in order to be certified. Rules 400-12.4 (Air) and 400-23.4 (Water) state that the executive director shall notify the taxpayer of the time and place of the particular commission's meeting and are procedural in nature, as are rules 400-12.5 (Air) and 400-23.5 (Water) which outline the procedure for issuing the certification to the taxpayer after his pollution-control property is approved by the particular commission. Rules 400-12.6 (Air) and 400-23.6 (Water) give general guidelines of eligibility and are informational in nature. These are all the rules adopted by the Department of Environmental Quality in order to implement Section 427.1(32).

In light of the decisions of the Iowa Supreme Court on the issue of reasonableness of administrative rules, the rules adopted by the Department of Environmental Quality are both reasonable and necessary for the implementation of Section 427.1(32) and do not circumvent the law.

March 21, 1977

COUNTY FAIR BOARDS—Appropriation of County Funds—§§174.1(2), 174.13, and 332.3(6). The Board of Supervisors may not give county aid to the Keokuk County Exposition because the Exposition does not qualify as a society eligible for funds pursuant to §§174.1 and 174.13. (Condon to Schwengels, State Senator, 3-21-77) #77-3-11

The Honorable Forrest V. Schwengels, State Senator: This letter is in

response to your request for an opinion regarding the following questions:

"1. On organization, Keokuk County Exposition, organized on March 1976 as a nonprofit corporation, such corporation is a contractual purchaser of real estate, but does not own any title in fee simple and does not lease any real estate.

There is also a long established fair association, Keokuk County Fair Association, which owns real estate.

The Board of Supervisors proposes to give county aid to the new fair association. Can such aid be given in view of the requirements of Section 174.13?

"2. The Keokuk County Board passed the attached Resolution.

"Can the Board of Supervisors control by Resolution the purposes for which county aid funds are used, in limitation of those permissive uses of Section 174.13?"

Section 174.13, Code of Iowa, 1975, provides a procedure by which a county board of supervisors may collect money in a fairground fund for distribution to a "society," defined in Section 174.1(2), Code of Iowa, 1975, as follows:

"2. '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."

The material accompanying your opinion request states that the Keokuk County Exposition does not own or lease any real estate. Clearly, then, it is not a society as defined in §174.1(2) and cannot be eligible for the county aid permitted in §174.13.

Lest there be any doubt as to the intention of the Legislature, §174.13 reiterates in a proviso the criteria for qualification as a society. Section 174.13 provides as follows:

"174.13 County aid. The board of supervisors of the county in which any such society is located may levy a tax of not to exceed six and three-fourths cents per thousand dollars of assessed value of the taxable property of the county, the funds realized therefrom to be known as the fairground fund, and to be used for the purpose of fitting up or purchasing fairgrounds for the society, or for the purpose of adding boys and girls 4-H club 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.*" [Emphasis added]

As long as the Keokuk County Exposition does not own or lease at least 10 acres of real estate and does not own or lease at least $8,000 worth of buildings and improvements on the real estate, it cannot receive the county aid allowed in §174.13.

The second question you pose pertains to the authority of the Board of Supervisors to control how the county aid fund is used. The resolutions attached to your opinion request indicate that the Keokuk County Board of Supervisors wants to appropriate money from the county fair fund to both

the Keokuk County Fair Association and the Keokuk County Exposition, said money to be used for premiums only. As concluded previously, the Keokuk County Exposition is not eligible for county funds.

Both Sections 174.13 and 174.18 limit the purposes for which the fair fund can be used. Chapter 174 does not address the power of the Board of Supervisors to control fund allocation within those limited purposes. Thus, we must consider Iowa case law and statutory authority of the Board.

Iowa law establishes that the Iowa Legislature intended the necessary powers of the Board of Supervisors to conduct county affairs to be construed broadly. The Board has the power expressly inferred by statute and those necessarily implied from the power so conferred. *Mandicino v. Kelly,* 1968, 158 N.W.2d 754; *Sorenson v. Andrews,* 1936, 221 Iowa 44, 264 N.W. 562.

Section 332.3(6), Code of Iowa 1975, provides the Board of Supervisors with 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 broad view of the power of the Board of Supervisors to supplement as necessary those powers expressly charged to it would indicate that the Keokuk County Board of Supervisors may control the purpose for which money is used when it resolves to appropriate money to the Keokuk County Fair Association.

March 21, 1977

TAXATION: Property Tax. A real estate parcel of exactly ten acres does not qualify as "agricultural" real estate, under rules of the Iowa Department of Revenue. Chapter 421.14, Code of Iowa, 1975; §441.47, as amended by Ch. 1199, Acts of 66th G.A., Second Session; Section 730-71.3 I.A.C. (Maggio to Eller, Crawford County Attorney, 3-21-77) #77-3-12

Mr. Thomas R. Eller, Crawford County Attorney: You have requested by your letter of January 18, 1977, an opinion of the Attorney General on the question of whether a rule of the Department of Revenue requiring more than ten acres of property to qualify as agricultural land for equalization purposes is "legal and enforceable." You ask whether the Department's rule is "inconsistent with law." See Rule 730-71.3(1), IAC.

The paramount consideration in answering your inquiry is ascertaining the purpose of the Department's rule. The requirement that agricultural land must be more than ten acres is designed for the purpose of accomplishing biennial statewide equalization of property taxes and for no other purpose.* There is nothing in the Iowa equalization statutes which require or prohibit such a rule. See Chapters 421, 441, and 445, Code of Iowa, 1975. As you correctly point out in your letter, the Director of Revenue is empowered to promulgate such a rule if it is not "inconsistent with law." Sections 421.14 and 441.47, as amended by Chapter 1199, Acts of 66th G.A., Second Session, Code of Iowa, 1975. This rule is not inconsistent with the equalization laws it was designed to implement; consequently, it is valid.

Recently, the Iowa Supreme Court upheld the Department of Revenue's property classifications for equalization purposes against a challenge that the classifications denied equal protection of the law. In the case of *Avery v. Peterson,* 243 N.W.2d 630, 632, 634, 1976, the Court held thusly:

"The crux of their theory is that the classification system of the Department of Revenue, which divides for the purpose of tax equalization property located within (urban residential) from property located outside (rural residential) the corporate limits of the municipality, unfairly penalizes the residents of Wahpeton because the town provides no significant municipal services to its residents. From this they conclude there should be no practical or rational distinction between the assessed valuation of similarly situated residential property located within or outside the corporate limits of Wahpeton. On this basis, they argue the ordered 15 percent increase in aggregate valuation of urban residential property within Wahpeton creates a constitutionally invalid inequality between rural and urban property unless a similar increase is imposed upon the rural residential properties." * * *

"As noted in *Lunday v. Vogelmann,* supra, a classification does not deny equal protection simply because in practice it results in some inequality; practical problems of government permit rough accommodations. 213 N.W.2d at 907. Plaintiffs-appellants did not demonstrate that the rural/urban classification system was arbitrary, capricious or invidiously discriminatory as applied to them. At best their witnesses indicated the classification as applied to Dickinson County was incorrect. *The Revenue Department's witness showed the classification to be proper."* (emphasis added).

Hence, the Director of Revenue's property classifications for equalization purposes have been upheld by the Iowa Supreme Court.

You point out that Section 426.2, Code of Iowa, 1975, defines "agricultural lands" to be "ten acres or more," asking whether the Department's rule is inconsistent with this law. In addition, I call your attention to Section 384.1, Code of Iowa, 1975, which describes agricultural realty as "more than ten acres." Such statutes as these have different purposes than the equalization statutes. Section 426.2 is designed to implement a specific tax credit, and Section 384.1 pertains to tax rates; neither statute governs the equalization of land valuations for property tax purposes. Consequently, these statutes are irrelevant to your questions.

In brief summary, there is no statutory definition of agricultural realty for equalization purposes. The Director of Revenue has lawfully exercised his rule-making power in defining agricultural realty, and said definition is not inconsistent with the equalization statutes it is designed to implement.

March 21, 1977

TAXATION: Semiannual Mobile Home Tax: Divorced spouse attaining age fifty-five: §135D.22(2), Code of Iowa, 1975, as amended by Chapter 1106, §1, Acts of 66th G.A., Second Session (1976). A divorced husband or wife is not a "surviving spouse" and therefore, does not, upon attaining the age of fifty-five years, qualify for the semiannual mobile home tax reduction set forth in §1 of Chapter 1106. (Griger to Harbor, State Representative, 3-21-77) #77-3-13

Hon. William H. Harbor, State Representative: You have requested an opinion of the Attorney General as to the meaning of the term "surviving

*The Department of Revenue is in the process of rescinding Chapter 71 of its Rules and adopting a new set of Rules dealing with assessment practices and equalization. These proposed Rules were sent to the Code Editor on March 18, 1977, for publication in the Iowa Administrative Code Supplement.

spouse" in §1 of Chapter 1106, Acts of 66th G.A., Second Session (1976) which amends §135D.22(2), Code of Iowa, 1975. Specifically, you present a situation involving a woman who owns and lives in a mobile home, who is divorced, who is over fifty-five years of age but less than sixty-five, and whose income is less than $9,000 a year but greater than $8,000. The question is whether this individual qualifies for a reduced mobile home tax rate. The answer is no.

Section 135D.22(1), Code of Iowa, 1975, imposes a semiannual mobile home tax computed by multiplying the "number of square feet of floor space each mobile home contains when parked and in use by ten cents." Section 1 of Chapter 1106, which by the express terms of §15 thereof became effective on January 1, 1977, provides in relevant part:

"If the owner of the mobile home is totally disabled as defined in section 425.17, subsection 7, is a surviving spouse having attained the age of fifty-five years of age or older not later than December thirty-first of the base year, or was sixty-five years of age or older not later than December thirty-first of the base year and his income...is eight thousand dollars or more but less than nine thousand dollars, the semi-annual tax shall be computed at the rate of seven and one-half cents per square foot..."

The term "surviving spouse" is not defined in Chapter 135D, as amended. Therefore, pursuant to §4.1(2), Code of Iowa, 1975, the term must be construed according to the "context and the approved usage of the language." A divorced husband or wife is a former spouse and is not considered to be a surviving spouse. *In Re Atwood's Trust,* 1962, 262 Minn. 193, 114 N.W.2d 284; *In Re Estate of Quinn,* 1952, 243 Iowa 1266, 55 N.W.2d 172.

Therefore, it is the opinion of this office that a divorced husband or wife is not a "surviving spouse" and does not, upon attaining the age of fifty-five years, qualify for the semiannual mobile home tax reduction set forth in §1 of Chapter 1106.

March 23, 1977

MUNICIPALITIES: Policemen and Firemen's Pensions—§411.6, Code of Iowa, 1975; §§23, 25 and 26, Ch. 1089, 66th G.A. (1976). Section 411.6 of the Code cannot be declared unconstitutional on the mere possibility that a member's retirement allowance under 55 might be more than one for a member over 55. (Blumberg to Junker, State Representative, 3-23-77) #77-3-14

Honorable Willis E. Junker, State Representative: We have your opinion request of February 22, 1977, in which you ask:

"As I understand the present statutes, a fireman who is disabled prior to his 55th birthday, and his disability is a permanent one, receives a pension equal to one-half of his service pay. However, if the fireman has reached his 55th birthday and is less than 65 years old and is permanently disabled, he receives his regular pension income which is less than half of his service income. It should also be noted further that a fireman between the ages of 55 and 65 still pays into his pension plan even though he is eligible for retirement, as I understand it, at age 55.

"I would like an opinion as to the constitutionality or conflict with other laws in this state which prescribe equal treatment under equal circumstances."

Section 411.6(4), 1975 Code of Iowa, as amended by §25, Ch. 1089, 66th G.A. (1976), provides that upon retirement for an ordinary disability a member

shall receive a service retirement allowance if he has reached 55 years of age. Pursuant to §411.6(2), as amended by §23, Ch. 1089, 66th G.A. (1976), the service retirement allowance consists of an annuity which is the actuarial equivalent of the member's accumulated contributions at the time of retirement, and a pension equal to one-half of the member's average final compensation.

Section 411.6(4) also provides that if, under an ordinary disability, the member has not reached the age of 55, the retirement allowance shall consist of an annuity equaling the actuarial equivalent of the accumulated contributions plus a pension which, together with the annuity, shall make a total allowance equal to ninety percent of 1/70 the average final compensation multiplied by the number of years of service, if such allowance exceeds one-half the average final compensation. Otherwise, the allowance shall consist of a pension which, together with the annuity, equals one-half the average final compensation. However, if the member has less than five years of service, the allowance shall equal one-fourth of the average final compensation.

Section 411.6(6), as amended by §26, Ch. 1089, 66th G.A. (1976), provides that upon retirement for an accidental disability the member shall receive a service retirement allowance if the age of 55 has been attained. If not, the retirement allowance shall consist of an annuity equal to the actuarial equivalent of the accumulated contributions, and a pension of 66-2/3 percent of the average final compensation.

We cannot find any cases speaking to the constitutionality of §411.6. Legislative enactments are presumed to be constitutional. The unconstitutionality of a statute must be proven beyond a reasonable doubt. Those alleging unconstitutionality must negative every reasonable basis which may support the statute. *Lewis Consolidated School Dist. v. Johnston,* 1964, 256 Iowa 236, 127 N.W.2d 118; *Dickinson v. Porter,* 1949, 240 Iowa 393, 35 N.W.2d 66. It must be shown that the statute clearly, palpably and without doubt infringes the Constitution, and every reasonable doubt must be resolved in favor of constitutionality. *Avery v. Peterson,* 243 N.W.2d 630 (Iowa 1976); *Lee Enterprises, Inc. v. Iowa State Tax Comm.,* 162 N.W.2d 730 (Iowa 1968). See also, as authority for all of these propositions, *City of Waterloo v. Selden* (decided by Supreme Court of Iowa on March 16, 1977). We must adhere to these pronouncements. Thus, we cannot state that the above sections are unconstitutional.

We can, however, point out that those sections do not lead to the ultimate conclusion that one disabled prior to the 55th birthday will receive an allowance greater than one who is disabled after the age of 55. It is apparent that one retiring with fewer years of service will have a lower average final compensation. Thus, an allowance equal to one-half the average final compensation or one equal to 66-2/3 percent of the average final compensation for a member under the age of 55 may still be lower than the service retirement of one over 55. We do not believe that the mere fact some member's retirement allowance at an age under 55 might possibly be more than one over 55 is sufficient, in and of itself, to require that these sections be declared unconstitutional.

March 21, 1977

STATE OFFICERS AND DEPARTMENTS: Executive Council; Employment of Outside Counsel. §§13.2 and 13.3, Code of Iowa, 1975. The Executive Council has no authority to employ legal counsel at public expense to defend an individual named as a defendant in a quo warranto proceeding

brought by the state to test such individual's title to the office of state senator, notwithstanding the fact that the petition has been amended to allege that the Iowa Senate acted in an arbitrary, capricious and illegal manner in seating the individual in question. (Haesemeyer to Wellman, Secretary, Executive Council of Iowa, 3-21-77) #77-3-15

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to your letter of March 15, 1977, in which you state:

"Under date of March 8, 1977, the Honorable George R. Kinley, State Senator, addressed a letter to Executive Council members advising that the Attorney General has amended the Petition in the above captioned proceeding against Senator John Scott alleging that the Iowa Senate has acted illegally, arbitrary, and capriciously in refusing to delve deeply into whether or not Senator Scott met the qualifications to hold the office of State Senator, as detailed in Senator Kinley's letter, a copy of which is forwarded herewith.

"The Executive Council, in meeting held March 14, 1977, deferred their decision relative to the request of Senator Kinley, in which the Executive Council is again asked, pursuant to the provisions of Section 13.3, Code of Iowa, to appoint Counsel to represent Senator Scott in this 'Quo Warranto' action because of the feeling that the basis for the prior opinion of the Attorney General advising that the Executive Council did not have authority to appoint Counsel for Senator Scott, is no longer valid.

"This office was directed to request another opinion as to whether or not the aforementioned amendment to the original petition in the 'Quo Warranto' proceeding materially effects your original opinion to the degree that the Executive Council now has authority to appoint Counsel for Senator Scott."

On January 20, 1977, we furnished you with our opinion to the effect that Senator John Scott was not entitled to have attorneys employed by the Executive Council to defend him in the *quo warranto* action pending against him in Polk County District Court. Since, as we stated in such opinion:

"...the suit is brought against him not as a state officer but in his individual capacity and because the state has no interest, at least at this time, in the defense of this suit."

This circumstance has not changed by reason of the amendment of the petition in this pending case. Senator Scott, in his individual capacity, is still the only defendant and the nature of the relief sought has not changed because of the amendment. The Senate is not a party to this case and petitioner is not seeking any relief, such as mandamus, against the Senate.

Accordingly, we adhere to the January 20, 1977, opinion and advise you that for the reasons stated therein the Executive Council is without authority to employ counsel to represent Senator Scott in the *quo warranto* action and that the amendment of the petition is irrelevant in these respects.

March 28, 1977

MUNICIPALITIES: Pensions—§411.6, Code of Iowa, 1975. A member who has not been retired and who is still employed may not receive his accumulated contributions. A member whose employment is terminated prior to retirement, other than by death or disability, may receive his accumulated contributions in a lump sum, but then waives his right to a retirement allowance. A member who retires shall receive at least 50 percent of his accumulated contributions upon request. (Blumberg to Ashcraft, State Senator, 3-28-77) #77-3-16

Honorable Forrest F. Ashcraft, State Senator: We have your opinion requests of February 15 and February 22, 1977, regarding pensions under Chapter 411 of the Code. In the first request you asked whether a police officer, retired because of disability, can receive his accumulated contributions in a lump sum. We indicated to you, by a letter of February 16, 1977, that your question had previously been answered in full by a prior opinion (1968 OAG 744) and enclosed a copy of that opinion for you. We also asked that your request be withdrawn since that prior opinion was still applicable. Without withdrawing that request, you submitted a second request on February 22, 1977. In that second request you ask whether a member who takes advantage of his vested rights under Chapter 411.6(c) (sic) may withdraw all or any portion of his accumulated contributions when he becomes eligible for his pension at age 55. This opinion is only in response to your second request.

Section 411.6, 1975 Code of Iowa, sets forth the various retirement allowances. Section 411.6(1)(a) provides that any member may retire at age 55 with 22 years of service. Subsection (c) provides a retirement allowance for a member, with at least 15 years of service, whose employment is terminated *prior* to retirement other than by death or disability. If such a member chooses to withdraw his accumulated contributions pursuant to §411.6(10), he shall not receive an allowance.

We are unable to tell from your request which situation has occurred. If the member has reached the age of 55, has not retired and is still employed, he may not receive his accumulated contributions. If he terminates his employment prior to retirement, other than by death or disability, he may, upon request, receive his accumulated contributions, but will then be unable to receive a retirement allowance. If he retires he is eligible for a retirement allowance. At this point the prior opinion, of which you have a copy, controls regarding his eligibility to receive the accumulated contributions.

March 28, 1977

MUNICIPALITIES: Pensions—§411.1(14), Code of Iowa, 1975; §18, Ch. 1089, 66th G.A. (1976). Longevity pay can be included within "earnable compensation." Extra pay for holiday duty and the temporary filling in for superiors shall not be included. (Blumberg to Robinson, State Senator, 3-28-77) #77-3-17

Honorable Cloyd Robinson, State Senator: We have your opinion request of February 10, 1977, which was expanded by an addition on February 24, 1977. You ask whether "earnable compensation" pursuant to Chapter 411 of the 1975 Code of Iowa, includes longevity pay, extra pay for working holidays, and extra pay for filling in for a superior for short periods of time.

This term has been the subject of several requests in the past few months. In an opinion to Representative Nealson on February 23, 1977, we discussed this problem. There, we held, citing to earlier opinions, that items such as night duty premiums are not to be included in the computation of earnable compensation.

Section 411.1(14), as amended by §18, Ch. 1089, 66th G.A. (1976), provides that "earnable compensation" shall not include amounts for overtime, meal and travel expenses, uniform allowances and accumulated sick leave. Extra pay for duty on holidays and for temporarily filling in for a superior are in the same category as overtime compensation. Thus, those amounts shall not be

included in the computation of "earnable compensation." However, we have previously held that longevity pay can be included within that compensation. See, OAG 65-12-16.

Accordingly, we are of the opinion that longevity can be included within "earnable compensation." Extra pay for holiday duty and temporarily filling in for a superior shall not be included.

March, 1977

CONSTITUTIONAL LAW

Income Tax, Active Duty Military Personnel, Delegation of Power. Art. VII, §7, Constitution of Iowa. A bill imposing the income tax on active duty military personnel is not unconstitutional because it conditions termination of the tax on congressional action reimposing universal military service or declaring war. (Turner to Hultman, State Senator, 3-1-77) #77-3-1

COUNTIES

County Fair Boards; Appropriation of County Funds. §§174.1(2), 174.13 and 332.3(6), Code of Iowa, 1975. The board of supervisors may not give county aid to the Keokuk County Exposition because the Exposition does not qualify as a society eligible for funds pursuant to §§174.1 and 174.13. (Condon to Schwengels, State Senator, 3-21-77) #77-3-11

Mental Health. §504A.101, Code of Iowa, 1975. Boards of directors of community mental health centers incorporated under Chapter 504A are covered under the provisions of Chapter 504A.101, as amended by Chapter 235, Acts, 66th G.A., 1975 (H.F. 816). In the event the issue of coverage is litigated, for those centers established under Chapter 230A.3(1), the county does owe the board a defense. (Wilson to Shirley, Dallas County Attorney, 3-14-77) #77-3-8

ELECTIONS

Campaign Finance Disclosure Commission; Political Party Tax Checkoff Proceeds. §§56.22(1), 56.19, 8.15, Code of Iowa, 1975. A political party may request that the state treasurer invest checkoff proceeds and these proceeds are to be paid out at the discretion of the party chairpersons pursuant to claims filed with the comptroller. (Haesemeyer to Murray, State Senator, 3-7-77) #77-3-4

ENVIRONMENTAL PROTECTION

Administrative Rules for Certification of Pollution-Control Property. §427.1(32), Code of Iowa, 1975; Chapter 1226, Acts, 65th G.A., §1. For purposes of implementing §427.1(32), the Iowa Department of Environmental Quality's administrative rules 400-12(455B) IAC and 400-23(455B) IAC are both reasonable and necessary. (Coriden to Hutchins, State Senator, 3-16-77) #77-3-10

Operation and maintenance agreement for watershed structural measures. Muscatine-Louisa Drainage District No. 13 is the contracting party responsible for maintenance and operation of a floodwater retarding and sediment control structure in the Leutzinger-Lowe Run Watershed in Muscatine County in accordance with a May 27, 1970, operational and maintenance agreement. (Coriden to Greiner, Director, Iowa Department of Soil Conservation, 3-1-77) #77-3-2

LIQUOR, BEER & CIGARETTES

Sunday Liquor Sales. Chapter 39, §§123.36, 362.2 and 364.2, Code of Iowa, 1975. (1) A conflict is not presented by a bar owner/councilman voting on the issue of Sunday liquor sales. §123.36, Code, 1975. (2) Election on Sunday liquor sales; The city council must determine whether the locality is to have Sunday liquor sales, and a popular community election is foreclosed. (McGrane to Anstey, Appanoose County Attorney, 3-11-77) #77-3-6

MUNICIPALITIES

Policemen and Firemen's Pensions. §411.6, Code of Iowa, 1975; §§23, 25 and 26, Chapter 1089, 66th G.A. (1976). §411.6 of the Code cannot be declared unconstitutional on the mere possibility that a member's retirement allowance under 55 might be more than one for a member over 55. (Blumberg to Junker, State Representative, 3-23-77) #77-3-14

Pensions. §411.6, Code of Iowa, 1975. A member who has not been retired and who is still employed may not receive his accumulated contributions. A member whose employment is terminated prior to retirement, other than by death or disability, may receive his accumulated contributions in a lump sum, but then waives his right to a retirement allowance. A member who retires shall receive at least 50 percent of his accumulated contributions upon request. (Blumberg to Ashcraft, State Senator, 3-28-77) #77-3-16

Pensions. §411.1(14), Code of Iowa, 1975; §18, Chapter 1089, 66th G.A. (1976). Longevity pay can be included within "earnable compensation". Extra pay for holiday duty and the temporary filling in for superiors shall not be included. (Blumberg to Robinson, State Senator, 3-28-77) #77-3-17

SCHOOLS

Products Liability. §§554.2104(1); 554.2313; 554.2314; 554.2315; 554.2316; 554.2318; 554.2607(5); 554.2719(3); 613A.1(3); 613A.8, Code of Iowa, 1975. The school district may be liable for injury caused by negligence or breach of warranty in the manufacture of defective products in a vocational technical education course. (Condon to Benton, Superintendent of Public Instruction, 3-11-77) #77-3-7

Punishment for Misbehavior; Transportation of Students. §285.10, Code of Iowa, 1975. Where pupils are retained after the normal class hours for disciplinary measures, the school is not responsible to see that the pupil is transported to his home after the disciplinary action has been completed. (Haesemeyer to Halvorson, State Representative, 3-3-77) #77-3-3

STATE OFFICERS AND DEPARTMENTS

Executive Council; Employment of Outside Counsel. §§13.2 and 13.3, Code of Iowa, 1975. The Executive Council has no authority to employ legal counsel at public expense to defend an individual named as a defendant in a quo warranto proceeding brought by the State to test such individual's title to the office of state senator, notwithstanding the fact that the petition has been amended to allege that the Iowa Senate acted in an arbitrary, capricious and illegal manner in seating the individual in question. (Haesemeyer to Wellman, Secretary, Executive Council of Iowa, 3-21-77) #77-3-15

Department of Social Services; Administrative Costs; Title XX, Appropriation. Chapter 1042; Chapter 1132, §1, 66th G.A., 1976 Session. Pay raises for Department of Social Services' employees are considered as administrative costs which may not be paid from funds appropriated by Chapter 1042. (Cosson to Ashcraft, State Senator, 3-16-77) #77-3-9

TAXATION

Property Tax. A real estate parcel of exactly ten acres does not qualify as "agricultural" real estate, under rules of the Iowa Department of Revenue. Chapter 421.14, Code, 1975; §441.47, as amended by Chapter 1199, Acts, 66th G.A., 2nd; §730-71.3, IAC. (Maggio to Eller, Crawford County Attorney, 3-21-77) #77-3-12

Semiannual Mobile Home Tax; Divorced spouse attaining age 55. §135D.22(2), Code, 1975, as amended by Chapter 1106, §1, Acts, 66th G.A. (1976). A divorced husband or wife is not a "surviving spouse" and therefore, does not, upon attaining the age of 55 years, qualify for the semiannual mobile home tax reduction set forth in §1 of Chapter 1106. (Griger to Harbor, State Representative, 3-21-77) #77-3-13

Property Tax; Failure to Appeal to Local Board of Review. §441.37, Code, 1971; §§446.7 and 446.18, Code, 1975. Failure of taxpayers to appropriately appeal assessment for real property taxes to local board of review precludes collateral attack on assessment and county treasurer should proceed to collect the taxes pursuant to §§446.7 and 446.18, Code, 1975. (Griger to Johansen, Assistant Franklin County Attorney, 3-10-77) #77-3-5

STATUTES CONSTRUED

Code, 1971	Opinion
441.37	77-3-5

Code, 1975	Opinion
8.15	77-3-4
13.2	77-3-15
13.3	77-3-15
39	77-3-6
56.19	77-3-4
56.22(1)	77-3-4
123.36	77-3-6
135D.22(2)	77-3-13
174.1(2)	77-3-11
174.13	77-3-11
285.10	77-3-3
332.3(6)	77-3-11
362.2	77-3-6
364.2	77-3-6
411.1(14)	77-3-17
411.6	77-3-16
411.6	77-3-14
421.14	77-3-12
427.1(32)	77-3-10
441.47	77-3-12
446.7	77-3-5
446.18	77-3-5
504A.101	77-3-8
554.2104(1)	77-3-7
554.2313	77-3-7
554.2314	77-3-7
554.2315	77-3-7
554.2316	77-3-7

554.2318	77-3-7
554.2607(5)	77-3-7
554.2719(3)	77-3-7
613A.1(3)	77-3-7
613A.8	77-3-7

66th GENERAL ASSEMBLY

Chapter 235	77-3-8
Chapter 1042	77-3-9
Chapter 1089, §18	77-3-17
Chapter 1089, §§23, 25, 26	77-3-14
Chapter 1106, §1	77-3-13
Chapter 1132	77-3-9

CONSTITUTION OF IOWA

Article VII, §7	77-3-1

April 1, 1977

COUNTIES: BOARD OF SUPERVISORS: Lease purchase agreement equipment. Section 750.6, Code of Iowa, 1975. A county may lease-purchase law enforcement communications equipment without bids. (Linge to Shepard, Butler county Attorney, 4-1-77) #77-4-1

Mr. Gene W. Shepard, Butler County Attorney: You have requested an opinion of the Attorney General on two questions: may a county enter into a lease-purchase contract for the acquisition of radio communications equipment and; are bids required before the lease or purchase of such equipment.

Section 750.6, Code of Iowa, 1975, authorizes a board of supervisors to both lease and purchase such equipment wherein it provides, in part:

"The board of supervisors of any county shall have...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 operation of the law-enforcement agencies under its jurisdiction, to pay the cost thereof from the general fund of said county."

A well established principle governing acts of county officials is that "a County is a creature of statute, a quasi-corporation, and its officials have only such powers as are expressly conferred by statute, or *necessarily* implied from the powers so conferred." *In re Estate of Frentress,* 1958, 249 Iowa 783, 786, 89 N.W.2d 367, 368, quoted in *Woodbury County v. Anderson,* 1969, 164 N.W.2d 129, 134. [emphasis added]. Since the legislature in Section 750.6 has not expressly conferred upon the board of supervisors the power to enter lease-purchase agreements, the power to enter such an agreement, to be valid, must be implied, as necessary for them to carry out their power to acquire radio communications equipment.

We have examined statutes granting the power to lease and to purchase and have concluded that this authorization implies and includes lease-purchase acquisitions. 1972 O.A.G. 614; 1972 O.A.G. 42.

A lease-purchase transaction may pose problems. First, a board of supervisors is a legislative body, *Mandicino v. Kelly,* 1968, 158 N.W.2d 754 and, as

a general rule of law, a legislative body cannot bind future legislatures. *State v. Executive Council,* 1929, 207 Iowa 923, 931, 223 N.W. 737, 740. The rule supports our general political philosophy that government is a creature of the people, and that the people have a right to retain control of political policy decisions by replacing a legislature which has acted against their interest with a new legislature which can repeal unpopular laws. The rule itself is applicable to counties, as delegates of the legislature. *Board of Education v. Bremen Tp. Rural Independent School District,* 1967, 148 N.W.2d 419, 424.

Seen in this light, an agreement, such as a lease-purchase agreement, should not bind subsequent boards of supervisors. The agreement, if used, should be periodically renewable at the board's option. (It might be argued that provisions retaining the option of termination by discontinuing rental payments would be an essential element distinguishing the lease-purchase and installment purchase contracts.) We have approved such agreements that would bind subsequent boards:

"[W]hen contracts are entered into by the Board which are in the performance of their statutory duties and which *necessarily* extend beyond the terms of their office, such contracts are valid." 1966 O.A.G. 136, 137. [emphasis added].

A decision to enter into this type of transaction must be based upon a "good faith determination of the board [that] it is necessary to do so to exercise its authority... ." 1964 O.A.G. 351, 353. And the contracts may bind the county only "for a reasonable length of time." 1972 O.A.G. 614, 616.

The second problem inherent in the lease-purchase transaction is discussed in *Bachtell v. City of Waterloo,* 1972, 200 N.W.2d 548. The Iowa Supreme Court, in that case, held that if a lease-purchase agreement obligates a political subdivision to pay all annual installments, the contract is treated as an installment purchase contract and the aggregate of such payments constitutes a present indebtedness of the political subdivision. This amount must be added to the other debts of the political subdivision to determine whether the annual debt limit of the political subdivision has been exceeded. Article XI, Section 3, Constitution of Iowa and Section 343.10, Code of Iowa, 1975.

The 1975 Code of Iowa specifically imposes a bidding procedure to effect public improvements, Section 23.18, contracts for road or bridge construction, Section 309.40, and for erection and repair of buildings, Section 332.7. No provision can be found that specifically requires bidding on the purchase or lease of communications equipment. The express mention of certain activities requiring bids implies the exclusion of other activities. *Expressio unius est exclusio alterius.* See *Lenerty v. Municipal Court,* 1974, 219 N.W.2d 513, 516 and authorities therein cited.

It is generally held that "in the absence of constitutional or statutory mandate, competitive bids are not necessary." 20 C.J.S. *Counties* §183, (1940); *Griswold v. Ramsey Co.,* 1954, 242 Minn. 529, 65 N.W.2d 647. We have opined that bids are not required if not mandated by statute. 1968 O.A.G. 546; 1974 O.A.G. 171.

When no statute requires bidding, the decision as to whether or not to let bids is left to the business judgment of the board of supervisors. In order to avoid charges that the board's decision is arbitrary, capricious or fraudulent, "this office has recommended that governing bodies of municipalities obtain bids on purchases as a matter of public policy, even where there is no statutory requirement that they do so." 1974 O.A.G. 171.

April 4, 1977

BARBERS AND COSMETOLOGISTS; STATE OFFICERS AND DEPARTMENTS: §§157.6, 157.11, 157.13(1), 157.15, 158.9, 158.13(1), 158.16, 1977 Code of Iowa; §157.6, 1973 Code of Iowa; Ch. 1093, §95, Acts of the 65th G.A. Whether a licensed cosmetologist who advertises in the telephone directory or elsewhere under a general heading of "Barbers" violates §157.13(1), 1977 Code of Iowa, or whether a licensed barber who advertises in a telephone directory or elsewhere under the designation of "Beauty Salons" violates §158.13(1) entails factual issues unique to each case and cannot be answered as a matter of law. (Haskins to Hill, State Senator, 4-4-77) #77-4-2

Honorable Philip B. Hill, State Senator: You request an opinion of our office on the following matter:

"The 1976 Legislature passed Senate File 1141 relating to the licensing of barbers and cosmetologists, and this bill has been incorporated in chapters 157 and 158 of the Code of Iowa. Section 157.13[1], Code 1977, states in part as follows: 'It is unlawful for a licensed cosmetologist to represent himself or herself as a licensed barber'.

"The Yellow Pages of the current Des Moines telephone book contained advertisements for various establishments under the listing 'Barbers', and it is my understanding that several of the institutions and individuals listed therein are licensed only for the practice of cosmetology. Since it appears that an advertisement of this type would be a representation by a licensed cosmetologist that he or she was a licensed barber, it would appear that these advertisements would be a violation of Section 157.13.

"Section 158.13[1] also contains a similar provision as follows: 'It is unlawful for a licensed barber to represent himself or herself as a licensed cosmetologist'. Although I do not know if any of the licensed barbers or licensed barbershops have advertised in the telephone directory or elsewhere as cosmetologists or cosmetology salons, I would assume that such advertisements would violate a portion of Section 158.13 quoted above.

"Also, I have been made aware of a declaratory ruling by the State Department of Health which contains the following statement: 'A person holding both licenses may operate both a barber and a cosmetology salon on the same premises, provided there is a partition separating the two establishments and assuming both meet the other necessary requirements as outlined in the statute and associated regulations'. Based upon a recent review of the Administrative Code, I have been unable to find any regulations issued by the Department of Health or the applicable Licensing Board under Chapter 17A of the Code since the passage of Senate File 1141.

"Your opinion is requested on the following matters:

"1. Is a licensed cosmetologist in violation of Section 157.13, Code of Iowa, 1977, if that licensed cosmetologist advertises in the telephone directory or elsewhere under a general heading of 'Barbers'?

"2. Is it a violation of Section 158.13, Code of Iowa, 1977, for a licensed barber or barbershop to advertise in a telephone directory or elsewhere under the designation of 'Beauty Salons'?

"3. Since the provisions of Chapters 157 and 158 of the Code of Iowa 1977 limit the authority of the Licensing Boards and/or the Department of Health with respect [to] prescribing rules, and no rules have been issued pursuant to the statutes enacted last year, is the above quoted portion of the declaratory ruling of the Department of Health valid and enforceable?

"It should be noted that this ruling was consistent with statutes repealed in 1974 and regulations issued thereunder. It should further be noted that the legislature did consider the question of whether an establishment could be licensed as both a barber and a cosmetology salon, and any restrictions on such dual licnesing were deleted from Senate File 1141."

In response to your first two questions, whether a licensed cosmetologist who advertises in the telephone directory or elsewhere under a general heading of "Barbers" is in violation of §157.13 (1), 1977 Code of Iowa, or whether a licensed barber who advertises in a telephone directory or elsewhere under the designation of "Beauty Salons" is in violation of §158.13(1), 1977 Code of Iowa, entails factual issues unique to each individual case and a blanket answer cannot be given. It cannot be said as a matter of law that such advertisement does or does not violate these sections. Too much depends upon the nature of, and circumstances surrounding, the particular advertisement. It can be said, however, that a barbershop cannot be charged with a violation of §158.13(1), or a beauty salon with a violation of §157.13(1), because those sections deal only with licensed barbers and licensed cosmetologists and not with barbershops or beauty salons. Barbershops and beauty salons are specifically mentioned in §158.9, 1977 Code of Iowa and §157.11, 1977 Code of Iowa, respectively, and the failure to specifically refer to them in §158.13(1) or 157.13(1) implies that they are not covered by these sections. It should be noted that criminal penalties are provided for violation of §157.13(1) and §158.13(1), *see* §§157.15, 158.16, 1977 Code of Iowa, and therefore the courts will accord them a strict construction. *See State v. Kool,* 212 N.W.2d 518, 520 (Iowa 1973). This is so even though the criminal penalties include only fines. *See State v. Glenn,* 234 N.W.2d 396 (Iowa 1975).

With regard to your third question, the regulation on which the above statement in the declaratory ruling was based is regulation 470-150.2(2), I.A.C., which states in relevant part:

"Cosmetology establishments operated in connection with any other business,...shall be separated either by complete or partial partitions."

Presumably, the declartory ruling treats a barbershop as an "other business" within the meaning of regulation 420-150.2(2) in reaching the conclusion that a partition must separate a barbershop and beauty salon operated on the same premises. Regulation 420-150.2(2) appeared in 1973 I.D.R., p. 480, and was promulgated under the authority of §157.6, 1973 Code of Iowa. That section stated:

"The state department of health shall prescribe such sanitary rules for shops and schools as it may deem necessary, with particular reference to the conditions under which the practice of cosmetology shall be carried on and the precautions necessary to be employed to prevent the creating and spreading of infectious and contagious diseases. Cosmetology may be practiced in the home providing a room, other than the living rooms be fitted up for that purpose. The department of health shall have power to enforce the provisions of this section and to make all necessary inspections in connection therewith."

§157.6, 1973 Code of Iowa, was repealed effective July 1, 1975. *See* Ch. 1093, §95, Acts of the 65th G.A. It was replaced by §157.6, 1977 Code of Iowa, effective July 1, 1976. §157.6, 1977 Code of Iowa, states:

"The department shall prescribe sanitary rules for beauty salons and schools of cosmetology which shall include the sanitary conditions necessary for the practice of cosmetology and for the prevention of infectious and contagious

diseases. Subject to local zoning ordinances, a beauty salon may be established in a residence if a room other than the living quarters is equipped for that purpose. The department shall enforce the provisions of this section and make necessary inspections for enforcement."

It is doubtful whether regulation 470-150.2(2) survived the repeal of the code section under which it was adopted. 2 An. Jur.2d *Adminsitrative Law* §297, at 124 states:

"A regulation is, of course, invalid if the statute under which it is issued is invalid,...."

Regulation 470-150.2(2) should therefore be repromulgated under the provisions of Ch. 17A, 1977 Code of Iowa, to remove any doubt as to its validity and enforceability.

April 5, 1977

MUNICIPALITIES: Incompatibility — Chapter 400, §411.5(1)(b). Code of Iowa, 1975. A public safety director in charge of the police department cannot simultaneously occupy the position of Chief of Police. A public safety director cannot be a member of the board for the police pension system. (Blumberg to Pavich, State Representative and Slater, State Senator, 4-5-77) #77-4-3

Honorable Emil S. Pavich, State Representative and Honorable Tom Slater, State Senator: We have received your joint opinion request of March 23, 1977, regarding a possible incompatibility of positions. You indicate that a Chief of Police is retiring. The Public Safety Director, who oversees the police department for the city has been appointed acting chief, while still retaining his former position. You ask whether he can occupy both positions, and, while so doing, if he can also remain on the pension board of the police retirement system.

There is nothing in Chapter 400, 1975 Code of Iowa, which specifically limits an acting chief to one in the department. Keeping in mind the obvious purpose of the civil service statutes, we believe that such a temporary appointment should be from the ranks. However, that is not dispositive of your first question. Because the Public Safety Director oversees the police department and makes recommendations and reports to the city regarding the department, it is quite obvious that an incompatibility exists. We have held numerous times that an incompatibility exists when an individual occupies two positions simultaneously and one of those positions involves a revisory power over the other. See, *State ex rel. Le Buhn v. White,* 1965, 257 Iowa 606, 133 N.W.2d 903; *State ex rel. Crawford v. Anderson,* 1912, 155 Iowa 271, 136 N.W. 128. Your public safety director should not be the acting chief.

Section 411.5(1)(b) of the Code, as amended by §19, Ch. 1089, 66th G.A. (1976), provides that the board of trustees of the police pension system shall consist of the chief officer of the police department, city treasurer, city attorney, two policemen and two citizens who do not hold any other public office. It is apparent that a chief of police can be on said board, but a public safety director cannot.

Accordingly, we are of the opinion that a public safety director of a city who oversees the police department cannot simultaneously occupy the position of chief of police. A public safety director cannot be on the board for the police pension system.

April 5, 1977

COUNTIES: Compensation Board. Chapter 340A, Code of Iowa, 1977. The board of supervisors has two alternatives with respect to the compensation schedule recommended by the compensation board under the present law. The board may accept the recommended schedule or it may reduce the recommended salary of each officer by an equal percentage. No other options are available. (Nolan to Egenes, State Representative, 4-5-77) #77-4-4

The Honorable Sonja Egenes, State Representative: This is written in reply to your letter of March 8, 1977, which is as follows:

"Chapter 191, Laws of the Sixty-Sixth General Assembly, 1975 Session, Section six (6), lines eighteen (18) through thirty-one, (31), states that:

" '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 or compensation 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.'

"This section seems to allow the board of supervisors only two alternative actions for determining the final compensation schedule of salaires. One option would be to accept the compensation board's recommendations, and the second option would be to reduce all of the recommended salaries by an equal percentage.

"However, there has been considerable controversy over this issue, with boards of supervisors taking action other than what the law seemingly allows. Some of the actions taken by various boards of supervisors have been to adjust individual salaries as opposed to adjusting all salaries by an equal percentage, adjust the increase in salary as opposed to adjusting the recommended annual salary, or in some cases the board of supervisors has done both.

"I am requesting an Attorney General's Opinion to clarify exactly what action the board of supervisors may take on the recommendations made by the compensation boards."

We agree with your conclusion that §6 of Chapter 191, Laws of the 66th G.A., 1975 Session, allows the board of supervisors only two alternative actions for determining the final compensation schedule of salaries. The board of supervisors may (1) accept the recommendations of the county compensation board as submitted; or (2) the board may determine that lower salaries or compensation should be fixed, and if it does so, it must reduce the recommended salary or compensation of each officer by an equal percentage.

Accordingly, it is our view that the boards of supervisors are not empowered by the act to adjust recommended salaries by reducing the recommended increase by 100% for each of the elected officials, nor are they empowered to adjust the recommended salaries or compensation of some county officers and not other county officers. If the board of supervisors acts in a manner which is inconsistent with the provisions of the statute, it is our opinion that such

acts are ultra vires and void. Where the legislature provides the manner of compensation, the boards of supervisors are obliged to follow the statute.

The board of supervisors is a legislative body, but its members have only such powers as are expressly conferred by statute or necessarily implied from the powers conferred. *Woodbury County v. Anderson,* 1969, 164 N.W.2d 129. Where the powers of the board of supervisors are specifically limited in the statute, they cannot be enlarged under an implied power theory.

Section 340A.6, Code of Iowa, 1977, provides that 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 state appeal board is given authority to "approve, disapprove or reduce" budgets where there is an appeal but is prohibited by §24.30 from increasing any "budget, expenditure...or any item contained therein".

Inasmuch as the time for action by the supervisors on the compensation board recommendations has now passed, and certified budgets for the 1977-1978 fiscal year are filed, but the levies have not been spread accordingly, it appears that the appropriate course for the supervisors is to reconsider the recommended salary schedule and file an amended budget as soon as possible.

April 5, 1977

MOTOR VEHICLES: Registration of vehicles. §§321.2, 321.4, 321.5, 321.109, Code of Iowa, 1975. Regs. 820-[07,D]11.1(8), 820-[07,D]11.34(321), Iowa Administrative Code, 1975. The Department of Transportation possesses statutory authority for adopting classifications concerning the registration and licensing of motor vehicles. The Chevrolet Blazer is properly classified as a "multi-purpose vehicle", and its registration fee is determined in the same manner as a passenger car. (Dundis to Glenn, State Senator, 4-5-77) #77-4-5

Mr. Gene W. Glenn, State Senator: In a letter of February 22, 1977, you requested an attorney general's opinion as the the proper registration in Iowa of a vehicle known as the Chevrolet Blazer. You ask, "Is such a vehicle properly licensed as a truck or a passenger car?" You indicate that while the Iowa Department of Transportation classifies the Blazer as a passenger car, some county treasurers initially license it as a truck.

Since the adoption of Regulation 820-[07,D]11.1(8) by the Iowa Department of Transportation in 1975, I.A.C., Transportation [820], Ch. 11, p. 2, the Chevrolet Blazer has in fact been classified as a "multi-purpose vehicle." This regulation states, "Multi-purpose vehicle means a vehicle which is self-propelled, designed to carry not more than nine persons as passengers, and is constructed either on a truck chassis or with special features for occasional off-road operation."

It seems clear from the description contained in you enclosed GM brochure that the Blazer easily fits the "multi-purpose vehicle" classification. It is also clear that the Department of Transportation possesses the authority to adopt such classifications and rules. Chapter 321, Code of Iowa, 1975, contains the laws, among others, pertaining to registration and licensing of all vehicles. Section 321.2 states in part, "The state department of transportation shall administer and enforce the provisions of this chapter." Section 321.4 states, "The director is hereby authorized to adopt and enforce such departmental rules governing procedure as may be necessary to carry out the provisions of this chapter; also to carry out any other laws the enforcement of which is vested in the department."

As to any initial disagreement between county treasurers and the Department of Transportation regarding proper vehicle classification, the Department is clearly the deciding authority. Section 321.5 states, "All local officials charged with the administration and enforcement of this chapter shall be governed in their official acts by the rules promulgated by the department."

Regulation 820-[07,D]11.34(321) states, "The registration fee for multi-purpose vehicles shall be based on vehicle weight and list price as provided in section 321.109." I.A.C., Transportation [820], Ch. 11, p. 15. Section 321.109 provides for a method of determining registration fees that covers all motor vehicles except those classified as motor trucks, hearses, motorcycles, and motor bicycles. Thus, Chevrolet Blazers are subject to registration in the same manner as passenger cars.

April 5, 1977

STATE OFFICERS AND DEPARTMENTS: DEPARTMENT OF ENVIRONMENTAL QUALITY: AUTHORITY TO REGULATE ROADSIDE SPRAYING OF HERBICIDES FOR WEED CONTROL. Chapter 317 and §§455B.101-.107, Code of Iowa, 1977. Chemical Technology Commission of the Department of Environmental Quality has authority to regulate spraying of herbicides along roadsides to control weeds and administrative rule therefor was duly promulgated and in proper form except that part thereof requiring consultation with county conservation board is beyond authority of commission and therefore invalid. (C. Peterson to Priebe, State Senator; Danker, State Representative; and Lounsberry, Secretary of Agriculture, 4-5-77) #77-4-6

The Honorable Berl E. Priebe, State Senator; The Honorable Arlyn E. Danker, State Representative; The Honorable Robert H. Lounsberry, Secretary of Agriculture: You have, in combination and in essence, requested the opinion of this office as to (1) whether the Chemical Technology Commission of the Department of Environmental Quality (DEQ) has authority under Chapter 455B, Code of Iowa, 1977, to adopt administrative rules limiting the spraying of herbicides along roadsides in purported conflict with the provisions of Code Chapter 317 conferring discretion in matters of weed control upon county boards of supervisors, and (2) whether the rules adopted by DEQ for that purpose are in proper form with proper procedure followed in the adoption thereof.

Portions of the Code of Iowa, 1977, pertinent to question (1) are:

"§317.3 Weed commissioner. The board of supervisors of each county shall annually appoint a county weed commissioner...

"317.4 Direction and control. ...Each commissioner shall, subject to direction and control by the county board of supervisors, have supervision over the control and the destruction of all noxious weeds in his county, including those growing within the limits of cities, and within the confines of abandoned cemeteries, and of any other weeds growing along streets and highways unless otherwise provided...

"317.10 Duty of owner or tenant. Each owner and each person in the possession or control of any lands shall *cut, burn, or otherwise destroy,* in whatever manner may be prescribed by the board of supervisors, all noxious weeds thereon as defined in this chapter at such times in each year and in such manner as shall be prescribed in the program of weed destruction order or orders made by the board of supervisors, and shall keep said lands free from such growth of any other weeds, as shall render the streets or highways adjoining said land unsafe for public travel. (Emphasis added.)

"317.11 Weeds on roads or highways. The board of supervisors shall destroy noxious weeds growing in secondary roads, and the state department of transportation shall destroy noxious weeds growing on primary roads...

"317.18 Order for destruction on roads. The board of supervisors shall order all weeds other than noxious weeds, on all county trunk and local county roads and between the fence lines thereof to be *cut, burned or otherwise destroyed*... . Said order shall define the roads along which said weeds are required to be *cut, burned or otherwise destroyed* and shall require said weeds to be *cut, burned or otherwise destroyed* within thirty days.... If the adjoining owner fails to *cut, burn or otherwise destroy* said weeds as required by said order the county commissioner shall have same *cut, burned or otherwise destroyed*... (Emphasis added)

"§455B.100 Definitions. As used in this division V, unless the context otherwise requires:

"1. 'Commission' means the chemical technology commission of [DEQ].

"2. 'Agricultural chemical' means a pesticide as defined in subsection 3 and...

"3. 'Pesticide' means (a) any substance or misture of substances intended for preventing, destroying, repelling, or mitigating directly or indirectly any... weeds...which the executive director [of DEQ] shall declare to be a pest.

"§455B.101 Agricultural chemicals. The commission shall collect, analyze, and interpret information relating to agricultural chemicals and their use. The commission shall co-ordinate the regulation and information responsibilities of state agencies on matters relating to the sale and use of agricultural chemicals. It shall adopt rules relating to the sale, use and disuse of agricultural chemicals *and may, by rule, restrict or prohibit the sale, distribution, or use of any agricultural chemical. In determining whether to restrict or prohibit the sale, distribution, or use of any agricultural chemical, the board shall consider any official reports, academic studies, expert opinions or testimony, or other matter deemed to have probative value. Any such evidence shall be received at a public hearing held for such purpose.*

"The commission shall consider the toxicity, hazard, effectiveness and public need for the agricultural chemicals, and the availability of less toxic or less hazardous agricultural chemicals and substances or other means of control." (Emphasis added.)

"§455B.102 Pests determined. The commission shall, by rule, after a public hearing following due notice:

"1. Declare as a pest any form of plant or animal life or virus which is unduly injurious to plants, man, domestic animals, articles or substances..."

Chapter 1096, Laws of the 63rd G.A., (codified as Chapter 206A, Code 1971) effective July 1, 1970, created a Chemical Technology Review Board within the Department of Agriculture and conferred upon that board duties and authority relating to the sale and use of agricultural chemicals.

Rule making authority was conferred upon the Board in the same terms as now possessed by the Chemical Technology Commission except that the italicized words in §455B.101 above were added by Ch. 151, Laws of the 64th G.A., 1971 Session. Code Chapter 206A was repealed by Ch. 1119, Laws of the 64th G.A., 1972 Session, and the duties and authority of the Chemical Technology Review Board thereby abolished were assigned to the Chemical Technology Commission as part of the Department of Environmental Quality, created by said Ch. 1119, which chapter is now codified as Chapter 455B.

The statute relating to weed control and eradication of weed first appeared in the Code Supplement of 1913, §§1565 et seq., and is now codified as Chapter 317.

It might well be argued that there is neither conflict nor ambiguity in the provisions of the two statutes, that Chapter 317 governs weed control and Chapter 455B (Section 101 et seq.) governs the use of herbicides. It might also be argued persuasively that the enactment by the legislature of the regulatory scheme presented in §§455B.101 et seq. with respect to the use of herbicides clearly evidences the legislative intent to concentrate expertise and authority with respect thereto in the Chemical Technology Commission.

However, since the use of herbicides has become a very important means of controlling weeds and boards of supervisors have long exercised sole discretion in the use of herbicides to control weeds along roadsides, we will consider the matter as though ambiguity and conflict do exist.

In resolving conflict between two statutes, recourse may be had to rules of statutory construction found in Code Sections 4.7 and 4.8, which provide:

"§4.7 Conflicts between general and special statutes.

"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.

"§4.8 Irreconcilable statutes.

"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."

Thus, the later enacted provision prevails unless the conflict which exists is between a general provision and a special or local provision, in which case the special or local provision prevails irrespective of which statute was first enacted. *Georgen v. State Tax Commission,* 1969 Iowa 165 N.W.2d 782; *City of Vinton v. Engeldow,* 258 Iowa 861, 140 N.W.2d 857; and *Iowa Mutual Tornado Insurance Association v. Fischer,* 245 Iowa 951, 65 N.W.2d 162. See also 1974 OAG 616, 1974 OAG 119, and 1974 OAG 232.

In *Chicago, R.I. and P.R. Co. v. Iowa State Highway Commission,* 1970 Iowa, 182 N.W.2d 160, the Iowa Supreme Court applied the general/special rule in a situation involving statutes analogous to those considered here. Involved in that case were §306A.10 which gave the Highway Commission broad authority over "relocation or removal of any utility now located in, over, along, or under any highway or street" and §478.22 (§327G.15, Code 1977) relating to situations when "a railway track crosses or shall hereafter cross a highway, street or alley." The Court held that the provisions of §478.22 were the more specific relating specifically to railroad crossings whereas §306A.10 dealth with removal or relocation of utility crossings in general.

In view of the above, we conclude that the provisions of §§455B.101 et seq. are more specific than the provisions of Chapter 317, inasmuch as Chapter 317 deals with the control of weeds by means of cutting, burning or otherwise destroying them and §§455B.101 et seq. govern the use of agricultural chemicals or herbicides, which use is included within the term, "otherwise destroy" found in Chapter 317. Thus, the use of herbicides for weed control along roads is subject to administrative rules properly promulgated pursuant to the provisions of Chapter 455B and 17A of the Code.

In resolving question (2), relating to the propriety of the rule adopted and the procedures followed in its adoption, we have reviewed the record of the rule (Chapter 400-37, Limitiations on Spraying for Control of Weeds Along Roadsides) as it appears in the Iowa Adminsitrative Code (IAC) and the records of DEQ with respect thereto. Proper notice of the intended action was published in the IAC on August 9, 1976, and a public hearing was held pursuant thereto on September 21, 1976. The record of the hearing includes testimony both for and against the adoption of the proposed rule as well as suggestions for changes. At the hearing, the Commission announced that the record thereof would be kept open until September 24, 1976, for additional comment. The Commission discussed the proposed rule at its November, 1976, meeting and directed the staff to formulate some changes in the rule as proposed to reflect testimony and suggestions received at the public hearing and to advise the Commission at the next (December, 1976) meeting as to the number of complaints received with respect to roadside spraying. The rule was considered by the Commission at its meeting on December 14, 1976, with the minor changes directed. The staff advised the Commission of the number and general content of letters received by the Commission complaining of roadside spraying. The letters were neither given to the Commission nor made a part of the record. The rule was adopted in final form by the Commission at that meeting, was approved by the Executive Committee of DEQ on December 21, 1976, was published in the Iowa Administrative Code on January 12, 1977, and became effective on February 16, 1977, which procedures are in harmony with the requirements of the Iowa Administrative Procedure Act and specifically §17A.4 thereof. Evidence having been received both for and against the adoption of the proposed rule, we are not prepared to substitute our judgment for that of the Commission in determining the need for the rule.

We are of the further opinion that the rule is in proper form and consistent with the statutory authority conferred upon the Commission with one exception, as follows:

"400-37.2 (455B) Roadside Spraying.

"The spraying of herbicides along the roadside shall be limited to those areas where the county board of supervisors or its designated agent or the state department of transportation has found weeds to be present and which have been specifically designated to be sprayed by the board of supervisors or the department of transportation and when the adjoining owners have not controlled the weeds. *The county conservation board shall be consulted before the spraying.* This limitation does not apply to roadside spraying done by or at the direction of the adjoining property owner." (Emphasis added.)

We find no authority in §§455B.101 et seq. for the Chemical Technology Commission to further delegate to the county conservation board the discretion and authority conferred therein upon the Commission. Webster's New World Dictionary, 2nd College Edition, 1974, defines the word "consult" as meaning "...to talk things over in order to decide or plan something..." and use of that term in the rule (as italicized above) implies some authority or discretion in the county conservation board over the proposed spraying.

In summary, we are of the opinion that the Chemical Technology Commission has authority to regulate spraying of herbicides along roadsides to control weeds and that the rule promulgated for that purpose, 400-37 (455B) IAC, was duly promulgated and is in proper form except that part of 400-37.2 (455B) requiring consultation with the county conservation board, which part is

beyond the authority of the Commission and is invalid and unenforceable.

April 5, 1977

PUBLIC SAFETY; HABITUAL OFFENDER STATUTE: Traffic laws. §§4.2, 4.6, 321.1(65), 321.174, 321.555(1). A conviction under §321.174 of the Iowa Code, a licensing provision, does constitute a violation of the traffic laws as that term is used in §321.555(1)(g). (Dundis to Sween, Hardin County Attorney, 4-5-77) #77-4-7

Mr. Jim R. Sween, Hardin County Attorney: You have requested an attorney general's opinion on the following question:

"Does a conviction under Section 321.174 of the Iowa Code constitute a violation of the traffic laws as that term is used in Section 321.555(1)(g)?"

Section 321.555(1), Code of Iowa, 1975, classifies any person an "habitual offender" who has accumulated three or more convictions within a six year period of certain separate and distinct offenses either singularly or in combination. Paragraph (g) of §321.555(1) specifies one of these offenses as, "A violation of the traffic laws, except parking regulations, committed during a period of suspension or revocation."

Section 321.174, Code of Iowa, 1975, states:

"No person, except those hereinafter expressly exempted shall drive any motor vehicle upon a highway in this state unless such person has a valid license as an operator or chauffeur issued by the department. No person shall operate a motor vehicle as a chauffeur unless he holds a valid chauffeur's license."

It is apparent that §321.174 is a licensing provision. The question remains whether it was intended by the state legislature that such a licensing provision within Chapter 321 should be considered a "traffic law" for the purposes of §321.555(1)(g).

Section 321.555 does not offer a specific definition of "traffic laws", nor does any other section in Chapter 321 or the rest of the Code. This term has not been exposed to judicial interpretation in Iowa either. However, §321.1(65) does define the word "traffic" itself. It states, " 'Traffic' means pedestrians, ridden or herded animals, vehicles, streetcars, and other conveyances either singly or together while using any highway for purposes of travel." Section 321.1 declares that all of its definitions of words and phrases "when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them." The above definition of "traffic" would naturally be controlling if that word were used somewhere else in Chapter 321.

A traffic law, therefore, would be any law dealing with the use of vehicles or other conveyances on any highway for purposes of travel. Since §321.174 deals with who shall be allowed to drive a vehicle on the highway, it is a traffic law.

The legislature has also demonstrated its intention that the term "traffic laws" in §321.555(1)(g) be given a broad coverage by specifically excepting parking regulations violations and excepting them only. If the legislature had intended to further limit the definition of "traffic laws" by excluding licensing provisions, it would have specifically done so.

Section 4.2, Code of Iowa, 1975, states that the common law rule that statutes in derogation thereof be strictly construed has no application to the Iowa

Code. "Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."

Section 4.6, Code of Iowa, 1975, states:

"If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

"1. The object sought to be attained. * * *

"4. The common law or former statutory provisions, including laws upon the same or similar subjects."

One of the major objects of Chapter 321 is obviously to promote and preserve safety on our public roads. The Habitual Offender Law (§§321.555-321.562), as the title of the act points out, seeks to "forbid the use of the highways of this state to habitual offenders of the traffic laws." Iowa Acts 1974 (65 G.A.), Ch. 1193, §1. It was enacted to protect society from the unsafe driver. This is in line with one of Chapter 321's overall purposes. Section 321.555(1)(g) must be construed with this object in mind.

The Minnesota Supreme Court dealt with the term "traffic laws" in *Anderson v. Commissioner of Highways,* 1964, 126 N.W.2d 778. Its reasoning is persuasive in the present context. The court considered a statute giving the state power to administratively suspend the license of a driver who was found to be an "habitual violator of the traffic laws." Minn. St. 171.18. It rejected the argument that violations of licensing provisions, in this case driving while suspended or revoked, did not constitute a violation of traffic laws:

"Although a violation of a provision of C.171 does not in itself impair safety on our highways, driving after suspension or revocation of a license can reasonably be considered to be evidence of an irresponsible attitude toward laws concerning the operation of motor vehicles, which in turn is strong evidence that the driver in question continues to be an unsafe driver. The orverriding object of these laws is to protect the public in the rightful use of highways. We are of the view that in carrying out the legislative purpose of securing highway safety, the commissioner may properly consider drivers license laws to be 'traffic laws' within the meaning of §171.18." *Anderson,* 126 N.W.2d at 783.

In accord with this reasoning, any violation of licensing provisions within Chapter 321 is logical and reasonable evidence of an irresponsible attitude toward laws concerning the operation of motor vehicles. This in turn provides evidence of an unsafe driver, which is the Habitual Offender Law's chief concern. A violation of a licensing provision within the particular context of §321.555(1)(g) would indicate an even greater disdain for motor vehicle laws since the individual in question would have no right to drive whatsoever at the time.

Other listed offenses under §321.555(1) demonstrate the Iowa legislature's compatibility with the Minnesota Supreme Court's reasoning. The specific offense under paragraph (c) is, "Driving a motor vehicle while operator's or chauffeur's license is suspended or revoked." Paragraph (d) is, "Perjury or the making of a false affidavit or statement under oath to the department of public safety." Paragraph (f) is "Failure to stop and leave information or to render aid as required by §321.263. These offenses do not directly impair safety on our highways either. However, they were specifically listed by the legislature.

In light of the foregoing, it is our opinion that a conviction under §321.174 of the Iowa Code does constitute a violation of the traffic laws as that term

is used in §321.555(1)(g).

April 6, 1977

MUNICIPALITIES: Civil Service—§400.18, Code of Iowa, 1977. A reclassification which places a previously lower grade above a previously higher grade is not a demotion for those individuals in that previously higher grade unless they are receiving a lower salary or having lower rank duties than they previously had. (Blumberg to Mosher, Acting State Citizens' Aide, 4-6-77) #77-4-8

Ms. Ruth Mosher, Acting State Citizens' Aide: We have received your opinion request regarding a Civil Service Commission's reorganization of a police department. You indicated that the commission unilateraly altered the relative ranks and pay grades for various positions, thereby placing a previously lower grade at a higher rank than a previously higher grade. We assume from your letter that the duties and pay within that previously higher position have continued within its previous description. You question whether the officers in that position have suffered a demotion which could only be effected through the procedure outlined in §400.18, Code of Iowa, 1977.

"Demotion", as it is used with respect to Civil Service, means to reduce to a lower rank or grade. *Brightman v. Civil Service Comm. of City of Des Moines,* 204 N.W.2d 588 (Iowa 1973). There, police detectives claimed they had received a demotion because sergeants, who had traditionally received the same pay, were given a greater pay increase. The Court held that the detectives' claim was without merit because a denial to those in one classification of a raise given to those in another is not a demotion. The duties and responsibilities of the two positions were distinct and the raise merely recognized this difference. The detectives had not received a reduction in either pay or grade, and therefore they were not demoted. Moreover, this rationale accords with the object of Civil Service classification which "is equality of treatment within a class, not between classes." *Brightman* at 591.

The question of whether a demotion had resulted from a fire department reogranization was addressed in *Harold v. City of Los Angeles,* 1963, 223 Cal.App.2d 836, 36 Cal. 271. The department had three grades and the duties of the lowest and highest position were expanded so as to overlap with those of the middle position. In addition, those within the middle position were allowed to perform only the "lower" duties of their classification because the duties of the higher rank had encroached upon the "higher" duties of that position. That Court held that notice of the reogranization was unnecessary because those individuals within the middle position had not been demoted. They continued to perform duties they had previously been assigned and had not received a reduction in pay.

The principle that is operative in the above cases is that how other classifications within a department are treated or arranged is not relevant to the question of whether a particular classification is demoted. As long as some, but not necessarily all, of the duties of that classification continue, and there is no reduction in pay, there has been no demotion.

If there is any problem with the situation you have outlined it is with the validity of the reogranization itself and not whether a demotion has occured. Although Civil Service statutes are designed to protect and safeguard against arbitrary actions of superior officers in removing employees, the overriding

concern is always the protection of the public. *Anderson v. Board of Civil Service Comm. of City of Des Moines,* 1940, 227 Iowa 1164, 290 N.W. 493. As such, Civil Service legislation is not designed to prevent a department from being reorganized in the interest of efficiency and economy. *Charles v. Wilson,* 1964, 52 Ill.App.2d 14, 201 N.E.2d 627. Any reclassification, therefore, which conforms the civil structure to the realities of the agency prior to the reclassification is valid. *Mandle v. Brown,* 1958, 5 N.Y.2d 51, 152 N.E.2d 511. However, merely establishing a title and moving individuals into those positions in order to establish a pay differential is not sufficient. It should be shown that there is a substantial difference in the work performed and that the reorganization accords with realities. *Morrison v. Hoberman,* 1969, 31 A.D.2d 331, 297 N.Y.S. 2d 1004. Whether the situation you have outlined presents such a problem exceeds both the information you have given us and our capacity to merely advise.

Accordingly, we are of the opinion that those individuals in the previously higher grade, unless they have received a reduction in pay or their duties are now those of a lower classification, have not suffered a demotion.

April 6, 1977

MUNICIPALITIES: Building and Housing Codes—§§103A.19, 413.123 and 413.124, Code of Iowa, 1977. Inspections of multiple dwellings for the Housing Code in Ch. 413 are mandatory. All other inspections for the Housing Code or a building code are discretionary. (Blumberg to A. Miller, State Senator, 4-6-77) #77-4-9

Honorable Alvin V. Miller, State Senator: We have your opinion request of March 25, 1977, wherein you ask the following questions:

"When a municipality adopts a building and/or housing code, does that municipality have to enforce that code by actual inspection?

"Is inspection required by statute?

"If inspections are required by statute, are future inspections also required to enforce continuing compliance?

"Are there any court decisions relative to this area of concern?"

Chapter 413, 1977 Code of Iowa, known as the "Housing Code," establishes minimum requirements for dwellings. Such requirements are enforced through the local board of health regarding the size of rear yards, placement and number of windows, ventilation, placement and number of stairways, non-encasement of plumbing fixtures and the like. Section 413.123 mandates an inspection of every multiple dwelling at least once a year for those requirements within Chapter 413. Section 413.124 clothes the local health boards or their designates with the discretion to inspect all premises, grounds, structures, apartments, dwellings, and buildings. Such is not, however, mandatory.

There is no statute in the 1977 Code which specifically mandates a city to adopt a building code. Under Home Rule, such a matter is discretionary with the city. Similarly, there is no statute which mandates a city to inspect for its building code. In §103A.18(1), governmental subdivisions *may* inspect buildings in relation to the State Building Code.

In furtherance of its own building code, or the housing code for other than multiple dwellings, a city is not mandated to inspect. Therefore, it could

conceivably enforce the same without inspection. For instance, it could approve or disapprove plans. There does not need to be any statute requiring inspection. The power to adopt and enforce such codes necessarily implies the power to inspect. The same can be said for reinspections. Any statutory mandate to inspect can also be declared a mandate to reinspect. Any implication of the power to inspect is an implication to reinspect. By the fact that no cases have been cited in support of any previous statements, it is obvious that such cases could not be found.

Accordingly, we are of the opinion that inspections of multiple dwellings for the Housing Code in Chapter 413 are mandated. The same can be said of reinspections. All other inspections for the Housing Code or a building code are discretionary.

April 6, 1977

MUNICIPALITIES: Mayoral Authority—§§372.4 and 372.14, Code of Iowa, 1977. When a city manager has been appointed and delegated full supervisory power over a police department, a mayor has no such supervisory power. In the absence of a grant by the council, a mayor has no revisory power over a city manager. (Blumberg to Mason, Page County Attorney, 4-6-77) #77-4-10

Mr. Donald R. Mason, Page County Attorney: We have your opinion request regarding the authority of a Mayor over a police department. You indicated that yours is a mayor-council form of government with a city manager appointed by the council. The council, by ordinance, has delegated supervisory powers over the police department to the manager. You ask, based upon these facts, what supervisory power the mayor has over the police department in addition to his power to appoint the chief.

Pursuant to §372.4, 1977 Code of Iowa, the mayor shall appoint the chief of police. Under that section the council may appoint a city manager and prescribe his powers and duties. Section 372.14 provides that the mayor is the chief executive officer, and "[*e*]*xcept for the supervisory duties which have been delegated by law to a city manager,* the mayor shall supervise all city officers and departments." Thus, when a city manager has been delegated the authority to supervise the police department, the mayor has no such supervisory powers. Nor does it appear that the mayor has any revisory powers over the manager, except those permitted by the council. A mayor cannot overrule actions and decisions of a city manager unless such a power is granted by the council or some statute. We cannot find any such statute.

Accordingly, we are of the opinion that where a city manager has been appointed and delegated full supervisory powers over a police department, the mayor has no such supervisory powers, and, in the absence of a grant of power by the council, a mayor has no revisory powers over a city manager.

April 4, 1977

STATE OFFICERS AND DEPARTMENTS: Voter Registration Commission; Use of Voter Registration Lists for Jury Selection. §§48.5(3), 609.5, Code of Iowa, 1977. Voter registration lists may be made available to the United States District Court for jury selection purposes. (Haesemeyer to Nelson, State Registrar of Voters, 4-4-77) #77-4-11

Mr. Dale L. Nelson, State Registrar of Voters, Voter Registration

Commission: On February 14, 1977, you requested an opinion from this office which asked,

What should be our policy concerning the provision of voter registration lists for jury selection purposes to courts? And specifically, is the procedure used by the Federal District Courts of Iowa in violation of Iowa law?

You referred to two sections of the Iowa Code which are in seeming direct conflict. Section 609.5, Code of Iowa, 1977 provides,

"For the purpose of aiding the appointive commission in drawing the jury lists, officials of the state and its political subdivisions shall furnish the appointive commission with copies of the current *lsit of registered voters,* tax assessments lists, lists of persons holding motor vehicle operators' licenses, or such other comprehensive lists of persons residing in the county as the commission may request. The clerk of the district court shall also deliver to the commission a list of all persons who have served as grand or petit jurors since January first of the preceding year." (Emphasis added)

Section 48.5(3), reads in pertinent part:

"Neither the duplicate registration records open to the public inspection or any list obtained under subsection two (2) of this section shall be used for any purpose of any kind or nature, other than to request a registrant's vote or any other *bona fide political purpose*... ." (Emphasis added)

Thus, the answer to your question turns on the issue of whether the Federal District Court procedure may be considered a bona fide political purpose, and therefore not within the prohibition of §48.5(3) of the Code.

The "Jury Selection and Services Act of 1968", Public Law 90-274, passed March 27, 1968, provides that each United States district court shall devise a plan for jury selection and outlines plan provisions, one of which includes sources to be used, naming as one source *voter registration lists.* (This United States statute, then, clearly authorizes the use of voter registration lists for jury selection purposes).

Section six of the Jury Selection Plan of the United States District Court for the Southern District of Iowa, as amended December 20, 1976, states, in subsection (c),

"The court may, at the option of the Clerk and the Chief Judge, direct the use of electronic data processing methods for any combination of the following tasks: * * *

"(2) Selecting and copying of names for the master wheel, from source lists authorized by this plan, from any or all counties that maintain these lists in machine readable form... ."

This amendment to the plan means that the court may hire an independent contractor with the electronic data processing equipment necessary to implement the adopted plan. This has been done in the Southern District of Iowa. The fact that an independent contractor and not the commission itself does the physical handling in the procedure we feel is not dispositive of the issue here.

It is our opinion that the courts' procedures herein outlined are a bona fide political purpose, in that they are clearly "pertaining or relating to the policy or the administration of government, state or national." This quote is the definition of political purpose found in *People v. Morgan,* 90 Ill. 558, 5 N.E.

602 (1886). This means that the use of voter registration lists for jury selection procedures as authorized by the courts is within the bounds of both Iowa Code §§609.5 and 48.5(3) (1977) and therefore gives effect to both.

Your policy then, should be to supply voter registration lists pursuant to Code §609.5 as a valid exercise of political purpose.

April 7, 1977

STATE OFFICERS AND DEPARTMENTS: Iowa Commission for the Blind; Conflict of Interest. Chapter 601D, Code of Iowa, 1977. There is no conflict of interest involved in the Director for the Iowa Commission for the Blind also serving as President of the National Federation of the Blind, nor does discharging his responsibilities as President of the National Federation of the Blind in any way legally compromise the duties required of the Director of the Iowa Commission for the Blind. (Haesemeyer to Rush and Redmond, State Senators, 4-7-77) #77-4-12

The Honorable Bob Rush, State Senator; The Honorable James M. Redmond, State Senator: Reference is made to your letter of February 18, 1977, in which you request an opinion of the Attorney General with respect to the following questions:

"Does his job as director of the Iowa Commission for the Blind and his position as president of the National Federation of the Blind involve Kenneth Jernigan in a conflict of interest? Further, could the discharge of his responsibilities as president of the National Federation of the Blind legally compromise the duties required of Mr. Jernigan in his capacity as director of the Iowa Commission for the Blind?"

In our opinion, there is no conflict of interest involved in the Director for the Iowa Commission for the Blind also serving as President of the National Federation of the Blind, nor do we believe that discharging his responsibilities as President of the National Federation of the Blind in any way legally compromises the duties required of Mr. Jernigan in his capacity as Director of the Iowa Commission for the Blind.

The question of the propriety of staff members and employees of the Iowa Commission for the Blind participating in activities of the National Federation of the Blind has been the subject of at least two prior Attorney General's opinions. 1972 OAG 497, OAG Haesemeyer to Jernigan, June 29, 1976. In the 1972 opinion, we noted:

"It is manifest from your letter that attendance at and participation in meetings, panels, workshops, institutes and conventions sponsored by the National Federation and similar groups by commission staff members in both desirable and beneficial. Indeed, it could be said that such attendance is vital to the effective functioning of the Iowa Commission for the Blind. Plainly, your commission cannot exist in a vacuum oblivious to developments in the field of services to the blind in other states and countries. Not only does the Iowa commission stand to gain much from meetings such as the one you describe but because of its acknowledged preeminence and position of leadership among state agencies for the blind, it also has a great deal to contribute. Getting together to discuss developments, exchange ideas and listen to authorities on blindness is what meetings of the type you describe are all about. Plainly they are worthwhile and job related.

"Currently salaries and traveling expenses of employees of the Iowa Commission for the Blind are paid from funds appropriated by Chapter 29, 64th

General Assembly, First Session (1971), §1 of which provides:

	1971-72 Fiscal Year	1972-73 Fiscal Year
"IOWA COMMISSION FOR THE BLIND		
"For salaries, support, maintenance and miscellaneous purposes:	$404,100.00	$446,720.00
"For training and education of multiple handicapped blind children:	10,000.00	10,000.00
"Total Iowa commission for the blind:	$414,100.00	$456,720.00

"This very broad language is the same as that which has been used for prior appropriations. Certainly it imposes no limitations on the staff of the Iowa commission for the blind in terms of how they must spend their working hours or what kind of travel expenses may be reimbursed to them. Other departments having appropriations containing the same language routinely and regularly send staff members at state expense to meetings and workshops thought by the department head to be beneficial to the state. In your case the staff members of the commission for the blind are willing to pay their own expenses, a circumstance which does them great credit.

"Under Chapter 93, Code of Iowa, 1971, as amended by Chapter 84, 64th General Assembly, First Session (1971) the Iowa commission for the blind is entrusted with broad duties relative to serving and aiding the blind citizens of this state. Withal we do not see how it could effectively and intelligently perform these duties without the access to the experience, expertise and ideas of authorities in the blind field which is afforded them by attendance at national meetings such as you describe.

"Accordingly, it is our opinion that the Iowa commission for the blind may permit its staff members to attend conventions of the National Federation of the Blind, the American Association of Workers for the Blind or other comparable groups without loss of pay or use of vacation time."

If it is proper, as we have concluded it is, for employees of the Iowa Commission for the Blind to actively participate in activities of the National Federation of the Blind, it is certainly equally proper for the Director of the Commission to involve himself in these activities.

The case of *Carter, et al. v. Jernigan, et al.*, Iowa 1975, 227 N.W.2d 131, was an action brought by a small faction of dissident blind persons against the director and members of the Iowa Commission for the Blind in which the plaintiffs challenged among other things, the involvement of the director of the commission in the activities of the National Federation of the Blind of which he was then, and is now, the president. In ruling on defendant's application of law points, the trial court in this case said the following, among other things:

"The following activities of the Director are matters within the discretion of the Blind Commission and not subject to judicial review. They are:

"1. The director may allocate his time to activities in the furtherance of the interests of the blind in such a manner as is acceptable to the Commission;

"2. The Director may permit employees of the Commission to assist in the organizational activities of any private organization involved in furthering the interests of the blind;

"3. The Director may serve as national president of the National Federation of the Blind, a private organization whose sole purpose is to further and protect the interests of the blind;

"4. The Director may travel within and outside the state of Iowa, with the permission of his employer, the Iowa Commission for the Blind, for the purpose of promoting the National Federation of the Blind and its goals;

"5. The Director may permit his employees to travel within and outside the State of Iowa, with the permission of his employer, the Iowa Commission for the Blind, for the purpose of promoting the National Federation of the Blind and its goals.

"The Court has examined the depositions of the plaintiff and found no acts the plaintiffs contend the defendants did that are unlawful and thus subject to the Court's review.

"The legislature has in Chapter 93 of the Code directed the Blind Commission to assist the blind in this state. It is not the duty of the Court to tell the Commission how best to aid the blind. . . ."

The trial court also sustained defendant's motion for summary judgment. Upon appeal, the Iowa Supreme Court reversed principally because the motion for summary judgment had been granted before plaintiffs had been allowed to complete discovery, however, the lower court's ruling with respect to adjudication of law points was left essentially undisturbed. The Supreme Court simply concluded that plaintiffs should have been afforded an opportunity to develop if they could specifc facts, through discovery, which would show that defendants had exceeded the discretion which they undoubtedly had. The case was remanded to the district court and eventually dismissed because of plaintiff's failure to prosecute the same. Thus in effect plaintiffs abandoned their case.

April 14, 1977

MUNICIPALITIES: Incompatibility — Open Meetings — §§28A.1 and 28A.5, Code of Iowa, 1977. A county attorney shall not represent public employees in bargaining sessions with government entities in the same county. "Private or closed informal meetings" of a city council, unless for a minor purpose of setting an agenda and the like, shall be held pursuant to Chapter 28A of the Code. (Blumberg to Griffee, State Representative, 4-14-77) #77-4-13

Honorable William B. Griffee, State Representative: We have your opinion request regarding a conflict of interest and the open meetings law. In the first question you ask whether a county attorney can represent policemen and firemen in bargaining sessions with a municipality. We assume the muncipality is in the county attorney's county. In your second question you ask whether a city council can meet in private or "closed informal meetings" without anyone keeping a record of the proceedings.

We have not found any authority which holds, as a matter of law, that the representation by a county attorney (presumably in his private practice) of public employees in bargaining sessions with another governmental unit is or is not a conflict of interest. The Code of Professional Responsibility, Canon 5, does not speak directly to this fact situation. That does not mean that this type of situation should be condoned. We do not believe that the overriding public policy should permit a county attorney, in his private practice, to represent clients against another governmental entity in the same county with which he has to or may have to deal.

Your second question is more difficult. We don't know what you mean by "private" or "closed informal meeting." In *Dobrovny v. Reinhardt,* 173 N.W.2d 837, 840-841 (Iowa, 1970), it was held that the purpose of Chapter 28A is to prohibit secret sessions of public bodies and to permit the public to be present, unless within the exceptions states in the Chapter. Open meetings are enacted for the public benefit and are to be construed most favorably to the public. Such statutes are generally accorded a liberal construction. *Greene v. Athletic Council of Iowa State University,* (Iowa Supreme Court, March 16, 1977); *Laman v. McCord,* 1968, 245 Ark. 401, 432 S.W.2d 753.

Meetings of city councils are included within the purview of Chapter 28A by virtue of §28A.1(2). Section 28A.1 also provides that wherever used in the chapter, " *'meeting' or 'meetings' includes all meetings of every kind, regardless of where the meeting is held, and whether formal or informal."* [Emphasis added]. We have discussed this issue in previous opinions. In 1972 OAG 158, 162, we stated that respect for the public policy inherent in Chapter 28A depends upon the good sense and good faith of those who apply it. We also held there, 1972 OAG at 163, that the requirements of this Chapter cannot be evaded by such devices as "just getting together to talk things over." We stated that the term "meeting" comprehends informal sessions or conferences of agencies, boards, and the like designed for discussion of public business, and includes deliberative gatherings however confined to investigation and discussion. In a later opinion, 1972 OAG 348, we held that mere exchanges of information are not necessarily a part of the deliberative process culminating in the adoption of a plan.

These opinions are not incompatible with one another. Meeting with others to receive information for a meeting, or setting an agenda for a meeting need not fall within the perview of the Chapter. However, because the Chapter is to be liberally construed, caution should be exercised. Any meeting, even if informal, which includes consultation and discussion of public business can be, and probably will be, considered a meeting within Chapter 28A. Since §28A.5 requires minutes to be kept, those meetings, even though "private" or "informal" which fall within the Chapter, must be recorded.

Accordingly, we are of the opinion that a county attorney shall not represent public employees in bargaining sessions with another government entity in the same county. "Private or closed informal meetings" of a city council, unless for minor things such as setting an agenda or the like, should be pursuant to Chapter 28A of the Code.

April 26, 1977

COUNTIES: MENTAL HEALTH AND INSTITUTIONS FUND. §§229.8, 230.1, 230.23, 775.5, 775.6, Code of Iowa, 1977. Costs of commitment for mental illness are to be paid from the County Mental Health and Institution Fund. (Boecker to Kopecky, Linn County Attorney, 4-26-77) #77-4-14

Mr. Eugene J. Kopecky, Linn County Attorney: You have requested an opinion from the Attorney General's Office in regards to the following question:

"...From what fund the following commitment hearing costs should be paid:

"1. Referral charges by doctors.

"2. Attorney for patient.

"3. Physician charges for evaluation.

"4. Sheriff's fees for transportation."

The initial discussion concerning from which fund the cost of commitment hearings should be paid from arises with Section 230.1, Code of Iowa, 1977, which sets forth the liability of the county. Section 230.1, Code of Iowa, 1977, reads in pertinent part:

"The necessary and legal costs and expenses attending the taking into custody, care, investigation, admission, commitment, and support of a mentally ill person admitted or committed to a state hospital shall be paid:

"1. By the county in which such person has a legal settlement...."

Section 230.1, then charges the county with all of the expenses attached to the commitment process, as long as, the person has a legal settlement in the county charged.

Section 230.23, Code of Iowa, 1977, states:

"All expenses required to be paid by counties for the care, admission, commitment, and transportation of mentally ill patients in state hospitals shall be paid by the board of supervisors from the county mental health and institutions fund."

It is the opinion of this office, in accordance with Section 230.23, Code of Iowa, 1977, that all the various costs listed in your request be paid from the county mental health and institutions fund.

This would encompass the area of attorney's fees. Section 229.8, Code of Iowa, 1977, states that the manner in which attorneys are to be compensated is to follow Sections 775.5 and 775.6, Code of Iowa, 1977, but not the fund from which fees are to be paid. As stated above the fund from which all expenses for the commitment of the mentally ill are to be paid is the county mental health and institutions fund.

April 26, 1977

CONSERVATION: SNOWMOBILES — §§111C.1, 111C.2(4), 111C.3, 111C.4, 111C.6(1), 111C.6(2), 111C.7, 1977 Code of Iowa. A landowner is exempt from liability under Chapter 111C, The Code (1977) for injuries occurring on his property sustained by those using his property for snowmobiling recreational purposes where the landowner charges no consideration for such land use; the landowner may be liable to those recreationally using his property for "willful or malicious" failure to guard or warn and may be liable for the "attractive nuisance" created by such recreational activities which injure children thereby attracted. (Salmons to Spencer, State Representative, 4-26-77) #77-4-15

The Honorable Don W. Spencer, State Representative: By your letter of March 2, 1977, you have requested the opinion of this office with regard to the liability of private landowners over whose land is routed snowmobile trails for the enjoyment and benefit of others.

Attached to your letter is a copy of a form contract by which the private landowner (holder) agrees to allow the use of his land for snowmobiling purposes. The other party to that agreement is the Palo Alto County Conservation Board. The contract itself makes reference to Chapter 111C of the 1977 Code of Iowa, in specifying that the liability of the landowner is limited as provided

in that Chapter.

On the basis of the information provided you ask: "What, if any, potential liability would the holder be exposed?"

First of all, the express salutary purposes of Chapter 111C, The Code, are "...to encourage private owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward such persons entering thereon for such purposes." Iowa Code Section 111C.1.

The means used to accomplish these legislatively defined goals are to change the court created common law status of both the landholder and those using his property; such statutes and the duties related to such classifications characteristically at issue in lawsuits between those two parties. Thus Iowa Code Section 111C.4 entitled *"Users not invitees or licensees"* provides:

...a holder of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

1. Extend any assurance that the premises are safe for any purpose.

2. Confer upon such person the legal status of an invitee or licensee to whom the duty of care is owed.

3. Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.

With both the classification of the landholder and his landuser altered by Section 111C.4, Iowa Code Section 111C.3 defines the landholders limited liability in terms of the duty he owes to one using his land recreationally:

...an owner of land owes *no* duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes. [Emphasis added].

For the exemption from liability provided a landholder by Sections 111C.3 and .4, the legislature has required, in return, two conditions with which the landholder must comply to ensure exemption from liability under the Chapter.

First, the landholder's freedom of liability is predicated on the sacrifice of any fees or admission charges he might require of those using his property. Iowa Code Section 111C.2(4) defines 'charge' as "any consideration, the admission price or fee asked in return for invitation or permission to enter or go upon the land." Both Sections 111C.4 and 111C.6(2) recognize that a landholder charging a fee to recreational users of his property loses the exemption from liability conferred by Chapter 111C, with the exception of a very narrow limitation in Section 111C.6(2) not here applicable. The declassification of landusers as invitees or licensees in Section 111C.4 has, as its precondition, the requirement that the landholder levy no charge to recreational property users. More to the point, however, Section 111C.6, sets out two instances when liability will lie against the landholder; one of them being for recreational injury that has occurred on the landholder's property where that holder has charged the persons for their recreational entrance.

The second proviso which conditions the landholder's exemption from liability under Chapter 111C is that found in Section 111C.6(1) which reads:

Nothing in this chapter limits in any way any liability which otherwise exists:

1. For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

It appears that the intent of this Section is that liability attach to the landholder for any intentional wrongs committed by the landholder that injure those recreationally using his property. However, the language used to express this intent is not totally clear.

While the words "willful or malicious" convey conduct which is intentional, (*Huston v. Huston*, 255 Iowa 543, 122 N.W.2d 892 (1963)), the immediately following phrase, "failure to guard or warn", describes conduct of omission and not conduct of affirmative intention or commission. The "failure to guard or warn" describes a standard for gauging negligent conduct, and such conduct of omission cannot, it would seem, rise to the level of the intentional conduct contemplated by the use of the terms "willful and malicious." *Jenkins v. Gilligan,* 131 Iowa 176, ..., 108 N.W. 237, 238, (1906) ("Malice is distinguishable from mere negligence in that it arises from absence of purpose. The characteristic of negligence is inadvertence or an absence of an intent to injure.") The problem then exists in discerning whether liability would attach to a landowner for negligent or intentional conduct given the uncertainty posed by the choice of words in Section 111C.6(1). Conceivably under the mixed standard of Section 111C.6(1) a landholder would be required to guard or warn "against a dangerous condition, use, structure or activity" actually within his knowledge and not created by him for, if he failed to warn of such dangerous conditions etc., the claim could be made that such failure was intentional and malicious, even though ordinarily a failure to warn of known dangers on one's property is merely negligent conduct. *Hanson v. Town and Country Etc. Center,* 259 Iowa 542, 144 N.W.2d 870 (1966); Restatement (Second) of Torts, Sections 342, 343, 343A.

It appears, because of the language used in Section 111C.6(1), that a landowner would be required to warn of actually known dangerous conditions, uses, structures or activities on his property, for the recreational user could claim that failure to warn of the condition actually known was an intentional or malicious failure from which the landholder is not exempt under the terms of Chapter 111C, The Code.

Aside from liability to a landholder which would follow from charging a fee of a recreational landuser or in intentionally or maliciously failing to guard or warn, a third premise of liability to the landowner exists which Chapter 111C identifies but makes no attempt to exempt—indeed, quite the contrary.

Section 111C.7 reads, in part,

Construction of law. Nothing in this chapter shall be construed to:

. . .

3. Amend, repeal or modify the common law doctrine of attractive nuisance.

The doctrine of attractive nuisance is a theory of liability, characteristically involving trespassing children, where the landowner may be said to have "allured" children onto his property by some enticing artificial condition existing thereon. Prosser, *Law of Torts* §59 (4th ed. 1971). Liability is imposed against the owner of the land for injuries sustaining by the child because the

owner should anticipate the presence of children and guard against the unreasonable risk posed to them by the attraction on his land; this although the child, in the strict legal sense, is a trespasser. *Rosenau v. City of Estherville,* 199 N.W.2d 125 (Iowa 1972); Restatement (Second) of Torts Section 339.

It is conceivable that snowmobiling activities on a landholder's property may be that type of 'attractive nuisance' which requires the landowner to exercise the highest duty of care to protect children from their own inability to perceive the dangers created by the existence of such risks. The failure to abide this duty which proximately results in the injury to the child attracted may most certainly result in liability to the landholder.

In direct answer to your question "What, if any, potential liability would the holder be exposed?" considered with regard to the form agreement provided and Chapter 111C, The Code (1977), my answers are that: (1) a landholder will not be exposed to liability in connection with snowmobile activities on his land if he permits such activities without charge to the individuals actually using his land or the Palo Alto County Conservation Board obtaining permission from the landholder for such use; (2) the landholder may be subject to liability under Section 111C.6(1) for 'willfully or maliciously' failing to guard or warn against dangerous conditions, uses, structures and activities. Because the enunciated standard of Section 111C.6(1) appears to invade the province of negligent conduct, a case of liability might be made against the landholder on a theory of negligence Chapter 111C expressly intended to exempt; (3) the landholder may be subject to liability in connection with snowmobiling activities on his property which attract and injure children on his land if it is factually found the landholder should have anticipated their presence and guarded against risks the children were not capable of understanding.

April 20, 1977

COUNTIES AND COUNTY OFFICERS: Vacancy in Sheriff's Office. §§341A.6(2), 341A.6(6) and 341A.13, Code of Iowa, 1977. When a vacancy occurs in the sheriff's office the sheriff is required to request a list of certified nominees from the county civil service commission and he is limited to an appointment from such list. He cannot appoint a noncertified person then attempt to have that person certified since such person would not be on the list certified to him by the county civil service commission. (Haesemeyer to Koogler, State Representative, 4-20-77) #77-4-16

The Honorable Fred L. Koogler, State Representative: By your letter of April 16, 1977 you have requested an opinion of the Attorney General and state:

"A vacancy exists in the Mahaska County Sheriff's department. A number of persons have been certified by the county Civil Service Commission. The sheriff proposes to appoint a new member to his department who is not one of those certified by the Commission.

"*Query*—In view of Section 341A.13 of the Code, is the sheriff required to request a list of certified nominees from the commission and is he limited to an appointment from such list? Can he, on the other hand, appoint a noncertified person and then attempt to have that person certified?"

Section 341A.13, to which you make reference, provides:

"Vacant positions filled. Whenever a position in the classified service is to be filled, the sheriff shall notify the commission of that fact, and the commission shall certify the names and addresses of the ten candidates standing highest

on the eligibility list for the class or grade for the position to be filled. The sheriff shall appoint one of the ten persons so certified, and the appointment shall be deemed permanent."

It is to be observed that the mandatory "shall" is used both with respect to the sheriff's duty to notify the county civil service commission of the fact that a position in the classified service is to be filled and his duty to make appointment from the list of the ten candidates standing highest on the eligibility list certified to him by the county civil service commission. There is no provision in the statute for adding a person to the list of the ten highest candidates after the list has been certified to the sheriff. In this connection, it is to be observed that in order to be eligible for inclusion on the list, an individual would have had to take and pass with a sufficiently high grade a competitive examination and as stated in §341A.6(2), in relevant part:

"...Notice of such tests shall be posted in the office of the sheriff and the office of the board of supervisors not less than thirty days prior to giving such tests."

Note also should be taken of the following language found in §341A.6(6):

"...Notice of competitive tests to be given shall be published at least two weeks prior to holding the tests in a newspaper of general circulation in the county or counties in which a vacancy exists."

Thus, in answer to your specific questions, the sheriff is required to request a list of certified nominees from the commission and he is limited to an appointment from such list. He cannot appoint a noncertified person then attempt to have that person certified since such person would not be on the list certified to him by the county civil service commission.

April 4, 1977

SCHOOLS: Meetings and Audit. §28A.4, Code of Iowa, 1977. 1) Notice of a school board meeting to consider closing the grade school at Stanhope which was printed in a local paper five days before the meeting is adequate notice under §28A.4. 2) State Auditor complied with the duties imposed by Chapter 11, Code of Iowa, by making his audit of the financial condition and transactions of the school district after the close of the school's fiscal year. (Nolan to Nystrom, State Senator, 4-4-77) #77-4-17

The Honorable Jack Nystrom, State Senator: We have received your request for an opinion on matters submitted to you by one of your constituents in regard to the South Hamilton School issue. According to the material which you transmitted to this office, on January 26, 1976, a special meeting of the South Hamilton School Board was held at the Junior-Senior High School in Jewell. The legality of this meeting has been questioned.

The minutes of the January 26th board meeting show that on roll call, all members were present and the number of visitors that were in attendance. The minutes state: "After a lengthy discussion among the board and after hearing comments and concerns of the visitors, it was moved by Wilcox and seconded by Olthoff that the Stanhope and Ellsworth Elementary Attendance Centers be closed beginning with the 1976-77 school year. Vote — unanimous."

There appears to be no real issue as to whether or not this meeting complied with the open meeting law. At its regular meeting on January 5, 1976, a quorum of the board was present to do business, and a number of matters were

presented, including the payment of unpaid bills, ratification of the master teachers' contract, salary requests for the 1976-77 school year and the closing of grade centers in the next year. The minutes of this meeting show:

"Wilcox made a motion to close Stanhope and Ellsworth centers, leaving one Jr-Sr High center, and two elementary centers at Jewell and Randall. Lindemann seconded the motion. The vote was *2* in favor, and *3* opposed. Moition failed to carry. Carlson made a motion to meet and make final decision concerning school closings on January 26th at 7:30 p.m. Olthoff seconded, and all voted in favor."

A copy of the South Hamilton record of Wednesday, January 14th contained a front page story indicating that the school board was then considering grade center centralization. A subsequent notice of a board meeting to be held on January 26th at the junior-senior high school in Jewell was printed on January 21, 1977. Thus, the requirements of Code §28A.4 pertaining to advance notice of meetings appear to have been adequately met. There is no other inference that the meetings in question were not otherwise illegal.

The second matter raised in your constituent's letter to you questions the legality of the audit of the South Hamilton School District conducted by the state auditor. The audit was for the school year ending June 30, 1976. It appears that your constituent questions the amount of $915,935.43 stated as receipts from local taxes on the state audit. Included with the information submitted was a statement by the treasurer of Boone County to the effect that the amount of $47,313.57 had been forwarded by that county for the South Hamilton School District. In addition, an excerpt from some newspaper is also included, indicating that South Hamilton School District received $976,852.02 from Hamilton County property taxes. The sum of these two amounts is $1,024,165.59. This amount squares with the statement of tax dollars received by the school district in the years 1975-1976 for both the general fund and schoolhouse fund purposes, all set out on page four of the state audit. Also pointed out in the audit were the comments to the effect that two tax draws totaling $213,001.29, which were in transit approximately four months, created a deficit balance of $8,360.53 in the general fund as of June 30, 1976. Due to the fact that the tax draws were not cashed for a four month period, the school district incurred the expense of $1,164.07 for interest paid on stamped warrants totaling $187,743.11. It appears to this office that the auditor properly complied with the duties imposed by Chapter 11, Code of Iowa, 1975, and made a proper audit of the financial conditions and transactions of the South Hamilton Community School District. The fact that the audit is made after the close of the fiscal year permits the auditor to comment on matters such as the cost of interest paid on stamped warrants, which would not have been incurred if the tax draw checks had been promptly cashed.

April, 1977

CONSERVATION

Snowmobiles. §§111C.1, 111C.2(4), 111C.3, 111C.4, 111C.6(1), 111C.6(2), 111C.7, 1977 Code of Iowa. A landowner is exempt from liability under Chapter 111C for injuries occurring on his property sustained by those using his property for snowmobiling recreational purposes where the landowner charges no consideration for such land use; the landowner may be liable to those recreationally using his property for "willful or malicious" failure to guard or warn and may be liable for the "attractive nuisance" created by such

recreational activities which injure children thereby attracted. (Salmons to Spencer, State Representative, 4-26-77) #77-4-15

COUNTIES

Mental Health and Institutions Fund. §§229.8, 230.1, 230.23, 775.5, 775.6, Code of Iowa, 1977. Costs of commitment for mental illness are to be paid from the County Mental Health and Institutions Fund. (Boecker to Kopecky, Linn County Attorney, 4-26-77) #77-4-14

Compensation Board. Chapter 340A, Code of Iowa, 1977. The board of supervisors has two alternatives with respect to the compensation schedule recommended by the compensation board under the present law. The board may accept the recommended schedule or it may reduce the recommended salary of each officer by an equal percentage. No other options are available. (Nolan to Egenes, State Representative, 4-5-77) #77-4-4

Board of Supervisors. §750.6, Code of Iowa, 1975. A county may lease-purchase law enforcement communications equipment without bids. (Linge to Shepard, Butler County Attorney, 4-1-77) #77-4-1

Vacancy in Sheriff's Office. §§341A.6(2), 341A.6(6) & 341A.13, Code of Iowa, 1977. When a vacancy occurs in the sheriff's office the sheriff is required to request a list of certified nominees from the county civil service commission and he is limited to an appointment from such list. He cannot appoint a noncertified person then attempt to have that person certified since such person would not be on the list certified to him by the county civil service commission. (Haesemeyer to Koogler, State Representative, 4-20-77) #77-4-16

MOTOR VEHICLES

Registration of Vehicles. §§321.2, 321.4, 321.5, 321.109, Code of Iowa, 1975. Regs. 820-(07,D) 11.1(8), 820-(07,D) 11.34(321), Iowa Administrative Code, 1975. The Department of Transportation possesses statutory authority for adopting classifications concerning the registration and licensing of motor vehicles. The Chevrolet Blazer is properly classified as a "multi-purpose vehicle", and its registration fee is determined in the same manner as a passenger car. (Dundis to Glenn, State Senator, 4-5-77) #77-4-5

MUNICIPALITIES

Incompatibility. Chapter 400, §411.5(1)(b), Code of Iowa, 1975. A public safety director in charge of the police department cannot simultaneously occupy the position of Chief of Police. A public safety director cannot be a member of the board for the police pension system. (Blumberg to Pavish, State Representative and Slater, State Senator, 4-5-77) #77-4-3

Civil Service. §400.18, Code of Iowa, 1977. A reclassification which places a previously lower grade above a previously higher grade is not a demotion for those receiving a lower salary or having lower rank duties than they previously had. (Blumberg to Mosher, Acting State Citizens' Aide, 4-6-77) #77-4-8

Building and Housing Codes. §§103A.19, 413.123 and 413.124, Code of Iowa, 1977. Inspections of multiple dwellings for the Housing Code in Chapter 413 are mandatory. All other inspections for the Housing Code or a building code are discretionary. (Blumberg to A. Miller, State Senator, 4-6-77) #77-4-9

Mayoral Authority. §§372.4 and 372.14, Code of Iowa, 1977. When a city manager has been appointed and delegated full supervisory power over a police department, a mayor has no such supervisory power. In the absence of a grant

by the council, a mayor has no revisory power over a city manager. (Blumberg to Mason, Page County Attorney, 4-6-77) #77-4-10

Incompatibility; Open Meetings. §§28A.1 and 28A.5, Code of Iowa, 1977. A county attorney shall not represent public employees in bargaining sessions with government entities in the same county. "Private or closed informal meetings" of a city council, unless for a minor purpose of setting an agenda and the like, shall be held pursuant to Chapter 28A. (Blumberg to Griffee, State Representative, 4-14-77) #77-4-13

SCHOOLS

Meetings and Audit. §28A.4, Code of Iowa, 1977. 1) Notice of school board meeting to consider closing the grade school at Stanhope which was printed in a local paper five days before the meeting is adequate notice under §28A.4. 2) State Auditor complied with the duties imposed by Chapter 11, Code of Iowa, by making his audit of the financial condition and transactions of the school district after the close of the school's fiscal year. (Nolan to Nystrom, State Senator, 4-4-77) #77-4-17

STATE OFFICERS AND DEPARTMENTS

Iowa Commission for the Blind; Conflict of Interest. Chapter 601D, Code of Iowa, 1977. There is no conflict of interest involved in the Director for the Iowa Commission for the Blind also serving as President of the National Federation of the Blind, nor does discharging his responsibilities as President of the National Federation of the Blind in any way legally compromise the duties required of the director of the Iowa Commission for the Blind. (Haesemeyer to Rush and Redmond, State Senators, 4-7-77) #77-4-12

Voter Registration Commission; Use of Voter Registration Lists for Jury Selection. §§48.5(3), 609.5, Code of Iowa, 1977. Voter registration lists may be made available to the United States District Court for jury selection purposes. (Haesemeyer to Nelson, State Registrar of Voters, 4-4-77) #77-4-11

Public Safety; Habitual Offender Statute; Traffic Laws. §§4.2, 4.6, 321.1(65), 321.174, 321.555(1). A conviction under §321.174 of the Code, a licensing provision, does constitute a violation of the traffic laws as that term is used in §321.555(1)(g). (Dundis to Sween, Hardin County Attorney, 4-5-77) #77-4-7

Department of Environmental Quality; Authority to Regulate Roadside Spraying of Herbicides for Weed Control. Chapter 317 and §§455B.101-.107, Code of Iowa, 1977. Chemical Technology Commission of the Department of Environmental Quality has authority to regulate spraying of herbicides along roadsides to control weeds and administrative rule therefor was duly promulgated and in proper form except that part thereof requiring consultation with county conservation board is beyond authority of commission and therefore invalid. (Peterson to Priebe, State Senator; Danker, State Representative and Lounsberry, Secretary of Agriculture, 4-5-77) #77-4-6

Barbers and Cosmetologists. §§157.6, 157.11, 157.13(1), 157.15, 158.9, 158.13(1), 158.16, Code of Iowa, 1977; §157.6, Code of Iowa, 1973; Chapter 1093, §95, Acts, 65th G.A. Whether a licensed cosmetologist who advertises in the telephone directory or elsewhere under a general heading of "Barbers" violates §157.13(1), or whether a licensed barber who advertises in a telephone directory or elsewhere under the designation of "Beauty Salons" violates §158.13(1) entails factual issues unique to each case and cannot be answered as a matter of law. (Haskins to Hill, State Senator, 4-4-77) #77-4-2

STATUTES CONSTRUED

Code, 1973	Opinion
157.6	77-4-2

Code, 1975	Opinion
4.2	77-4-7
4.6	77-4-7
321.1(65)	77-4-7
321.2	77-4-5
321.4	77-4-5
321.5	77-4-5
321.109	77-4-5
321.174	77-4-7
321.555(1)	77-4-7
400	77-4-3
411.5(1)(b)	77-4-3
750.6	77-4-1

Code, 1977	Opinion
28A.1	77-4-13
28A.5	77-4-13
48.5(3)	77-4-11
103A.19	77-4-9
111C.1	77-4-15
111C.2(4)	77-4-15
111C.3	77-4-15
111C.4	77-4-15
111C.6(1)	77-4-15
111C.7	77-4-15
157.6	77-4-2
157.11	77-4-2
157.13(1)	77-4-2
157.15	77-4-2
158.9	77-4-2
158.13(1)	77-4-2
158.16	77-4-2
229.8	77-4-14
230.1	77-4-14
230.23	77-4-14
317	77-4-6
340A	77-4-4
341A.6(2)	77-4-16
341A.6(6)	77-4-16
341A.13	77-4-16
372.4	77-4-10
372.14	77-4-10
400.18	77-4-8
413.123	77-4-9
413.124	77-4-9
455B.101	77-4-6
455B.102	77-4-6
455B.103	77-4-6

455B.104	77-4-6
455B.105	77-4-6
455B.106	77-4-6
455B.107	77-4-6
601D	77-4-12
609.5	77-4-11
775.5	77-4-14
775.6	77-4-14

65th GENERAL ASSEMBLY

Ch. 1093, §95	77-4-2

May 3, 1977

MUNICIPALITIES: Volunteer Police Reserves: §§364.1 and 613A.2, and, Chapter 372, Code of Iowa, 1975. Municipalities have the power to use and equip volunteer police reserves. The approval and consent by the city to their use may render the city liable for their acts. (Blumberg to Schnekloth, State Representative, 5-3-77) #77-5-1

Honorable Hugo Schnekloth, State Representative: We have your opinion request of February 17, 1977, regarding police reserves. You ask the following questions:

"1) Should a city allow a police reserve unit?

"2) Should a reserve officer be permitted to drive a patrol car when accompanied by an officer, as the responsibility of a high speed chase or other involvement might develop?

"3) Should a city council provide money for the purchase of uniforms and equipment when the unit is considered volunteer?"

We assume that by "reserve" you mean a volunteer.

Pursuant to Chapter 372, 1975 Code of Iowa, the mayor, city manager or council have, or may be given the power to, employ police officers. The provisions of Chapter 400 (civil service) are applicable here. There is nothing in the Code which requires all police officers to be full time employees, or prohibits the use of volunteers as police officers from time to time. Pursuant to Home Rule and §364.1 of the Code, a city can use reserves (volunteers) to supplement its police force.

Your second question is actually one of liability. That is, whether the city could be held liable for the wrongful act of such a reserve. Section 613A.2 of the Code provides that except as otherwise provided, a city is subject to liability for its torts and those of its officers, employees and agents. The reserves, as volunteers would probably not be considered to be officers or employees. However, they can be considered as agents of the city. Black's Law Dictionary defines "agent" at page 85 to include "One who acts for or in place of another by authority from him; a substitute, a deputy, appointed by principal with power to do the things which principal may do." When an individual performs services for a city which the city approves and grants its consent, we are unable to say that the city cannot be held responsible for the acts of that individual. If the individual is a salaried employee, the result is obvious under *respondeat superior*. The fact that the individual does not receive compensation should

not make any difference. Of course, each case is dependent upon its own set of facts. Therefore, there may be instances when the acts of such an individual will not be imputed to the city. Generally, however, the approval and consent of a city should result in such an individual being declared an "agent" within Chapter 613A.

Your third question is whether a city can provide money for the purchase of uniforms and equipment for these volunteers. If, as we have stated in answer to your first question, that a city has the power to use these volunteers, then it must also have the power to equip them.

Accordingly, we are of the opinion that municipalities have the power to use volunteer police reserves and equip them. The approval and consent by the city to their use may render the city liable for their acts.

May 5, 1977

TAXATION: Motor Fuel Tax — §§324.17, 422.86, 25.2, Code of Iowa, 1977. The income tax credit provided in §422.86, can only be granted to persons specifically subject to taxation under Divisions II and III of Chapter 422. (Kuehn to Oxley, 5-5-77) #77-5-2

The Honorable Myron B. Oxley, State Representative: We acknowledge receipt of your letter in which you have requested an opinion of the Attorney General as follows:

"Can a 'uniform partnership' organized under Chapter 544 and not holding the permit provided for in section 324.18, Code 1975, or having held such permit and cancelled same, and which elects to take fuel tax credits as Iowa income tax credits under the provisions of Chapter 422, division VIII, Code 1975, now be denied these tax credits based on the provisions of Department of Revenue Rule 730-42.5(422)?

"It would appear Rule 730-42.5(422) is intended to preclude the individual members of a 'uniform partnership' from the provisions of Chapter 422, division VIII, but not the 'uniform partnership' itself."

Apparently, you have a situation where a partnership has surrendered its refund permit which it was entitled to have pursuant to §324.17 of the Code and has been advised that, as such partnership, no motor fuel tax credit would be available for income tax purposes.

As you correctly point out, §324.17, Code of Iowa, 1977, which provides for motor fuel tax refunds to certain claimants states in §324.17(15) that "In lieu of the refund provided in this section a person may receive an income tax credit as provided in Chapter 422, Division VIII".

You also point out that §324.57(5), Code of Iowa, 1977, defines "person" for purposes of Divisions I, II, and III of Chapter 324, Code of Iowa, 1977, which would include §324.17, to include partnerships.

Section 422.86, Code of Iowa, 1977, provides that in lieu of the motor fuel tax refund provided in §324.17, "Each person or corporation subject to taxation under Divisions II or III of this Chapter" may elect to receive an income tax credit.

You will note, that in order to be eligible to receive the motor fuel tax credit, §422.86 specifically requires that the person or corporation claiming such credit be subject to taxation under Divisions II (individual income tax) or III

(corporations) of Chapter 422, Code of Iowa, 1977.

Rule 730-42.5(422), contained in Volume 6 of the Iowa Administrative Code, is a duly adopted rule and regulation of the Iowa Department of Revenue and states in part as follows:

"Since the credit may be claimed only by the person or corporation that purchased the fuel, the shareholders of electing Sub-Chapter S corporations and the individual partners of partnerships which purchased fuel are not eligible for the motor vehicle fuel tax credit and such corporations and partnerships should not surrender their refund permits for the purpose of obtaining a credit."

From the above statutory provisions, it is clear that in order to be eligible for a fuel tax credit for income tax purposes, the person or corporation seeking such credit must be subject to Iowa income tax. Partnerships and Sub-Chapter S corporations are not subject to Iowa income tax. Thus, when §324.17(15) of the Code states that in lieu of the motor fuel refund provided for in §324.17, a person may receive an income tax credit as provided in Chapter 422, Division VIII (§422.86), it is clear that, since Section 324.17(15) specifically refers to Section 422.86, those statutes are in pari materia and must be construed together. *In the Matter of Bliven's Estate,* 1976, Iowa, 236 N.W.2d 366; *Northern Natural Gas Co. v. Forst,* 1973, Iowa, 205 N.W.2d 692. Thus, when we read all of these statutes in Chapter 324 of the Code and in Chapter 422 of the Code together, it can clearly be seen that the income tax credit is granted only to persons specifically subject to taxation under Divisions II and III of Chapter 422. In the event that such "person" is not subject to taxation as provided in Divisions II and III of Chapter 422, such person is not eligible to receive an income tax credit, but such person would be eligible to receive a motor fuel tax refund as provided in §324.17 and such refund could go to a "partnership."

In promulgating Rule 720-42.5(422), the Department of Revenue has made an effort to advise those persons who would not be eligible for the Iowa Motor Fuel Tax credit for income tax purposes *not* to surrender their refund permits for motor fuel tax purposes.

In summary, when all of the applicable statutes are read together, there is no conflict between the relevant provisions of Chapter 324 of the Code and Chapter 422 of the Code and it is clear that Chapter 324 of the Code does not authorize a motor fuel tax credit for income tax purposes to a partnership and, indeed, the statute authorizing such motor fuel tax credits for income tax purposes, namely, §422.86, expressly precludes it.

However, all is not lost for those who mistakenly surrendered their refund permits for motor fuel tax purposes. First of all, if they haven't already done so, they should reapply for a permit so they can obtain all future refunds they are legally entitled to receive. Secondly, for those refund claims which the statute of limitations prevents the state from refunding as provided in §324.17 (7), those who mistakenly surrendered their refund permits should follow all the procedures set forth in Chapter 25, Code of Iowa, 1977. Section 25.2 states:

"The state appeal board with the recommendation of the special assistant attorney general for claims may approve...claims against the state of less than ten years covering the following...fuel and gas tax refunds...."

May 12, 1977

STATE FAIR BOARD: Issuance of Tickets—§§8.38, 68B.5, 173.8 and 173.14(3). The distribution of free Grandstand tickets to members by the Iowa State Fair Board does not directly contravene any provision of the Code of Iowa, 1977. (Condon to Taylor, Secretary, Manager, Iowa State Fair, 5-12-77) #77-5-3

J. D. Taylor, Secretary/Manager, Iowa State Fair Board: You have requested that this office review the proposed Iowa State Fair Board policy of offering two admission per Grandstand event to each Board Member and/or Staff and issue an opinion as the whether or not the proposed policy violates any provision of the Iowa Code.

In your letter requesting this opinion, you referred to Section 68B.5, Code of Iowa, 1977. That section states:

"68B.5 Gifts solicited or accepted. 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, hosipitality, 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."

Section 68B.5 applies to all state employees and officials, including State Board officials, since they are "any officer of the State of Iowa receiving a salary or per diem whether elected or appointed or whether serving full time or part-time." §68B.2(6), Code of Iowa, 1977.

This prohibition against the acceptance or solicitation of gifts by state employees was enacted to prevent outsiders from attempting to influence state employees and state employees from using their decision-making powers to solicit favors from others. Also, the section alleviates the requirement in a criminal prosecution that actual bribery or influence be proven. Accordingly, the voting of free tickets to Grandstand events to themselves by Fair Board members would not seem to fall within the category of acts which the statute was designed to prohibit.

Moreover, it is uncertain that such action by the Fair Board directors could be included under the standard definition of "gift" found in Iowa case law. In *Kirchner v. Levy,* 1901, 114 Iowa 527, the Supreme Court adopted the definition of "gift" from Webster's Dictionary: "[A]nything given or bestowed; any piece of property which is voluntarily transferred by one person to another without compensation."

Webster's New Collegiate Dictionary, 485 (1975), defines "gift" as "something voluntarily transferred by one person to another without compensation." These definitions require the giving of something by one person to another person.

Since Chapter 68B is a penal statute, violation of which is a misdemeanor, the well-established principle applies 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,* 401 U.S. 923, 91 S.Ct. 864, 27 L.Ed.2d 826. See also cases cited at 17 Iowa Digest,

statutes, §241 (1).

Strictly construed, the voting of free tickets to themselves by the Fair Board directors lacks the necessary element of a transfer of property by one person to another. Thus, Section 68B.5 is not the appropriate Code provision for an evaluation of the legality of the ticket distribution policy.

Another section of the Code which merits consideration in a response to your question concerning the violation of any provision is Section 8.38, regarding the misappropriation of funds. That section provides:

"8.38 Misuse of appropriations. No state department, institution, or agency, or any board member, commissioner, director, manager, or other person connected with any such department, institution, or agency, shall expend funds or approve claims in excess of the appropriations made thereto, nor expend funds for any purpose other than that for which the money was appropriated, except as otherwise provided by law. A violation of the foregoing provision shall make any person violating same, or consenting to the violation of same liable to the state for such sum so expended, together with interest and costs, which shall be recoverable in an action to be instituted by the attorney general for the use of the state, which action may be brought in any county of the state."

The term "public fund" is defined in *Black's Law Dictionary,* 803 (4th Ed. 1951), as follows:

"An untechnical name for (1) the revenue or money of a government, state, or municipal corporation; (2) the bonds, stocks, or other securities of a national or state government. Money, warrants, or bonds, or other paper having a money value, and belonging to the state, or to any county, city, incorporated town or school district."

Thus, the term "funds" apparently extends only to money or paper with a monetary value which is readily convertible into money. If §8.38 is given the strict construction to which it is entitled as a criminal statute, a ticket to a Grandstand event at the Iowa State Fair may not be deemed "funds."

However, even though the proposed distribution of Grandstand tickets by the Fair Board may not fall within the literal confines of §§8.38 and 68.5, every state board or agency is to conduct its affairs in a manner as to promote both the actual practice and the public appearance of government business without unwarranted privileges or exemptions for its personnel.

Your attention is directed to a previous opinion requested by the Fair Board in which this office concluded that payment of transportation, lodging and other travel expenses of public officials and employees by private interests are in most cases prohibited. Beamer to Fulk, 1970, O.A.G. 437. In making that determination, Beamer stated:

"Government at all levels continues to grow and increase its role in the economy and welfare of the country and private life of the individual citizen. Concern for honesty and integrity on the part of elected government officials is becoming increasingly important. *Conflicts of Interest of State and Local Legislators,* 55 Iowa L.Rev. 450 (1969-1970). This principle should be equally true of appointed officials and government employees. Americans seem to demand more from their governmental representatives than from their private prefessional and business community. It has long been recognized that the public official, because of his position of public trust, has 'the obligation of acting solely in the interests of the cestui que trust, the public'. *Conflicts of Interest: State*

Government Employees, 47 Va.L.Rev. 1034 (1961). *State ex rel Grant v. Eaton,* 114 Mont. 199, 133 P.2d 588. *Ekern v. McGovern,* 154 Wis. 157, 142 N.W. 595. Today the questionable conduct of public officials often falls within the gray area of 'subtle and illusive conflict situations encompassing a vast span of activities, such as influence peddling, gift giving, arrangements, promises and friendships'. *Remedies for Conflict of Interest Among Public Officials in Iowa.* 22 Drake L.Rev. 600 (1972-1973).

"Traditionally, nothing has been so damaging to the governmental institution as the mere appearance of a conflict between a public official and private interests. A conflict of interest question tends to undermine public confidence in the individual official specifically, and in state or federal government generally. The federal government enacted 18 U.S.C.S. Section 208 to deal with this problem. The federal statute is designed to prohibit government officials from engaging in conduct which might be inimical to the best interest of the general public. *U.S. v. Mississippi Valley Generating Co.* 364 U.S. 520, 5 L.Ed.2d 268, 81 S.Ct. 294.

"It is apparent that the regulation of potential as well as actual conflict situations will tend to erase both the temptation which might improperly influence an official in the discharge of his official duty and the concurrent public suspicion of malfeasance. Apparently, this concern in Iowa manifested itself in the adoption by the Iowa legislature of Chapter 68B, Code of Iowa, 1973, known as the Iowa Public Officials Act, enacted by the 62nd General Assembly, Chapter 107, 62nd G.A. (1967)."

Section 173.14(3), Code of Iowa 1977, specifies as a duty of the Fair Board to "hold an annual fair and exposition on said grounds." Commensurate with the exercise of the duties enumerated in Section 173.14 is the provision in §173.8 for the reimbursement to Fair Board members of "actual and necessary expenses incurred while engaged in official duties."

As an alternative to the proposed ticket distribution plan, the Fair Board may wish to consider a plan whereby members of the Fair Board or its staff are selected to attend and review the Grandstand performances. These representatives could purchase their tickets and then be reimbursed for the expense pursuant to §173.8. In that way, the Board could avoid any appearance of unwarranted privilege or exemptions for its personnel, which is so important if public confidence is to be maintained.

May 12, 1977

TAXATION: PROPERTY TAX: Increases in valuation by assessor. Section 450.23, Code of Iowa, 1977. The mere fact that the assessor failed to follow the notice provisions of §441.23 does not preclude increases in valuations from being in effect since the statutory notice provisions are directory, not mandatory. (Griger to Schneckloth, State Representative, 5-12-77) #77-5-4

The Honorable Hugo Schneckloth, State Representative: You have requested the opinion of the Attorney General on a property tax matter as follows:

"Can the county assessor put into effect an increase in valuations if the notice of the increase failed to meet the requirements of Section 441.23 of the Code of Iowa?"

Section 441.23, Code of Iowa, 1977, provides:

"If there has been an increase or decrease in the valuation of the property, or upon the written request of the person assessed the assessor shall, at

the time of making the assessment, inform the person assessed, in writing, of the valuation put upon his property, and notify him, if he feels aggrieved to appear before the board of review and show why the assessment should be changed. In odd-numbered years, the owners of real property shall be notified not later than April 15 of any adjustment of the real property assessment. In even-numbered years, the notice of an increase or decrease in the valuation of the property shall be provided to the owners of real property not later than June 30 as provided in section 441.49."

In construing §441.23 containing similar language found in the first sentence thereof, the Iowa Supreme Court has held that such notice requirements are directory, not mandatory, and the failure of the assessor to inform the person assessed of any changes in valuation does not, per se, render an assessment void. *In Re Kauffman's Estate,* 1898, 104 Iowa 639, 74 N.W. 8; *McDonald v. Clarke County,* 1923, 196, Iowa 646, 195 N.W. 189. This same result has been opined by this office, 1940 O.A.G. 89; 1964 O.A.G. 432.

Therefore, the mere fact that the assessor failed to follow the notice provisions of §441.23 does not preclude increases in valuations, for property tax purposes, from being in effect.

May 12, 1977

WORKMEN'S COMPENSATION: Section 85.1, Code of Iowa, 1977. Only the partners in a father-son partnership in a farm operation are exempted from coverage under the Iowa Worker's Compensation Act. (Jackwig to Wyckoff, State Representative, 5-12-77) #77-5-5

The Honorable Russell L. Wyckoff, State Representative: You have requested an opinion concerning the following aspect of Section 85.1, Code of Iowa, 1977, relating to exemptions from coverage under the Iowa Worker's Compensation Law:

"No mention is made of partnerships engaged in agriculture; however, there is language relating to inclusion in the exemption of spouse of employer and parents, brothers, sisters, children, etc.

"Is a father-son partnership (not a family farm corporation) in a farm operation exempted from coverage?"

The issue is twofold: (1) whether the partners in such an agreement are exempted from coverage and (2) whether the spouses and various relatives of the partners are exempted from coverage.

The relevant portions of Section 85.1, Code of Iowa, 1977, provide:

"3.b. The following persons or employees or groups of employees shall be specifically included within the terms of the exemption from coverage of this chapter provided by this subsection:

"(1) The spouse of the employer and parents, brothers, sisters, children and stepchildren of either the employer or the spouse of the employer; and
* * *

"(3) The president, vice president, secretary, treasurer, of a family farm corporation and their spouses and parents, brothers, sisters, children and stepchildren of such officers and their spouses who are employed by such corporation, the primary purpose of which, although not necessarily the stated purpose, is farming or ownership of agricultural land, and while such officer

or person related to the officer is engaged in agricultural pursuits or any operation immediately connected therewith whether on or off the premises of the employer."

In order to answer the first aspect of your question — whether the partners in such an arrangement are exempted from coverage — reference must be made to Section 85.61, Code of Iowa, 1977, which states:

"3. The following persons shall not be deemed 'workers' or employees':
* * *

"c. Partners; directors of any corporation who are not at the same time employees of such corporation; or directors, trustees, officers of other managing officials or any nonprofit corporation or association who are not at the same time full-time employees of such nonprofit corporation or association."

Subsection 3, paragraph c of Section 85.61 formerly provided that a person holding an official position or standing in a representative capacity of the employer would not be deemed a worker or employee. A 1967 amendment struck former paragraph c and added provisions to subsection 2 of Section 85.61 so as to include executive corporate officers within the definition of a worker or employee. Partners were not so included. A 1969 amendment added the present paragraph c to subsection 3.

Whether agricultural pursuits are involved or not the present Iowa Worker's Compensation Act does not provide for worker's compensation coverage to partners. By legislative action, it appears that executive corporate officers may be included in the definition of worker or employee in certain instances and may therefore be covered by worker's compensation; yet, by further legislative action officers in a family farm corporation are exempted from such coverage. It would be inconsistent with such legislative enactments, to interpret the lack of a specific provision for agricultural partnerships in Section 85.1 to mean that these partners are included in the coverage of the Worker's Compensation Act.

Volume 1A, *Larson's Workmen's Compensation Law*, §54, seemingly agrees with this analysis by noting that whereas the corporation is generally viewed as a separate entity in law and the executives are considered to be employed by such entity, the partnership is usually not viewed as an entity separate from its members. Thus, the partners cannot be employees because there is no separate business entity that can be called the employer.

With regard to the second aspect of your question — whether the spouses and various relatives of the partners are exempted from coverage, the Larson treatise proceeds to stress in Section 54.31 that the impact of the no-entity argument has been confined to cases in which the partner is the claimant. When the situation concerns an employee of a partnership, courts such as the one in *Keegan v. Keegan et al.*, 194 Minn. 261, 260 N.W. 318 (1935), have considered the partnership to be an entity in order to achieve the beneficent purpose of compensation legislation. As discussed in *Bashford v. Slater*, 252 Iowa 726, 108 N.W.2d 474, 477 (1961) and in *Carter v. Carter Logging Co.*, 83 Idaho 50, 357 P.2d 660 (1960), a statutory definition such as subsection 1 of Section 85.61, Code of Iowa, 1977, which provides that an " 'employer' includes and applies to any person, firm, association, or corporation..." settles the issue of a partnership being an entity for purposes of worker's compensation legislation.

Volume 1A, *Larson's Workmen's Compensation Law,* §47.20, comments that where the employer is a partnerhsip entity, spouses and members of the partners' families do not fall within any exemption for members of an employer's family. A partnership can have neither spouse nor child. *Schwartzman v. Miller,* 262 App. Div. 635, 30 N.Y.S.2d 882, 884, affirmed 288 N.Y. 568, 42 N.E.2d 22. In the *Carter* case mentioned above, the Idaho court found that the claimant son who lived at home with his parents was employed by the partnership and not by his father who was a partner in the arrangement, and therefore, did not come within the exemption for employment of members of an employer's family dwelling in his household. Clearly, paragraph b(1) of subsection 3 of Section 85.1 cannot be relied upon to include the family members of a partner in the exemption from coverage, and paragraph b(3) of the same subsection is limited to family farm corporations.

Thus, it is the opinion of the Attorney General that the partners in a father-son partnership in a farm operation are exempted from coverage under the Iowa Worker's Compensation Act but that the spouses and various relatives of the partners are not so exempted from coverage.

May 16, 1977

MINING: COAL: GENERAL ASSEMBLY: STATUTES, TITLES: SUBJECT MATTER. Art. III, §29, Constitution of Iowa. §4.12 and Ch. 83A, Code of Iowa, 1977; Ch. 87 (S.F. 314), Acts of the 66th G.A., 1st Session, 1975, is, by virtue of the limitation contained in its title, an Act relating only to coal mining and §§3, 4, 5 and 7 thereof are inapplicable except as applied to coal mining. (Turner to Millen, State Representative, 5-16-77) #77-5-6

The Honorable Floyd Millen, State Representative: You have requested the opinion of the Attorney General as to whether Chapter 87, Laws of the 66th General Assembly, 1975 Session, is unconstitutional, in whole or in part, as violating Article III, §29, Constitution of Iowa.

Chapter 87 was enacted as Senate File 314 entitled "An Act relating to the regulation of surface *coal* mining, imposing additional fees and providing a penalty for violation of the Act." (Emphasis added) The Chapter consists of ten sections all purporting to amend Chapter 83A, Code 1975, the state statute governing mining generally. Limitations expressed in §§1, 2, 6, 8, 9 and 10 of Senate File 314 clearly limit the application of those sections to surface coal mining. The remaining sections 3, 4, 5 and 7 purport to amend provisions of code Chapter 83A applying to surface mining generally.

Article II, §29 of the Constitution of Iowa provides as follows:

"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 application of this constitutional provision was considered in great detail in two recent opinions of this office. OAG Turner to Coleman, State Senator, June 18, 1975, and OAG Turner to Lipsky, State Representative, October 16, 1975.

As noted in those opinions, the 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. See *Long v. Board of Supervisors of Benton County,* 1966, 258 Iowa 1278, 142 N.W.2d 378; 8 Drake Law Review 66.

The primary purpose of this constitutional 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. See *Long,* supra. In *National Ben. Acc. Assn. v. Murphy,* 1936, 222 Iowa 98, 269 N.W. 15, the Iowa Supreme Court discussed the application of Art. III, §29, to the facts of that case in the following terms:

"The title to the act in question in the case at bar does not contain anything from which one, by reading the title, would know or have reason to think that there was any provision in the act under which any assessment life association would be prohibited from carrying on the business of writing life insurance. We cannot escape the conclusion that the title failed to express the subject-matter which was contained in Section 1 of the act in question, and that this section of the act is, therefore, violative of the constitutional provision. The provision of the Constitution in question, however, provides that, if any subject be embraced in the act which is not expressed in the title, the act shall be void only as to so much thereof as shall not be expressed in the title."

In my opinion, the title to Senate File 314 does not contain anything from which one, by reading the title, would know or have reason to think that there was any provision in the act regulating the surface mining of ores and mineral solids other than coal.

Thus, those provisions of Senate File 314 which relate to surface coal mining or are reasonably connected therewith (§§1, 2, 6, 8, 9 and 10) are in conformity with this constitutional requirement and those sections which purport to amend statutory provisions governing surface mining generally (§§3, 4, 5 and 7) are inapplicable except as applied to coal mining. §4.12, Code of Iowa, 1977.

The provisions of Senate File 314 have been incorporated into Chapter 83A of the 1977 Code. Section 1 amends Chapter 83A by adding Section 2 of the Act. Section 2 is codified as new §83A.31; §3 is incorporated into §83A.2(2); §4 into §83A.13; §5 into §83A.14; §6 into §83A.17; §7 into §83A.19; §8 into §83A.21; §9 into §83A.23 and §10 into §83A.28.

May 18, 1977

STATE OFFICERS AND DEPARTMENTS: Department of Transportation. U.S. Constitution Amendment 14, §1 (due process and equal protection); Iowa Constitution, Article I, §9; Iowa Administrative Code 820 (01,B) Chapter 2, §§2.1 and 2.1(1). Lack of formal bidding procedure by state agency does not in absence of statute requiring formal bidding procedure, constitute deprivation of property without due process of law, of a merchant who did not enjoy the benefit of a contract which he had not been invited to bid on and which he might have enjoyed had he had the opportuity to bid and been the successful bidder, nor is there property right in such opportunity to bid. Nor was there violation of the equal protection provisions of the state of Iowa or federal constitutions in so failing to follow a formal bidding procedure. (Tangeman to Redmond, State Senator, 5-19-77) #77-5-7

The Honorable James M. Redmond, State Senator: On December 27, 1976, you submitted a request for a formal Attorney General's Opinion. An opinion was drafted in response to your inquiry and released by the Attorney General on February 2, 1977.

That response did not satisfactorily answer your inquiry and on March 3, 1977, you submitted a request for an additional opinion in which you stated:

"Accordingly, I hereby ask you to review your February 2, 1977, opinion with respect to any due process violations (e.g.: no bidding procedure; takes others property without due compensation; etc.) or equal protection rights (other competitors in similar situations treated differently without any rational basis)."

In response to a request to you for further clarification, you further stated in your letter of April 13, 1977:

"In any event, the due process issue is generated in this instance by the fact that the IDOT did NOT use a bidding procedure. In fact the DOT was not actively seeking a location for this type of facility. SmuleKoff's owners very generously and I believe without any ulterior motive offered free space for an operator's license renewal office in their downtown store. The problem is that others who also may have been interested in providing this service were not offered this opportunity. It is this lack of either a formal or informal bidding procedure that concerns me. Without this safeguard in a situation where government action operates to the competitive advantage of a member of the private sector the due process clauses are violated because the adversely affected parties property has been taken without just compensation."

In researching the subject of due process, I have the following to report. The applicable due process provision in the U.S. Constitution is Amendment 14. In 16 Am. Jur. 2d 692, §364 states:

"The word 'property' in the Fourteenth Amendment embraces all valuable interests which a man may possess outside of himself — outside of his life and liberty. It is more than the mere thing which a person owns; it includes the right to acquire, use, and dispose of it, and the Constitution, in the Fourteenth Amendment, protects these essential attributes. The right of property has been also defined as the right to acquire, possess, and enjoy particular things and objects in any way consistent with the equal rights of others and the just exactions and demands of the state."

In 16 Am. Jur. 2d 695, §366 it is stated:

"The term 'property' in its strict legal sense means the right of dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects. ...The general meaning assigned to the term in cases involving constitutional questions is similar in import.

"The rule is that an owner cannot be deprived of any of the essential attributes which belong to the right of property, and that included within the right of property which is constitutionally protected are the right to acquire, hold, enjoy, possess, manage, insure, and improve property, and the right to devote property to any legitimate use."

The due process provision in the Constitution of the State of Iowa is Article I, §9.

The case of *State v. Cowen* (1942) 3 N.W.2d 176, 231 Ia. 1117, stated as follows:

"...in no case can there be any such property right unless there is a legal right to possession, and a right to transfer or to dispose of as ones own."

All these citations make it clear that the property rights considered under the due process clause are those referring to properties in which one has a right of possession and disposition.

In my opinion, there are no such characteristics attached to the interests of the contesting merchants in the matter which prompted your request. When the invitation was offered, the only interest any party might have had was a hope for, or an expectation of, a business opportunity. In my opinion such hope or expectation is not "property" under the above citations.

It seems further that the considerations of property rights with regard to due process as treated by the courts in the cited cases have to do with the action of the state or federal governments in regulating and controlling business and legislating in regard thereto. Whereas in the case in question, we are concerned with the state acting in a proprietary capacity in the rental of office space not asserting any regulatory sanctions.

It is my conclusion that there is no property interest involved that would entitle a claimant to protection under the due process clauses of the Iowa State or U.S. Consititutions.

In your letter of March 3rd you referred, among other things, to review of:

"...equal protection rights (other competitors in similar situations treated differently without any rational basis)."

A review of the equal protection provisions of the legal encyclopedias brings me to the same conclusion reached with regard to the due process clause. The constitutional provision is intended to apply to the regulatory application of the laws of the states to the citizens, both by the state agencies which administer them and by the courts that interpret and apply them.

The present status of the law does not require the DOT to follow a more formal bidding procedure than it followed in acquiring the space for the driver license office in downtown Cedar Rapids. There is no statutory requirement of formal bidding in situations such as this one but there is an Administrative Rule on procurement, 820[01,B], Chapter 2, of the Iowa Administrative Code which is as follows:

"§2.1 Policy. It is the policy of the Department of Transportation to procure equipment, materials, supplies, and services necessary to fulfill its operation or responsibilities *in the most efficient and economic manner possible.* It is further the policy of the Department that all purchases and contracts, whether awarded on the basis of offered compensation or through negotiation, shall be made on a competitive basis *to the maximum practicable extent.*" (Emphasis added)

"§2.1(1) Contracts for property and services shall be made on the basis of offered compensation in all cases in which the use of such method is *feasible and practicable under the existing conditions and circumstances.* Such procurement may be affected through formal advertising or limited solicitation." (Emphasis added)

As you can see by the passage italicized above, the prescribed procedure demands the exercise of discretion by the DOT employee performing the acquisition function and it can be varied appropriate to any given situation.

If you are not satisfied with the representation made by DOT Director Preisser to you in his letter of December 1, 1976, of his intention "...to be publicly advertising for space in other locations..." and to remain in the present Cedar Rapids location "...for at least a couple of years, and then we may look at what Ginsberg and others have to offer,..." it seems that there are at least three courses of action which may be taken.

1. A petition for rule making may be submitted requesting the DOT to adopt more formal rules in acquiring office space. (This would not necessarily solve the immediate problem because it would probably not call for reconsideration of already existing locations.)

2. Legislation could be enacted specifying the standards and procedures to be followed.

3. Since there has been a claim of a violation of a citizens constitutional rights in this transaction, an appropriate proceeding might be initiated by the offended party.

May 18, 1977

MUNICIPALITIES: Disability Benefits—§§4.5 and 411.6(7)(a), Code of Iowa, 1977. The amendment to §411.6(7)(a) which included those receiving accidental disability benefits within that class of individuals who have their benefits adjusted by outside compensation applies to all receiving such benefits as of the effective date of the amendment, but only for those benefit payments after the effective date. (Blumberg to Harkin, Story County Attorney, 5-18-77) #77-5-8

Ms. Ruth R. Harkin, Story County Attorney: We have your opinion request of April 15, 1977, wherein you ask about the application of an amendment to §411.6 of the Code. That section in the 1975 Code only applied to those with an ordinary disability. Section 27, Ch. 1089, 66th G.A. (1976) amended that section to include those with accidental disabilities. You ask whether that amendment applies to all those currently receiving an accidental disability benefit, or only to those who receive such a benefit after the effective date of the amendment.

Section 411.6(7)(a), 1977 Code of Iowa, now reads, in part:

"Should any beneficiary for either ordinary or accidental disability be engaged in a gainful occupation paying more than the difference between his retirement allowance and his average final compensation, then the amount of his pension shall be reduced to an amount which together with his annuity and the amount earned by him shall equal the amount of his average final compensation."

Section 4.5 of the Code provides that a statute is presumed to be prospective in its operation unless expressly made retrospective. This means that those receiving an accidental disability benefit prior to the effective date of the amendment could not have their benefits adjusted for that period of time prior to the effective date.

In *Walker State Bank v. Chipokas,* 228 N.W.2d 49 (Iowa 1975), it was held that a retroactive or retrospective law is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already past. The prospectivity or retrospectivity of a statute is largely determined by legislative intent. Section 4.5 of the Code contains the general rule. However, there is an exception when dealing with procedural, rather than substantive, matters. If it relates to a substantive right, it normally applies prospectively only. If it relates to remedy or procedure, it applies both prospectively and retroactively.

Substantive law creates, defines and regulates rights. Procedural law is the practice, method, procedure or legal machinery by which the substantive law

is enforced. *State v. Limbrecht,* 246 N.W.2d 330 (Iowa 1976). It was also held there (246 N.W.2d at 332):

"In [*Schmitt v. Jenkins Truck Lines, Inc.,* 1967, 260 Iowa 556, 149 N.W.2d 789] we adopted the definition of a remedial statute as contained in Black's Law Dictionary, Fourth Ed., p. 1457:

'One that intends to afford a private remedy to a person injured by the wrongful act. That is *designed to correct an existing law, redress an existing grievance,** *.

" 'A statute giving a party a mode of remedy for a wrong, where he had none, or a different one, before,* * *.

" 'A remedial statute is one which not only remedies defects in the common law but defects in civil jurisprudence generally.' (Emphasis in *Schmitt.*) 260 Iowa at 560, 149 N.W.2d at 791. See generally 82 C.J.S. Statutes §§416, 417, pp. 992-995; 73 Am.Jur.2d, Statutes, §354, pp. 489-490; II Sutherland Statutory Construction (Sands), Retroactive Legislation, §41.06, pp. 268-274, §41.09, pp. 280-286."

In *Schultz v. Gosselink,* 1967, 260 Iowa 115, 148 N.W.2d 434, the question was whether a revision of §619.17 was prospective or retrospective. In reaching its decision, the Court held (260 Iowa at 118):

"Black's Law Dictionary, Fourth Ed., page 1598, states Substantive Law is 'That part of law which creates, defines, and regulates rights, as opposed to "adjustive or remedial law," which prescribes methods of enforcing the rights or obtaining redress for their invasion.' "

It then cited with approval to *State v. Birmingham,* 96 Ariz. 109, 392 P.2d 775, which held that the right to appeal is substantive, but the manner in which the right may be exercised is procedural, and continued that the distinction between remedial procedures and impairment of vested rights is difficult to draw. The Court's result was that the new section was both remedial and substantive. As to the burden of proof the section was both prospective and retrospective. As to the quantum of proof it was prospective only. Finally, in determining legislative intent as to retrospectivity or prospectivity of a statute, courts look to the language, consider the evil to be remedied, and determine whether there was a previous statute governing or limiting the acts the new statute is intended to remedy. *State v. Limbrecht,* 246 N.W.2d at 333.

The above definitions are not helpful in your situation. By the amendment in question, those receiving accidental disabilities benefits are still entitled to such benefits. However, those benefits may now be adjusted by a new method. We cannot state with any degree of certainty that the insertion of a group of individuals into an existing statute is either substantive or remedial. We believe that the best result is to treat it as though it was both prospective and retrospective. That is, it applies to all who were receiving such benefits as of the effective date of the Act, but only for those benefit payments after the effective date of the Act.

May 19, 1977

MUNICIPALITIES: Firemen and Policemen Pensions — §§4.5, 411.5(9), 411.6(6) and 411.6(7), Code of Iowa, 1977; §§411.6(6) and 411.6(7), Code of Iowa, 1975. Physicians from the University Hospitals need not examine a member for a disability retirement. The amendment found in §411.6(6) of the Code only applies to those receiving an accidental disability retirement

after July 1, 1976. The amendment to §411.6(7) applies to all receiving an accidental disability retirement allowance, but deductions can only occur from July 1, 1976. (Blumberg to Walter and Connors, State Representatives, 5-19-77) #77-5-9

Honorable Craig D. Walter and Honorable John H. Connors, State Representatives: We have your opinion request of May 3, 1977, regarding certain sections of H.F. 914 of the 66th General Assembly, which are now found in Chapter 411, 1977 Code of Iowa. You asked:

"1. Under Section 18, is longevity and incentive pay included in earnable income? What is the Iowa law on this subject?

"2. Do members of the medical board located in Iowa City perform the actual examination or can it be done by a local doctor or medical board and submitted to the board? Does the Board of Trustees have the option to decide where the examination will be held?

"3. Under Section 26, if a member has not completed the requirement of 22 years of active service and becomes disabled after age 55, can the member receive a service retirement allowance? Does this apply to present employees or only those hired after July 1, 1976?

"4. Do the provisions of Section 27 apply to all present retirees or only to those who retire after July 1, 1976? Or only to those hired after July 1, 1976?

"5. Is the age provision of Section 26 as it relates to persons who have not attained the age of 55 discriminatory and therefor unconstitutional?"

The answer to your first question has been previously given in opinions to Representative Otto Nealson, No. 77-2-7, and Senator Cloyd Robinson, No. 77-3-17. We assume that your second question refers to §411.5(9) of the Code, which provides:

"The board of...trustees jointly shall designate a medical board to be composed of three physicians who shall *arrange for and pass upon all medical examinations* required under the provisions of this chapter, *except* that *for examinations* required because *of disability* three physicians from the University of Iowa hosiptals and clinics who shall *pass upon* the medical examinations required *for disability retirements*...." [Emphasis added]

Pursuant to this section, the joint medical board has the duty to arrange for *all* medical examinations. It also has a duty to pass upon those examinations, except for those for disability retirement. The physicians from the University hosiptals and clinics must pass on disability retirement examinations. By providing that the local medical board shall arrange for all examinations, it is apparent that they decide who performs the examinations, where and when.

The term "pass upon" is the key. In defining the word "pass", it is stated in Black's Law Dictionary, p. 1279 (4th ed.):

"The term also means to examine into anything and then authoritatively determine the disputed questions which it involves. In this sense a jury is said to *pass upon* the rights or issues in litigation."

In *Larkin v. Gronna,* 285 N.W. 59, 65 (N.D. 1939), the phrase "pass upon", as used in a section providing that the Secretary of State shall pass upon each initiative petition, was defined:

"It means to sit in adjudication, to exercise judgment upon, to determine sufficiency in accordance with the standard set, to weigh and determine the

essential facts for and against. *Fitzsimons v. Richardson, Twigg & Co.*, 86 Vt. 229, 84 A. 811, 814, intimates that the term 'pass upon' means a weighing of and deciding on material facts necessary to establish a case. *Kennebec Housing Co. v. Barton,* 122 Me. 374, 120 A. 56, 57, has the same intimation—that to 'pass upon' issues means to weigh the evidence for and against and decide thereon."

Therefore, the physicians for the University Hospitals need not do the actual examination as long as they have records and evidence upon which to base their decision.

Your third question refers to §411.6(6), which provides:

"Upon retirement for accidental disability a member shall receive a service retirement allowance if the member has attained the age of fifty-five, otherwise the member shall receive an accidental disability 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, in addition to the annuity, of 66-2/3 percent of his average final compensation."

Prior to July 1, 1976, the first paragraph of this section read:

"Upon retirement for accidental disability a member shall receive an accidental disability retirement allowance which shall consist of:...."

The service retirement allowance in §411.6(2) consists of an annuity which is the actuarial equivalent to his accumulated contributions plus a pension which shall equal one-half of the member's average final compensation. Thus, prior to July 1, 1976, a member on accidental disability received an annuity equal to his accumulated contributions plus a pension equal to 66-2/3 percent of his average final compensation, regardless of age. After July 1, 1976, a member only receives an accidental disability retirement allowance if he is under fifty-five. If he is fifty-five or older at the time of the accidental disability he receives a service retirement allowance, as if he had received a normal retirement. There is nothing in this section which requires twenty-two years of service in order to receive a service retirement allowance based upon an accidental disability.

Statutes are presumed to be prespective only unless expressly made retrospective. See, §4.5 of the Code. This rule is subject to exception where the statute relates solely to remedy or procedure, or unless it clearly appears the legislature intended it to be retrospective. *State ex rel. Turner v. Limbrecht,* 246 N.W.2d 330 (Iowa 1976), and cases cited therein. A secondary issue, but one of importance, is that of vesting. In a previous opinion regarding these types of pensions, 1972 O.A.G. 618, we held that the right to such a pension does not vest until the retirement occurs. In other words, those in the system who have not retired do not have a vested right to the pension. It can therefore be amended or altered without divesting them of any vested right. Thus, with regard to those in active service as of July 1, 1976, the recent amendments apply when they retire. However, because their rights have vested, those who were receiving such an allowance prior to July 1, 1976, will not be affected by the change in §411.6(6).

The above result is different than that for the amendment to §411.6(7). That section, in the 1975 Code, provided that those on ordinary disability retirement

could have their retirement allowances reduced because of earning compensation over a specified amount of their allowances. That section, in the 1977 Code, now also applies to those on accidental disability retirement. In a very recent opinion, Blumberg to Harkin, we held that all those who on July 1, 1976, were receiving an accidental disability retirement allowance could have it reduced by outside compensation from and after July, 1976. The difference between the two results is that in the first case the original formula upon which the retirement allowance is based would be changed for those already receiving it, irrespective of outside employment. In the second case, the formula upon which the retirement is based is the same. The amendment merely treats those with accidental disability retirements the same as those with ordinary disability retirements. In other words, one may have a vested right to the formula upon which the allowance he is receiving is based. However, he does not have a vested right regarding adjustments to the total amount of allowance received based upon outside employment.

In your last question you ask whether §411.6(6) is unconstitutional as to those who have not reached the age of fifty-five. In a previous opinion, Blumberg to Junker, No. 77-3-14, we were asked whether this section was unconstitutional because it was possible for one under fifty-five to receive a higher allowance than a similarly situated person over fifty-five. There, we held, citing to several cases, that we must presume the statute to be constitutional until it clearly, palpably and without doubt infringes the Constitution. We still adhere to that pronouncement. We direct your attention to *Massachusetts Bd. of Retirement v. Murgia,* 96 S.C. 2562 (1976), which concerned age discrimination and forced retirement at age fifty. Applying the rational basis standard to the state statute, the Court noted that the drawing of lines creating distinctions is peculiarly an unavoidable legislative task, and that perfection in making necessary classifications is neither possible nor necessary. We cannot state that this section is unconstitutional.

May 18, 1977

PUBLIC OFFICIALS: Public Funds. §§453.1, 452.10, 424.103, 454.1, 496A, 534.19(18). Statutory authority exists for public officials to deposit public funds not needed for current expenses in bank passbook accounts and such deposits in banks are covered by the state sinking fund. (Nolan to Hansen, State Representative, 5-19-77) #77-5-10

The Honorable Ingwer L. Hansen, State Representative: We have received your request for an opinion which is as follows:

"The question has been raised by one of my constituents whether political subdivisions, or elected officials who have custody of public funds may invest any surplus funds in pass book accounts in banks or savings and loan associations, from which they may make regular deposits and withdrawals, and still continue to earn interest on such accounts."

The deposit of public funds is governed by Chapter 453, Code of Iowa, 1975. Section 453.6 states that such deposits "shall except for time deposits, be evidenced by pass book entry by the depository designated as depository for such funds".

Under §453.1, all funds not needed for current operating expenses are to be invested by the treasurer of the political subdivision. The statute further states that such investments shall be in time certificates of deposit or savings

accounts in banks as defined in §524.103, or in investments permitted by §452.10 of the Code (notes, certificates, bonds or other evidences of indebtedness which are obligations of or guaranteed by the United States of America or any of its agencies).

At the present time, state sinking fund protection is given to demand or time deposits in banks only. Section 454.1, et seq., Code of Iowa, 1975.

Savings and loan associations are not banks, although they may perform some similar functions. Notably, §534.11(10), Code of Iowa, 1975, pertaining to the ownership of share accounts in a savings and loan association provides:

"...municipalities and other public corporations and bodies, and public officials hereby are specifically authorized and empowered to invest funds held by them, without any order of court in share accounts of insured savings associations which are under state supervision, and in accounts of federal savings and loan associations...under federal supervision and such investments shall be deemed and held to be legal investments for such funds."

Such statutory designation of share accounts gives rise to a question of whether such deposits are permissable under Article VIII, §3 of the Iowa Consititution which prohibits the state from becoming a stockholder or assuming liability for a corporation. Savings and loan associations are incorporated pursuant to the provisions of Chapter 534 of the Code of Iowa. By statute, the members of a savings and loan institution are entitled to one vote at any members' meeting, plus an additional vote for each $100 in a share account owned and held by the member at the time of any election. Thus, it would appear that the holder of a qualifying share account acquires the attributes of ownership in the association and that such ownership is precluded by the Constitution of Iowa for all the political subdivisions of the state.

The provisions of §534.19(18) authorize a state savings and loan association to operate in a manner similar to federally-chartered associations regarding the use of the term "deposit and interest". Savings and loan associations which have amended their articles and bylaws to operate in accordance with this section have been authorized thereby to receive investments of money and pay interest thereon at competitive rates, rather than merely declaring dividends from time to time based on earnings of the association. Certificates of deposits issued by such institutions do not confer membership rights upon the holder. Thus, political subdivisions may invest in the time certificates of such associations without violating the constitutional limitation.

There appears to be adequate statutory authorization for the investment of surplus public funds in pass book accounts in banks. However, there is no authority for public officials to invest surplus public funds in pass book savings accounts in other financial institutions and it is the opinion of this office that since Article VIII, §3 of the Constitution of Iowa precludes the state from investing public funds in private corporations, it cannot delegate such power to its subdivisions. 1968 O.A.G. 843.

May 19, 1977

BANKS: Acquisition of minority shares by bank holding companies. §528.1803, Code of Iowa, 1977. Statutory requirement that bank holding companies make same offer to shareholders of minority stock interests as made to majority interests is constitutionally valid. (Nolan to Branstad, State Representative, 5-19-77) #77-5-11

The Honorable Terry E. Branstad, State Representative: This is written in reply to your letter requesting an opinion on the constitutionality of §524.1803, 1977 Code of Iowa, which provides:

"Offer to purchase stock. No bank holding company shall make any offer to purchase or acquire, directly or indirectly, the voting shares of any state or national bank without extending the same offer to the owners of all outstanding shares of the bank not owned or controlled by the holding company. The refusal of any shareholder to accept the offer shall not be a bar to purchase or acquisition of the shares of any other shareholder if all other pertinent requirements of this division have been met by the bank holding company."

In your letter, you state you wish an opinion on the constitutionality of the above statute in the light of Article I, §6 and Article III, §30 of the Iowa Constitution, which provide in pertinent part:

"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." (Article I, §6)

The General Assembly shall not pass local or special laws in the following cases: * * *

"In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State;..." (Article III, §30)

Your specific question is: "How can it be said that there is a basis for classification between bank holding companies on the one hand and all other bank purchasers on the other hand?" As you point out, if it is bad for minority stockholders not to receive the same offer as a majority stockholder when a bank holding company seeks to acquire voting shares of a bank, it would seem to be just as deleterious to minority stockholders not to receive the same offer as the majority stockholders, no matter who is the offerer.

It is well settled that a presumption of constitutionality follows all duly enacted statutes. The legislature has wide discretion in determining classifications to which its acts apply. *Dickinson v. Porter,* 1949, 240 Iowa 393, 35 N.W.2d 66, appeal dismissed 70 S.Ct. 88, 338 U.S. 843, 94 L.Ed. 1371. Any classification is permissible which has a reasonable relation to some permitted end of government action and rests upon some reason of public policy. The test of reasonableness of a classification is good faith of the legislature in making it. *Dickinson v. Porter, supra.* A constitutional right to equal protection does not entitle everyone to be treated alike but if the legislature classifies persons for different treatment, the distinctions made must be reasonable and relevant to the purpose to be accomplished. *State v. Brooks,* 1975, 225 N.W.2d 322. Where no sanctions or penalties are involved, the legislature possesses the greatest freedom in classification and wide discretion in determining classes to which such acts apply. *Lee Enterprises, Inc. v. Iowa State Tax Commission,* 1968, 162 N.W.2d 730, *Steinberg-Baum & Co. v. Countryman,* 1956, 247 Iowa 924, 77 N.W.2d 15.

The statute which you have questioned was enacted into the division of the Iowa Banking Act, which regulates the practices of bank holding companies rather than in the general provisions (Division XVIII) of the law relating to shares, shareholders and dividends (Division V). From this, it may be inferred that the actions of the bank holding companies are given a particular

classification by the Iowa legislature. The reason for such classification was indicated in *Iowa Independent Bankers v. Board of Governors of the Federal Reserve System,* 1975, 511 F.2d 1288, where the Court declared:

"The bank holding company is a popular device for expansion in states that limit or prohibit financial institutions from engaging in branch banking."

The legislative history of §524.1803, Acts, 64th G.A., 1972, Chapter 1114, §9, as set forth in the Final Report of the Bank Holding Companies Study Committee to the 64th G.A., dated December 8, 1971, is limited to considerations of providing for similarity to the federal law:

"Section nine of the bill requires that when a bank holding company undertakes to acquire a bank in Iowa, it must make the same offer for purchase of shares to all of the bank's shareholders, thereby protecting minority shareholders. This provision is also a duplication of existing federal requirements, but that is apparently a regulation rather than statutory law and might therefore be changed on short notice in the future."

It should also be noted that the legislature has specifically precluded bank holding companies from acquiring more then 25% of the voting shares of any bank or the power to control in any manner the election of a majority of the directors of a bank if such acquisition would result in the holding company aggregating more than 8% of the total deposits of all banks in this state. (§524.1802) Thus, it is clear that the statute in question is intended not to classify the benefits to the minority stockholders but rather to provide a classification which promotes the object of regulating the activities of bank holding companies in expanding their positions of control over the various unit banks in the state. If a classification is reasonable and operates equally upon all within the class, it is a valid classification. *Keasling v. Thompson,* 1974, 217 N.W.2d 687.

Accordingly, it is the opinion of this office that the classification as set forth in §524.1803, 1977 Code of Iowa, is valid.

May 19, 1977

MUNICIPALITIES: Low-Rent Housing — §§384.24(2)(k), 384.50(5), 384.82(1), and 403A.14(2), Code of Iowa, 1977. There is no statutory provision which limits the amount of interest a city can pay a lending institution for a loan. (Blumberg to Schwengels, State Senator, 5-19-77) #77-5-12

Honorable Forrest V. Schwengels, State Senator: We have your opinion request of April 20, 1977, regarding low-rent housing. Under your facts, the city of Fairfield wishes to borrow funds for construction of a low-rent housing facility for the elderly, and not issue bonds. The loan would be repaid from rents of the facility and Federal assistance. The amount of interest on the loan is 8¾%. You ask whether there is any limit on the amount of interest a city can pay on a loan.

Section 384.82(1), 1977 Code of Iowa, provides that a city may borrow money to pay all or part of the cost of projects. "Project" is defined in §384.80(5) to include a city enterprise. "City enterprise" is defined in §384.24(2)(k) to include housing for the elderly. There is nothing in Chapter 384 which limits the amount of interest payable by a city to a lending institution. Nor do we find anything within Chapter 403A which is the Chapter controlling low rent housing.

Section 403A.14(2) provides that in connection with the incurring of

obligations under leases made pursuant to this Chapter, and in order to secure the payment of the obligations, a city can mortgage its property held pursuant to this Chapter. But, no mention of an interest rate is made. Nor can we find anything in any other Code section which sets forth such interest rates.

Accordingly, we are of the opinion that there is no statutory ceiling on the amount of interest a city can pay to a lending institution for a loan.

May 19, 1977

HOSPITALS: Liability for Commitments of the Mentally Ill—Chapter 229, Code of Iowa, 1977. Any liability of a hospital to which a patient has been committed voluntarily or involuntarily, pursuant to Chapter 229 of the Code, is the same as that of any other hospital according to the common law. (Blumberg to Brice, Mahaska County Attorney, 5-19-77) #77-5-13

Michael P. Brice, Mahaska County Attorney: We have your opinion request regarding a hospital's liability under Chapter 229, Code of Iowa, 1977. You ask what liability may exist for a hospital where an individual admitted under Chapter 229 either injures himself or others. There is nothing in Chapter 229 which speaks to this issue. Therefore, we must assume that the duty owed to or on account of patients under this Chapter is the same as those duties owed by hospitals under other circumstances.

The fact that a patient who injures himself or others is voluntarily or involuntarily committed under Chapter 229 does not make a difference in the duty owed by a hospital. *Baker v. United States,* 226 F.Supp. 129 (S.D. Iowa 1964), involved a hospital's liability for a self-inflicted injury by a mental patient. It was held at Page 132 that "there appears to be no Iowa cases involving the standard of care required of mental hospitals toward their patients." The court therefore applied the Iowa common law and concluded that the standard of care owed to a mental patient is no different than that standard owed to non-mental patients.

There are generally two standards of care required of a hospital. The first is based upon professional activity and concerns the skill and knowledge exercised by the ordinary physician of good standing under like circumstances. *Speed v. State,* 240 N.W.2d 901, 908 (Iowa 1976); *Kastler v. Iowa Methodist Hospital,* 193 N.W.2d 98 (Iowa 1971). The second standard relates to non-medical, administrative, ministerial or routine care based upon reasonable care for patients as their known mental and physical conditions require. *Kastler,* supra. Generally though, "the correct standard of care to which hospitals should be held is that which obtains in hospitals generally under similar circumstances." *Dickinson v. Milliard,* 175 N.W.2d 588, 596-597 (Iowa 1970).

A hospital is not an insurer of a patient's safety and therefore not required to guard against that which is unforseeable. *Shrover v. Iowa Lutheran Hospital,* 1961, 252 Iowa 712, 107 N.W.2d 85. It has been stated, however, that it is a matter of common knowledge that mental patients will become involved in problems, even to the extent of injuring themselves. *White v. United States,* 244 F.Supp. 127 (E.D. Vir. 1965). These are mere propositions of general application. Each case must be determined on its own set of facts. The following are examples of cases regarding a hospital's liability.

Given a patient's known mental condition, a hospital may be required to afford protection to either the patient or others. *Hunt v. King,* 1971, 4 Wash. App. 14, 481 P.2d 593. The protection afforded should not be such as to unjustly

deprive a patient of certain liberties. *In re Jones,* 338 F.Supp. 428 (D.C.D.C. 1972). A hospital is liable on account of a patient's assault on another only if it had actual knowledge of the patient's dangerous condition. *Bullock v. Park Chester General Hospital,* 1957, 3 App.Div. 254, 160 NYS2d 117.

There are many other cases involving a hospital's liability regarding responsibility for the acts of its employees and physicians. Suffice it to say, however, that any liability of a hospital to which a patient has been voluntarily or involuntarily admitted, pursuant to Chapter 229 of the Code, is the same as that of any other hospital according to the common law.

May, 1977

BANKING

Acquisition of minority shares by bank holding companies. §528.1803, Code of Iowa, 1977. Statutory requirement that bank holding companies make same offer to share holders of minority stock interests as made to majority interests in constitutionally valid. (Nolan to Branstad, State Representative, 5-19-77) #77-5-11

HOSPITALS

Liability for Commitments of the Mentally Ill. Chapter 229, Code of Iowa, 1977. Any liability of a hospital to which a patient has been committed voluntarily or involuntarily pursuant to Chapter 229 of the Code, is the same as that of any other hospital according to the common law. (Blumberg to Brice, Mahaska County Attorney, 5-19-77) #77-5-13

MINING

Coal; General Assembly; Statutes; Titles; Subject Matter. Art. III, §29, Constitution of Iowa. §4.12 and Chapter 83A, Code of Iowa, 1977; Chapter 87 (S.F. 314), Acts, 66th G.A., 1st Session, 1975, is, by virtue of the limitation contained in its title, an Act relating only to coal mining and §§3, 4, 5 and 7 thereof are inapplicable except as applied to coal mining. (Turner to Millen, State Representative, 5-16-77) #77-5-6

MUNICIPALITIES

Disability Benefits. §§4.5 and 411.6(7)(a), Code of Iowa, 1977. The amendment to §411.6(7)(a) which included those receiving accidental disability benefits within that class of individuals who have their benefits adjusted by outside compensation applies to all receiving such benefits as of the effective date of the amendment, but only for those benefit payments after the effective date. (Blumberg to Harkin, Story County Attorney, 5-18-77) #77-5-8

Low Rent Housing. §§384.24(2)(k), 384.50(5), 384.82(1) and 403A.14(2), Code of Iowa, 1977. There is no statutory provision which limits the amount of interest a city can pay a lending institution for a loan. (Blumberg to Schwengels, State Senator, 5-19-77) #77-5-12

Firemen and Policemen Pensions. §§4.5, 411.5(9), 411.6(6) and 411.6(7), Code of Iowa, 1977. §§411.6(6) and 411.6(7), Code of Iowa, 1975. Physicians from the University Hospitals need not examine a member for a disability retirement. The amendment found in §411.6(6) of the Code only applies to those receiving an accidental disability retirement after July 1, 1976. The amendment to §411.6(7) applies to all receiving an accidental disability retirement allowance, but deductions can only occur from July 1, 1976. (Blumberg to Walter and Connors, State Representatives, 5-19-77) #77-5-9

Volunteer Police Reserves. §§364.1 and 613A.2, and Chapter 372, Code of Iowa, 1977. Municipalities have the power to use and equip volunteer police reserves. The approval and consent by the city to their use may render the city liable for their acts. (Blumberg to Schnekloth, State Representative, 5-3-77) #77-5-1

PUBLIC OFFICIALS

Public Funds. §§453.1, 452.10, 424.103, 454.1, 496A, 534.19(18), Code of Iowa, 1977. Statutory authority exists for public officials to deposit public funds not needed for current expenses in bank passbook accounts and such deposits in banks are covered by the state sinking fund. (Nolan to Hansen, State Representative, 5-19-77) #77-5-10

STATE OFFICERS AND DEPARTMENTS

State Fair Board; Issuance of Tickets. §§8.38, 68B.5, 173.8 and 173.14(3). Code of Iowa, 1977. The distribution of free grandstand tickets to members by the Iowa State Fair Board does not directly contravene any provision of the Code of Iowa, 1977. (Condon to Taylor, Secretary/Manager, Iowa State Fair Board, 5-12-77) #77-5-3

Department of Transportation. U.S. Constitution, Amendment 14, §1 (due process and equal protection); Iowa Constitution, Article I, §9; Iowa Administrative Code 820 (01,B), Chapter 2, §§2.1 and 2.1(1). Lack of formal bidding procedure by state agency does not, in absence of statute requiring formal bidding procedure, constitute deprivation of property without due process of law, of a merchant who did not enjoy the benefit of a contract which he had not been invited to bid on and which he might have enjoyed had he had the opportunity to bid and been the successful bidder, nor is there property right in such opportunity to bid. Nor was there violation of the equal protection provisions of the state of Iowa or federal constitutions in so failing to follow a formal bidding procedure. (Tangeman to Redmond, State Senator, 5-18-77) #77-5-7

TAXATION

Motor Fuel Tax. §§324.17, 422.86, 25.2, Code of Iowa, 1977. The income tax credit provided in §422.86, can only be granted to persons specifically subject to taxation under Divisions II and III of Chapter 422. (Kuehn to Oxley, 5-5-77) #77-5-2

Property Tax; Increases in valuation by assessor. §450.23, Code of Iowa, 1977. The mere fact that the assessor failed to follow the notice provisions of §441.23 does not preclude increases in valuations from being in effect since the statutory notice provisions are directory, not mandatory. (Griger to Schneckloth, State Representative, 5-12-77) #77-5-4

WORKMEN'S COMPENSATION

§85.1, Code of Iowa, 1977. Only the partners in a father-son partnership in a farm operation are exempted from coverage under the Iowa Worker's Compensation Act. (Jackwig to Wyckoff, State Representative, 5-12-77) #77-5-5

STATUTES CONSTRUED

Code, 1975	Opinion
364.1	77-5-1
372	77-5-1

411.6(6) 77-5-9
411.6(7) 77-5-9
424.103 77-5-10
452.10 77-5-10
453.1 77-5-10
454.1 77-5-10
496A.534(18) 77-5-10
613A.2 77-5-1

Code, 1977	Opinion
4.5	77-5-8
4.5	77-5-9
411.5(9)	77-5-9
411.6(6)	77-5-9
411.6(7)	77-5-9
411.6(7)(a)	77-5-8
4.12	77-5-6
8.38	77-5-3
25.2	77-5-2
68B.5	77-5-3
83A	77-5-6
85.1	77-5-5
173.8	77-5-3
173.14(3)	77-5-3
229	77-5-13
324.17	77-5-2
384.24(2)(k)	77-5-12
384.50(5)	77-5-12
384.82(1)	77-5-12
403A.14(2)	77-5-12
422.86	77-5-2
441.23	77-5-4
450.23	77-5-4
528.1803	77-5-11

66th GENERAL ASSEMBLY

S.F. 314 77-5-6

CONSTITUTION OF IOWA

Article I, §9 77-5-7

UNITED STATES CONSTITUTION

Amend. 14, §1 77-5-7

June 1, 1977

STATE OFFICERS AND DEPARTMENTS: Department of Agriculture; Authority to promulgate rules; Regulation of toilet facilities. §§170.16, 159.5, 159.6 and Chapter 17A, Code of Iowa, 1977. A rule, promulgated by the Department of Agriculture, which names additional establishments requiring toilet facilities after a statute enacted by the general assembly has enumerated only a select group of establishments, goes

beyond the defined powers of the Department of Agriculture. (Haesemeyer to Lounsberry, Secretary of Agriculture, 6-1-77) #77-6-1

Honorable Robert H. Lounsberry, Secretary of Agriculture: You re-recently requested our opinion regarding the authority of the Department of Agriculture to promulgate rules. Your question relates to the validity of Iowa Administrative Code §30-37.10(170), which implements Iowa Code §§170.16 and 170.17 (1977). Specifically, is the rule beyond the authority delegated to the Department of Agriculture?

The Department of Agriculture Rule provides as follows:

"30-37.10(170) *Toilet Facilities.*

"37.10(2). If extensive remodeling or the construction of new facilities is required by restaurants, cafeterias, cafes, lunch counters, taverns, cocktail lounges and other food establishments to comply with these rules said establishment may, upon receiving a written permit from the department, have an extension of time to so comply. No permit issued shall grant an extension of time later than the first day of July 1975. All restaurants, cafeterias, cafes, lunch counters, taverns, cocktail lounges and other food establishments constructed after July 1, 1973, shall provide separately designated toilet rooms for men and women."

Iowa Code §170.16 provides:

"*Toilet rooms.* Hotels, motor inns, taverns, cocktail lounges, restaurants, cafeterias, and food establishments shall provide toilet rooms. All toilet rooms shall be completely enclosed, have tight fitting self-enclosing doors, and shall be vented to the outside of the building. Toilet fixtures shall be of a sanitary design, readily cleanable, and shall be kept in a clean condition and in good repair. The floors of such rooms shall be of a suitable, non-absorbent, impermeable material and the walls and ceilings shall be of material that can be easily cleaned and kept in a sanitary condition. All places serving beer, cocktails, or alcoholic beverages shall provide separate toilet rooms for men and women."

Upon close reading of the above passages, it becomes evident that the Department of Agriculture rule is more restrictive than the Iowa statute. The rule provides for all restaurants, cafeterias, cafes, lunch counters, taverns, cocktail lounges and other food establishments to provide separate toilet rooms for men and women while the statute mandates separate facilities in only those places serving beer, cocktails, or alcoholic beverages. Herein lies the issue, can the Department of Agriculture make rules which are more restrictive than laws handed down by the legislature? We must examine the extent of the powers and duties of the Department of Agriculture.

Iowa Code §§159.5 and 159.6 (1977) set out the powers and duties of the Department of Agriculture. Sections 159.5(10) and 159.6(7) read together make clear the fact that the legislature has enabled the Department to regulate hotels, restaurants, and food establishments under Chapter 170. However, nowhere in chapter 159 or Chapter 17A of the Code is the Department of Agriculture given powers to promulgate rules which are more restrictive than statutes passed by the general assembly. Chapter 17A, the Administrative Procedure Act, helps to assure that all state agencies keep within the means and objectives set for them by the legislature. Chapter 17A mandates a procedure respect to fundamental rights and minimum general standards and thereby places regulation of only minor details in the hands of the agencies. *See*

Proposed Iowa Administrative Procedure Act, Introductory Note (Ten. Draft, Sept. 10, 1973) (drafted by the Iowa State Bar Association, Special Commission Administrative Law).

Section 17A.1, in stating the purpose of the Administrative Procedure Act, goes on to say that "Its impact is limited to procedural rights with the expectation that beter substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained." It can be seen from the above passages that the legislature intends that agencies have limited powers restricted to making rules of general applicability that implement, interpret, or prescribe law or policy. Iowa Code §17A.2(7) (1977).

It follows accordingly, that a rule, promulgated by the Department of Agriculture, which names additional establishments after a statute enacted by the general assembly has enumerated only a select group of establishments, goes beyond the defined powers and duties of the Department of Agriculture. The fact that the legislature does enumerate only places serving beer, cocktails, or alcoholic beverages would indicate that naming additional categories of establishments was not at the discretion of the Department.

Iowa case law supports this view. *Lewis Consolidated School District v. Johnson,* 127 N.W.2d 118 (Iowa 1964). In *Lewis,* a State Board of Public Instruction rule was challenged for the same reasons that this rule is questioned. The Iowa Supreme Court, in striking down an agency made rule concerning state school funding, said that an administrative agency must stick within guidelines set down by the legislature. The Department of Agriculture, in promulgating Rule 30-37.10(170), was not within the legislatuve guidelines because of the inconsistency of its rule with the statute.

It is our opinion that the Department of Agriculture cannot promulgate a rule which goes further than the statute passed by the general assembly. Iowa Administrative Code §30-37.10(170) is beyond the authority delegated to the Department of Agriculture.

June 1, 1977

MUNICIPALITIES: Mayor's Authority: §372.5, Code of Iowa, 1977. In a Commission form of government a mayor does not have the power to unilaterally overrule decisions of a Commissioner. (Blumberg to Redmond, State Senator, 6-1-77) #77-6-2

Honorable James M. Redmond, State Senator: We have your opinion request of May 12, 1977, regarding the authority of a mayor in a commission form of government. You asked:

"(1) Does the mayor in a commission form of government have the power to overrule the administrative decisions made by the independently elected commissioners under the statutory duty to 'supervise the administration' of the other departments?

"(2) If the answer to the first question is negative, what, in fact, is the extent and meaning of the mayor's power in a commission form of city government to 'supervise the administration' of the four other city departments?"

Section 372.5, 1977 Code of Iowa, provides for the commission form of government. Pursuant to that section there are five departments. The mayor administers the department of public affairs and the four councilmembers

administer each of the four remaining departments. The mayor "shall supervise the administration of all departments and report to the council all matters requiring its attention."

We can find no cases on the mayor's authority. The key is the mayor's power to supervise the administration of all departments. To "supervise" means to have general oversight over—to superintend or to inspect. *State v. Manning,* 1935, 220 Iowa 525, 539, 259 N.W. 213. Coupling this definition with a mayor's duty to report matters to the council, it becomes apparent that a mayor in a commission form of government does not have the power to unilaterally overrule decisions of the commissioners. A mayor can, by supervising, make sure that the departments are being administered and that things are being done. A mayor can approach the council on matters regarding a department head or the lack thereof. "Supervise", as used in §372.5, does not, however, mean the power to unilaterally overrule decisions of the commissioners. To hold otherwise would be to, in effect, usurp the power of each commissioner and the council as a whole and place it entirely in the hands of one person. We do not believe that this is what the legislature intended.

June 13, 1977

WORKERS' COMPENSATION: 87.1, 87.11, Code of Iowa, 1977. That local units of government must purchase workers' compensation insurance as required under 87.1, or in the alternative furnish satisfactory proof to the Insurance Commissioner of such solvency and financial ability to make the required payments whereby they are allowed to self insure as provided by 87.11. (Yocum to Anderson, Insurance Commissioner, 6-13-77) #77-6-3

The Honorable Herbert W. Anderson, Commissioner of Insurance: To answer the question of whether local units of government must purchase workers' compensation insurance, the provisions under the code must be applied to determine the appropriate solution.

First, section 85.1 must be consulted to determine if local units of government are exempted from applicable workers' compensation statutes. After examining all the exemptions under 85.1, it is discovered that there is no exemption listed (exception 85.1(4)) that would release local units of government from adhering to the appropriate workers' compensation statutes.

To the contrary, by reading section 85.2, it is determined that the payment of workers' compensation is compulsory as to local units of government:

"Compulsory when. Where the state, county, municipal corporation, school corporation, area education agency, or city under any form of government is the employer, the provisions of this chapter for the payment of compensation and amount thereof for an injury sustained by an employee of such employer shall be exclusive, compulsory, and obligatory upon both employer and employee, except as otherwise provided in section 85.1. For the purposes of this chapter elected and appointed officials shall be employees."

Since the question of whether local units of government must pay workers' compensation is answered in the affirmative, the next question then is whether a local unit of government must purchase insurance to guarantee the payment of claims in case of liability. This issue is dictated by section 87.1:

"Insurance of liability required. Every employer subject to the provisions of this and chapters 85 and 86, unless relieved therefrom as hereinafter

provided, shall insure his liability thereunder in some corporation, association, or organization approved by the commissioner of insurance.

"Every such employer shall exhibit, on demand of the industrial commissioner, evidence of his compliance with this section; and if such employer refuses, or neglects to comply with this section, he shall be liable in case of injury to any worker in his employ under the common law as modified by statute."

To clarify the word "employer" — it is defined under section 85.61(1):

" 'Employer' includes and applies to any person, firm, association, or corporation, state, county, municipal corporation, school corporation, area education agency, township as an employer of volunteer firemen only, benefited fire district and the legal representatives of a deceased employer."

Therefore, it is quite evident that since a local unit of government is defined as an employer according to 85.61(1), then section 87.1, which requires employers to purchase insurance, is applicable to local units of government.

As an alternative to the purchasing of insurance by the employer as required by section 87.1, section 87.11 allows the employer to furnish satisfactory proof to the insurance commissioner of such employer's solvency and financial ability to make such payments as required by statute. Once this showing of solvency has been met, then the employer is allowed to self insure.

"Relief from insurance. When an employer coming under this chapter furnishes satisfactory proofs to the insurance commissioner of such employer's solvency and financial ability to pay the compensation and benefits as by law provided and to make such payments to the parties when entitled thereto, or when such employer deposits with such commissioner security satisfactory to him and the industrial commissioner as guaranty for the payment of such compensation, such employer shall be relieved of the provisions of this chapter requiring insurance; but such employer shall, from time to time, furnish such additional proof of solvency and financial ability to pay as may be required by such insurance commissioner or industrial commissioner."

Thus, according to the Code of Iowa, local governmental units are required to pay workers' compensation pursuant to Chapter 85. Since local governmental units are required to pay workers' compensation, they therefore have the alternative right to either elect to insure their liabilities with a reputable company pursuant to section 87.1 or show financial ability to make payments in case of injury and thus self insure according to section 87.11.

The above conclusion would be determinative, except there is an Attorney General's Opinion, 1919 O.A.G. 212, which addressed the questions of whether a city was required to purchase insurance to secure the payment of compensation to its injured employees. In that opinion, it was stated that cities are not required to purchase workers' compensation insurance.

The above opinion was founded on two major factors:

(1) At that time all cities were presumed to be solvent and since the status of an employer being solvent was the basic intention in determining whether the employer should be relieved from the requirement of carrying insurance, it was decided there was no reason to require cities to comply with section 2477-M41(87.1) and section 2477-M49 (87.11).

(2) Since cities are limited by the Constitution and by statute as to the amount of indebtedness that it can incur, they were deemed that this statutory provision performed the function of insurance in that it protected the city

in the event of a large loss.

Yet today with the vast revisions that have occurred in the area of workers' compensation benefits and procedures coupled with the great changes in economic conditions, the above reasons for exempting cities from compliance with Chapter 87, Code of Iowa, are no longer a valid basis. Thus with the emphasis in the workers' compensation field being placed upon the protection of the worker, the exemption granted to cities by the above Attorney General's Opinion of November 6, 1919, is hereby overruled.

Finally, to guarantee that the designated methods and means created by statute for the giving of greater protection and security to the workers and their dependents against injury and death occurring in the course of employment will be implemented as intended by the legislature, it is imperative that local units of government defined to be employers be compelled to adhere to Chapter 87, Code of Iowa.

June 23, 1977

STATE OFFICERS AND DEPARTMENTS: Board of Regents: Coverage by Chapter 25A of University Employees—§25A.2(3), Code of Iowa, 1977. Residents and fellow physicians and dentists of the University Hospitals and interns and residents of the College of Veterinary Medicine are employees of the State and generally covered by Chapter 25A of the Code. (Blumberg to Richey, Executive Secretary, State Board of Regents, 6-23-77) #77-6-4

Mr. R. Wayne Richey, Executive Secretary, State Board of Regents: We have your opinion request regarding Chapter 25A of the Code. You specifically asked:

"1. Are resident and fellow physicians and dentists of the University of Iowa Hospitals and Clinics employees of the state for purposes of Chapter 25A.3 [sic] of the Code of Iowa when providing professional services at the University of Iowa Hospitals and Clinics?

2. Are resident and fellow physicians and dentists of the University of Iowa Hospitals and Clinics employees of the state for purposes of Chapter 25A.3 [sic] of the Code of Iowa when they are providing professional services under the supervision of physicians or dentists in programs sanctioned by the university during training periods away from the University Hospitals and Clinics, such as, for example, practicing at an affiliated public or private hospital or institution while still a resident or fellow of the University of Iowa Hospitals and Clinics, serving at a University of Iowa sponsored clinic which is established on a temporary or permanent basis at a location other than University Hospitals, or serving with a private practitioner as part of a University Hospital residency program?

3. With respect to the facts posited in Question 2, does the fact that the resident or fellow physicians are paid or the university is reimbursed, for their services by the affiliated institution, federal or state training grant, or other source affect their status as employees of the state?

4. Are resident and fellow physicians and dentists of the University of Iowa Hospitals and Clinics employees of the state for purposes of Chapter 25A.3 [sic] of the Code of Iowa when providing professional services at the University of Iowa Hospitals and Clinics, even though their stipends are paid by the Veterans Administration Hospital in Iowa City under an accounting agreement? (In order to avoid the bookkeeping problems of shifting residents who serve part of their residency at the Veterans Administration Hospital

from a university stipend to a Veterans Administration stipend and back, VA now pays a stipend of approximately 66 of the residents for the entire year. This is done because, on the average, 66 of the residents are at the VA Hospital at any given time during the year. Thus, some of the residents receive their stipends via VA check while serving at University Hospitals and some residents receive their stipends via university check while serving at the VA Hospital. All the residents receive the same benefits.)

5. Are residents of other private or public hospitals employees of the state for purposes of Chapter 25A.3 [sic] of the Code of Iowa when providing professional services at the University of Iowa Hospitals and Clinics, when their stipends are paid by the university or when their stipends are paid by the university [sic] or when their stipends are paid by the community hospital of their residency or a federal or state training grant?

6. Are residents and interns of the College of Veterinary Medicine at Iowa State University employees of the state for purposes of Chapter 25A.2 of the Code of Iowa while practicing veterinary medicine at the college or away from the college under a program sponsored by the college.?"

Section 25A.2(3), 1977 Code of Iowa, defines "Employee of the state" to include:

"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 services 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."

Whether an individual is an employee of the State is a fact question. This question is often easily resolved in most cases. However, when dealing with physicians who use the State's facilities, e.g. University Hospitals, the answer can be difficult. The mere fact that a physician uses the facilities of the University Hospitals does not automatically make that physician an employee of the State.

Responsibility of the State for the acts of its employees pursuant to Chapter 25A is based upon *respondeat superior* or master-servant doctrines. There are generally three categories with such a doctrine: Employer, employee, independent contractor. In *Meredith Pub. Co. v. Iowa Emp. Sec. Comm.,* 1942, 232 Iowa 666, 6 N.W.2d 6, it was held, citing to *Arne v. Western Silo Co.,* 1932, 214 Iowa 511, 516, 242 N.W. 539, 542, that an independent contractor is one who, in the pursuit of an independent business, undertakes to do work for another, using his own means and methods, without submitting himself to control of the other person. Citing to *Pace v. Appanoose County,* 1918, 184 Iowa 498, 508, 168 N.W. 916, 919, it was stated that the relation of master and servant will not be established unless the master has retained the right to exercise control of the servant regarding how the work is to be done. The court then adhered to the following definitions in 1 Restatement of Agency §2 (232 Iowa at 674):

"(1) A master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of

the other in the performance of the service.

"(2) A servant is a person employed by a master to perform services in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.

"(3) An independent contractor is a person who contract with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."

Similarly, it was held in *Duffy v. Hardin,* 179 N.W.2d 496, 502 (Iowa 1970):

"The tests for determining who is a servant are stated in Restatement (Second) of Agency §220 (1957). It is generally agreed the most important test is the right to control the work done. *Johnson v. Scott* (1966), 258 Iowa 1267, 1272, 142 N.W.2d 460, 463; *Houlahan v. Brockmeier* (1966), 258 Iowa 1197, 1202, 141 N.W.2d 545, 548."

The Court then quoted from *Frankil v. Twedt,* 1951, 234 Minn. 42, 47 N.W.2d 482, 487:

"Although in the abstract, the right of control is the decisive test, its decisive character in practical application fades into a twilight of uncertainty by reason of the fundamental differences in the nature of various occupations, by the varying arrangements of the parties and the circumstances of each particular case, and by such variable factors as the force of custom. Prosser, Torts, §63; Restatement, Agency, §220. The existence of the right of control may be inferred from a combination of factors which usually varies according to the circumstances of each case. Restatement, Agency, §220. * * *

"One may be a servant though far away from the master, or though so much more skilled than the master that actual direction and control would be folly, since it is the right to control rather than the exercise of control that is the test of the relationship of master and servant. *Bell v. Sawyer,* 313 Mass. 250, 47 N.E.2d 1. * * *."

In *Bengford v. Carlem Corporation,* 156 N.W.2d 855, 863 (Iowa 1968), it was held:

"An employee or servant is a person bound by duty of service, subject to the master's or employer's command as to the manner in which the work shall be done....

"In *Lembke v. Frits,* 223 Iowa 261, 265, 272 N.W. 300, 302, we quote this from *Norton v. Day Coal Company,* 192 Iowa 160, 164, 180 N.W. 905, 908. 'The relationship of master and servant does not exist, unless there be the right to exercise control over methods and details — to direct how the result is to be obtained. The power to direct must go beyond telling what is to be done — to telling "how it is to be done".'

"The right of control is the principal test for determining whether an employer-employee relationship exists."

More recently, it was held in *Greenwall v. Meredith Corporation,* 189 N.W.2d 901, 904 (Iowa 1971):

"In determining whether a person is an independent contractor or an employee, we look first as to who has the right to control the physical conduct of the service. If this control is vested in the person giving service, he is an

independent contractor; if it is vested in the employer, then the person rendering the service is an employee."

Payment for services has also been used as a test for the employer-employee relationship. *Uhe v. Central States Theatre Corp.*, 1966, 258 Iowa 580, 139 N.W.2d 538; *Erickson v. Erickson,* 1959, 250 Iowa 491, 94 N.W.2d 728. However, since §25A.2(3) includes the phrase "whether with or without compensation" in its definition of employee, we need not concern ourselves with such a test in relation as whether the individual is paid. However, it is still a factor in determining who the employer is when payment is made.

According to the information you have supplied, the residents and fellows are paid a yearly salary or stipend. They are not paid any fees from patients nor can they bill for fees. Neither are they permitted to have their own private patiens. They are covered by FICA, unemployment compensation and worker's compensation. Based upon the definition of "employee" within §25A.2(3), they are employees of the State and fall within the coverage of that chapter while providing services at the Univesity Hospitals and Clinics.

Your second question is more complicated. The residents and fellows, as part of their training, are sent to other hospitals for periods of up to two months. This is required by the University Hospitals. They are then placed under the supervision of a clinical professor who is simultaneously a member of the University faculty and a physician in private practice. The residents and fellows still receive pay from the University Hospitals, although that may be reimbursed by the other facility. The University Hospitals not only order the residents and fellows to the other facilities, but also direct what area of medicine they are to work, the type of things on which they are to concentrate and who shall supervise them. Under these facts they can be considered to fall within Chapter 25A.

Residents and fellows also travel across the state with temporary diagnostic clinics where diagnostic tests for such conditions as glaucoma are administered. These clinics are operated under the auspices of the college of medicine for the dual purpose of training and providing medical assistance to state inhabitants. The residents and fellows continue to receive their pay while at these clinics. Again, it is apparent that they would still fall within Chapter 25A.

In your third question, you ask whether reimbursement to the University Hospitals by the facilities where the residents and fellows are placed will affect their status under Chapter 25A. As pointed out above, payment can be a factor used to determine an employer-employee relationship. However, other matters such as control of the individual or the work are also important. From your facts, it is apparent that the residents and fellows are under complete control of the University Hospitals and/or College of Medicine. The other facility does not appear to exercise any such control. Therefore, we cannot say that reimbursement by another facility divests the residents and fellows of the protection of Chapter 25A.

Your fourth question is similar. One of the hospitals used for outside training is the VA hospital in Iowa City. Because of the red tape involved with a reimbursement, the VA hospital computes the total time residents and fellows from University Hospitls are there. Then, an equivalent number of residents and fellows are selected and their salaries or stipends are paid by the VA hospital for a full year. The resident or fellow may actually spend most of the year at University Hospitals. The control of the resident and fellow is the

same as that in question two. Thus, the result would be the same.

Your fifth question is more difficult. University Hospitals also accept residents from other facilities for up to two months for training. Supervision is by a staff physician or faculty member of the University Hospitals or College of Medicine. However, other control is exercised by the other facility. It requires this training and directs it in the same manner as the University Hospials with its residents. The above-cited cases indicate, with respect to control, that it is not only the actual control or direction of an emplolyee that is determinative, but the right of control which can be inferred from the facts. We cannot hold as a matter of law that these residents from other facilities fall within Chapter 25A. The amount of and right to control by the other facility will determine that issue.

Finally, you ask about interns and residents of the College of Veterinary Medicine at Iowa State University. It is our understanding that the facts are similar. That is, they are on a salary, are subject to FICA and the like and are supervised by faculty. As such, they should be considered to fall within Chapter 25A the same as the residents and fellows at the University Hospitals. The same can be said of the dentists.

There is a caveat to the above discussion. Each case is determined on its own set of facts. The question of whether any of the individuals in this opinion are employees is one of fact. For the most part there will not be any question and these individuals (excluding for the time those from other facilities) will be considered by this office, if not by the courts, to be employees within Chapter 25A. Based upon the facts you supplied and assuming those facts remain constant, we foresee little problem with this area. We wish to point out, however, that facts may exist whereby one of these individuals may not be an employee at the time an act or omission occurs. For instance, if one of the residents or fellows was administering to a private patient of their own outside of their normal duties, or if the control by University Hospitals changed while they were at another facility. Although these are speculative, we cite them so that these individuals will have a better idea of coverage under Chapter 25A.

Accordingly, we are of the opinion that resident and fellow physicians and dentists of the University Hospitals and interns and residents of the College of Veterinary Medicine, based upon the facts you supplied to us, would generally and in most, if not all cases, fall within the coverage of chapter 25A of the Code.

June 24, 1977

COUNTIES AND COUNTY OFFICERS: County indemnification Fund. §332.36, 1977 Code of Iowa. Whether a claim against the county indemnification fund arising out of an unlawful arrest or assault by a county officer would be valid will depend on the facts of each case. (Haskins to Pahlas, Clayton County Attorney, 6-24-77) #77-6-5

Harold H. Pahlas, Clayton County Attorney: You ask the opinion of our office as to whether, in essence, a claim against the county indemnification fund arising out of an unlawful arrest or assault by a county officer would be valid.

§332.36, 1977 Code of Iowa, creates the "county indemnification fund". It states:

"There is created in the office of the treasurer of state a fund to be known as 'the county indemnification fund' to be used to indemnify and pay on behalf of any elected county officer and any deputies, assistants or employees of the county, all sums that such officers, deputies, assistants or employees are legally obligated to pay because of their *errors or omissions* in the performance of their official duties, except that the first five hundred dollars of each such claim shall not be paid from this fund." [Emphasis added]

Putting aside the question of whether county officers or employees who are guilty of an unlawful arrest or assault have acted in the "performance of their official duties", the issue boils down to whether an unlawful arrest or assault could fall under the category of "errors or omissions.". In the ordinary sense in which these words are used, it would not seem that an unlawful arrest or assault could do so. Indeed, so-called errors and omissions insurance policies generally exclude intentional torts. *See Grieb v. Citizens Casualty Co. of New York,* 148 N.W.2d 103, 106 (Wis. 1967). However, the exclusion of such torts in these policies appears to be accomplished by the express terms of the policy. And, in the language of §332.36, liability for an unlawful arrest or assault could conceivably arise "because of" a mere "error", i.e., a mistake, *see Guarino v. Celebrezze,* 336 F.2d 336, 339 (3rd Cir. 1964). Indeed, it has been said that the words "error" and "mistake" could also embrace an assault. *See Sommer v. New Amsterdam Casualty Co.,* 171 F.Supp. 84, 86 (E.D. Mo. 1959). Obviously, the question of whether liability for unlawful arrest or assault arises because of "errors or omissions" will depend on the facts of each case. Beyond this, no general statement can be made in response to your question.

June 22, 1977

STATE OFFICERS AND DEPARTMENTS: Commerce Commission; Electric Transmission lines. §§478.18 and 478.20, Code of Iowa, 1977. §478.18 requires that transmission lines be constructed near and parallel to the right of way of railroads or along land division lines wherever the same is practicable and reasonable, but makes no mention of an agreement with affected landowners. However, §478.20 provides that a transmission line is not to be constructed within 100 feet of a dwelling house or other building unless the parties agree or except where the line crosses or passes along a public highway or is located along side or parallel with a railroad right of way. (Haesemeyer to Hullinger, State Representative, 6-22-77) #77-6-6

Honorable Arlo Hullinger, State Representative: Reference is made to your letter of May 19, 1977, in which you request an opinion of the Attorney General with respect to an interpretation of §478.20, Code of Iowa, 1977. Specifically you ask:

"Under the provisions contained in this section, is it mandatory that all electric transmission lines be built 'along a public highway' or 'parallel with the right of way of any railroad' unless an agreement is reached with the land owner to do otherwise?"

Such §478.20 provides:

"Distance from buildings. No transmission lines shall be constructed, except by agreement, within one hundred feet of any dwelling house or other building, except where said line crosses or passes along a public highway or is located alongside or parallel with the right of way of any railway company. In addition to the foregoing, each person, company, or corporation shall

conform to any other rules, regulations, or specifications established by the state commerce commission, in the construction, operation, or maintenance of such lines."

The requirement of §478.20 is that a transmission line is not to be constructed within 100 feet of a dwelling house or other building unless the parties agree or except where the line crosses or passes along a public highway or is located along side or parallel with a railroad right of way.

Section 478.20 does not relate to the general requirement that transmission lines be constructed along public highways or railroad right of ways but instead is directed to construction of such lines within 100 feet of a building. Section 478.18 does contain a general requirement of this type but makes no mention of an agreement with the landowner. Such §478.18 provides:

"Supervision of construction-location. The state commerce commission shall have power of supervision over the construction of said transmission line and over its future operation and maintenance. Said transmission line shall be constructed near and parallel to the right of way of the railways of the state or along the division lines of the lands, according to the government survey thereof, wherever the same is practicable and reasonable, and so as not to interfere with the use by the public of the highways or streams of the state, nor unnecessarily interfere with the use of any lands by the occupant thereof."

This section thus requires that transmission lines be constructed near and parallel to the right of way of railroads or along land division lines "*wherever the same is practicable and reasonable.*" In the case of *Hanson v. Iowa State Commerce Commission,* 227 N.W.2d 157 (Iowa 1975) the Iowa Supreme Court construed and interpreted the language italicized above and made the following observation:

"If the legislature required adherence to railroad and land division lines, the electric industry (and therefore its customers) would often have the additional expense involved in longer lines, more cable and structures, proximity to more buildings, more changes of direction in lines, and interference with more landowners. These are built-in, unavoidable added costs of such a system. But such is the system the legislature chose, to be used wherever practicable and reasonable.

"Clearly the legislature did not mean that the additional burdens which ordinarily attend railroad and land division routes, as contrasted to diagonal lines, make those routes impracticable and unreasonable. Those additional burdens inhere in the railroad and land division system. If those burdens made the railroad and land division system impracticable or unreasonable, then few if any situations would exist in which such system would prevail over diagonal lines and the statute would be an almost empty letter. * * *

"Not only did IPALCO misinterpret the 'practicable and reasonable' clause, its diagonal route also violated the 'wherever' requirement of §489.18. That requirement means that a utility must start its planning with railroad or land division routes. If such routes contain points of impracticability or unreasonableness, the utility may deviate from the route at those points. the transmission line must follow a railroad or land division route 'wherever' practicable and reasonable. * * *"

We believe the Supreme Court in its opinion in *Hanson, supra,* sufficiently claries the meaning of the language, "wherever the same is practicable and reasonable" and we have nothing to add thereto.

June, 1977

COUNTIES AND COUNTY OFFICERS

County Indemnification Fund. §332.36, Code of Iowa, 1977. Whether a claim against the county indemnification fund arising out of an unlawful arrest or assault by a county officer would be valid will depend on the facts of each case. (Haskins to Pahlas, Clayton County Attorney, 6-24-77) #77-6-5

MUNICIPALITIES

Mayor's Authority. §372.5, Code of Iowa, 1977. In a commission form of government, a mayor does not have the power to unilaterally overrule decisions of a commissioner. (Blumberg to Redmond, State Senator, 6-1-77) #77-6-2

STATE OFFICERS AND DEPARTMENTS

Board of Regents; Coverage by Chapter 25A of University employees. §24A.2(3), Code of Iowa, 1977. Residents and fellow physicians and dentists of the University Hospitals and interns and residents of the College of Veterinary Medicine are employees of the State and generally covered by Chapter 25A of the Code. (Blumberg to Richey, Executive Secretary, State Board of Regents, 6-23-77) #77-6-4

Department of Agriculture; Authority to promulgate rules; Regulation of toilet facilities. §§170.16, 159.5, 159.6, and Chapter 17A, Code of Iowa, 1977. A rule, promulgated by the Department of Agriculture, which names additional establishments requiring toilet facilities after a statute enacted by the general assembly has enumerated only a select group of establishments, goes beyond the defined powers of the Department of Agriculture. (Haesemeyer to Lounsberry, Secretary of Agriculture, 6-1-77) #77-6-1

Commerce Commission; Electric Transmission Lines. §§478.18 and 478.20, Code of Iowa, 1977. §478.18 requires that transmission lines be constructed near and parallel to the right of way of railroads or along land division lines wherever the same is practicable and reasonable, but makes no mention of an agreement with affected landowners. However, §478.20 provides that a transmission line is not to be constructed within 100 feet of a dwelling house or other building unless the parties agree or except where the line crosses or passes along a public highway or is located along side or parallel with a railroad right of way. (Haesemeyer to Hullinger, State Representative, 6-22-77) #77-6-6

Workers' Compensation; Local units of government. §§87.1, 87.11, Code of Iowa, 1977. That local units of government must purchase workers' compensation insurance as required under §87.1, or in the alternative furnish satisfactory proof to the Insurance Commissioner of such solvency and financial ability to make the required payments whereby they are allowed to self insure as provided by §87.11. (Yocom to Anderson, Insurance Commissioner, 6-13-77) #77-6-3

STATUTES CONSTRUED

Code, 1977	Opinion
17A	77-6-1
25A.2(3)	77-6-4
87.1	77-6-3

87.11	77-6-3
159.5	77-6-1
159.6	77-6-1
170.16	77-6-1
332.36	77-6-5
372.5	77-6-2
478.18	77-6-6
478.20	77-6-6

July 5, 1977

COUNTIES — Sheriff Uniforms — §337A.2-337A.4 and §20.9. Statutory limitation of $300 per year limits the amount the county can spend to outfit a man with a sheriff's uniform but does not preclude the payment of cleaning and maintenance bills. (Nolan to Kelly, State Senator, 7-5-77) #77-7-1

Honorable E. Kevin Kelly, State Senator: In response to your letter of June 7, 1977, this office has considered the provisions of Section 337A.2, Code of Iowa, 1977, relating to sheriff's uniforms and the questions you presented as follows:

"1. Must funds spent by a county for providing uniforms and accessories to the county sheriff and his full-time bonded deputies, including expenses for cleaning, repairing and maintaining the uniforms and accessories, be kept within the three hundred dollars per man in any calendar year limitation, or does the limitation only apply to the providing of the uniform with the county able to pay additional necessary expenses related to cleaning, repairing and maintaining those uniforms and accessories?"

"2. Is a provision contained in a union agreement between the county and the deputy sheriffs of the county requiring the county to pay each of the deputy sheriffs an annual cash payment of three hundred dollars as a 'uniform allowance' a legally enforceable provision of that agreement?"

Under Section 337A.2, Code of Iowa, 1977, the county board of supervisors is authorized to spend not more than $300 in any calendar year for the uniforms and accessories "deemed necessary by the sheriff for properly outfitting the sheriff and his deputies." The uniforms and accessories are required to be purchased through the State Department of General Services pursuant to Code §337A.3. In §337A.4, the legislature has defined the uniform to "include standard shoulder patches, badges, name plates, hats, trousers, neck ties, jackets, socks, shoes, boots and leather goods." Accessories are defined in rule of the Department of Public Safety 680 ICA 2.209 to "consist of shoulder and blazer emblems, safety helmets, badges, whistle and chain, name bar, I.D. badge case, handcuffs and case, firearms and holster, tie accessories, chemical maze and holder, night sticks, rank insignia, equipment belt, reversible style interbelt, baton holder, key strap, cartridge case and grip holder."

The answer to the first question you submitted, in our view, rests on whether or not to properly outfit the sheriff and his deputies the county is required to bear the expense of cleaning and maintenance for the uniforms and accessories. There does not appear to be an expressed statutory provision controlling this matter. The general meaning of the word outfitting is to furnish or supply an outfit. An outfit is defined as the tools or equipment for the practices of the trade or the wearing apparel and accessories for a special occasion. See Webster

Seventh New Collegiate Dictionary, page 599. Accordingly the statutory limitation of $300 per man per year contained in §337A.2 relates to the original supply of any and all new equipment necessary, and would not restrict the county in appropriating funds under Chapter 344 for the sheriff's budget items necessary related to maintenance and repair of the uniforms.

In answer to your second question it is the opinion of this office that a provision in a union agreement between the county and the deputy sheriffs requiring that the county pay each deputy sheriff $300 as a "uniform allowance" is not a legally enforceable substitute for the statutory requirement that the county purchase such uniforms through the general services department (§337A.3). Any provision in a collective bargaining agreement to the contrary of the policy of standardization of sheriff deputy uniforms as expressed in Chapter 337A would appear to be beyond the scope of negotiations set forth in §20.9, Code of Iowa, 1977. Accordingly it is our view that whereas the county is not prohibited by statute from paying costs incidental to maintaining the uniforms and accessories furnished for sheriffs and sheriff's deputies, such costs should be paid as budgeted expenses, or treated as reimbursable claims rather than as supplemental benefit to the individual deputies.

July 11, 1977

DEPARTMENTAL RULES, STATE: STATUTORY CONSTRUCTION; Public Safety; Fire Marshal's authority to adopt fire safety regulations for apartment buildings. §§100.35, 4.1(2), 4.4(5), 4.6(6), 103.1, 103.7, 103.12, Code of Iowa, 1977; Ch. 1245, Acts of the 66th G.A., Ch. 4, §72. The fire marshal may adopt, amend, promulgate and enforce rules, regulations and fire safety standards affecting apartment buildings. (Linge to Larson, Commissioner, Iowa Department of Public Safety, 7-11-77) #77-7-2

Mr. Charles W. Larson, Commissioner, Iowa Department of Public Safety: You have requested an opinion of the Attorney General about Section 100.35, Code of Iowa, 1977. You wish to know if this statute that empowers the State Fire Marshal to adopt and enforce rules relating to the reduction of fire hazards in specified buildings authorizes the regulation of apartment buildings.

Section 100.35 of the Iowa Code provides:

"Rules of marshal. The fire marshal shall adopt, amend, promulgate and enforce rules and standards relating to fire protection, fire safety and the elimination of fire hazards in...hotels,...boarding homes or housing, rest homes, dormitories,...and all other buildings or structures in which persons congregate from time to time, whether publicly or privately owned."

Although apartment buildings are not specified in Section 100.35, the words "all other buildings...in which persons congregate" might be said to include apartment buildings. Rather than summarily concluding that such an interpretation was intended by the legislature, it is thought to be more appropriate to assume that sufficient ambiguity exists to justify an examination of relevant rules of statutory construction.

The legislature, in Chapter 4 of the Iowa Code, 1977, has established the method by which its enactments are to be analyzed. Section 4.1(2) provides that:

"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."

The questioned language "all other buildings... in which persons congregate" has not been found to have acquired a peculiar or appropriate meaning in law. The common meaning or approved usage of these words would sustain a determination that apartment buildings are buildings in which people congregate.

The reference in Section 4.1(2) to construing these words according to the context of the statute provides further guidance in detemining the application that may have been intended when the legislature passed this law. Section 100.35 is part of a chapter enacted to reduce the risk to human life of fire and fire hazards. This office has opined that by including the phrase "all other buildings or structures in which persons congregate from time to time" along with its enumeration of structures to be covered by the regulations of the fire marshal, "[i]t is apparent...that the intent of the Legislature was to include as many facilities as possible." 1972 O.A.G. 227, 229. That opinion states that, "It must be remembered that police powers are very broad and comprehensive" and include "everything essential to public safety, health and morals." *Id.* at 228.

By creating the position of Fire Marshal and requiring that he or she gather information about the causes and prevention of fires in Section 100.1, and by then authorizing him or her to promote fire safety and to develop rules to eliminate fire hazards in Section 100.35, the legislature clearly intended to assure the fullest possible protection to the public. The context of the statute would dictate that if a particular reading will provide greater protection to the public, then that construction should be chosen.

Section 4.4(5), Code of Iowa, 1977, provides in relevant part:

"In enacting a statute, it is presumed that: * * *

5. Public interest is favored over any private interest."

Since the regulation of apartment buildings by the Fire Marshal would be in the public's interest, we may presume that the legislature intended that they be included within the purview of Section 100.35.

Section 4.6(6) provides that the administrative construction of a statute may be considered when interpreting an ambiguous enactment. "[W]hile not controlling, courts give much weight to the construction of statutes by administrative officials charged with their operation and enforcement. Especially where such construction is of long standing it will not be lightly discarded by the courts." *State ex rel. McElhinney v. All-Iowa Agricultural Association*, 1951, 242 Iowa 860, 868 48 N.W.2d 281, 285 and cases cited therein. *See also Iowa National Industrial Loan Co. v. Iowa State Department of Revenue*, 1974, 224 N.W.2d 437, 440.

The Fire Marshal adopted in 1962 the current rules that set minimum safety standards for "apartment houes", Iowa Administrative Code §680-5.803 (100), and has included the definition of apartment buildings among definitions of other multiple unit housing facilities: hotels, dormitories, lodging or rooming houses and row housing. Iowa Administrative Code §680-5.801(100). We must recognize and give weight to the construction given the statute by the Fire Marshal.

Courts have also held that where a statute has been "reenacted...without

pertinent change", the Legislature's "failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by" the Legislature. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, 1974. In 1976, the Iowa Legislature amended Section 100.35 as part of its criminal code revision (Chapter 1245, Acts of the 66th G.A. (1976), Chapter 4, Section 72), that changed the penalty attached to a violation of its provisions, but did not alter the definition of buildings subject to regulation. It would appear that the Legislature thereby acquiesced in the construction of the statute by the Fire Marshal.

Finally, we must determine whether a construction of Section 100.35 to include apartment buildings with other structures specifically mentioned would be in harmony with "all relevant legislative enactments...so as to give meaning to all if possible." *Matter of Estate of Bliven,* 1975, 236 N.W.2d 366, 369.

Another Chapter, 103, of the 1977 Code of Iowa, involves fire protection measures: Section 103.12 grants to the Fire Marshal rule-making authority similar to Section 100.35 and Section 103.1 describes the buildings to be regulated in a manner substantially similar to the description in Section 100.35. Section 103.1 provides, in relevant part:

"Every...hotel...college or university building,...public meeting place, and all other structures in which persons congregate from time to time, whether publicly or privately owned, shall have at least two means of exit from each story."

The Legislature has construed the language in Section 103.1 to include apartment buildings. In Section 103.7, it is provided, in part:

"1. Hotels,...apartment buildings...required by law to be equipped with fire escapes, shall be equipped with those of class 'A' or class 'B'."

One would be required to construe Section 100.35 to include apartment buildings in order to achieve harmony with the Legislature's construction of the same language in Section 103.1.

It is therefore our opinion that the Fire Marshal is empowered by Section 100.35 to adopt rules relating to fire protection, safety and hazards in apartment buildings.

Inspections of apartment buildings to assure compliance with fire safety regulations must meet certain constitutional requirements, *Camara v. Municipal Court,* 1967, 387 U.S. 523, if the rules promulgated by the Fire Marshal are to be effectively enforced. *State v. Smith,* 1970, 178 N.W.2d 329, 332-33.

July 12, 1977

TAXATION: SALES TAX: §§422.43, 422.48, 422.42(3), Code of Iowa, 1977. The suppliers of body shops are responsible for collection of sales tax from the body shops upon sale of materials such as masking paper, masking tape, thinner and abrasives used in the repair of automobiles, since the body shops are the "consumers or users" of those materials. The fact that a seller (who holds a retail sales tax permit) sells an item or items to a buyer who also holds a retail sales tax permit, is not relevant to the determination of whether such seller is responsible for the collection of sales tax from the buyer. (Kerwin to Pelton, State Representative, 7-12-77) #77-7-3

The Honorable John Pelton, State Representative: You have requested an opinion of the Attorney General with regard to the following two questions:

1. When should the sales tax be collected on the sale of materials such as masking paper, masking tape, thinner and abrasives used in the repair of automobiles in body shops — upon sale by the supplier to the body shop or at the time transferred in conjunction with the furnishing of services by the body shop to the customer?

2. Must a seller, who is the holder of a retail sales tax permit, charge and collect sales tax on those sales which he makes to a buyer who also holds a retail sales tax permit?

At the outset, the statutory setting must be put forth to place the questions you have raised in proper perspective. The Iowa sales tax is imposed by §422.43, Code of Iowa, 1977, which provides, in relevant part, as follows:

"There is hereby imposed a tax of three precent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this division, *sold at retail in the state to consumers or users....*" (emphasis supplied)

According to the foregoing statute, the determination of when sales tax is properly to be collected depends upon when the item or items of tangible personal property are "sold at retail...to consumers or users." Whenever this transaction occurs, the tax is imposed. Section 422.48, Code of Iowa, 1977, provides further that the retailer is responsible for collection of the tax and that the tax is a debt from the consumer or user to the retailer until paid.

In order to determine when the taxable transaction occurs (a sale at retail to consumers or users), the legislative definitions must be consulted. Section 422.42(3), Code of Iowa, 1977, provides the following definition:

" 'Retail sale' or 'sale at retail' means the sale to a consumer or to any person for any purpose, other than for processing or for resale of tangible personal property or taxable services, or for resale of tangible personal property in connection with taxable services...."

The foregoing definition of "retail sale" excludes a sale for resale of tangible personal property itself or in connection with the performance of a taxable service.

Thus, in response to your first question, it must be determined whether the body shops purchase materials such as masking paper, masking tape, thinner and abrasives for resale to their customers or whether the body shops are the consumers or users of those materials.

The terms "consumer or user" are not defined in the Code of Iowa for purposes of the retail sales tax imposed upon the gross receipts derived from sales of tangible personal property. However, the Iowa Supreme Court, in *W. J. Sandberg Co. v. Iowa State Board of Assessments & Review,* 1938, 225 Iowa 103, 278 N.W. 643, construed the meaning of the terms "consumer or user" relative to purchases of certain materials by a shoe repairman. The issue was whether the customer of the shoe repairman or the repairman himself was the "consumer or user" of materials such as bends, strips, taps, and half-soles of leather, cement, glue, wax, thread, nails, polish, plates and rubber and leather heels. The Court held that the shoe repairman was the "consumer or user" of all of the foregoing items an thus that his supplier was required to

collect sales tax from the shoe repairman. However, the Court, in a Supplemental Opinion (225 Iowa 111), modified its original decision to the extent that the customer of the shoe repairman was deemed to be the "consumer or user" of taps and rubber heels, and thus the shoe repairman was required to collect sales tax from the customer on sales of those items.

The Court, in *Sandberg,* gave the following rationale for its decision:

"The point urged by appellant is that, even though the material is used in repairing another person's shoes, and notwithstanding the service charge is one lump sum, the material used is, in fact, a resale of such material. We are inclined to the view that this is too strained and narrow a construction and, when applied to the vocation of shoe repairers, would render the law unworkable and impracticable. Such a rule of construction might be made practical in so far as the use of such articles as rubber heels or the use of taps for a complete job of resoling the shoes is concerned, but, as applied to the numerous other and different repair jobs, which include patchwork of all kinds, necessitating the use of odd and irregular pieces of material and quantities incapable of any fixed or definite price value, the same would be wholly impracticable." (225 Iowa 103 at 107).

With respect to your first question, then, and applying the rationale of the Iowa Supreme Court set forth above, it is reasonable to conclude that the body shops are the "consumers or users" of materials such as masking paper, masking tape, thinner and abrasives, used in the repair of automobiles. Such materials are used in odd and irregular amounts and as such are incapable of any fixed value or price. The Iowa Supreme Court has stated that the use of odd quantities of materials in a repair service does not amount to a "retail sale" as that term is defined in §422.42(3), Code of Iowa, 1977. Thus, the "retail sale" occurs upon sale by the supplier to the body shops of such materials as masking paper, masking tape, thinner and abrasives, and the supplier is responsible for the collection of the sales tax from the body shops on those items.

It should be noted that while the supplier makes a "retail sale" to the body shop of *tangible personal property,* that the body shop thereafter makes a taxable sale to its customer of its *services.* These are two separate taxable transactions. See §422.43, Code of Iowa, 1977.

With regard to your second question, it should first be stated that various items of tangible personal property are purchased by those engaged in the performance of services. The Court, in *Sandberg,* set forth the following:

"The guiding and controlling consideration is 'the disposition of the goods made by the buyer, not the character of the business of the seller or the buyer'." (225 Iowa at 107).

One may be the "consumer or user" of certain items purchased and may, at the same time, be re-selling certain other items to customers. Following the rule in *Sandberg,* whether or not one is a "consumer or user" of a certain item or items depends upon the manner of disposition of such items. Thus, the fact that a seller (who holds a retail sales tax permit) sells an item or items to a buyer who also holds a retail sales tax pemit, does not mean that such seller is not required to collect sales tax from the buyer on the gross receipts derived from such sale. The fact that one holds a retail sales tax permit does not mean that all items purchased by him are thereafter "sold at retail." Nothing within the imposition statute, nor in any other relevant statute,

excludes the gross receipts of any sale from taxation on the ground that both seller and buyer hold retail sales tax permits. Rather, as stated earlier in this opinion, the determination of when sales tax is properly to be collected depends upon when the items are "sold at retail. . . to consumers or users." See §422.43, Code of Iowa, 1977.

Therefore, it is the opinion of this office that the body shops are the "consumers or users" of materials such as masking paper, masking tape, thinner and abrasives used in the repair of automobiles and, therefore, the suppliers are responsible for collection of sales tax from the body shops upon sale of such items. It is the further opinion of this office that the fact that a seller (who holds a retail sales tax permit) sells an item or items to a buyer who also holds a retail sales tax permit, is not relevant to the determination of whether such seller is responsible for the collection of sales tax from the buyer.

July 12, 1977

TAXATION: Mobile Homes Converted to Realty. §§135D.26, Code of Iowa, 1977, 428.4, Code of Iowa, 1977. In the event that a mobile home is converted to real estate pursuant to §135D.26 in 1977, the semi-annual mobile home tax and registration fee for the full calendar year 1977 must be paid. In such a situation, the converted mobile home is not assessed as real estate, for real property tax purposes, until January 1, 1978. Upon determining that the conversion occurred in 1977, the assessor should collect the mobile home vehicle title, registration, and license plates from the owner before January 1, 1978. (Griger to Bauercamper, Allamakee County Attorney, 7-12-77) #77-7-4

Mr. John Bauercamper, Allamakee County Attorney: You have requested the opinion of the Attorney General as follows in your recent letter:

"A mobile home has been properly converted to real estate in conformity with the provisions of Section 135D.26(1), during the middle of a calendar year and prior to July 1. Mobile home license taxes are payable semi-annually.

Our questions are:

1. When, in point of time, is the assessor required to collect and take possession of the mobile home vehicle title, registration, and license plates from the owner?

2. When, in point of time, is the assessor to enter the property on the tax rolls since assessment takes place on January 1?

3. Is the mobile home owner liable for payment of the semi-annual square footage tax and registration fee for the full calendar year in which the conversion takes place?"

Section 135D.26(2), Code of Iowa, 1977, provides in relevant part:

"After complying with the provisions of subsection 1, the owner shall notify the assessor who shall inspect the new premises for compliance. . . When the mobile home is properly converted, the assessor shall then collect the mobile home vehicle title, registration, and license plates from the owner and enter the property upon the tax rolls."

The semi-annual registration fee on mobile homes is imposed in §321.123 (3), Code of Iowa, 1977. This fee is not prorated or refunded and this statute provides that the semi-annual tax set forth in Chapter 135D of the Code "shall

be paid at the same time that the registration fee is paid and the issuance of the registration certificate and plate herein provided shall be subject thereto."

The semi-annual property tax on mobile homes is imposed by §135D.22, Code of Iowa, 1977. The tax on mobile homes coming into Iowa from out of state and those parked and put to use after January 1 or July 1 is prorated. Section 135D.24 provides in relevant part:

"The semi-annual tax provided herein shall be due and payable to the county treasurer semi-annually on or before January 1 and July 1 in each year; and shall be delinquent February 1 and August 1 in each year... The semi-annual payment of taxes and license may be paid at one time if so desired."

There is no statutory provision for refunding of semi-annual taxes paid.

Section 135D.26 expressly makes a mobile home, which has been converted to real estate pursuant to this statute, eligible for homestead and military service tax credits. Homestead tax credits are not granted if no application thereof is made to the local assessor on or before July 1 of each year. See §425.2, Code of Iowa, 1977. Likewise, military service tax credits must be applied for on or before July 1 of each year. See §§427.5 and 427.6, Code of Iowa, 1977. 1970 O.A.G. 293, 1946 O.A.G. 37.

Real property is assessed and valued for property tax purposes as of January 1 of the year of the assessment by the local assessor. See §428.4, Code of Iowa, 1977.

In essence, your questions concern the time frame for which a mobile home converted to real estate prior to July 1 is to be subject to the semi-annual mobile home tax and when such converted mobile home becomes subject to the property tax on real property. Your questions will be answered herein in the reverse order in which they were asked by you.

Your third question is answered in the affirmative. As you point out, §428.4 provides for the valuation of real property, for property tax purposes, as of January 1 of the year of the assessment. If the status of the property on January 1 was that of a mobile home not yet converted to realty, no real property assessment could have been made as of that date. However, the mobile home would have been subject to the semi-annual mobile home tax on January 1 and the mobile home owner could have paid the January 1 installment of the semi-annual tax or the entire mobile home tax for the year at that time. Construction of statutes should be reasonable, sensible, and made to comport with the Legislative intent and construction resulting in unreasonable and absurd consequences should be avoided. *Isaacson v. Iowa State Tax Commission,* 1971, Iowa, 183 N.W.2d 693. There are no statutory provisions under the circumstances herein, to somehow prorate the mobile home tax and real property taxes by the termination of the former and commencement of the latter when the mobile home is converted to real estate. Therefore, it seems reasonable to conclude that the Legislature intended, in the year of conversion, for either the full mobile home tax to apply or the real property tax to apply. A contrary interpretation would have the mobile home tax due and payable on January 1 and then, upon conversion of the property, it would be assessed as real property for the calendar year of the conversion, taxes payable in the fiscal year commencing on July 1 in the calendar year succeeding the year of conversion. In other words, the contrary interpretation of the mobile home statutes would unreasonably and absurdly require

the mobile home owner converting the mobile home to real estate to be assessed for both mobile home and real property taxes by the assessor for the same period for which other real property owners would only be assessed for real property taxes. And, if the conversion occurred after July 1, the mobile home owner would lose any benefits he could have obtained from the military and homestead credits contemplated by §135D.26, if the contrary interpretation were accepted. A more rational and reasonable interpretation of the interplay between the mobile home tax statutes and real property tax statutes is that the mobile home owner would be liable for the semi-annual tax and registration fees for the full calendar year in which conversion occurs, whether before or after July 1, and the mobile home would, for January 1 of the succeeding year, be assessed as real estate. Such construction of the mobile home tax and real property tax statutes would treat the mobile home owner in a manner consistent with other real property owners, for all purposes, when the mobile home is converted to real estate. Had the Legislature intended to depart from the traditional time frame for assessment of real property for property tax purposes or even prorate the mobile home tax and real property tax during the year of conversion, one would have expected such departure and proration to be clearly provided for. Taxing statutes are strictly construed against the taxing body and it must appear from the statutory language that the tax assessed was clearly intended. *Scott County Conservation Bd. v. Briggs,* 1975, Iowa, 229 N.W.2d 126.

The above answer to your third question contains the answer to your second question, namely, that the assessor is to enter the converted mobile home on real property tax rolls for the calendar year assessment period succeeding the year of the conversion. Thus, if the conversion occurs in 1977, the assessor will assess the mobile home as real estate as of January 1, 1978.

Your first question appears to pertain to the last sentence of §135D.26 (2) which provides:

"When the mobile home is properly converted, the assessor shall then collect the mobile home vehicle title, registration, and license plates from the owner and enter the property upon the tax rolls."

As previously noted, if the mobile home is properly converted to real estate at any time in 1977, it is placed on the real property tax rolls as of January 1, 1978. That being the case, the assessor must collect the title, registration, and license plates, and return them to the county treasurer for cancellation pursuant to §§135D.26(2) and 441.17(10), Code of Iowa, 1977, but there is no requirement that he immediately do so upon being notified by the mobile home owner of the conversion and, upon investigation, determining that the mobile home is properly converted pursuant to the provisions of §135D.26. The Assessor should collect the title, registration, and license plates prior to when the converted mobile home is to be assessed as real estate. Consequently, when an assessor determines that the mobile home was properly converted in 1977, he should collect the title, registration, and license plates after the conversion and before January 1, 1978.

July 14, 1977

STATUTORY CONSTRUCTION: Temporary restriction on acquisition of agricultural lands by certain corporations — Chapter 172C, Code of Iowa, 1977. Corporations as defined in §172C.1 can acquire agricultural lands during the moratorium period established by §172C.1 for the purpose

of constructing and operating a research and development farm to improve, research and develop superior genetic seed swine but may not acquire such lands for possible future expansion. (C. Peterson to James M. Redmond, State Senator, 7-14-77) #77-7-5

The Honorable James M. Redmond, State Senator: You have requested the opinion of the Attorney General as to whether Kleen Leen, Inc., a corporation in the business of selling breeding swine to other breeders and farmers, is permitted under Iowa law to acquire agricultural land in the State for the purpose of constructing and operating a research and development farm to improve, research and develop superior genetic seed swine.

The proposed research and development farm would house approximately 460 breeding female swine and 32 sires producing approximately 8,300 pigs per year. From those pigs, 1,600 boars and 1,600 gilts per year would be sold as breeding stock to Kleen Leen producers and individual hog producers to improve their herds. Approximately 3,600 of the pigs would be sold as feeder pigs to local farmers as culls for their feed lots. Ap-- proximately 1,100 cull sows and unsaleable boars and gilts would then be sold at slaughter market. One of the units to be constructed on the farm would house research boars for the production of semen for artificial insemination.

The building site for the research and development farm, if it is ideal, would require 12 acres for the buildings and lagoons for the farrow-to-finish unit, 3 acres for the building and lagoons for the research unit and approximately 2 acres for the housing of employees. If the building site is not ideal, the land requirements could increase by as much as 5 acres.

In addition to the building site, the Iowa Department of Environmental Quality requirements (based upon 460,000 lbs. of pork) dictate that the farm have access to 73.6 acres for manure disposal. The Iowa Department of Environmental Quality may also require some buffer area around the buildings to protect the environment and such buffer zone would also promote hog health standards for the farm. Kleen Leen, Inc., intends to cash rent or cropshare that land to one or more local farmers.

We are advised that Kleen Leen, Inc., is a corporation as defined in §172C.1 and so is subject to the limitations imposed by Chapter 172C, Code of Iowa, 1977.

You ask specific questions as follows:

"1. Are the 'commercial sales' of feeder pigs, cull sows and unsaleable boars and gilts as well as the cash rent or crops raised on the agricultural land where the manure disposed 'incidental to the research or experimental objectives of the corporation'?"

"2. Does the language 'held for potential expansion of its physical facilities' in Section 172C.5 of the Iowa Code apply to Section 172C.4 to enable Kleen Leen, Inc., to acquire 120 acres of land when the physical requirements and the requirements of the Iowa Department of Environmental Quality would indicate that depending upon the land, it would need approximately 95 acres for the research and development farm?"

Pertinent to your questions are portions of the Code of Iowa, 1977, as follows:

"Section 172C.1 Definitions. For the purposes of this chapter:

"1. 'Corporation' means a domestic or foreign corporation as defined in Chapter 491, 496A, 497, 498, 499, 504 and 504A which owns or leases agricultural land or is engaged in farming.

"5. 'Agricultural land' means land suitable for use in farming.

"6. 'Farming' means the cultivation of land for the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horitcultural crops, grazing or the production of livestock. Farming shall not include the production of timber, forest products, nursery products, or sod and farming shall not include a contract where a processor or distributor of farm products or supplies provides spraying, harvesting or other farm services."

"Section 172C.3 Penalties for prohibited operation — Injunctive relief. Any processor violating the provisions of Section 172C.2 shall, upon conviction, be punished by a fine of not more than fifty thousand dollars. The courts of this state may prevent and restrain violations of this chapter through the issuance of an injunction. The attorney general or a county attorney shall institute suits on behalf of the state to prevent and restrain violations of this chapter."

"Section 172C.4 Temporary restriction on increase of holdings. For a period of three years from August 15, 1975, no corporation, other than a family farm corporation or an authorized farm corporation shall, either directly or indirectly, acquire or otherwise obtain or lease any additional agricultural land in this state. However, the restrictions provided in this section shall not apply to the following:" * * *

"2. Agricultural land acquired by a corporation for research or experimental purposes, if the commercial sales from such agricultural land are incidental to the research or experimental objectives of the corporation, and agricultural land acquired for the purpose of testing, developing or producing seeds, animals, or plants for sale or resale to farmers or for purposes incidental to those purposes. * * *

"4. Agricultural land acquired by a corporation for immediate or potential use in non-farming purposes. * * *

"Section 172C.5 Reports by corporations. All corporations, except where the corporation is acting in a fiduciary capacity, which own or lease agricultural land in the State of Iowa, or which own or lease any land on which poultry or livestock are confined for feeding or other purposes for ten days or more, or which contract for keeping and feeding poultry or livestock, or which contract for the growing of agricultural crops, fruits or other horticultural products in the State of Iowa, shall file with their annual report, on forms approved pursuant to the provisions of Chapter 17A and supplied by the secretary of state, the following additional information, unless otherwise provided: * * *

"6. In the case of a corporation holding agricultural land for immediate or potential use in nonfarming purposes, a statement specifying for what purpose such land is being held. * * *

"This section shall not apply to land held for the purpose of railroad or highway rights of way, nor shall it apply to lots within city limits which are smaller than twenty acres.

"The annual report from any corporation owning agricultural land in Iowa used for research, testing or experimental purposes or held for the potential expansion of its physical facilities shall include only the information required by subsections 1 to 6.

"Corporations organized under Chapter 504, shall file only the additional report required by this section."

The primary rule in construction of a statute is to ascertain and give effect to the intention of the Legislature (*In re Klug's Estate,* 1960, 251 Iowa 1128, 104 N.W.2d 600) and the intent of the Legislature is to be gathered from the statute itself (*Hill v. Electronics Corp. of America,* 1962, 253 Iowa 581, 113 N.W.2d 313).

Chapter 172C was enacted by the Sixty-sixth General Assembly, 1975 Session (effective August 15, 1975) as House File 215 entitled "an Act prohibiting any processor or limited partnership with certain exceptions from owning, controlling or operating a feedlot in Iowa, providing for divestment of prohibited operations, providing a moratorium on acquisition of agricultural land by certain corporations, requiring reports from corporations, limited partnerships, fiduciaries, nonresident aliens and nonresident alien corporations, and providing penalties," with the following explanation of the Act:

"This bill prohibits certain corporations from engaging in farming operations and from owning farm lands except under specified conditions. It provides a method whereby corporations shall dispose of farm lands, provides that family farm corporations and authorized corporations may engage in farming, requires annual reports of farm corporations and prohibits certain corporate entities from engaging in agricultural industry. Penalties for violations are provided."

Although none of the provisions of Chapter 172C have been construed by the Iowa Supreme Court, the legislative intent as expressed in the title of House File 215 and the explanation thereof as well as the clear and explicit language of the statute itself evidence a general legislative scheme to prohibit certain feedlot activities by certain corporations and to establish a three-year moratorium on the acquisition of additional agricultural lands by certain corporations unless the acquisition is within the exemptions listed in §172C.4. Subsection 2 of §172C.4 states the exemption from the moratorium in almost the very terms used to describe the operation of Kleen Leen, Inc. Under these circumstances, it seems clear that Kleen Leen, Inc., can legally acquire agricultural lands for the purposes stated in §172C.4(2).

Exceptions to a general scheme or prohibition are construed narrowly, however, and the acquisition of agricultural lands for potential future expansion not being expressly exempted therefrom are within the statutory prohibitions. *Wood Bros. Thresher Co. v. Eicher,* 1942, 231 Iowa 550, 1 N.W.2d 665; *State ex rel. Weede v. Iowa Southern Utilities Co. of Delaware,* 1942, 231 Iowa 784 2 N.W.2d 372, modified 4 N.W.2d 869.

Section 172C.5 deals with annual reports by corporations and does not purport to exempt acquisitions for expansion of physical facilities. At the time the provisions of Chapter 172C became effective, it seems almost certain that a considerable quantity of agricultural land was held by corporations for the potential expansion of its physical facilities. Under the terms of the statute, corporations are not prohibited from holding agricultural lands acquired prior to the effective date of the moratorium, rather it is the acquisition of additional agricultural land that is prohibited during the period delineated. Section 172C.5 lists the information to be included in the required annual report by corporations, limiting the scope of the report

where the agricultural land is held for the potential expansion of its physical facilities.

In summary, we are of the opinion that corporations as defined in §172C.1, Code 1977, can acquire agricultural lands during the moratorium period established by §172C.4 for the purpose of constructing and operating a research and development farm to improve, research and develop superior genetic seed swine but may not acquire such lands for possible future expansion.

July 14, 1977

MUNICIPALITIES: Libraries — Chapter 303B, Code of Iowa, 1977; §393B.9, Code of Iowa, 1975. A municipality is only mandated to levy a tax or appropriate money for library services if it currently receives them or desires to contract for or establish them. (Blumberg to Correll, Black Hawk County Attorney, 7-14-77) #77-7-6

David H. Correll, Black Hawk County Attorney: We have your opinion request of June 23, 1977, regarding the taxing requirement of Chapter 303B of the Code. The City of Elk Run Heights has no library. It questions whether the 6¾ cents per thousand dollars assess value tax in §303B9 will generate enough revenue to enable it to enter into a contract to provide library services. The tax levy will generate $393.20, which, because it is not enough to either contract for library service or establish its own library, will remain in the City fund. You ask what the City should do with the money.

The purpose of Chapter 303B, 1977 Code of Iowa, as expressed in §303B.1, is to provide supportive library services to existing libraries and to individuals with no other access to library service and to encourage local financial support of public library service in those localities when it is inadequate or nonexistent. 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 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 country 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 thereof when all or a portion of the funds are obtained from a source other than taxation for the purpose of proving [sic] financial support to the public library which provides library services within the respective jurisdictions."

In contrast, see this section as it was in the 1975 Code:

"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."

There was no doubt under the old section that municipalities with public libraries receiving services under §303B.6 had to levy a tax or appropriate money to fund said library.

The problem arises because the section is now so unclear. Ordinarily, a change in the language of a statute implicates an intention to change its meaning. *Des Moines Ind. Com. School District v. Armstrong,* 1959, 250 Iowa 634, 95 N.W.2d 515. An exception is where an amendment clearly expresses what was previously supposed or intended to be the law. *Hansen v. Iowa Employment Security Comm'n.,* 1948, 239 Iowa 1139, 34 N.W.2d 203. Applying these cases, it could be said that a change in meaning was intended. Although the wording has changed and is now ambiguous and quite unclear, it still appears to be very similar to the previous wording. If a change was intended it could only be found in the words "for the purpose of proving [sic] financial support to the public library which provides library services within the respective jurisdictions."

There are two keys to this phrase. The first is what is meant by "respective jurisdictions." That could refer either to the cities and counties mentioned previously in the section, or it could refer to the regional library boards. We feel that the proper interpretation is that it refers to the cities and counties. Thus, we need to define what is meant by "the public library which provides library services within the respective jurisdictions." The previous wording referred to those libraries within cities which received services pursuant to §303B.6. If, as we stated, any change was intended, it could only be that the Legislature now intends cities to help fund those public libraries providing services to them, whether or not the library is located in those cities.

Applying that interpretation to your situation, if Elk Run Heights has either a public library or receives such services from another public library under Chapter 303B, it must either levy a tax of *at least* 6¾ cents per thousand dollars of assessed value, or appropriate the monetary equivalent to help support that library. The words "at least" are italicized because that taxable amount is a minimum. A city may levy more if it feels the need. But, what application does this section have if Elk Run Heights does not have its own library, nor receives library services from another library?

The purpose of this Chapter is quite clear — to make library services available to citizens of this State. With that in mind, it would not be inconsistent with that purpose to require all cities to levy a tax or appropriate money in order to receive library services. There can be no doubt that cities could contract with one another to share library services. This can be done by the cities themselves or through the Regional library board. It also appears that cities can give the money directly to the regional board for library services. See, §303B.6(1). If we view the entire Chapter, it is not unreasonable that a city is mandated to levy a tax or appropriate money in order to have library services. However, there is nothing in the Chapter which mandates that a city or county must contract with another for these services. Nor is there anything mandating that the regional board must provide such services if the city collects taxes or appropriates money for the services and gives it to the board. That inconsistency is puzzling, for a city could tax or appropriate the money, yet not receive any services because the amount of money is determined not to be enough. This leads us back to your original question of what to do with the money if services cannot be contracted.

Generally, money appropriated from the general fund to other funds during the fiscal year reverts back to the general fund at the end of the year if unexpended. If a tax is levied pursuant to §303B.9, a special "fund" is created. Any money left over in that "fund" need not be returned to the general fund.

If the monetary equivalent is appropriated out of the general fund it automatically reverts back to the general fund. Thus, the money Elk Run Heights receives from the special tax of §303B.9, would remain in that special "fund" and carry over to the next year for library purposes.

The only logical interpretation we can place on §303B.9 is that if a city wishes to receive or receives library services it will have to help fund them. In other words, a city will have to pay for what it wants and gets. Therefore, if a city wishes to receive such services it will have to levy the tax or appropriate the equivalent in order to contract for them. If a city already is receiving such services it has a duty to help fund them. However, if a city does not want such services (we assume the citizens will have so expressed their views) it need not levy or appropriate any monies, for it should not have to pay for what it will not receive. If the Legislature intended a different result it did not so express it. In clarification of a prior opinion, 1976 OAG 677, where we stated that home rule permitted a city to opt not to levy the tax, even if such tax was mandatory, we meant that home rule would permit a city to opt between levying the tax or appropriating the monetary equivalent. We find further support for our interpretation of this section in that prior opinion wherein we held that the Legislature intended to mandate local support of public libraries "regardless of whether or not *the local public library* receives regional library services." [Emphasis added].

July 14, 1977

CONSTITUTIONAL LAW: Mandatory Immunization: §§147.80(3) and 150.11, Code of Iowa, 1977; H.F. 163, Acts of the 67th G.A. (1977). Section 1(4) of H.F. 163 is not unconstitutional. Annual immunization is not necessarily required. (Blumberg to Taylor, State Senator, 7-14-77) #77-7-7

Honorable Ray Taylor, State Senator: We have your opinion request of May 5, 1977, regarding H.F. 163, 67th G.A., an act relating to immunization of school children. You asked the following:

"House File 163, Section 1, subsection 4, paragraphs a and b, appear to have the following effect:

"1. Paragraph a would limit the authority to granting exemption to only one class of professional licensed to practice in this state.

"2. Paragraph b would appear to limit the religious exemption to *only* an adherent or member of a recognized religious denomination with tenets and practice which conflict with the immunication process.

"3. Paragraph b would give the commissioner of health the authority to override the exemption in times of emergency or epidemic as declared by him."

"In view of these or other effects, would House File 163, particularly Section 1, subsection 4, paragraphs a and/or b, be unconstitutional as violative of the first amendment of the United States Constitution or violative of the equal protection or due process clauses of the United States or Iowa constitutions?"

"Secondly, would Section 1, subsection 5, of the bill require annual immunization?"

Section 1(1) and (4) of H.F. 163 provides:

"1. Every parent or legal guardian shall assure that his or her minor children residing in the state have been adequately immunized against

diphtheria, pertussis, tetanus, poliomyelitis, rubeola, and rubella, according to recommendations provided by the state department of health subject to the provisions of subsection three (3) and four (4) of this section."

. . .

"4. Immunization is not required for a person's enrollment in any elementary or secondary school if that person submits to the admitting official either of the following:

"a. A statement signed by a doctor, who is licensed by the state board of medical examiners, in which it is stated that, in the doctor's opinion, the immunizations required would be injurious to the health and well-being of the applicant or any member of the applicant's family or household; or

"b. An affidavit signed by the applicant or, if a minor, by a legally authorized representative, stating that the immunization conflicts with the tenets and practice of a recognized religious denomination of which the applicant is an adherent or member; however, this exemption does not apply in times of emergency or epidemic as determined by the state board of health and as declared by the commissioner of health."

This act was passed because of a sharp increase in the number of measles cases in this State and across the nation. It has generated a substantial amount of controversy which appears to be at the root of this opinion request. These questions came up during the month or so that this bill was debated.

Your first two questions concern the constitutionality of §1(4). In preface to the following discussion, we have held many times that we must presume a statute to be constitutional until it is evident that it clearly, palpably and without doubt infringes the constitution; that all reasonable doubts must be resolved in favor of constitutionality; and, that every reasonable basis supporting the statute must be negatived. *Lewis Consolidated School District v. Johnston,* 1964, 256 Iowa 236, 127 N.W.2d 118; *Dickinson v. Porter,* 1949, 240 Iowa 393, 35 N.W.2d 66; *Avery v. Peterson,* 243 N.W.2d 630 (Iowa 1976); *Lee Enterprises, Inc. v. Iowa State Tax Commission,* 162 N.W. 2d 730 (Iowa 1968). We must adhere to these pronouncements. We feel, however, compelled to at least give some discussion on this issue.

Your first question concerns the fact that only those doctors licensed by the board of medical examiners can exempt a child from the requirements of this act. Pursuant to §147.80(3) and Chapter 148, those licensed by the board of medical examiners are physicians and surgeons, osteopathic physicians and surgeons, and osteopaths. Thus, others that can be called doctors (podiatrists, chiropractors, dentists and optometrists) do not fall within the provisions of §1(4). The fact that some are excluded does not render the act unconsitutional. There appears to be a sufficient and reasonable basis for the distinction. Physicians and surgeons and osteopathic physicians and surgeons, pursuant to *State v. Boston,* 1939, 226 Iowa 429, 278 N.W. 291, reh. 284 N.W. 143, can practice the entire field of healing arts unless specifically prohibited by the Legislature. All other practitioners, pursuant to *Boston,* may only practice a limited area of healing arts as specifically permitted by the Legislature. Osteopaths, under Chapter 150 of the Code, although more restricted in their practice than physicians and surgeons, may still perform minor surgery, prescribe drugs, and do those things related to those procedures such as urinalysis, blood drawing and the like, short of major surgery. In addition, §150.11, provides that there are no new osteopathic licenses after

May 10, 1963, thereby eventually eliminating this practice. The remaining professions are more restricted. Those licensed as such generally could not legally be able to perform the tests and medical procedures necessary to determine whether a child's health would be adversely affected by an immunization. The Legislature's recognition of this does not necessarily render the act unconstitutional.

Your second question refers to the constitutionality of exemption granted for religious reasons. That exemption is narrowly applied to those tenets and practices of a recognized religious denomination. You question this subsection because of the absence of a "conscience clause" — a clause granting an exemption because of ethical or moral beliefs outside of a recognized religion. Amendments to the act in the form of a "conscience clause" were offered. S-3380 failed on April 25, 1977, and H-3997 failed on May 6, 1977. This indicates a specific intent not to permit beliefs outside of a recognized religion as an exemption from immunization. *Lenertz v. Municipal Court of City of Davenport,* 219 N.W.2d 513, 516 (Iowa 1974). You included an opinion from the Pennsylvania Attorney General which held that deeply and sincerely held beliefs of an individual based upon ethical or moral considerations fell within the exemption granted by that state's Legislature from immunizations. However, the statute in question merely provided an exemption based upon religious grounds, whereas ours specifically limits it to a recognized religion. Therefore, that opinion is not applicable.

In *Cude v. State,* 377 S.W.2d 816 (Ark. 1964), an instance of state required immunization, it was held that parents could not refuse immunization of their children based upon religious grounds where the regulation provided no such exemption. The court held, citing to other cases, including *Zucht v. King,* 260 U.S. 174, 43 S.Ct. 24, 25, 67 L.Ed. 194 and *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, that compulsory vaccinations do not deprive citizens of liberty under the United States Constitution, and that it is within the police power of a state to provide for compulsory vaccination. It was also so held in *Wright v. DeWitt School District No. 1 of Arkansas County,* 385 S.W.2d 644 (Ark. 1965). There, the court stated that an individual's freedom to act according to religious beliefs is subject to a reasonable regulation for the benefit of society as a whole. In *Wisconsin v. Yoder,* 1971, 406 U.S. 205, 220, the Supreme Court indicated that activities of individuals, even when religiously based, are often subject to regulation by a state in the exercise "of their undoubted power to promote the health, safety and general welfare...." See also, *Gillette v. United States,* 1971, 401 U.S. 437; *Braunfeld v. Brown,* 1961, 366 U.S. 599; *Prince v. Massachusetts,* 1944, 321 U.S. 158; and, *Reynolds v. United States,* 1879, 98 U.S. 145.

Texas has an immunization statute similar to H.F. 163, including an exemption for grounds based solely upon a recognized religion. There is no other type of "conscience clause." In *Itz v. Penick,* 493 S.W.2d 506 (Tex. 1973), it was held that such a statute was not unconstitutional on grounds of equal protection, due process and the like. The court stated (at 509):

"A much more enlightened view of the necessity for immunization of students attending elementary and secondary schools and institutions of higher education in order to lessen the spread of communicable diseases has been adopted by the Legislatures and approved by the courts of Texas and a majority of the other states during the past half century. All of appellants'

points of error have been heretofore assigned in challenging the constitutionality of compulsory immunization statutes, city ordinances or school disrict regulations and overruled...."

"A great majority of the states have enacted compulsory or local option immunization laws. These statutes were the subject of frequent attack in the early years of the century and were universally upheld as proper exercises of the police power for the protection of the health and safety of the citizenry. See *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643; *Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194; *Commonwealth v. Pear*, 183 Mass. 242, 66 N.E. 719; *French v. Davidson*, 143 Cal. 658, 77 P. 663; *Ragler v. Larner*, 284 Ill. 547, 120 N.E. 575; *Blue v. Beach*, 155 Ind. 121, 56 N.E. 89; *Hartman v. May*, 168 Miss. 477, 151 So. 737; In re Rebenak, 62 Mo.App. 8; *State v. Drew*, 89 N.H. 54, 192 A. 629; *Matter of Biemeister*, 179 N.Y. 235, 72 N.E. 97; *State ex rel. Milhoof v. Board of Education*, 76 Ohio St. 297, 81 N.E. 568; *Stull v. Reber*, 215 Pa. 156, 64 A. 419; *State ex rel. Cox v. Board of Education of Salt Lake City*, 21 Utah 401, 60 P. 1013." [citations omitted]

Based upon the above we cannot hold §1(4) to be unconstitutional.

Your final question is whether §1(5) requires annual immunization. That section provides:

"A person may be provisionally enrolled in an elementary or secondary school or licensed child care center if the person has begun the required immunizations and if the person continues to receive the necessary immunizations as rapidly as is medically feasible. The state department of health shall promulgate rules relating to the provisional admission of persons to an elementary or secondary school or licensed child care center."

We see nothing in this provision which specifically requires a child to receive annual immunizations. The act requires immunization from six diseases. If the vaccinations on any of them are only good for one year, then annual immunization would be required. However, if the vaccination lasts for a longer period of time, annual immunization would not be required. In other words, the effectiveness of the vaccination is the controlling factor.

Accordingly, we are of the opinion that H.F. 163 of the 67th G.A. (1977) is not unconstitutional. Annual immunization is not necessarily required.

July 14, 1977

SCHOOLS: Teachers. §294.2, Code of Iowa, 1977. The State Board of Public Instruction is not authorized to apply Rule 670.13.18 to require a teacher holding a permanent professional certificate to take course work in human relations education. (Nolan to Benton, State Superintendent of Public Instruction, 7-14-77) #77-7-8

Dr. Robert D. Benton, State Superintendent, Department of Public Instruction: This is written in response to your request for an opinion on the following:

"The State Board of Public Instruction has adopted human relations requirements for teacher education and certification [670-13.18(257)], and has directed me to request an Attorney General's Opinion as to whether such rules could be applicable to teachers holding the permanent professional certificate.

"Rules 670-14.2(257) states, 'The permanent professional certificate is valid throughout the lifetime of the holder except when revoked or suspended

for cause, and for service as indicated by the endorsement or endorsements appearing thereon.'

"Taking Rule 670-14.2(257) together with Section 294.2, Code 1975, may the State Board of Public Instruction apply the human relations requirement to teachers holding the permanent professional certificate?"

Section 294.2 of the Code provides:

"No regulations or orders by the state superintendent of public instruction or the board of educational examiners with reference to the qualifications of teachers, in regard to having taken certain high school or collegiate courses or teachers training courses, shall be retroactive so as to apply to any teacher who has had at least three years' successful experience in teaching; and no teacher once approved for teaching in any kind of school shall be prevented by such regulations or orders from continuing to teach in the same kind of school for which he has previously been approved; provided, however, that this section shall not be construed as limiting the duties or powers of any school board in the selection of teachers, or in the dismissal of teachers for the inefficiency or for any legal cause."

Since a holder of a permanent professional certificate must have had four years of "successful teaching experience, [I.A.C. §670-14.3(257)], each such holder meets the experience requirement of §294.2 of the Iowa Code. Thus, a teacher with a permanent professional certificate could not now be required to take additional course work to meet the recently established departmental human relations requirement, regardless of whether the "teacher training courses" previously completed by such individual included the studies required in Rule 670-13.21(257) of the Iowa Administrative Code.

July 14, 1977

COUNTIES: Public Defender. Chapter 336A, Code of Iowa, 1977, authorizes a single office of Public Defender and where two or more counties join together to finance such office one of the staff of the office of Public Defender may be assigned to work full time in but one of the cooperating counties while other members of the staff serve more than a single county. (Nolan to Hoffman, Lee County Attorney, 7-14-77) #77-7-9

Mr. James P. Hoffman, Lee County Attorney: You have requested an Attorney General's opinion concerning the provisions of Chapter 336A, 1975 Code of Iowa, pertaining to the compensation for the office of public defender. In your letter you state:

"In November of 1976, Lee, Des Moines, Henry, and Louisa Counties joined together to form a Public Defender's Office. Des Moines and Lee Counties have each agreed to be responsible for 40% of the County share funding for this program, with Henry County contributing 15% and Louisa County contributing the remaining five percent of the County share of the cost of this program.

"The Lee County Contribution level is designed to pay in full the costs of one Attorney who is to work full time in Lee County and to cover the costs of his office expenses, when taken together with the proportional share of crime commission funding.

"The Public Defender's Office will have three attorneys working in the office. Two attorneys will be based in an office in Des Moines County and will serve Des Moines County, Henry, and Louisa Counties. A third attorney will be based in Lee County and serve only Lee County. The Public

Defender's Office will be under the supervision of a five member commission with at least one member of the commission from each of the respective counties.

"One of the Public Defenders who will work out of the Des Moines County office is the former Des Moines County Public Defender. He will retain his salary of $19,000 per year, the same salary as that of the Des Moines County attorney, the highest paid County Attorney within the four counties making up the Public Defender system. His assistant will be hired at yet undisclosed salary.

"The Public Defender whose office will be in Lee County is a former Lee County Public Advocate, a term used because his appointment did not conform to the appointment procedure under Chapter 336A and his duties contained one additional duty than those enumerated in Chapter 336A. The Lee County Public Advocate formerly received a salary of $18,000 the same as the Lee County Attorney. Under the multi-County, the Public Defender assigned to Lee County will receive a salary of $19,000.

"The issues that are presented by these facts are:

"1. Does Section 336A require that if two or more counties joined together to finance a Public Defender's Office, only one office may be established.

"2. If the answer is yes, does a Public Defender system which in fact has three counties sharing expenses for a Public Defender and an Assistant Public Defender who devote full time to work in the same three counties and a fourth county which has one Public Defender working full time in that county, with all of his salary and funding for that office going first into a common fund, and then back to the contributing county for the support of that county's Public Defender constitute one office.

"3. If the answer to the foregoing question is no, may the Public Defender in that fourth County, Lee County, be paid a greater salary than the Lee County Attorney's salary."

In response to your request, we have examined the provisions of §336A.5, Code of Iowa, 1975, which provides that the compensation for the Public Defender shall be fixed by the supervisors, and shall not be more than that paid by the highest paid county attorney "of the county or counties the public defender serves."

The matter as we see it can only be determined by the agreement entered into by the member counties. Assuming that the boards of supervisors of the four counties have agreed to establish a single Public Defender office, it follows that that office was established to serve all participating counties. It does not follow that all persons on the Public Defender staff must necessarily be located at the same place or that the assignment of duties by district, county or region disturbs the integrity of the single Public Defender concept. The statute authorizes the public defender to appoint as many assistant attorneys as the board of supervisors consider necessary and at a compensation to be fixed by the county boards of supervisors. We understand this to be an underlying feature of the joint agreement. Accordingly, it is the opinion of this office that the first two questions which you raise must be answered affirmatively, and that the answer to these questions disposes of your third question.

July 14, 1977

CRIMINAL LAW: Use of Public Property for Private Purposes: §§330.21,

364.1, 364.2, 740.20 and 740.22, Code of Iowa, 1977. An airport commission has no authority to authorize, by resolution, the private use of public property by employees. If the public property is so used, voting in favor of the resolution may be a violation of §740.20. The fact that the employees so use the property pursuant to the resolution may not constitute a sufficient defense to a criminal charge under §§740.20 and 740.22. (Blumberg to Redmond, State Senator, 7-14-77) #77-7-10

Honorable James M. Redmond, State Senator: We have your opinion request of June 16, 1977, regarding the private use of airport property by employees. Under your facts, an airport commission adopted a resolution permitting its employees the use of airport property during nonbusiness hours. We do not know what type of use the employees will make of the property. However, that may not be crucial to our determination. Your questions are:

"1. Does the Cedar Rapids Airport Commission have authority under Iowa law to authorize use of public property for private use as either part of an employee benefit program or in lieu of or as a substitute for money wages? Does it make any difference that the Commission found such a program to be in the public interest?

"2. If the answer to the above questions are negative, does the action of those commissioners voting in favor of Resolution 2-3-77 constitute permission for public property to be used or operated for private purposes and therefore a violation of Section 740.20?

"3. Does the private use of public property by airport employees under the apparent authorization of the Resolution 2-3-77 constitute a violation of §740.20 of the Iowa Code?"

Section 740.20, 1977 Code of Iowa, provides:

"*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 the state, shall use or operate the same, or permit the same to be used or operated for any private purpose."

Section 740.22 prescribes the penalty for violation of §740.20 as a misdemeanor. We find no cases regarding §740.20. However, several opinions from this office exist regarding that section. See 1938 OAG 837, 1940 OAG 116, 1972 OAG 352, 1976 OAG 69, and 1976 OAG 339.

In the 1938 opinion, the question was whether a board of supervisors could authorize the use of county machines to grade private roads that entered onto county roads. Even though the private individuals offered to pay for the service, it was held that such would be a violation of §740.20 (then §13316-el). It was specifically stated that the board had no authority to permit the use of public property for private purposes, especially in light of the statute. The 1972 opinion emphasizes that §740.20 does not allow anyone to permit the use of public property for private purposes.

An airport commission, pursuant to §330.21, has all the powers of the city or county which owns the airport. Although cities do have home rule, we do not believe that home rule would permit the airport commission to do something contrary to §740.20. See, §§364.1 and 364.2, and Amendment 25 (1968), §38A, Art. III, Iowa Constitution. Nor do we believe that the belief such uses would be in the public interest is sufficient to permit such a resolution.

The key is the use to which the property is put. If the use is for the government, then who uses it or when is not necessarily controlling. However, if the property is used for a private purpose, even by public employees, then, as seen in the previous opinions, the use is improper.

We cannot give you a definitive answer to your last two questions. The first of those is whether merely voting for such a resolution results in a violation of §720.40. There must be actual use of the property for private purposes before §740.20 can be operational. Thus, the mere voting for a resolution permitting such a use in the future is not sufficient without the actual use. If the property is used for a private purpose, the permission of such use by a resolution may be a violation of §740.20. This is, of course, dependent upon the facts.

Your last question concerns whether the private use of the property pursuant to the resolution relieves those individuals of the consequences of §§740.20 and 740.22. The statute in question is quite clear. It prohibits the use of public property for a private purpose by an employee. In the above cited prior opinions, we held each time that §740.20 prohibited the private use of public property by any employee under any circumstances. Although we cannot state what a court or jury will do with such facts, we do not believe that such use of private property pursuant to a resolution would constitute a sufficient defense to the criminal charge against an employee.

Accordingly, we are of the opinion that an airport commission does not have the authority to authorize the private use of public property. The fact that such use is deemed to be in the public interest or is the result of bargaining with the employees does not change the result. The mere voting for such a resolution is not a violation of the statutes. If the property is used for a private purpose, then voting for the resolution may be a violation. Reliance by employees on the resolution may not be a sufficient defense to a charge filed under §§740.20 and 740.22.

July 14, 1977

STATE OFFICERS AND DEPARTMENTS: Mobile Home Parks: §§135D.1, 135D.7 and 135D.26, Code of Iowa, 1977. Unless zoning ordinance is to the contrary, a modular home can be placed within the confines of a mobile home park. Chapter 135D is not applicable to modular homes. (Blumberg to Pawlewski, Commissioner of Health, 7-14-77) #77-7-11

Norman L. Pawlewski, Commissioner, State Department of Health: This letter is in response to your request for an opinion regarding whether a modular home can be located within the designated confines of a mobile home park licensed under Chapter 135D, 1977 Code of Iowa. In addition, you asked whether the provisions of Chapter 135D would be applicable to modular homes in requiring vacation of them if the park is ordered closed.

In response to your first question, §135D.1(2) defines "mobile home parks" as follows:

" 'Mobile home park' shall 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, and shall include any building, structure, tent, vehicle or enclosure used or intended for use as part of the equipment of such mobile home park."

Clearly, this section does not exclude the placement of a modular home

within such a park. This is supported by the fact that habitations other than mobile homes can be found within a park. Section 135D.26 provides a means by which a mobile home owner may convert his mobile home to real property. Although section 135D.4(6) requires any plans and drawings for new construction and buildings to be included in the application for an annual license, section 135D.7 provides in part:

"No approval of plans and specifications and issuance of a permit to construct or make alterations upon a mobile home park and the appurtenances by the State Department of Health shall be construed as having been approved for other than sanitation.

"Such a permit does not relieve the applicant from securing building permits in municipalities having a building code; or from complying with any other municipal ordinances, applicable thereto, and not in conflict with this section."

Since neither the Code of Iowa nor the current Iowa Administrative Code, Chapter 71, Health Department [740] restrict the inclusion of modular homes within mobile home parks, an answer to your question can only be provided by the county or municipal zoning ordinances where the park in question is located.

In regard to your second question, modular homes generally do not fall within the definition of a mobile home as provided by section 135D.1, which provided:

" 'Mobile home' means any vehicle without motive power used or so manufactured or constructed as to permit its being used as a conveyance upon the public streets and highways and so designated, 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."

Given this definition, modular homes are more properly defined as "factory-built structures" under Chapter 103A of the Code. Since modular homes do not fall within the above definition of a "mobile home," they are not within the jurisdiction of Chapter 135D. As such, any provisions of Chapter 135D relating to the vacation of mobile homes in the event the park is ordered closed do not relate to modular homes. This is in accord with a previous opinion of this office stating that mobile homes converted to real estate do not fall within the jurisdiction of Chapter 135D because they do not satisfy the definition of a mobile home. 1972 OAG 407.

In summary, we are of the opinion that absent some county or municipal zoning ordinance to the contrary, modular homes can be included in mobile home parks. In addition, since modular homes do not fall within the definition of a mobile home, they are immune from any provisions of Chapter 135D regarding the vacation of mobile homes in the event the park is closed.

July 14, 1977

MUNICIPALITIES: Medical Payments; Pension System—§411.15, Code of Iowa, 1977. There is no provision in §411.15 which limits the time period to receive medical payments. (Blumberg to Robinson, State Senator, 7-14-77) #77-7-12

Honorable Cloyd Robinson, State Senator: We have your opinion request of May 19, 1977, regarding medical payments under §411.15, 1977 Code of Iowa. You asked:

"Our main concern is if a person is retired from the department with a disability pension, that is having been injured in the line of duty, is it the obligation of the City to pay medical bills for that individual as long as he lives. We realize that it is the City's obligation to pay the bills as long as he is still an active member of the department but the question arises when he has retired as to whether or not he should still be considered an active member."

Section 411.15 of Code provides:

"Cities shall provide hospital, nursing, and medical attention for the members of the police and fire departments of such cities, when injured while in the performance of their duties as members of such department, and the cost of such hospital, nursing, and medical attention shall be paid out of the appropriation for the department to which such injured person belongs; provided that any amounts received by such injured person under the workers' compensation law of the state, or from any other source for such specific purposes, shall be deducted from the amount paid by such city under the provisions of this section."

There is no language in that section which limits the payments for medical expenses, except for workers' compensation or similar benefits. Nor is there anything in the remainder of Chapter 411 which sets a time limit of any type upon medical payments. This section is quite clear that when a member is injured in the performance of his or her duties as a member, medical payments by a city are mandated. Since earlier provisions in §411.6 provide for retirement based upon an accidental disability, it can be said that the Legislature intended the medical payments to be mandatory regardless of whether the member takes a retirement or not. Since these payments are for accidents while a member, it should be noted that any future medical expenses should only be covered by a city if it is shown that they are a result of the accident.

July 14, 1977

MUNICIPALITIES: Obscenity Ordinances: §§364.1, 364.2(3), 725.1(2) and 725.9, Code of Iowa, 1977. A municipality cannot adopt an ordinance controlling obscene materials. It may adopt an ordinance controlling obscene behavior, acts or conduct. (Blumberg to Richter, Pottawattamie County Attorney, 7-14-77) #77-7-13

Mr. David E. Richter, Pottawattamie County Attorney: We have your opinion request of May 5, 1977, wherein you ask whether a city can adopt an ordinance prohibiting the distribution or display of obscene material or conduct. You also question the liability of city officers enforcing such an ordinance.

Section 725.9, Code of Iowa, 1977, provides that §§725.1 through 725.10 (which prohibits the dissemination or exhibition of obscene materials) shall be the sole and only regulation of obscene material in this state, and that "no municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of *obscene materials.*" [Emphasis added] The emphasized portion is important because it indicates that municipalities are only prohibited from regulating obscene materials, not conduct.

"Material" is defined in §725.1(2) as any book, magazine, newspaper or other printed or written material, picture, drawing, photograph, film or other pictorial representation; statute or other figure, recording, transcription of mechanical, chemical or electrical reproduction; or any other

articles, equipment, machines or materials. Any obscenity ordinance passed by a municipality cannot include any provisions regarding materials. Section 364.1, Code of Iowa, 1977, specifically provides that a city cannot adopt an ordinance if expressly limited by the Constitution, or inconsistent with a state law. Section 364.2(3) provides that an exercise of a city power is inconsistent with a state law when it is irreconcilable with the state law. If such an ordinance or part thereof would not be valid under §§364.1, 364.2(3) and 725.9, it could not be valid under Chapter 380. A municipality may, however, adopt an ordinance regarding obscene behavior, acts or conduct.

The fact that your city officers and the like would operate under the proposed obscenity ordinance, assuming it is valid, would not change their legal liability for malicious prosecution, false arrest, violation of civil rights and the like. The burden of proof and other requirements would be the same whether they operated under an obscenity ordinance or any other ordinance or state law.

Accordingly, we are of the opinion that municipalities cannot adopt an ordinance controlling obscene materials. They may, however, control obscene behavior, acts or conduct.

July 18, 1977

WAGE ASSIGNMENTS: Binding on employer—§§539.4, 598.23, Code of Iowa, 1977. In the event of the passage of S.F. 149, 67th G.A., First Session (1977), court ordered wage assignments for the payment of child support could be enforced even though the employer does not accept and agree to pay the assignment. (Keith to Nielsen, State Representative, 7-18-77) #77-7-14

Hon. Carl V. Nielsen, Speaker Pro Tempore: We have received your letter of March 23, 1977, requesting an opinion regarding the enforceability of court ordered wage assignments for the payment of child support. You refer to Section 598.23, Code of Iowa, 1975, as modified by S.F. 149, a bill now pending in the Iowa House of Representatives:

"...wherein the senate version seems to make an assignment of wages in a divorce action which assignment is court approved binding on the employer of the assignor without making the employer a party to the litigation."

You "request an opinion as to whether any ex parte order would be enforceable."

Section 539.4, Code of Iowa, 1975, provides in part, that: "...no such (wage) assignment or order shall be effective or binding upon the employer unless the employer has in writing agreed to accept and pay said assignment or order." This section of the Code is in direct conflict with Section 598.23 as it would stand modified by S.F. 149.

These two laws are in pari materia. They relate to a common subject, wage assignments, and, if possible, they should be read together to produce a harmonious interpretation. As they are, however, irreconcilable, the latter one (Section 598.23 as amended by S.F. 149, 67th G.A.) controls. *Llewellyn v. Iowa State Commerce Commission,* 200 N.W.2d 881, (Iowa 1972); *Waugh v. Shirer,* 1933, 216 Iowa 468, 249 N.W. 246; *Curlew Consol. Sch. Dist. v. Palo Alto Etc.,* 1955, 247 Iowa 112, 73 N.W.2d 20; *Kruse v. Gaines,* 1966, 258 Iowa 983, 139 N.W.2d 535.

Section 598.23, if amended, would provide, as an alternative to punishment for contempt of court for failure to pay child support, that:

"The court may...make an order directing the defaulting party to assign a sufficient amount in salary or wages due, or to become due in the future, from an employer or successor employers, to the clerk of court where the order or judgment was granted for the purpose of paying the sums in default as well as those to be made in the future. The assignment order shall be binding upon the employer upon receipt by the employer of a copy of the order, signed by the employee...."

This is a specific statute covering a narrowly defined situation. Section 539.4 is a general statute covering wage assignments per se. "When a general statute is in conflict with a specific statute, the latter generally prevails whether enacted before or after the general statute." *Llewellyn v. Iowa State Commerce Commission, supra,* at 884; *Shriver v. City of Jefferson,* 190 N.W.2d 838, 840 (Iowa 1971), and authorities cited.

Prior to its amendment in 1965 (Ch. 411, §2, 61st G.A.), Section 539.4 did not provide that an employer must agree to accept and pay the assignment or order for it to be effective or binding. "Ordinarily, in the absence of statute, it does not appear to be necessary to obtain the assent of the employer to the assignment of wages under an existing contract." 6 Am.Jur.2d *Assignments,* §46, p. 231 (1963). Even though the period of employment or compensation may vary at different times, the assignment of wages is valid. *Id.* at 230.

Assignment of wages for any purpose other than the payment of child support will not be effective unless agreed to and accepted in writing by the employer. Section 539.4. Employers should suffer no great hardship in most cases for having to honor only those assignments ordered by the Court under Section 598.23. It is the opinion of this office that said court ordered wage assignments will be enforceable.

It should be noted that Section 598.23 pertains only to child support ordered in the course of proceedings for dissolution of marriage. Apparently, orders adjudicating paternity and providing for the support of the dependent child therein, (Chs. 675, 252A), will not be enforceable by court ordered wage assignments.

As S.F. 149 is still pending before the House of Representatives, it may be informative to consider similar legislation in other midwestern states, e.g.s. Section 256.872, Minnesota Statutes; Section 552.203, Michigan Compiled Laws.

July 21, 1977

STATE OFFICERS AND DEPARTMENTS: Members of the General Assembly, Acceptance of gifts, §68B.5, Code of Iowa, 1977. Acceptance by legislators of reimbursement for travel, meals and lodging expense from Legis/50 for attendance at a meeting to be held at Clear Lake July 28 and 29, 1977, would violate §68B.5 if individual reimbursements were $25.00 or more and are related to legislative activities and intended solely to influence legislative action. (Haesemeyer to Phil Hill, State Senator, 7-21-77) #77-7-15

Honorable Philip B. Hill, State Senator: Reference is made to your letter dated July 11, 1977, addressed to Lieutenant Governor Arthur A. Neu concerning a meeting to be sponsored by Legis/50 at Clear Lake on July 28-29,

1977. By a copy of this letter to the Attorney General you have requested an opinion relative to the application of Section 68B.5, Code of Iowa, 1977, to legislators attending this meeting. In your letter to the Lieutenant Governor you state in part:

"It is my understanding that legislators attending this meeting will be reimbursed for travel expenses to and from Clear Lake, as well as meals and lodging in Clear Lake from noon July 28 through noon July 29, and the reimbursement will be made not by the State of Iowa but by Legis/50.

"Based upon the July 6 letter, I understood the purpose of the meeting is to discuss the Model Committee Staff Project which has been going on in Iowa for more than a year — staffing for the Human Resources Committees — and to urge the members of the General Assembly to adopt legislation to provide permanent staffing of several or all legislative committees.

"If the reimbursement to any legislator equals or exceeds $25.00, it would appear that such legislator is in violation of 68B.5, Code of Iowa, 1977, since the reimbursement clearly relates to legislative activities. See *Report of the Attorney General,* 1976, page 702, wherein Solicitor General Haesemeyer found the statute was not violated because attendance at another conference sponsored by Legis/50 was not intended to have the affect of influencing legislative action. The Clear Lake conference, on the other hand, appears intended solely to influence legislative action."

Section 68B.5 to which you make reference is part of Chapter 68B, the Iowa Public Officials Act. Such section in 68B 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."

An earlier opinion of the Attorney General to which you refer, 1976 O.A.G. 702, had to do with attendance of members of the General Assembly at a juvenile justice workshop under the sponsorship of Legis/50, the Center for Legislative Improvement, and the acceptance by legislators attending the workshop by their transportation and meal costs from funds made available to Legis/50 by the Law Enforcement Assistance Administration (LEAA). In this earlier opinion we noted that §68B.5 has been rather exhaustively treated in earlier opinions of the Attorney General and that little of it remains to be interpreted. 1968 O.A.G. 72, 1970 O.A.G. 319, 1972 O.A.G. 276 and 1974 O.A.G. 437. In the 1976 opinion we observed in part:

"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." 1966 O.A.G. 753.

* * *

"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.

* * *

"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."

Unlike the request for the 1976 opinion no project description or other materials have been submitted with your present request. However, on the basis of your statements that the purpose of the meeting is, "to urge the members of the general assembly to adopt legislation to provide permanent staffing of several or all legislative committees" and "the Clear Lake conference ...appears intended solely to influence legislative action," it is our opinion that if the reimbursement to any legislator equals or exceeds $25 a violation of §68B.5 would occur.

July 22, 1977

STATE OFFICERS AND DEPARTMENTS: Members of the General Assembly, Acceptance of gifts, §§68B.5 and 741.1, Code of Iowa, 1977. Acceptance by legislators of reimbursement for travel, meals and lodging expense from Legis/50 for attendance at a meeting to be held at Clear Lake July 28 and 29, 1977, would not violate §68B.5 or §741.1 where the purposes of the seminar are to assess the goals, activities and results of the MCSP in the Iowa General Assembly; and to examine how a part-time, citizen legislature can improve its procedures and operations in order to translate objectives into meaningful, accountable programs and attendance at the meeting by legislators and payment of expenses are a matter of contract between the Iowa General Assembly and Legis/50. (Haesemeyer to Nielsen, 7-22-77) #77-7-16

Hon. Carl V. Nielsen, State Representative: Reference is made to your letter of July 21, 1977, in which you state:

"I have read your opinion of July 21, 1977, to Senator Philip B. Hill concerning reimbursement of travel expenses by 'Legis/50' for the attendance at the Legis/50 — Model Committee Staff Project seminar to be held at Clear Lake on the 28th and 29th of July would be a violation of Section 68B.5.

"In the closing paragraph of that opinion, you state that there were 'no project description or other material submitted with the request' and that the result was dependent upon Senator Hill's statement that the purpose of the meeting was solely to influence legislative action to provide permanent committee staffing.

"Please find enclosed a copy of the memorandum of agreement between the Iowa General Assembly and Legis/50.

"In light of the existence of this contract and the avowed purpose of the

agreement (especially with regard to provisions I, IX, XI and XII) would the acceptance of reimbursement of transportation, meals and lodging expenses from Legis/50 — Model Committee Staff Project by a state legislator be a violation of Section 68B.5 of the Iowa Code?

"Section I provides that the Model Committee Staff Project in Health is to provide on a demonstration basis year round fulltime professional committee staff in Human Resources.

"Section IX provides for the Legislature and Legis/50 to share the costs of the model project.

"Section XI provides that legislators will attend seminars to be held by the project and that such attendance will be an important part of the project.

"Section XII provides for the payment of seminar expenses by the project.

"I enclose a copy of my letter signed by Arthur Neu and others dated July 6, 1977, from which Senator Hill has concluded that we will urge to adopt certain legislation. I find nothing in the July 6 letter which so indicates. Since there now is supporting data, would your opinion be any different?"

§68B.5, Code of Iowa, 1977, provides as follows:

"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."

As you correctly note, our opinion of July 21, 1977, to Senator Philip B. Hill concerning reimbursement of travel expenses by Legis/50 for attendance of members of the General Assembly at a seminar on the Model Committee Staff Project to be held at Clear Lake on the 28th and 29th of July was based on the statements made by Senator Hill that the purpose of the meeting is "to urge the members of the General Assembly to adopt legislation to provide permanent staffing of several or all legislative committees" and "the Clear Lake conference,...appears intended solely to influence legislative action."

Given these facts it was our conclusion that a violation of §68B.5 would occur. In answering requests for opinions of the attorney general we do not normally purport to sit as a trier of fact and customarily base our opinions on the facts as they are presented to us. It now appears that there is a difference of opinion as to the purpose of the Clear Lake conference and if it is as stated in the materials which you furnished us, a different conclusion would necessarily follow. The contract to which you make reference and of which we were previously unaware, also makes a considerable difference in the result we reach.

The letter dated July 6, 1977, from House Speaker Dale M. Cochran and others to all Iowa legislators urging them to attend the Clear Lake meeting makes no mention of any legislation or legislative action being proposed but merely says, "The seminar will focus on the results of the MCSP and the full legislative process in Iowa."

Another letter which we now have before us is dated June 15, 1977, and is from Al Kelly, Manager Field Staff Projects, Legis/50 to House Speaker

Dale M. Cochran. It states in part:

"The purposes of the seminar are:

"1. To assess the goals, activities and results of the MCSP in the Iowa General Assembly; and

"2. To examine how a part-time, citizen legislature can improve its procedures and operations in order to translate objectives into meaningful, accountable programs."

On the basis of these statements of the purpose of the Clear Lake meeting and also on the basis of the purpose of the project as stated in Art. I of the contract between Legis/50 and the Iowa General Assembly, we would have to conclude that the conference is not being held to urge members of the General Assembly to adopt any particular legislation or to influence legislative action in any particular direction and that therefore a violation of §68B.5 would not occur by reason of acceptance of members of the General Assembly of reimbursement for their travel and meal expenses in attending the conference.

It is noteworthy, too, as you point out, that as a matter of contract Legis/50 is obliged to hold these seminars, that members of the General Assembly are expected to attend and take part and that Legis/50 is obligated to pay the seminar expenses. In an earlier opinion of the attorney general, 1970 OAG 319, we advised the Secretary of the Executive Council that where General Electric Co. had agreed to pay the travel expenses of two employees of the Iowa Education Television Network to permit them to be present at the company's test site to witness the testing of a new antenna being purchased by the Iowa agency, it would not be unlawful for the employees to accept the payment of the travel expenses since these were a contractual obligation of the company. By the same token it would not be unlawful for members of the General Assembly to accept payment of their travel expenses to the Legis/50 Clear Lake Conference since Legis/50 is contractually obligated to pay such expenses.

In conclusion while we believe our July 21, 1977, opinion to Senator Hill was correct based on the purposes of the meeting as stated in Senator Hill's request for that opinion, we now would have to conclude based on the materials that you have furnished us that acceptance of meals and travel expenses by members of the General Assembly attending the Legis/50 Clear Lake meeting would not be in violation of §68B.5.

In a letter subsequent to his request for the July 21, 1977, opinion, Senator Hill has asked us to also consider the applicability of §741.1 to the Legis/50 Clear Lake Conference. We will do so at this time rather than write a separate opinion on that subject. Such §741.1 provides:

"It shall be unlawful for any agent, representative, or employee, officer or agent of a private corporation, or a public officer, acting in behalf of a principal in any business transaction, to receive, for his own use, directly or indirectly, any gift, commission, discount, bonus or gratuity connected with, relating to, or growing out of such business transactions; and it shall be likewise unlawful for any person, whether acting in his own behalf or in behalf of any copartnership, association, or corporation, to offer, promise, or give directly or indirectly any such gift, commission, discount, bonus, or gratuity.

"The provisions of this section shall not be construed to apply to officials or employees of the State of Iowa nor to legislators or legislative employees."

In *State v. Books,* 225 N.W.2d 322 (Iowa 1975) the Iowa Supreme Court found the last sentence of this section which excludes employees in the State of Iowa, legislators and legislative employees from its application was unconstitutional. Thus legislators are no longer exempt from the provision of such §741.1. However, in our opinion acceptance by members of the General Assembly of travel, meals and lodging expenses in attending the Legis/50 Clear Lake Conference would not be a "gift, commission, discount, bonus or gratuity" within the meaning of this statute, especially since they are expected, under the terms of the contract, to attend the seminars and Legis/50 is obliged to pay the expenses of such seminars.

July, 1977

CONSTITUTIONAL LAW

Mandatory Immunization. §§147.80(3) and 150.11, Code, 1977; H.F. 163, Acts, 67th G.A. (1977). §1(4) of H.F. 163 is not unconstitutional. Annual immunization is not necessarily required. (Blumberg to Taylor, State Senator, 7-14-77) #77-7-7

COUNTIES AND COUNTY OFFICERS

Public Defender. Chapter 336A, Code, 1977. Chapter 336A authorizes a single office of public defender and where two or more counties join together to finance such office one of the staff of the office of public defender may be assigned to work full time in but one of the cooperating counties while other members of the staff serve more than a single county. (Nolan to Hoffman, Lee County Attorney, 7-14-77) #77-7-9

Sheriff Uniforms. §§337A.2-337A.4 and 20.9, Code, 1977. Statutory limitation of $300 per year limits the amount the county can spend to outfit a man with a sheriff's uniform but does not preclude the payment of cleaning and maintenance bills. (Nolan to Kelly, State Senator, 7-5-77) #77-7-1

CRIMINAL LAW

Use of Public Property for Private Purposes. §§330.21, 364.1, 364.2, 740.20 and 740.22, Code, 1977. An airport commission has no authority to authorize, by resolution, the private use of public property by employees. If the public property is so used, voting in favor of the resolution may be a violation of §740.20. The fact that the employees so use the property pursuant to the resolution may not constitute a sufficient defense to a criminal charge under §§740.20 and 740.22. (Blumberg to Redmond, State Senator, 7-14-77) #77-7-10

DEPARTMENTAL RULES

State; Statutory Construction; Public Safety; Fire Marshal's authority to adopt fire safety regulations for apartment buildings. §§100.35, 4.1(2), 4.4(5), 4.6(6), 103.1, 103.7, 103.12, Code, 1977; Ch. 1245, Acts, 66th G.A., Ch. 4, §72. The fire marshal may adopt, amend, promulgate and enforce rules, regulations and fire safety standards affecting apartment buildings. (Linge to Larson, Commissioner, Iowa Department of Public Safety, 7-11-77) #77-7-2

MUNICIPALITIES

Libraries. Chapter 303B, Code, 1977; §393B.9, Code, 1975. A municipality is only mandated to levy a tax or appropriate money for library services if it currently receives them or desires to contract for or establish them. (Blumberg to Correll, Black Hawk County Attorney, 7-14-77) #77-7-6

Obscenity Ordinances. §§364.1, 364.2(3), 725.1(2) and 725.9, Code, 1977. A municipality cannot adopt an ordinance controlling obscene materials. It may adopt an ordinance controlling obscene behavior, acts or conduct. (Blumberg to Richter, Pottawattamie County Attorney, 7-14-77) #77-7-13

Medical Payments; Pension System. §411.15, Code, 1977. There is no provision in §411.15 which limits the time period to receive medical payments. (Blumberg to Robinson, State Senator, 7-14-77) #77-7-12

SCHOOLS

Teachers. §294.2, Code, 1977. The State Board of Public Instruction is not authorized to apply Rule 670.13.18 to require a teacher holding a permanent professional certificate to take course work in human relations education. (Nolan to Benton, State Superintendent of Public Instruction, 7-14-77) #77-7-8

STATE OFFICERS AND DEPARTMENTS

Members of the General Assembly, Acceptance of Gifts. §68B.5, Code, 1977. Acceptance by legislators of reimbursement for travel, meals and lodging expense from Legis/50 for attendance at a meeting to be held at Clear Lake July 28 and 29, 1977, would violate §68B.5 if individual reimbursements were $25.00 or more and are related to legislative activities and intended solely to influence legislative action. (Haesemeyer to Phil Hill, State Senator, 7-21-77) #77-7-15

Members of the General Assembly, Acceptance of Gifts. §§68B.5 and 741.1, Code, 1977. Acceptance by legislators of reimbursement for travel, meals and lodging expense from Legis/50 for attendance at a meeting to be held at Cleark Lake July 28 and 29, 1977, would not violate §68B.5 or §741.1 where the purposes of the seminar are to assess the goals, activities and results of the MCSP in the Iowa General Assembly; and to examine how a part-time, citizen legislature can improve its procedures and operations in order to translate objectives into meaningful, accountable programs and attendance at the meeting by legislators and payment of expenses are a matter of contract between the Iowa General Assembly and Legis/50. (Haesemeyer to Nielsen, State Representative, 7-22-77) #77-7-16

Mobile Home Parks. §§135D.1, 135D.7 and 135D.26, Code, 1977. Unless zoning ordinance is to the contrary, a modular home can be placed within the confines of a mobile home park. Chapter 135D is not applicable to modular homes. (Blumberg to Pawlewski, Commissioner of Health, 7-14-77) #77-7-11

STATUTORY CONSTRUCTION

Temporary Restriction on Acquisition of Agricultural Lands by Certain Corporations. Chapter 172C, Code, 1977. Corporations as defined in §172C.1 can acquire agricultural lands during the moratorium period established by §172C.1 for the purpose of constructing and operating a research and development farm to improve, research and develop superior genetic seed swine but may not acquire such lands for possible future expansion. (C. Peterson to Redmond, State Senator, 7-14-77) #77-7-5

TAXATION

Sales Tax. §§422.43, 422.48, 422.42(3), Code, 1977. The suppliers of body shops are responsible for collection of sales tax from the body shops upon sale of materials such as masking paper, masking tape, thinner and abrasives used in the repair of automobiles, since the body shops are the "consumers or users" of those materials. The fact that a seller (who holds a retail sales tax permit) sells an item or items to a buyer who also holds a retail sales tax permit, is not relevant to the determination of whether such seller is responsible for the collection of sales tax from the buyer. (Kerwin to Pelton, State Representative, 7-12-77) #77-7-3

Mobile Homes Converted to Realty. §§135D.26, 428.4, Code, 1977. In the event that a mobile home is converted to real estate pursuant to §135D.26 in 1977, the semiannual mobile home tax and registration fee for the full calendar year 1977 must be paid. In such a situation, the converted

mobile home is not assessed as real estate, for real property tax purposes, until January 1, 1978. Upon determining that the conversion occurred in 1977, the assessor should collect the mobile home vehicle title, registration, and license plates from the owner before January 1, 1978. (Griger to Bauercamper, Allamakee County Attorney, 7-12-77) #77-7-4

WAGE ASSIGNMENTS

Binding on Employer. §§539.4, 598.23, Code, 1977. In the event of the passage of S.F. 149, 67th G.A., First Session (1977), court ordered wage assignments for the payment of child support could be enforced even though the employer does not accept and agree to pay the assignment. (Keith to Nielsen, State Representative, 7-18-77) #77-7-14

STATUTES CONSTRUED

Code, 1975	Opinion
393B.9	77-7-6

Code, 1977	Opinion
4.1(2)	77-7-2
4.4(5)	77-7-2
4.6(6)	77-7-2
20.9	77-7-1
68B.5	77-7-16
100.35	77-7-2
103.1	77-7-2
103.7	77-7-2
103.12	77-7-2
135D.1	77-7-11
135D.7	77-7-11
135D.26	77-7-11
135D.26	77-7-4
147.80(3)	77-7-7
150.11	77-7-7
172C.1	77-7-5
294.2	77-7-8
303B	77-7-6
330.21	77-7-10
336A	77-7-9
337A.2	77-7-1
337A.3	77-7-1
337A.4	77-7-1
364.1	77-7-13
364.1	77-7-10
364.2	77-7-10
364.2(3)	77-7-13
411.15	77-7-12
422.42(3)	77-7-3
422.43	77-7-3
422.48	77-7-3
428.4	77-7-4
539.4	77-7-14
598.23	77-7-14
725.1(2)	77-7-13

725.9	77-7-13
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August 2, 1977

WELFARE: Uniform Support Of Dependents Law, Chapter 252A, 1977 Code of Iowa. Decree of divorce or dissolution is not res judicata in subsequent action under this chapter, but it appears to be necessary for a change of circumstances to be shown if an increase in the amount of support payments is sought under Chapter 252A. No change of circumstances need be shown when the adequacy of the original support order is challenged. (Keith to Redmond, Iowa State Senator, 8-2-77) #77-8-1

The Honorable James M. Redmond, Iowa State Senator: You request an Attorney General's Opinion concerning the "Uniform Support of Dependent's Law", Chapter 252A, Code of Iowa. You ask: "What is the effect of an order for support issued pursuant to a Chapter 252A proceeding on the existence of and liability for child support payments that are part of an order and judgment rendered in a dissolution or divorce action?"

You are interested in the concepts of res judicata and the necessity of showing a substantial change in the circumstances before modification of a decree as these rules apply to a Chapter 252A proceeding. Your inquiry presumes a prior divorce or dissolution decree awarding child support in the Iowa District Court.

Your question is answered, in part, by the statute:

"252A.3 ... * * *

"7. Notwithstanding the fact that the respondent has obtained in any state or country a final decree of divorce or separation from his wife or her husband or a decree dissolving his or her marriage, the respondent shall be deemed legally liable for the support of any dependent child of such marriage."

"252A.8 Additional remedies. This chapter shall be construed to furnish an additional or alternative civil remedy and shall in no way affect or impair any other remedy, civil or criminal, provided in any other statute and available to the petitioner in relation to the same subject matter."

"252A.6 ... * * *

"15. Any order of support issued by a court of the state acting as a responding state shall not supersede any previous order of support issued in a divorce or separate maintenance action, but the amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period under both."

It is clear that the legislature intended that a USDL suit may be maintained even though both parties reside in Iowa and received their decree of dissolution in the Iowa District Court. Sections 252A.3.2, .7:1968 OAG 185; *Davis v. Davis,* 246 Iowa 262, 67 N.W.2d 566 (1954). Your question is whether the prior decree and order of support is res judicata in the subsequent Chapter 252A proceeding, and whether a change of circumstances must be shown by the petitioner.

"Res judicata", is translated, "the matter adjudged." "The sum and substance of the whole rule is that a matter once judicially decided is finally decided." *Black's Law Dictionary,* 4th Ed., at 1470. For the rule to be applied, it is required that there be "...identity in thing sued for as well as identity of cause of action, of persons and parties to action, and of quality in persons for or against whom claim is made..." *Black's* supra.

The issues, and even the parties, in an action under the USDL are not necessarily identical to those in the dissolution. Unlike the dissolution proceeding, wherein the caption of the petition names the parents as the parties in action (Section 598.4), the dependent children, or their representatives, are the interested parties in a Chapter 252A proceeding. Section 252A.6.1.

The USDL is used most frequently where the dependents have become public charges and suit for support is initiated by the Department of Social Services. In these suits for reimbursement and continuing support, the Department has the same rights as the dependent, and consent of the dependent is not required in order to institute proceedings. Section 252A.5.5.

The Iowa Supreme Court has considered aspects of the res judicata problem in several cases. In *Moore v. Moore,* 252 Iowa 404, 107 N.W.2d 97 (1961), a suit was brought under the USDL seeking an increase in support which had been granted in an Alabama divorce decree. The district court increased support from $50 to $65 per month. On appeal, the Iowa Supreme Court concluded: "...a reasonable interpretation of the entire Act fairly shows that it was intended to give an additional remedy, in the application of which the respondent court might make its own determination of the needs of the petitioning party and make such order as justice might require." *Moore,* at 411, 107 N.W.2d at 101; see also *Thompson v. Thompson,* 93 So.2d 90 (Fla. 1957).

Note that the USDL defines "responding state" as "the state wherein the respondent resides or is domiciled or found." Section 252A.2.10. The initiating state and the responding state can be the same state. 1968 OAG 185.

In *Keefe v. Keefe,* 259 Iowa 85, 143 N.W.2d 335 (1966), an Iowan petitioner, who had been denied separate maintenance in another suit, filed under the USDL to compel support. Her husband, the respondent, argued res judicata of the right to support. The Court held that the previous action for separate maintenance was no bar to a USDL action for support. In a similar case in 1957, the Supreme Court did bar the Chapter 252A suit for reason that a prior dismissal of a separate maintenance action was res judicata. In that case, however, the Court concluded that the second action, "although brought under procedure provided by Chapter 252A of the Code, [was] in fact merely a suit by a wife for separate maintenance." *Peters v. Peters,* 249 Iowa 110, 115, 86 N.W.2d 206, 210 (1957).

The grounds for separate maintenance are generally the same as the statutory grounds for divorce. *Peters,* supra, and cases cited therein. While

the Court has not expressly determined that a prior dissolution decree is not res judicata in a later Chapter 252A proceeding, it seems to be leaning towards that conclusion. As stated in *Beneventi v. Beneventi,* 185 N.W.2d 219 (Iowa 1971), the USDL is a special procedure statute intended to supplant inadequate laws for the enforcement of support.

It appears to be necessary for a change of circumstances to be shown if an increase in the amount of support payments is sought under Chapter 252A. In the recent case of *Brecht v. Brecht,* filed June 29, 1977, the Iowa Supreme Court concluded that:

"Under a decree providing for periodic support (or a lump sum decree with adequate safeguards such as we have outlined) the rules are well settled. In order to obtain an increase in the amount of support the department, standing in the shoes of the children, would be required to show a substantial change of circumstances since the date of the original decree. It would further be required to show such change was not within the contemplation of the trial court when the earlier decree was entered. *Page v. Page,* 219 N.W.2d 556, 557 (Iowa 1974); *In re Marriage of Glass,* 213 N.W.2d 668, 671 (Iowa 1973); *Mears v. Mears,* 213 N.W.2d 511, 515, (Iowa 1973)."

The cases cited above are dissolution cases and not Chapter 252A cases, and the paragraph quoted is clearly dicta, but the Court does apear to impose the change of circumstances rule upon the Chapter 252A action.

Brecht is a case where the trial court provided for a $6000.00 lump sum child support obligation. This was paid. The Department of Social Services sought additional support by suit under chapter 252A. The dismissal of the Department's action was appealed. In its decision, the Supreme Court did not mention res judicata, but we feel the language quoted above shows the Court's present position.

The Court expressly held in *Brecht* that lump sum support payments, without adequate safeguards to preserve the fund for the children's benefit, are against public policy. In conclusion, the Court states that:

"The department might have escaped the necessity of showing such a change of circumstances because of the inadequacy of the safeguard for the lump sum support payment but failed in its proof. The department merely showed the children received ADC payments of $2890 from September 1, 1973, to the approximate date of the hearing. The department made no showing of what the children's necessaries were, of Corbin's ability to pay them, or even of his refusal to pay for them. The department's petition for reimbursement and future support fails for total lack of factual basis in the record."

Thus, in the instant case, the Department of Social Services might have escaped the necessity of showing any change of circumstances because of the inadequacy of the original decree. The Department failed in its proof.

Apparently, no change of circumstances need be shown where the adequacy of the original support order is challenged. Where, however, no such showing of inadequacy is made, the petitioner's representative in the Chapter 252A proceeding must show a change of circumstances not contemplated by the trial court in order to obtain an increase in the support obligation.

August 2, 1977

MUNICIPALITIES: Private Sewage Disposal Facilities: Art. III, sec. 38A, Iowa Const.; §§137.5, 137.7(4), 364.1 and 364.2(3), Code of Iowa, 1977.

The provisions of §137.7(4), giving county boards of health authority to issue permits for private facilities, prevail over a similar ordinance of a city under 25,000 population. (Blumberg to Pillers, Clinton County Attorney, 8-2-77) #77-8-2

G. Wylie Pillers, III, Clinton County Attorney: We have your opinion request of June 22, 1977, regarding Chapter 137, 1977 Code of Iowa. The City of Camanche has an ordinance on sewage and waste disposal. Within that ordinance is a provision that an individual constructing a private sewage disposal system (septic tank) shall obtain a permit from the city at a cost of $125.00. The county board of health has a similar provision, but the permit fee is only $25.00. You ask whether the city or the county board of health has exclusive jurisdiction over this subject matter.

Section 137.5 of the Code provides:

"The county board shall have jurisdiction over public health matters within the county, except as set forth herein.... The council of any city having a population of twenty-five thousand or more...may appoint a city board of health...or the council may appoint itself to act as the city board of health. The city board shall have jurisdiction within the municipal limits."

It is conceded that the population of Camanche has not reached twenty-five thousand. Section 137.7(4) provides that the local board (which includes the county or city board) has the power to issue licenses and permits and charge reasonable fees in relation to the "collection or disposal of solid waste and the construction or operation of private water supplies or sewage disposal facilities."

The key to your question must be found in §137.5. If that section stands for the proposition that unless a city's population is twenty-five thousand or more the county board of health has complete jurisdiction with the city's boundaries, then Camanche cannot enact an ordinance for the issuance of a permit for a septic tank. If, however, that section only speaks to a city establishing a department of health, but does not prevent a city from enacting health ordinances, then Camanche could enact the ordinance in question.

Article III, sec. 38A of the Iowa Constitution provides:

"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 any 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."

Section 364.1, 1977 Code of Iowa, echoes this provision. 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. In *Green v. City of Cascade,* 231 N.W.2d 882 (Iowa 1975), it was held, with reference to §364.2(3), that "irreconcilable" means impossible to make consistent or harmonious. It was held (231 N.W.2d at 890):

"The legislature appears to say in [364.2(3)] that state laws are to be interpreted in a way to render them harmonious with ordinances unless the court or other body considering two measures cannot reconcile them, in which event the state law prevails."

There can be no doubt that a municipality can adopt ordinances for sewage disposal. This is especially true when the city constructs a sewage system. *State v. City of Iowa Falls,* 1956, 247 Iowa 558, 74 N.W.2d 594. However, we are concerned here not with a sewer system of a city, but rather a private system. Local boards of health are specifically given the authority to establish rules and issue permits therefor. Section 137.5 provides that county boards of health (which fall within the definition of local boards) shall have jurisdiction within the limits of a city unless such city has established its own board of health or the city council acts as such. That can only exist, however, if the city has a population of at least twenty-five thousand. Since Camanche is under twenty-five thousand, the county board of health has the power to exercise its authority within the city limits.

As expressed in the *Green* case, an attempt should be made to give effect to both the county's and the city's rules and permits. Unfortunately, that may not be possible. In order to get a permit, in addition to payment of the fee, the rules and requirements of the county board and the city must be met. If those rules and requirements were identical, we could hold that both had concurrent jurisdiction. However, it is possible that one could comply with the requirements of the county board, but not the city, and vice-versa. This would place an individual in an impossible situation. Because Chapter 137 specifically gives the county boards the authority to issue permits for private facilities in cities under twenty-five thousand population that chapter must prevail over an ordinance of Camanche adopted pursuant to Home Rule powers.

August 3, 1977

COUNTIES: Auditor's Plat. Sections 409.14, 441.65, Code of Iowa, 1977. County auditor's plat made pursuant to Section 441.65 for assessment and taxation purposes need not be accompanied by title opinion to be recorded but must where appropriate have a certificate of approval from the city council. (Nolan to Dunton, State Representative, 8-3-77) #77-8-3

Honorable Keith H. Dunton, State Representative: This is written in response to your request for an opinion of §441.65, Code of Iowa, 1977. The letter raises questions as to whether or not when the auditor causes an auditor's plat to be made pursuant to §441.65 of the Code the auditor is required to comply with the provisions of Chapter 409 of the Code to the extent of having all abstracts updated, all liens released, title opinion obtained together with certicates of approval from appropriate county offices or city councils.

The pertinent provisions of Section 441.65 are as follows:

"Whenever a lot or subdivision of land 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 or the assessor, be made sufficiently certain and accurate for the purposes of assessment and taxation without noting the metes and bounds of the same, or whenever the original proprietor of any subdivision of land has sold or conveyed any part thereof, or invested the public with any rights therein, and has failed to file for record a plat as provided in chapter 409, the county auditor by certified mail shall notify all of the owners, and demand compliance. If the owners fail to execute and file the plat within sixty days after the issuance of such notice...the auditor shall cause a plat to be made as the auditor deems appropriate in accordance with the provisions of Chapter 409. ...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 that it must be platted within sixty days thereafter. If the grantor in the conveyance shall neglect for sixty days thereafter to file for record a plat thereof, then the auditor shall proceed as is provided in this section, and cause the plat to be made in accordance with the provisions of chapter 409 and recorded in the office of the auditor, and the office of the county recorder, and in the office of the assessor."

In an opinion of November 2, 1967, 1968 OAG 387, this office advised that in all of Chapter 409 there is only one section which gives the procedure for preparing a plat once it is determined that an auditor's plat is to be prepared. That section is §409.1. It seems clear that the only purpose for which the auditor's plat is made is to clarify for assessment and taxation purposes the description of property as they already appear on the transfer book. Accordingly, it is the view of the office that the auditor is not required to obtain a title opinion, to obtain certificates from the clerk, recorder and treasurer or affidavit and bond. However, §441.65 requires that the auditor shall cause the auditor's plat to be recorded "in the office of the auditor, and the office of the county recorder, and in the office of the assessor." Under §409.14 no county recorder shall file or record any plat pertaining to any plat of land within a city having a population of 25,000 or over or within a city of any size which by ordinance adopts the restrictions of §409.14 or 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." Accordingly it is our opinion that in such instance the approval of the city council must be obtained by the county auditor before the auditor's plat is filed for record.

August 3, 1977

COUNTIES: Indemnification Fund. Section 332.37, Code of Iowa, 1977. Township officers and employees are not covered by the county indemnification fund. (Nolan to Pillers, Clinton County Atorney, 8-3-77) #77-8-4

Mr. G. Wylie Pillers, III, Clinton County Attorney: This is written in response to your request for an official opinion of the Attorney General on the following:

"Chapter 332.36 creates in the office of the Treasurer of the State of Iowa a fund to be known as the 'County Indemnification Fund'. According to the literal language of this section this fund is to be used to indemnify the following individuals: elected county officers and any deputies, assistants or employees of the county, for their errors and omissions in the performance of their official duties. Interestingly enough, the county does seek out and utilize services of various individuals who do not fall under the classifications of deputies, assistants or employees. Many board members, such as conservation, zoning, compensation and the like perform services for the benefit of the county and receive only their out-of-pocket expenses as a reward for their services. In a like manner, the township trustees can hardly be employees of the county.

"The question becomes whether or not the township trustees and those individuals entitled to indemnification and protection under the present language of Chapter 332.37 of the Code of Iowa."

The older cases in this state have held that a township is not a corporate

body and cannot sue or be sued. *Austin Western Company v. Weaver Township,* 1907, 136 Iowa 709, 114 N.W. 189. *Davis v. Laughlin,* 1910, 147 Iowa 487, 124 N.W. 876. *Hop v. Brink,* 205 Iowa 74 (1928). However, the provisions of Chapter 613A of the Iowa Code include townships and township trustees in connection with the statutory provisions relating to tort liability of governmental subdivisions. It is the view of this office that Chapter 613A has superseded the longstanding common law rule that townships could not be sued and held liable for the actions of township trustees. However, it should be noted that immunity from liability still exists for claims enumerated in §613A.4. With respect to tort claims from which liability may be imposed under §613A.2, as this office pointed out in 1970 O.A.G. 462, there is authority available under both Chapter 517A and §613A.7 for governing bodies (board of trustees) to purchase liability insurance as they deem necessary to the operation of the governmental subdivision. We specifically advised that townships may purchase such insurance to cover the possibility of negligence or failure to provide fire protection. 1976 O.A.G. 440.

The county indemnification fund created by Code §332.36 is available only for payments on behalf of elected county officers, deputies, assistants or employees of the county. County conservation board and other agents of the county are considered generally as employees under §613A.2 and are thus covered by the provisions of §332.36. There has been no recent act of the legislature to extend the benefits of such funds to cover the township trustees or other autonomous board members. Accordingly, we must advise that township trustees are not covered by the county indemnification fund. Should a judgment be obtained against a township or its officers or employees which cannot be satisfied otherwise, then the Code §613A.10 provides for the township to budget an amount sufficient to pay the judgment plus interest and a tax will be levied for this purpose.

August 3, 1977

CONSTITUTIONAL LAW: CIVIL RIGHTS: LAW ENFORCEMENT: Personnel rule limiting weight of peace officer employees. U.S. Constitution, Fourteenth Amendment (equal protection). 42 U.S.C. 2000e-2(a). The State may require that its peace officer emloyees be trim by setting a maximum weight based on height. (Linge to Criswell, Warren County Attorney, 8-3-77) #77-8-5

Mr. John W. Criswell, Warren County Attorney: We have received your letter that requests an opinion about the legality of an Order by the Commissioner of the Iowa Department of Public Safety. You have asked specifically whether this Order is discriminatory and unconstitutional.

The regulation you question, entitled General Order D51, requires that each officer employed by the Department of Public Safety be weighed semiannually. If the officer's weight is above or below the maximum or minimum weight limitations set for a person of his or her height, indicated on a chart contained in the Order, the officer is required to bring his or her weight to within the maximum and minimum weight limitations by the date of the next "weigh-in." If the officer's weight does not conform to the limitations set by the Department, he or she is subject to a three-day suspension without pay. Provision is made for waiver of the requirement if nonconformance is medically justified.

In your letter you indicated a belief that this Order might be considered

to be discriminatory because it appears to treat overweight and underweight persons unfairly.

Regulations prohibiting employment of persons over or under a specified maximum or minimum height or weight have been challenged as discriminatory by members of protected classes of persons. *See e.g., Dothard v. Rawlinson,* 45 U.S.L.W. 4888 (June 27, 1977); *Cox v. Delta Air Lines,* 1976, 14 EPD paragraph 7600 (S.D. Fla.), *aff'd* 1977, 14 EPD paragraph 7601 (5th Cir.); *Laffey v. Northwest Airlines,* 1976, 12 EPD paragraph 11,216 (D.C. Cir.); *Smith v. Troyan,* 1975, 520 F.2d 492 (6th Cir.); *Castro v. Beecher,* 1972, 459 F.2d 725 (1st Cir.); *Arnold v. Ballard,* 1975, 390 F. Supp. 723 N.D. Ohio). The Supreme Court recently affirmed a three-judge district court determination that a woman, denied a position by the Alabama Board of Corrections for failure to meet a minimum 120-pound weight requirement, had been unlawfully discriminated against. *Dothard v. Rawlinson, supra, aff'g Mieth v. Dothard,* 1976, 418 F. Supp. 1169 (M.D. Ala.).

The height-weight chart of the Iowa Department of Public Safety differs significantly from the regulations challenged in the above-cited cases. Like a regulation found not to be " *'per se'* discriminatory" by the Washington State Human Rights Commission, the Iowa Public Safety Commissioner's order does not set a "single maximum or minimum criterion" of height or weight, but instead includes separate tables "for males and females in order to account for differences in the average body structure of the two sexes." *Berrysmith v. Alaska Airlines, Inc.,* Washington State Human Rights Commission (No. ES-2156 February 11, 1976). It therefore appears that the only classifications of employees against whom the regulation discriminates are overweight or underweight persons.

The Fourteenth Amendment of the United States Constitution prohibits a state from denying "any person within its jurisdiction the equal protection of the laws." Persons who believe that a regulation is unfair because it enables a state to treat them differently than it treats others, may challenge the constitutionality of the regulation in court. However, unless the regulation adversely affects a member of a class of persons subjected to a "long and unfortunate history" of discriminatory stereotyping based on "an immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson,* 1973, 411 U.S. 677, 684-685, the regulation "must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." *Id.* at 683.

"[W]eight is neither an immutable characteristic nor a constitutionally protected category." *Cox v. Delta Air Lines,* 1976, 14 EPD paragraph 7600 (S.D. Fla.), *aff'd* 1977, 14 EPD paragraph 7601 (5th Cir.). Therefore, the state may "discriminate" against overweight or underweight persons if there is a legitimate state purpose served by such "discrimination," and the regulation enacted reasonably furthers that purpose.

We deal first with the question of whether the Department of Public Safety regulation serves a legitimate state purpose. A recent issue of a publication entitled *Crime Control Digest* reported the preliminary findings of a survey conducted by the International Association of Chiefs of Police and the Law Enforcement Assistance Administration. The survey revealed that, of all officers employed by 291 law enforcement agencies, fourteen percent retired early because of medical or physical disabilities, most frequently caused

by problems closely correlated with overweight. Also contained in the *Digest* article was a statement by Dr. Richard Keelor, director of program development for the President's Council on Physical Fitness and Sports:

"In a crisis, there is a tremendous demand on the heart, lungs and musculature. Officers who are out of shape are in danger and place their colleagues in jeopardy. If they are in poor muscular shape, they run a greater risk of back strain."

Crime Control Digest, October 4, 1976, at 4.

It appears that the height-weight ratio chart serves at least two legitimate state purposes. By requiring officers to conform with certain minimum and maximum weight requirements, the state will reduce the number of overweight peace officers who may eventually claim disability benefits, thus relieving taxpayers of some taxes collected to pay such claims. And the state will also reduce some of the health risks incident to the performance of the police officers' regular duties.

The United States Supreme Court has specifically recognized as legitimate a state's interest in protecting the public "by assuring physical preparedness of its uniformed police." *Massachusetts Board of Retirement v. Murgia,* 1976, 427 U.S. 307, 314.

Secondly, we deal with the question of whether the regulation is rationally related to the state purpose discussed above. Officers have six months in which to adjust their weight to the weight specified in the chart before any disciplinary action is taken. The regulation further provides for a waiver of the weight requirement for medical reasons, with the cost of such a determination paid by the Department. The regulation appears on its face to operate effectively and fairly, to accomplish the purpose it is intended to serve, *i.e.,* to encourage peace officers to lose or gain weight so that the interest of the public in assuring that their officers are in good health and prepared to meet emergencies is effectuated.

The Virginia District Court recently rejected a claim that an airline's use of a height-weight chart, allowing even less variations in weight than the chart used by the Iowa Department of Public Safety, violated Title VII of the Civil Rights Act of 1964, *infra. Jarrell v. Eastern Air Lines,* 1977, 14 FEP 799 (E.D. Va.). After finding that the use of the chart was "consistent with accepted medical notions of good health,...may be complied with without imposing a health hazard," *Id.* at 806, and did "not [have] a disparate impact on the employment opportunities of women," *Id.,* the court held that the airline's use of the chart was not discriminatory. *Id.* at 807.

Courts have generally upheld regulations restricting employment of overweight persons. In *Cox v. Delta Air Lines, supra,* the Florida District Court held that the suspension of an overweight stewardess was not violative of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §2000e *et seq.* (1970 ed. and Supp. V). A refusal to hire because of the applicant's overweight problem was upheld by a North Carolina District Court. *Logan v. General Fireproofing,* 1972, 521 F.2d 881 (W.D.N.C.). And a regulation restricting weight variations of both male and female employees "in a nondiscriminatory fashion" was upheld by the District of Columbia Circuit Court. *Laffey v. Northwest Airlines, Inc.,* 1976, 12 EPD paragraph 11,216 at 5622 (D.C. Cir.)

The United States Supreme Court was asked to determine whether a regulation setting a compulsory retirement age of fifty for employees of the Massachusetts state police was unconstitutional. Upon deciding that persons over the age of 50 did not constitute a " 'discrete and insular' group, *United States v. Carolene Products Co.,* 304 U.S. 144, 152-153, n.4,... (1938), in need of 'extraordinary protection from the majoritarian political process,' " *Massachusetts Bd. of Retirement v. Murgia,* 1976, 427 U.S. 307, 313, the Court upheld the classification as "rationally related to the State's objective," *Id.* at 315, *i.e.,* "assuring physical preparedness of its uniformed police." *Id.* at 314.

"That the State chooses not to determine fitness more precisely through individualized testing...is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum age limitation....[W]here rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' *Dandridge v. Williams,* 397 U.S., at 485."

Id. at 317.

It is, therefore, our opinion that because the weight restriction contained in General Order D51 of the Iowa Department of Public Safety appears to be rationally related to a legitimate state purpose, it is not unconstitutional.

August 3, 1977

DRAINAGE DISTRICTS: Levy for costs of repair or improvements. Sections 455.136, 455.198 and 74.2, Code of Iowa, 1977. The provision of §455.136 providing for levy for the costs of repair or improvements of draining districts within two years from incurring the costs is directory, not mandatory, and failure of the local board to make a levy within the two year period will not defeat collection of the tax. Interest accrues on warrants issued to pay for the costs of drainage district repair or improvements at the rate of seven percent per annum from the date the warrant has been presented to the county treasurer and endorsed. (Maggio to Norland, Worth County Attorney, 8-3-77) #77-8-6

Mr. Phillip N. Norland, Worth County Attorney: You have asked whether an assessment may be levied for the costs of drainage district repairs more than two years after said costs have been incurred. Further, you have asked whether such a levy, if lawful, can include interest accrued on the costs of repairs. Lastly, you have asked whether, if such a levy is unlawful, the costs of the repairs can be paid from the county general funds.

Section 455.136, Code of Iowa, 1977, provides in relevant part:

"The costs of the repair or improvements provided for in §455.135 shall be paid for out of the funds of the levee or drainage district. If the funds on hand are not sufficient to pay such expenses, the board within two years shall levy an assessment sufficient to pay the outstanding indebtedness and leave the balance which the board determines is desirable as a sinking fund to pay maintenance and repair expenses."

The Iowa Supreme Court has repeatedly held that levy statutes such as §455.136 are directory, not mandatory, and mere irregularity in the application of such levy statutes, where no injury is shown, will not defeat the collection of taxes justly due. *In re Kaufman's Estate,* 1898, 104 Iowa 639, 74 N.W. 8; *McDonald v. Clarke County,* 1923, 196 Iowa 646, 195 N.W. 189; *Iowa Railroad Lane Co. v. Carroll County,* 1874, 39 Iowa 151; *Perrin v. Benson,*

1878, 49 Iowa 325; *Hill v. Wolfe,* 4511870, 28 Iowa 577; *Yengel v. Allen,* 1907, 179 Iowa 633, 161 N.W. 631; *Easton v. Savery,* 1876, 44 Iowa 654; *Cantillon v. Dubuque & N.W.R.Co.,* 1889, 78 Iowa 48, 42 N.W. 613; *Montis v. McQuiston,* 1899, 107 Iowa 651, 78 N.W. 704; *Jewett Realty Co. v. Bd. of Sup. of Polk Co.,* 1948, 239 Iowa 988, 33 N.W. 377; *Conway v. Younkin,* 1869, 28 Iowa 295. Many of these Iowa Supreme Court cases interpret statutes which use the word "shall" and which provide time periods within which a levy must be made. Under the doctrine developed by the Iowa Supreme Court in this area, two considerations are especially important. The tax in question must be "justly due," and the persons required to pay the tax must not be "injured" thereby. In *Hill,* supra, a tax levied beyond the time required by statute was upheld since it was justly due, and the taxpayers were not injured by its collection. In that case the local board had the power and duty to collect the tax in question, and the tax was levied on taxpayers who expected to pay the tax but for the irregularity in collection by the local board. In upholding the tax, the court stated that the time limit with which the local board failed to comply merely was "intended to promote system and uniformity, rather than of the essence of the thing to be done." *Hill,* supra, 28 Iowa 577, 585.

This doctrine has been more fully explained in *Easton,* supra, 44 Iowa 654, 658, wherein the Iowa Supreme Court states:

"No one should be at liberty to plant himself upon the nonfeasance or misfeasance of officers under the revenue law, which in no way concern himself, and make them the excuse for a failure on his part to perform his own duty. Cooley on Taxation, 215.

"It was the duty of defendants to pay their taxes, and it is no excuse that the officers did not strictly perform their duty, unless, as we have said, defendants were prejudiced thereby. Section 739 of the Revision, as amended by Chap. 24, §3, of the Acts of the extra session of the 8th General Assembly, in substance provides that the board of supervisors at their June meeting shall add to the assessment any taxable property not included in the assessment as returned by the assessors. Where the supervisors omitted such duty at the June meeting and performed it at their September meeting, their action was held to be legal for the reason that the law under which they acted was directory. *Hill et al. v. Wolfe et al.,* 28 Iowa, 577.

"This decision having been made under this same law, the same rule then established must prevail unless there is a distinction between a levy made before and after the day fixed by statute. Our attention has not been called by counsel to any adjudicated case so holding, and our own researches have been unavailing in this respect.

"On principle we cannot see why such fact should make any difference. The defendants were not prejudiced thereby, as we have seen.

"The act was no more prohibited before than after the day."

Applying the foregoing case law to your question, it is readily apparent that the drainage district board has the power and duty under §455.136 to levy taxes for the payment of drainage district repairs. Furthermore, it is readily apparent that no legal injury will be suffered by the property owners against whom the tax will be levied since these property owners are enjoying the benefits provided by the drainage district and should have expected to pay the tax in question. Under these circumstances the failure of the drainage district board to timely levy for repair costs amounts to a mere irregularity

and will not serve to defeat the collection of the tax.

Since the levy in question is valid, your second question must be considered, to wit: may the levy include interest accrued on the warrants from the date of the repairs to the date of their payment? Yes, interest may accrue on the outstanding warrants at the rate of seven percent per annum from and after presentment of the warrants to the County Treasurer and endorsement thereof in compliance with §74.2, Code of Iowa, 1977. (Note that the interest does not necessarily accrue from the date of the repairs as suggested in your letter.) This conclusion is based on §455.198, Code of Iowa, 1977, which expressly provides:

"Chapter 74 shall be applicable to all warrants which are legally drawn on levee and drainage district funds and are not paid for want of funds, except that such warrants shall bear interest at not to exceed seven percent per annum."

In view of the answers given to your first two questions, your third question is now moot.

August 9, 1977

STATE OFFICERS & DEPARTMENTS: CONSERVATION COMMISSION: HUNTING SEASON: DOVES: ADMINISTRATIVE RULES. §§17A.4, 109.38, 109.41 and 109.48, Code, 1977. The Iowa State Conservation Commission lacks statutory authority to establish, by administrative rule, an open season on mourning doves. (Turner to Pelton and Miller, State Representatives, 8-9-77) #77-8-7

Honorable John Pelton and Honorable Kenneth D. Miller, State Representatives: Each of you has requested by separate letter to this office an opinion concerning the authority of the Conservation Commission to promulgate a rule establishing a dove season. You indicate that the legislature has demonstrated a clear intent not to permit dove hunting in Iowa. Since your letters each concern the recent action of the Conservation Commission establishing a dove season, this opinion is addressed to both.

You have presented four separate questions for consideration. They are:

(1) Was the Iowa State Conservation Commission acting within the statutory authority of Section 109.48, 1977 Code of Iowa, or any other statute, when it promulgated a rule on July 6, 1977, establishing a mourning dove season for hunting in Iowa?

(2) Did the Iowa State Conservation Commission violate Section 17A.4 of the 1977 Code of Iowa by promulgating this mourning dove hunting season without publishing notice of its intention nor allowing a public hearing prior to its promulgation?

(3) Did the Iowa State Conservation Commission adequately show good cause that notice and public participation was unnecessary, impracticable, or contrary to the public interest when it promulgated a rule establishing a mourning dove hunting season in Iowa, and did the Commission incorporate a statement of the reasons therefor, or a statement that the rule is within a very narrow category of rules which may be exempted from Section 17A.4(1), all in accordance with Section 17A.4(2) of the 1977 Code of Iowa?

(4) Does your office find objection to the rule promulgated by the Iowa State Conservation Commission on July 6, 1977, which set a mourning

dove hunting season in Iowa, because said rule is deemed to be unreasonable, arbitrary, capricious or otherwise beyond the authority delegated to that agency?

Section 109.41, Code of Iowa, 1977, provides in relevant part:

"Game. For the purposes of this chapter the term 'game' shall be construed to mean all of the wild animals and wild birds specified in this section except those designated as not protected, and shall include the heads, skins, and any part of same, and the nests and eggs of birds and their plumage. * * *

"5. The Columbidae: Mourning doves and wild rock doves only.* * *"

Thus, it is apparent that for the purposes of Chapter 109, mourning doves and wild rock doves are included within the meaning of the term "game."

Section 109.38 provides in Part:

"It shall be unlawful for any person to take, pursue, kill, trap or ensnare, buy, sell, possess, transport, or attempt to so take, pursue, kill, trap or ensnare, buy, sell, possess, or transport any game,... or any part thereof, except upon the terms, conditions, limitations and restrictions set forth herein, and administrative orders necessary to carry out the purposes set out in section 109.39, or as provided by the Code. * * *"

Accordingly, unless there is provision elsewhere in the Code or in valid administrative orders, §109.38 would operate to flatly prohibit the hunting of doves, among other species of wildlife. However, it is the position of the Conservation Commission that the second paragraph of §109.48 delegates to the Conservation Commission the authority to set game seasons on doves. We disagree.

Such §109.48 provides:

"Restrictions—possession of falcons. No person, except as otherwise provided by law, shall willfully disturb, pursue, shoot, kill, take or attempt to take or have in possession any of the following game birds or animals except within the open season established by the commission: Gray or fox squirrel, bobwhite quail, cottontail or jack rabbit, duck, snipe, pheasant, goose, woodcock, partridge, coot, rail, ruffed grouse, wild turkey, or deer. The seasons, bag limits, possession limits and locality shall be established by the commission under the authority of sections 107.24, 109.38 and 109.39.

"Subject to annual approval of the commission by departmental rule, no person shall take, possess, transport or use migratory game birds except during the periods of time and in the manner and numbers established under the provisions of the federal 'Migratory Bird Treaty Act' and the 'Migratory Bird Stamp Hunting Act.'

"The commission may by rule permit the taking and possession of designated raptors during the time and in the manner permitted under the federal 'Migratory Bird Treaty Act'."

In searching for legislative intent, the Supreme Court considers the object sought to be accomplished by the subject statute and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect the purpose of the statute rather than one which will defeat it. The Supreme Court is mindful of the state of the law when it was enacted and will seek to harmonize it, if possible, with other statutes relating to the same subject. *Doe v. Ray,* 1977 Iowa, 251 N.W.2d 496.

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.* If the language of a statute is plain and unambiguous, no duty of interpretation arises and the court's sole function is to enforce it according to its terms. *State v. Dunham,* 1975 Iowa, 232 N.W.2d 475. Statutory construction is properly invoked when legislative acts contain such ambiguities or obscurities that reasonable minds may disagree or be uncertain as to their meaning. *Janson v. Fulton,* 1968 Iowa, 162 N.W.2d 438.

In this instance, we think the statute is clear and unambiguous and that reasonable minds cannot differ as to its meaning. The first paragraph of §109.48 lists the game birds or animals for which an open season may be established by the Commission. Mourning doves are simply not included in the list. *Expressio unius est exclusio alterius.* The express mention of one or more things in a statute implies the exclusion of others. *In re Wilson's Estate,* 1972 Iowa, 202 N.W.2d 41. Thus, if it were not for the proscription of other sections, such as §109.38, mourning doves could be shot in Iowa at any time and in any number even absent provision for an open season. But, mourning doves are "game" as defined in §109.41 and since no open season is authorized, §109.38 forbids killing doves at any time or in any manner.

The second paragraph of §109.48 merely harmonizes the state and federal law. Thus, if, for example, the Commission established an open season on ducks, with a bag or possession limit of 10 ducks, and the federal migratory bird laws established a limit of 5 ducks, 5 would be the limit. (We need not here consider whether the Commission may properly be statutorily authorized to disregard federal acts and regulations governing migratory birds.) We are satisfied that as authorization to kill doves under the federal migratory bird law does not, and could not, authorize the Commission to establish an open season on doves. Unlike the words of the first and third paragraphs, the words of the second paragraph of §109.48 are words of limitation rather than a grant of rule-making power.

The second paragraph of §109.48 was added to such section by Chapter 103, 60th G.A. (1962), "An Act to Amend section one hundred nine point forty-eight (109.48), Code 1962, relating to the granting of permission to the state conservation commission to incorporate into state regulations by administrative order the regulations under the Federal Migratory Bird Treaty Act and the Migratory Bird Hunting Stamp Act." At the time such Chapter 103 was enacted, §109.48 did not, as it does now, grant to the Conservation Commission authority to set season and bag limits on a series of enumerated birds or animals. Instead, the section itself specified the kinds of animals and localities, seasons, bag limits, and possession limits. Thus, it was necessary for the legislature to grant to the Commission authority to conform the seasons established by state statute to the federal requirements. Otherwise, insofar as migratory game birds were included within the enumeration of species in §109.48, it would have been necessary for the legislature annually to amend the statute so that the seasons established thereunder were not at variance with those established by the federal government.

Subsequently, of course, §109.48 was amended to repeal the statutory season and bag limits and give the authority to set the same to the Conservation Commission, but only with respect to certain species not including doves. The

significance of this is that when the second paragraph of §109.48 was first enacted into law, it was not, as now urged by the Conservation Commission, an additional, or parallel, grant of rule making authority to that body, but merely a practical necessity so that Iowa's statutory season and bag limits would not be out of step with changing federal requirements. The fact that later the legislature saw fit to give the Commission rule making authority with respect to certain species, including a number of species of migratory game birds, but not including doves, did not in our opinion operate to expand the Commission's authority under the second paragraph to establish seasons on migratory game birds not enumerated in the first paragraph.

We need not speculate upon the effect of numerous bills which have been introduced in the General Assembly over the past several years to authorize the Commission to establish open seasons for "any game bird" or which would add mourning doves to the list, and which amendemtns to the law have repeatedly failed. E.G. H.F. 1054, 65th G.A., House Journal, 1974, pgs. 227-8. We attach little or no weight to the failure of passage of a proposed amendment in construing a statute. *Iowa State Commerce Commission v. Northern Natural Gas Co.*, 1968 Iowa, 161 N.W.2d 111. But see *In Re Public Utilities Commissioner of Oregon,* 201 Ore. 1, 268 P.2d 605 (1954) in which rejection of amendatory bills was considered evidence that the legislature did not wish the Oregon Public Utilities Commissioner to have power over minimum, as well as maximum, rates. And there is authority that where a public official attempted to purchase an airplane from a general appropriation to his department after the General Assembly had twice refused to appropriate money specifically requested for an airplane the general appropriation could not be so used. *Turner v. Ray,* in the Polk County, Iowa District Court, No. CE 4-1974 (1975).

In any case, we think it is clear that if mourning doves are to be lawfully hunted in Iowa it must be as a consequence of legislative action rather than administrative fiat. In view of this conclusion it is unnecessary to answer your second and third questions.

For the reasons stated herein and pursuant to §17A.4(4) (a), I do find the proposed rule to be "beyond the authority delegated to the agency." We will separately give the Conservation Commission notice of this objection as required by §17A.4(4) (a).

August 12, 1977

COUNTIES AND COUNTY OFICERS: §§28E.1, 28E.2, 28E.3, 28E.12, 520.1, 613A.1(2), 613A.8, 1977 Code of Iowa. Ch. 520 does not permit counties to exchange reciprocal or interinsurance contracts. However, Ch. 28E does authorize counties to form an indemnification pool from which claims against the counties entering the pool may be paid. (Haskins to Smith, State Auditor, 8-12-77) #77-8-8

The Honorable Lloyd Smith, Auditor of State: You have requested the opinion of our office on the following matter:

"1. Since Chapter 613A imposes the responsibility for payment of damages upon county governments, and considering the fact that counties have the authority to self-indemnify as well as purchase insurance for liability coverage, may as few as two or in fact all counties in the state join together under Chapter 28E of the Code of Iowa to form an indemnification pool from which claims against any one or all of the counties entering the pool could

be paid?

"2. Do counties fall within the terminology 'municipal corporations of this state' provided in Chapter 520 of the Code? If so, may counties proceed to undertake the formation of such reciprocal or interinsurance contracts between themselves?"

Your questions will be dealt with in reverse order. As to your second question, Ch. 520 authorizes the exchange of reciprocal or interinsurance contracts. §520.1, 1977 Code of Iowa, provides:

"Individuals, partnerships, and corporations, including independent school districts and *municipal corporations* of this state, hereby designated subscribers, are hereby authorized to exchange reciprocal or interinsurance contracts with each other, and with individuals, partnerships, and corporations of other states, territories, districts, and countries, providing insurance among themselves from any loss which may be insured against under the law, except life insurance." [Emphasis added].

The question is whether counties are "municipal corporations" under the above section so that they may exchange reciprocal or interinsurance contracts.

In its strict and proper sense, the term "municipal corporation" includes only cities and towns. *See Board of Park Commrs. v. Marshalltown,* 244 Iowa 844, 854, 58 N.W.2d 394 (1953); *Curry v. The District Township of Sioux City,* 62 Iowa 102, 104, 17 N.W. 191 (1883). 20 C.J.S. *Counties* §3, at 758 sets forth the traditional rule as to whether counties are "municipal corporations" as follows:

"There are a number of decisions which hold that a county is a municipal corporation equally with cities and towns, but while it is in a sense a municipal corporation and may sometimes properly be classed as such, together with other public, political, and quasi corporations, to distinguish them from private or business corporations, and is so classed or construed under some constitutional and statutory provisions, yet counties and municipal corporations proper, such as cities and towns, differ largely in their purposes, attributes, and mode of creation, and are to be distinguished; and the weight of authority is to the effect that a county is not, strictly speaking, a city or municipal corporation,...."

While inroads have been made in the principle that counties are not "municipal corporations", *see Wapello County v. Ward,* 257 Iowa 1231, 136 N.W.2d 249 (1965), we believe that they are limited in scope.

Hence, we conclude that Ch. 520 does not permit counties to exchange reciprocal or interinsurance contracts.

Turning to your first question, Ch. 28E, 1977 Code of Iowa, provides for the joint exercise of governmental power by "public agencies". §28E.1, 1977 Code of Iowa, states:

"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 construe to that end."

§28E.3, 1977 Code of Iowa, states:

"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."

§28E.12, 1977 Code of Iowa, states:

"Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which any of the public agencies entering into the contract is authorized by law to perform."

"Public agency" is defined in §28E.2, 1977 Code of Iowa, as follows:

"For the purposes of this chapter, the term 'public agency' shall mean any *political subdivision* of this state; any agency of the state government or of the United States; and any political subdivision of another state. The term 'state' shall mean a state of the United States and the District of Columbia. The term 'private agency' shall mean an individual and any form of business organization authorized under the laws of this or any other state." [Emphasis added].

A county is a "political subdivision" of the state. *See Larsen v. Potawattamie County,* 173 N.W.2d 579, 581 (Iowa 1970). Hence, Ch. 28E applies to counties.

§613A.8, 1977 Code of Iowa, creates a duty on the part of counties to indemnify their officers, employees, and agents in certain circumstances. That section states:

"The governing body shall defend any of its officers, employees and agents, whether elected or appointed and, except in cases of malfeasance in office, willful and unauthorized injury to persons or property, or willful or wanton neglect of duty, shall save harmless and indemnify such officers, employees and agents 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. Any independent or autonomous board or commission of a municipality having authority to disburse funds for a particular municipal function without approval of the governming body shall similarly defend, same harmless and indemnify its officers, employees and agents against such tort claims or demands.

"The duty to defend, save harmless, and indemnify shall apply whether or not the municipality is a party to the action and shall include but not be limited to cases arising under title 42 United States Code section 1983."

(The term "governing body" includes a county board of supervisors. *See* §613A.1(2), 1977 Code of Iowa.)

Clearly then, counties do have the power (indeed, the duty) to indemnify their officers and employees in certain situations. It therefore follows that under §28E.2, and §28E.12 they may exercise this power jointly with other counties and may enter into contracts to do so. It can be reasonably concluded that they may thus form an indemnification pool from which claims against the counties entering the pool may be paid.

August 15, 1977

TAXATION: REAL ESTATE TRANSFER TAX: EASEMENTS. §428A.1, Code of Iowa, 1977. An easement constitutes "lands or other realty" within the ambit of the tax on real estate transfers imposed in §428A.1. (Griger to Anderson, Howard County Attorney, 8-15-77) #77-8-9

Mark B. Anderson, Howard County Attorney: You have requested the

opinion of the Attorney General on the question of whether an easement is included within the provisions of §428.1, Code of Iowa, 1977, which impose a tax upon real estate transfers.

Section 428A.1 provides in relevant 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:..."

This language in §428A.1 became effective on January 1, 1968, and this tax took the place of a similar federal tax, found in repealed 26 U.S.C. §4361, on conveyances of real property which had existed for many years. See discussion in 1968 O.A.G. 643.

Federal Internal Revenue Service regulation §47.4361-1(a) which interpreted 26 U.S.C. §4361 stated that what constituted "realty" would be determined by federal, not state, law. Perpetual easements were expressly considered in this regulation to be realty for purposes of the federal tax.

Obviously, Iowa law, not federal, will determine whether an easement is included within §428A.1. Indeed, the Attorney General stated in 1968 O.A.G. 643, 644:

"We believe that it is advisable to be guided by Internal Revenue Service interpretations on this question so long as they do not conflict with the Iowa statute, and for the purpose of maintaining a related procedure accepted by those in charge of enforcement over the preceding years."

Section 4.1(8), Code of Iowa, 1977, 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:

* * *

"8. *Land—real estate.* The word 'land' and the phrases 'real estate' and 'real property' include lands, tenements, hereditaments, and all rights thereto and interests therein, equitable as well as legal."

There is nothing in Chapter 428A, Code of Iowa, 1977, which precludes §4.1(8) from being applicable to "lands, tenements, or other realty" in §428A.1.

In 25 Am.Jur.2d *Easements and Licenses* §2, it is stated at page 418:

"An easement is, however, property or an interest in land. It is an incorporeal right or hereditament to which corporeal property is rendered subject."

The Iowa Supreme Court has also held that an easement is an interest in land. *McKeon v. Brammer,* 1947, 238 Iowa 1113, 29 N.W.2d 518; *Independent School Dist. v. DeWilde,* 1952, 243 Iowa 685, 53 N.W.2d 256. In *McKeon,* supra, the Court, quoting from the Restatement of the Law, Property, 5 *Rest. Prop.* §450 (1944), described an "easement" as follows at 238 Iowa 1123:

" 'An easement is an interest which one person has in the land of another. Its most important characteristic is that its burdens fall upon the possessor of the land with respect to which it constitutes an interest regardless of the

circumstances under which it was created or under which he entered possession'."

Moreover, an easement is recognized as an interest in land covered by §4.1(8). *McKeon,* supra, at 238 Iowa 1125.

It is the opinion of this office that an easement constitutes "lands or other realty" within the ambit of the tax on real estate transfers imposed in §428A.1.

August 26, 1977

COUNTIES: Jails. §356.5(6), Code of Iowa, 1977. A sheriff's office separate from the jail building but in close proximity on the same lot is on the premises within the meaning of House File 101, 67th G.A., 1977 Session. The requirement of nighttime inspection is not met by electronic surveillance. (Nolan to Hultman, State Senator, 8-26-77) #77-8-10

Honorable Calvin O. Hultman, State Senator: Your letter of July 8, 1977, made reference to questions which have arisen concerning the construction to be accorded language contained in House File 101, passed by the 67th G.A., 1977 Session, which amends §356.5(6) of the 1977 Code of Iowa. The pertinent language is as follows:

"The keeper of each jail shall: * * *

"(6) Keep a matron on the jail premises at all times during the incarceration of one or more female prisoners; keep either a jailer or a matron on the premises at all times during the incarceration of one or more male prisoners, and make nighttime inspections while any prisoners are confined, or provide for incarceration in a jail which conforms to the provisions of this subsection."

As you pointed out, in some counties the sheriff's office is separated from the jail by but a few feet and since the jail is physically separated from the sheriff's office, the question has arisen as to whether a person stationed in the sheriff's office is "on the premises" for purposes of House File 101 when in fact both structures are located on the same lot of land.

In *Orke v. McManus,* 121 N.W. 177, 142 Iowa 654 (1909), the Iowa Supreme Court determined that the premises of a brewery included all structures covering eight lots of ground in a certain block and where one structure contained a room which was operated as a saloon and open to the public.

"The question presented to us is whether the brewery company permitted any drinking of its product or sold the same at retail 'upon the premises of such manufacturing establishment.' We see no escape from the conclusion that this entire property was one property, under one ownership, and under one management.

"The fact that one room was set apart...ought not to be deemed as separating it from the premises. If it could be so deemed, then the provision of the statute has little use. Its evasion would involve no inconvenience... ."

Accordingly, it is the view of this office that the keeper of the jail who is stationed in his office which is housed in a separate building from the jail, but which is nevertheless located on the same lot of land, is "on the premises" within the meaning of House File 101.

A second question is raised by your letter. You also ask whether the

nighttime inspection requirement of House File 101 would be satisfied if audio and visual electronic equipment were installed in the jail to observe the prisoners and maintained or monitored in the adjacent sheriff's office. It is our view that while maintaining such equipment under the situation described in your letter would result in meeting the rquirements of being "on the premises" that the electronic surveillance is not equivalent to the making of "nighttime inspection while any prisoners are confined."

While it may be possible to obtain electronic equipment which can scan every portion of the interior and exterior of the jailhouse, still it would seem that a statutory requirement to make nighttime inspections is not necessarily confined to visual observation but may very well connote the necessity to employ senses of smell, touch or taste. In *Fidelity and Casualty Co. v. City of Seattle,* 47 Pac. 963, 16 Wash. 445 (1897), the court held that when an officer of any kind is instructed to inspect, the duty goes beyond a mere survey of the eye and implies such tests as are necessary to ascertain quality of the thing inspected. Other courts have held that the words examination and investigation are synonymous with the word inspection relating to the activities of public officers. *U.S. v. Kendrick,* C.A. Ill. 518 F.2d 842 (1975), *Oklahoma Alcoholic Beverage Control Board v. McUlley,* 377 P.2d 568 (1963).

It is the view of this office that the language of House File 101 which provides that the keeper of the jail shall make nighttime inspections while any prisoners are confined is a requirement that will necessitate the jailer making periodic visits inside the jail in the nighttime to critically examine the conditions therein.

August 26, 1977

SCHOOLS: Compatibility of public offices: Area Education agency board and local school district board. §273.8(2), Code of Iowa, 1977. The question of compatibility of offices of local school board member and member area education board is resolved by express statutory provision contained in §273.8(2). (Nolan to Brockett, State Representative, 8-26-77) #77-8-11

Honorable Glenn F. Brockett, State Representative: This is written in reply to your letter of August 17, 1977, requesting an opinion on the question of whether an individual can serve on both the local school board and an area education agency board without violating the doctrine of compatibility of public offices.

It is noted in your letter §273.8(2), Code of Iowa, 1977, provides as follows:

* * *

"The board of directors of the area education agency shall be elected at director district conventions attended by members of the boards of directors of the local school districts located within the director district. The member of the area education agency board to be elected at the director district convention may be a member of a local school district board of directors and shall be an elector and a resident of the director district, other than school district employees." * * *

The second sentence of the above quoted provision was omitted from the 1975 Code by the Code Editor as being a temporary measure although there

had not been any specific repeal of this language by the legislature. In 1976 O.A.G. 89 in an opinion advising that an employee of the Area Education Agency is not precluded from holding the office of director on a local school board, further commented that an incompatibility existed in the offices of area education board member or area education agency administrator and the office of local school district director. This view was premised on language quoted in *State Ex Rel. LeBuhn v. White,* 1965 257 Iowa 606, 133 N.W.2d 903, which held that the offices of local school board director and member of the county board of education were incompatible under the following tests:

"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 officers 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."

Viewing the language as it presently exists in the 1977 Code of Iowa it is now the opinion of this office that the legislature has expressed a public policy that a member of a local school board may also serve as a member of the area education agency board. Accordingly it is our view that the question which you presented may be answered affirmatively.

August 30, 1977

ADOPTIONS: Notice. §§600.3(2), as amended by §2, S.F. 363, Acts, 67th G.A., 1st Session (1977), 600.5(10), as amended by §3, S.F. 363, Acts, 67th G.A., 1st Session (1977), 600.6(2), 600.7, 600.11, as amended by §8, S.F. 363, Acts, 67th G.A., 1st Session (1977), 600.16(2), as amended by §13, S.F. 363, Acts, 67th G.A., 1st Session (1977), 600A.2(3), 600A.2(4), 600A.2(7), as amended by §15, S.F. 363, Acts, 67th G.A., 1st Session (1977), 600A.9 as amended by §27, S.F. 363, Acts, 67th G.A. 1st Session (1977), Code of Iowa, 1977. Parents whose parental rights have been terminated do not have to receive notice of an adoption hearing pursuant to Section 600.11(2), as amended by §8, S.F. 363, Acts, 67th G.A., 1st Session (1977), Code of Iowa, 1977. (Boecker to Clark, State Representative, 8-30-77) #77-8-12

The Honorable Betty Jean Clark, State Representative: This is in answer to your request for an opinion with respect to the question of whether or not natural parents who have had their parental rights terminated must be served with notice of the adoption hearing pursuant to Section 600.11, Code of Iowa, 1977, as amended by §8, S.F. 363, Acts, 67th G.A., 1st Session (1977).

Section 600.11, Code of Iowa, 1977, as amended by §8, S.F. 363, Acts, 67th G.A., 1st Session (1977) states in pertinent part:

"2. At least twenty days before the adoption hearing, a copy of the petition and its attachments and a notice of the adoption hearing shall be given by the adoption petitioner to:

"a. A guardian, guardian ad litem if appointed for the adoption proceedings, and custodian of, and *any person in a parent-child relationship with the person to be adopted.*

"* * *" (Emphasis supplied)

The parent-child relationship is defined in Section 600A.2(3), Code of Iowa, 1977:

"3. 'Parent-child relationship' means the relationship between a parent and a child recognized by the law as conferring certain rights and privileges and imposing certain duties. The term extends equally to every child and every parent, regardless of the marital status of the parents of the child. The rights, duties, and privileges recognized in the parent-child relationship include those which are maintained by a guardian, custodian, and guardian ad litem."

When the definition of "parent-child relationship" contained in Section 600A.2(3), Code of Iowa, 1977, is read in conjunction with the definition of "termination of parental rights" Section 600A.2(4), Code of Iowa, 1977, it is clear that the natural parents whose parental rights have been terminated no longer stand in a parent-child relationship with the person to be adopted as stated in Section 600.11(2)(a) of the Code as amended by §8, S.F. 363, Acts, 67th G.A., 1st Session (1977). Section 600A.2(4) defines termination of parental rights:

"4. 'Termination of parental rights' means a complete severance and extinguishment of a parent-child relationship between one or both living parents and the child."

Other Sections of Chapter 600, Code of Iowa, 1977, as amended by S.F. 363, Acts, 67th G.A., 1st Session (1977), when the entire chapter is read, gives support to the position that the natural parents whose parental rights have been terminated do not have to receive the notice required in Section 600.11 of the Code as amended by §8, S.F. 363, Acts, 67th G.A., 1st Session (1977). Section 600.3(2), Code of Iowa, 1977, as amended by §2, S.F. 363, Acts, 67th G.A., 1st Session (1977) states:

"2. An adoption petition shall not be filed until a termination of parental rights has been accomplished except in the following circumstances:

"a. The person to be adopted is an adult.

"b. The parent's spouse is the adoption petitioner.

"For the purposes of this subsection, a consent to adopt recognized by the courts of another jurisdiction in the United States and obtained from a resident of that jurisdiction shall be accepted in this state in lieu of a termination of parental rights proceeding."

It is further required that the adoption petition contain when and where the termination of parental rights pertaining to the person to be adopted occurred. Section 600.5(10), Code of Iowa, 1977, as amended by §3, S.F. 363, Acts, 67th G.A., 1st Session (1977). Section 600.6(2) of the Code rquires that a copy of the termination order be attached to the adoption petition.

Section 600.7, Code of Iowa, 1977, states who must consent to the adoption. One such individual is the guardian of the person to be adopted. The natural parent whose parental rights have been terminated no longer stands in a guardianship relation to the child. Sections 600A.2(3) and 600A.2(4), Code of Iowa, 1977. Thus the natural parents do not have authority to consent to or block the adoption proceeding, if their rights have been terminated and they have not been placed in the position of guardian as defined in Section 600A.2(7), Code of Iowa, 1977, as amended by §15, S.F. 363, Acts, 67th G.A., 1st Session (1977).

Again, following the same theory as evidenced by the entire language of the chapter, are the provisions of Section 600.16(2), Code of Iowa,

1977, as amended by §13, S.F. 363, Acts, 67th G.A., 1st Session (1977), which in part states:

"The permanent termination of parental rights record of the juvenile court under chapter 600A and the permanent adoption record of the court shall be sealed by the clerk of the juvenile court and the clerk of court, as appropriate, when they are complete and after the time for appeal has expired. All papers and records pertaining to a termination of parental rights under chapter 600A and to an adoption, whether a part of the permanent termination and adoption records of the juvenile court and of the court or on file with a guardian, guardian ad litem, custodian, person who placed a minor person, or the department shall not be open to inspection and the identity of the natural parents of an adopted person shall not be revealed...."

Section 600A.9, Code of Iowa, 1977, as amended by §27, S.F. 363, Acts, 67th G.A., 1st Session (1977) supplies further foundation for the position expressed in this opinion by denying a terminated parent the opportunity to request the vacation of the termination order if the child is on placement for adoption or a petition for adoption is on file. Section 600A.9, Code of Iowa, 1977, as amended by §27, S.F. 363, Acts, 67th G.A., 1st Session (1977), states in pertinent part:

"1. Subsequent to the hearing on termination of parental rights, the juvenile court shall make a finding of facts and shall:

"* * *

"c. Order the petition be granted. The juvenile court shall appoint a guardian and a custodian or a guardian only. An order issued under this paragraph shall include the finding of facts.

"Such finding shall specify the factual basis for terminating the parent-child relationship and shall specify the ground or grounds upon which the termination is ordered.

"2. If an order is issued under subsection 1, paragraph 'c' of this section, the juvenile court shall retain jurisdiction to change a guardian or custodian and to allow a terminated parent to request vacation of the termination order if the child is not on placement for adoption or a petition for adoption of the child is not on file. The juvenile court shall grant the vacation request only if it is in the best interest of the child...."

In *Carson v. Elrod,* 411 F.Supp. 645 (U.S.D.Ct. E.D. Virginia 1976), the United States District Court for Eastern District of Virginia held, in a civil rights action brought by a mother alleging she was deprived of the custody of her daughter without due process of law, that when a parent has been deprived of said custody by lawful court order and permanently divested of responsibility, the parent was not entitled to notice or the opportunity to be heard prior to the adoption.

Carson v. Elrod, 411 F.Supp. 645 (U.S.D.Ct. E.D. Va. 1976) states at 649:

"Plaintiff's second allegation, that she was not given notice or an opportunity to be heard prior to the entry of the order of adoption by the state court, likewise fails to state a cause of action capable of surviving a motion to dismiss. Plaintiff was permanently divested of custody of her child by decision of the circuit court of the City of Virginia Beach on 31 August 1967. Thereafter, lawful custody of plaintiff's natural child rested with the Department of Social Services and all of plaintiff's rights with respect to the child were extinguished. This included the right of plaintiff to be notified when the child was placed for adoption."

It is clear that once the parent-child relationship has been terminated the parents who were the subject of the termination proceedings are not persons standing in a parent-child relationship so as to fall within those required to receive notice of an adoption hearing pursuant to Section 600.11, Code of Iowa, 1977, as amended by §8, S.F. 363, Acts, 67th G.A., 1st Session (1977).

August 30, 1977

COUNTY ATTORNEYS: Uniform Support of Dependents Law, Ch. 252A, and Child Support Recovery, Ch. 252B, Code of Iowa, 1977. Ch. 252B does not relieve the county attorney of duties imposed by Ch. 252A. Claims for support, other than child support, should not be referred to the Child Support Recovery Unit. (Keith to Rush, Iowa State Senator, 8-30-77) #77-8-13

The Honorable Bob Rush, State Senator: You request an opinion of the attorney general regarding the application and construction of Chapters 252A and 252B, Code of Iowa, 1977. Both chapters pertain to the securing of support for dependent children and you question their interrelation. You are particularly interested in the duties of the county attorney vis-á-vis the Child Support Recovery Unit. You ask:

"1. Is it appropriate for a county attorney to refer and/or forward to the Child Support Recovery Unit those cases in which a support decree for a child need be obtained, and thus require the filing of an application fee and reimbursement of costs incurred?

"2. If the first question is answered in the affirmative, may the county attorney forward along with the child's claim the claims of other attendant dependents, e.g., its mother's claim for support?"

Chapter 252A, the Uniform Support of Dependents Law, was enacted, "...to secure support in civil proceedings for dependent spouses, children and poor relatives from persons legally responsible for their support." Section 252A.1. As you point out, the county attorney, as "petitioner's representative," is "...charged by law with the duty of instituting, maintaining or prosecuting a proceeding under this chapter...." Section 252A.2(7); cf. Section 252A.7.

Under Chapter 252B there is created a Child Support Recovery Unit, one function of which is the pursuit of actions to secure support for dependent children by appropriate action under Chapter 252A. Sections 252B.3, .4, .5 (3), .7(b).

It is apparent that the legislature intended there to be a certain amount of overlap between the two chapters of the Code. In Section 252B.7, wherein the legal services available to the Child Support Recovery Unit from the office of the attorney general are delineated, it is stated:

"For the aforesaid purposes, the attorney general shall have the same power to commence, file and prosecute any action or information in the proper jurisdiction, which the county attorney could file or prosecute in that jurisdiction. This shall in no way relieve any county attorney from his or her duties,...."

Chapter 252B, thus, does not relieve the county attorney of duties imposed by Chapter 252A. Uniform Support actions may be filed and prosecuted by either the county attorney or the attorney general.

In response to your first question, it is not appropriate for the county attorney to decline to prosecute support cases merely because there is a Child Support Recovery Unit with powers coextensive in this area. Sections 252A.2(7), 252B.7. It would be appropriate, however, for the county attorney to advise the applicant for assistance of the availability of the parallel avenue of support enforcement, the CSRU. In either case, certain costs must be borne by the initiating party:

"Section 252A.10 Costs advanced. Actual costs incurred in this state incidental to any action brought under the provisions of this chapter shall be advanced by the initiating party or agency unless otherwise ordered by the court...."

"Section 252B.4 Nonassistance cases...The commissioner may require an application fee not to exceed twenty dollars as determined by the commissioner. The commissioner may require an additional fee to cover the costs incurred by the department in providing the support collection and paternity determination services...."

While your initial question is not answered with an unqualified affirmative, a comment on your second question may be in order. Chapter 252B provides for the collection of child support only. There is no provision for recovery of support claimed by other dependent relatives. Chapter 252A. is broader and provides for securing support for dependent relatives generally.

"Section 252A.2 Definitions.

* * *

"4. 'Dependent' shall mean and include a spouse, child, mother, father, grandparent or grandchild who is in need of and entitled to support from a person who is declared to be legally liable for such support by the laws of the state or states wherein the petitioner and the respondent reside."

Claims for support, other than child support, should not be referred to the Child Suport Recovery Unit.

August 30, 1977

CONSERVATION COMMISSION: Authority to "promote" or disseminate information, Section 107.23, Code of Iowa, 1977. The Conservation Commission is empowered to disseminate information to residents and nonresidents of Iowa concerning all of the material it has collected, classified and preserved under Section 107.23 and which, in its opinion, tends to promote the objects of Chapter 197. (Davis to Kinley, State Senator, 8-30-77) #77-8-14

Mr. George R. Kinley, State Senator: You have requested an opinion of this office as to whether under Section 107.23, Code of Iowa, 1977, the Conservation Commission has the authority to "promote" hunting and fishing activities thereunder or if it is confined to the dissemination of information only. You further ask whether this office has ever issued an opinion on that section. Section 107.23 states as follows:

"It shall be the duty of the commission to protect, propagate, increase and preserve the fish, game, fur-bearing animals and protected birds of the state and to enforce by proper actions and proceedings the laws, rules and regulations relating thereto. The commission shall collect, classify, and preserve all statistics, data, and information as in its opinion shall tend

to promote the objects of this chapter; shall conduct research in improved conservation methods and disseminate information to residents and non-residents of Iowa in conservation matters.

Upon the issuance of such data and information in printed form to private individuals, groups or clubs, the commisssion shall be entitled to charge therefor the actual cost of printing and publication as determined by the state printer."

The only prior opinion of the attorney general in this area, issued in 1938, determined that language then contained in what is now §107.23 gave the commission power 'to disseminate information to residents of Iowa in conservation matters' but did not authorize the commission to solicit paid subscriptions for and to publish a periodical not generally available to the public.

In 1943, evidently in response to this opinion of the attorney general, the legislature added the last paragraph of what is now §107.23.

In 1969, the legislature broadened the scope of the paragraph by adding "and nonresidents" near the end of the first paragraph.

The statute is clear that the commission is empowered to "disseminate information to residents and nonresidents of Iowa" concerning all of the material it has collected, classified and preserved under this section and which, in its opinion, tends to "promote the objects of this chapter".

To argue as to whether the commission has the authority to "promote" or only the power of "dissemination of information" is an argument in semantics which could serve no useful purpose. One person's "promotional literature" is another person's "informational material".

The commission has the power to "disseminate information" which "tends to promote" those areas of its assigned duties, which include not only Chapter 107 but also Chapter 106, Water Navigation Regulations; Chapter 106A, Use of State Waters by Nonresidents; Chapter 108, Acquisition of Lands by Conservation Commission; Chapter 108A, Scenic Rivers System; Chapter 109, Fish and Game Conservation; Chapter 109A, Management and Protection of Endangered Plants and Wildlife; Chapter 110, Fish and Game Licenses and Contraband Articles and Guns; Chapter 110A, Game Breeding and Shooting Preserves; Chapter 110B, Migratory Waterfowl; and Chapter 111, Conservation and Public Parks.

There are certain other duties of the commission in some other chapters of the code, however, those are the principal areas of authority about which it is authorized to disseminate information under Section 107.23.

August 30, 1977

COUNTIES: SUPERVISORS. Trustees of a charitable trust for the benefit of persons admitted to the county home may receive a court ordered fee for services performed even though such trustees are members of the board of supervisors since the duties imposed by the trust are not within the scope of duties prescribed for the supervisors by statute. (Nolan to Hoth, Des Moines County Attorney, 8-30-77) #77-8-15

Mr. Steven S. Hoth, Des Moines County Attorney: This is written in response to your request for an opinion on the question of whether it is legal

for elected members of the board of supervisors, who are serving as trustees for the Gabeline Trust, to be paid a court ordered fee for their duties as trustees of the trust.

You included a copy of the original Will creating the Gabeline Trust with your request for an opinion. We note that Item 6 of the Will is concerned with the trust in question and provides:

"...upon the termination of the Life Estate created in the last item above, I give, bequeath and devise all the rest and residue of my Estate, wherever situate and in whatsoever form the same may be unto the Board of Supervisors of Des Moines County, Iowa, and their duly elected successors in interest in Trust for the following purposes: * * *

"3. To annually make payments of all income to and on behalf and to the benefit of all persons admitted to the Des Moines County Home, Des Moines County, Iowa, said income to be used to provide addiional services and facilities to said persons living at the Home, in addition to the basic services furnished through taxation. The Board of Supervisors determination of what is to be furnished under this power is to be binding." * * *

ITEM VII

"It is the intention of this Will and the intent of the Trust created in the last paragraph above to provide additional services and facilities at the Des Moines County Home for persons who live at the Home and for whom the Home is furnishing custodial or nursing care."

A charitable trust may be established for charitable purposes, including gifts for the benefit of an indefinite number of persons, which have the effect of otherwise lessening the burden of government. 14 C.J.S. Charities §1. In the creation of a charitable trust, there must be a separation of the legal estate from the beneficial enjoyment of the gift in order to prevent a merger of legal and beneficial estate. If a charitable bequest is made to a muncipal corporation, a provision that the management thereof shall be by the board of trustees, does not necessarily divest the municipality of the legal title invested in its trustees. 14 C.J.S. §24. In such case the gift may be construed to make the municipality the technical trustee holding the legal title and a so-called trustees merely an agency entrusted with the management. *In re Spangler's Estate,* 127 N.W. 625 (Iowa, 1910). Formal acceptance of a trust by a county governmental body is not necessary. *In re Nugents Estate,* 272 N.W. 638, Iowa (1937). Further, it appears to be well settled that the elected officers of a municipal corporation can not accept the trust on behalf of the corporation where the purposes of the trust are repugnant to or inconsistent with the proper purposes for which the municipal corporation was created. 14 C.J.S. 633.

In reviewing Chapters 331 and 332 of the Code of Iowa pertaining to the board of supervisors and the powers and duties of supervisors, I do not find any statutory provision which would preclude an elected member of the board of supervisors from qualifying and serving as a trustee under a testamentary charitable trust such as the Gabeline Trust. Further, the provisions of §331.22:

"A board of supervisors shall receive an annual salary or per diem compensation as provided in section 340.6. The annual salary or per diem shall be in full payment for all services rendered to the county... ."

The board of supervisors is responsible for the approval of all reasonable and proper claims to be paid from the county treasury for the care and support of the poor. §252.35. Under §253.2 the board is authorized to "make all contracts and purchases requisite for the county farm and care facility and ...prescribe rules for the management and government of the same, and for the sobriety, morality and industry of its occupants." The board is required to publish an itemized "financial statement of the receipts of the county care facility or county farm," (§253.3) and also to cause county care facility to be visited at least once a month by one of its members to see the condition of the residents, the manner in which they are clothed and fed and otherwise provided for and treated and what labor they are required to perform. The supervisor visiting the care facility is also to inspect the books of the administrator and to report to the board on all matters relating to the county care facility and its residents. (§253.8).

The trustees of the Gabeline Trust act only to manage the property comprising the corpus of the trust and to distribute the income to provide services and facilities which are not provided by public funds for persons admitted to the county home. Obviously, this trust was created to supplement and not encroach upon any of the benefits which the county is empowered to provide for the residents at the county home. Item VI, paragraph 5 of the Will creating the trust specifically provides that the funds of the trust shall be accounted for in separate accounts and never "comingled or become part of any public funds."

Accordingly, it is the opinion of this office that an elected member of the board of supervisors may serve as the trustee of this charitable trust and may be paid a court-ordered fee for undertaking such duties.

The second question which you submitted is whether the administration of the trust is created under the Will is Des Moines County business therefore requiring a Des Moines County Auditor to maintain the trust records, the Des Moines County Attorney to make the trust report, and the Des Moines County Supervisors to administer the trust as one of their official county duties.

The Gabeline Trust is subject to the jurisdiction of the District Court in and for Des Moines County in accordance with the charitable trust laws of the State of Iowa. Accordingly the administration of the trust is not county business and the supervisors do not administer the trust as one of their official county duties. Consequently the records of the administration of the Gabeline Trust should not be comingled with the county records in the office of the county auditor. You also ask whether since beneficiaries of the trust are cared for by the county ward, purchases made in their behalf should be exempt from the payment of state sales tax in the manner that other purchases paid by the county or the benefit of individuals living in the Des Moines County Home are exempt from state sales tax.

Section 422.45 provides exemption from sales tax only in the situations enumerated thereunder. Subsection 5 provides for an exemption in the case of "gross receipts or from services rendered, furnished, or performed and all of the sales of goods, wares or merchandise used for public purposes to any tax-certifying or tax-levying body of the State of Iowa or governmental subdivision thereof... ." Such exemption, in our opinion, does not depend on the status of the ultimate beneficiaries and therefore does not

reach to purchases made by the trustees.

We believe that any other questions presented in your letter of February 1, 1977, have been discussed in the answers to the questions set out above.

August 31, 1977

TAXATION: Tax Sale Certificates. §§446.31, 446.37, Code of Iowa, 1977. When a county acquires a tax sale certificate, it may assign the same pursuant to the provisions of §446.31 and the five year period in §446.37 would not be applicable to cancel the certificate held by the assignee. (Griger to Kelso, Supervisor of County Audits, 8-31-77) #77-8-16

William E. Kelso, Supervisor of County Audits: You have requested an opinion of the Attorney General involving tax sales for delinquent real property taxes. Specifically, your letter states:

"Section 446.37, Code of Iowa, provides for cancellation of tax sale certificates over five years old where action has not been started to obtain a deed.

We are aware of previous opinions stating that this section did not apply to certificates issued to a county as this was a way of being able to collect taxes.

The question now arises concerning a certificate in which it was originally issued to the county and was later assigned.

(1) If the certificate was assigned to an individual paying the county for the certificate and then no action taken for over five years, should the certificate be cancelled as provided in Section 446.37?

(2) If the assignment was made to a city which paid the county the amount due, should it be cancelled after five years as provided by Section 446.37?"

Section 446.37, Code of Iowa, 1977, provides:

"After five years have elapsed from the time of any tax sale, and action has not been completed during such time which qualifies the holder of a certificate to obtain a deed, it shall be the duty of the county auditor and county treasurer to cancel such sale from their tax sale index and tax sale register."

As you correctly observe, prior opinions of the Attorney General have ruled that where the county acquires tax sale certificates by reason of bidding for the property pursuant to §446.19, Code of Iowa, 1977, the five year period in §446.37 does not apply to require cancellation of those certificates held by the county. 1946 O.A.G. 114; 1970 O.A.G. 160. In the last cited opinion, the Attorney General stated:

"There is no obligation for the county to cancel the certificates which it holds after the five year period. Purchase by the county at a public bidder sale is a method of collecting the tax. No money is paid, and the transaction is a mere bookkeeping item. In the acquisition by the county, the county acts as a trustee for all taxing bodies. To cancel such sale after an elapse of years according to the terms of the statute, would impede the county in the collection of its taxes and adversely affect not only the county but all taxing bodies by and through the county. The section does not operate to cancel a sale to a county under the public bidder act. 1946 O.A.G. 114."

The five year period, when applicable, commences from the time of the

tax sale under the clear provisions of §446.37. It does not commence from the date of an asignment by the county of the tax sale certificate pursuant to §446.31, Code of Iowa, 1977, which provides:

"The certificate of purchase shall be assignable by endorsement and entry in the register of tax sales in the ofice of county treasurer of the county from which said certificate issued, and when such assignment is so entered, it shall vest in the assignee or his legal representatives all the right and title of the assignor. The statement in the treasurer's deed of the fact of the assignment shall be presumptive evidence thereof. When the county acquires a certificate of purchase and has the same in its possession for one year, or more, the board of supervisors may compromise and assign the said certificate of purchase, with the written approval of all tax-levying and tax-certifying bodies having any interest in said general taxes. All moneys received from assignment of said certificates shall be apportioned to the tax-levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold."

Since the county as the holder of a tax sale certificate does not come within the scope of the provisions of §446.37 requiring cancellation of such certificates, it would seem to logically follow that he county could assign such certificates, pursuant to §446.31, after the five year period. To say otherwise would result in applying the five year period for purposes of assignment of tax sale certificates, but not for purposes of acquiring a tax deed in the name of the county, thus producing an anomaly. Moreover, there is nothing in the statutes which expressly preclude an assignment by the county of the certificate after the five year period. Consequently, the county may assign the tax sale certificate before or after the five year period in §446.37.

Section 446.31 specifically states that assignments of tax sale certificates vest in the assignee "all the right and title of the assignor." Such rights of assignment existed for many years prior to the enactment, in 1939, of Chapter 210, Acts of 48th G.A., which expressly sets forth conditions for assignments of certificates by a county. However, the county had, prior to such enactment, the right to assign tax sale certificates. *Fleck v. Duro,* 1939, 227 Iowa 356, 288 N.W. 426; 1938 O.A.G. 2. Moreover, this office has previously opined that the language in §446.31 stating that an assignment vests in the assignee right and title of the assignor applies to a county's assignment of a tax sale certificate. 1942 O.A.G. 93. In any event, unlike the provisions of §446.37, the assignment provisions in §446.31 clearly apply to the county. When the county (assignor) assigns tax sales certificates, the assignee succeeds to the county's rights which include non-applicability of the five year period in §446.37.

A holder of a tax sale certificate, whether the county or an assignee, obtains no right of possession or title to the property before the tax deed issues and, after the tax sale, subsequent real property taxes continue to atach to the property so sold, regardless whether the county or another holds the tax sale certificate. *Currington v. Black Hawk County,* 1971, Iowa, 184 N.W.2d 675; *Moffitt v. Future Assurance Associates, Inc.,* 1966, 258 Iowa 1160, 140 N.W.2d 108; 1922 O.A.G. 160.

It is the opinion of this office that when a county acquires a tax sale certificate, it may assign the same pursuant to the provisions of §446.31 and the five year period in §446.37 would not be applicable to cancel the certificate held by the assignee.

August, 1977

ADOPTIONS

Notice. §§600.3(2), as amended by §2, SF 363, Acts, 67th G.A., 1st Session (1977); 600.5(10), as amended by §3, SF 363, Acts, 67th G.A., 1st Session (1977); 600.6(2); 600.7; 600.11, as amended by §8, SF 363, Acts, 67th G.A., 1st Session (1977); 600.16(2), as amended by §13, SF 363, Acts, 67th G.A., 1st Session (1977); 600A.2(3); 600A.2(4), 600A.2(7), as amended by §15, SF 363, Acts, 67th G.A., 1st Session (1977); 600A.9, as amended by §27, SF 363, Acts, 67th G.A., 1st Session (1977). Parents whose parental rights have been terminated do not have to receive notice of an adoption hearing pursuant to §600.11(2). (Boecker to Clark, State Representative, 8-30-77) #77-8-12

CONSTITUTIONAL LAW

Civil Rights; Law Enforcement; Personnel rule limiting weight of peace officer employees. U.S. Constitution, Fourteenth Amendment (equal protection). 42 U.S.C. 2000e-2(a). The State may require that its peace officer employees be trim by setting a maximum weight based on height. (Linge to Criswell, Warren County Attorney, 8-3-77) #77-8-5

COUNTIES AND COUNTY OFFICERS

Supervisors. Trustees of a charitable trust for the benefit of persons admitted to the county home may receive a court ordered fee for services performed even though such trustees are members of the board of supervisors since the duties imposed by the trust are not within the scope of duties prescribed for the supervisors by statute. (Nolan to Hoth, Des Moines County Attorney, 8-30-77) #77-8-15

Uniform Support of Dependents Law. Chapter 252A and Child Support Recovery, Chapter 252B, Code of Iowa, 1977. Chapter 252B does not relieve the county attorney of duties imposed by Chapter 252A. Claims for support, other than child support, should not be referred to the Child Support Recovery Unit. (Keith to Rush, State Senator, 8-30-77) #77-8-13

Jails. §356.5(6), Code of Iowa, 1977. A sheriff's office separate from the jail building but in close proximity on the same lot is on the premises within the meaning of House File 101, 67th G.A., 1st Session (1977). The requirement of nighttime inspection is not met by electronic surveillance. (Nolan to Hultman, State Senator, 8-26-77) #77-8-10

Reciprocal or interinsurance contracts. §§28E.1, 28E.2, 28E.3, 28E.12, 520.1, 613A.1(2), 613A.8, Code of Iowa, 1977. Chapter 520 does not permit counties to exchange reciprocal or interinsurance contracts. However, Chapter 28E does authorize counties to form an indemnification pool from which claims against the counties entering the pool may be paid. (Haskins to Smith, State Auditor, 8-12-77) #77-8-8

Indemnification Fund. §332.37, Code of Iowa, 1977. Township officers and employees are not covered by the county indemnification fund. (Nolan to Pillers, Clinton County Attorney, 8-3-77) #77-8-4

Auditor's Plat. §§409.14, 441.65, Code of Iowa, 1977. County auditor's plat made pursuant to §441.65 for assessment and taxation purposes need not be accompanied by title opinion to be recorded but must where appropriate have a certificate of approval from the city council. (Nolan to Dunton, State Representative, 8-3-77) #77-8-3

DRAINAGE DISTRICTS

Levy for costs of repair or improvements. §§455.136, 455.198 and 74.2, Code of Iowa, 1977. The provision of §455.136 providing for levy for the costs of repair or improvements of drainage districts within two years from incurring the costs is directory, not mandatory, and failure of the local board to make a levy within the two year period will not defeat collection of the tax. Interest accrues on warrants issued to pay for the costs of drainage district repair or improvements at the rate of seven percent per annum from the date the warrant has been presented to the county treasurer and endorsed. (Maggio to Norland, Worth County Attorney, 8-3-77) #77-8-6

MUNICIPALITIES

Private Sewage Disposal Facilities. Art. III, §38A, Iowa Constitution; §§137.5, 137.7(4), 364.1 and 364.2(3), Code of Iowa, 1977. The provisions of §137.7(4) giving county boards of health authority to issue permits for private facilities, prevail over a similar ordinance of a city under 25,000 population. (Blumberg to Pillers, Clinton County Attorney, 8-2-77) #77-8-2

SCHOOLS

Compatibility of public officers; Area Education agency board and local school district board. §273.8(2), Code of Iowa, 1977. The question of compatibility of offices of local school board member and member area education board is resolved by express statutory provision contained in §273.8(2). (Nolan to Brockett, State Representative, 8-26-77) #77-8-11

STATE OFFICERS AND DEPARTMENTS

Conservation Commission: Authority to "promote" or disseminate information. §107.23, Code of Iowa, 1977. The Conservation Commission is empowered to disseminate information to residents and nonresidents of Iowa concerning all of the material it has collected, classified and preserved under §107.23, and which, in its opinion, tends to promote the objects of Chapter 197. (Davis to Kinley, State Senator, 8-30-77) #77-8-14

Conservation Commission; Hunting Season; Doves; Administrative Rules. §§17A.4, 109.38, 109.41 and 109.48, Code of Iowa, 1977. The Iowa State Conservation Commission lacks statutory authority to establish, by administrative rule, an open season on mourning doves. (Turner to Pelton and Miller, State Representatives, 8-9-77) #77-8-7

TAXATION

Tax Sale Certificates. §§446.31, 446.37, Code of Iowa, 1977. When a county acquires a tax sale certificate, it may assign the same pursuant to the provisions of §446.31 and the five year period in §446.37 would not be applicable to cancel the certificate held by the assignee. (Griger to Kelso, Supervisor of County Audits, 8-31-77) #77-8-16

Real Estate Transfer Tax; Easements. §428A.1, Code of Iowa, 1977. An easement constitutes "lands or other realty" within the ambit of the tax on real estate transfers imposed in §428A.1. (Griger to Anderson, Howard County Attorney, 8-15-77) #77-8-9

WELFARE

Uniform Support of Dependents Law. Chapter 252A, Code of Iowa, 1977. Decree of divorce or dissolution is not res judicata in subsequent action under this chapter, but it appears to be necessary for a change of circumstances to be shown if an increase in the amount of support payments is

sought under Chapter 252A. No change of circumstances need be shown when the adequacy of the original support order is challenged. (Keith to Redmond, State Senator, 8-2-77) #77-8-1

STATUTES CONSTRUED

Code, 1977	Opinion
17A.4	77-8-7
28E.1	77-8-8
28E.2	77-8-8
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September 2, 1977

SCHOOLS: Busing. §285.1(9), Code of Iowa, 1977. Under §285.1(9), the safest and most passable route to school on to a bus route is to be determined according to safety for pedestrians. The responsibility for such determination is placed with the Area Education Agency. (Nolan to Murray, State Senator, 9-2-77), #77-9-1

Honorable John S. Murray, State Senator: You have requested an opinion of this office as to the proper determination of distance for the purpose of applying the mandatory provisions of the Iowa law relating to school busing. Your letter states as follows:

"There has been some considerable confusion in the application of Section 285.1(9) of the Iowa Code in determining the requirement for school busing within the Ames Community School District. In addition, differences of opinion have arisen on the relative responsibilities of the local school board and the area education agency board in implementing this section."

"The section in questions, 285.1(9), sets out the method for measuring distances from pupils' homes to their schools for purposes of establishing whether or not school districts are required to bus the pupils to school under 285.1(1). The section states: 285.1(9) 'Distance to school or to a bus route shall in all cases be measured on the public highway only and over the most passable and safest route as determined by the area education agency board, starting in the roadway opposite the private entrance to the residence of the pupil and ending in the roadway opposite the entrance to the school grounds or designated point on bus route.' "

"I respectfully request an opinion from you on the following two questions:

"1. Does Section 285.1(9) require the Area Education Agency Board to determine 'the most passable and safest route' or is that determination the responsibility of the local school board?

"2. In establishing what is 'the most passable and safest route'; what standard is to be used by the board responsible for the decision: passable and safe for school children (who are pedestrians and bicyclists) or passable and safe for school busses or other motor vehicles?"

Code Section 285.1(9) provides:

"Distance to school or to a bus route shall in all cases be measured on the public highway only and over the most passable and safest route as determined by the area education agency board, starting in the roadway opposite the private entrance to the residence of the pupil and ending in the roadway opposite the entrance to the school grounds or designated point on bus route."

It appears to us that the language of this section of the Code clearly provides that the determination of the "most passable and safest route" is the responsibility of the Area Education Agency Board.

The question of measurement of distance has been considered by this office on several previous occasions. In 1938 O.A.G. 34 the language of the then

existing statute was considered:

"Distance to school shall in all cases be measured on the public highway only and by the most practical route, starting on the roadway opposite private entrance to the residence of the pupil and ending on the roadway opposite the entrance to the school grounds."

That opinion advised that the duty to provide statutory transportation to pupils was a duty to be strictly construed citing *Riecks v. School District,* 219 Iowa 101, 257 N.W. 546. At 1938 O.A.G. 663 it was said that:

"It is clear that the board is not required in all events, to send the bus to the residence of all children entitled to attend school. Routes are to be fixed by the board and a statute cited above provides methods of taking care of the transportation of those children who may reside off the fixed route of travel."

In our view an important factor in the proper construction of §285.1(9) is that the language requires that the distance be measured "on the public highway only." Under §321.1(48) highway is defined as the "entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for the purposes of vehicular traffic." Where more than one public highway is available as a possible route to school or to the school bus, the question then becomes which of the routes is the safest and most passable for pedestrians to travel.

September 9, 1977

TAXATION: Sale of property by county acquired as result of tax sale. §569.8, Code of Iowa, 1977. Where the county has not complied with the statutory notice provisions regarding the sale of property acquired by virtue of a tax deed, the sale is void and vests no right, title or interest to the property in the purported purchaser. (Griger to Anstey, Appanoose County Attorney, 9-9-77) #77-9-2

W. Edward Anstey, Appanoose County Attorney: You have requested the opinion of the Attorney General involving the following situation: A certain tract of real estate located in Appanoose County was sold at scavenger tax sale pursuant to §446.18, Code of Iowa. The county bid for the property pursuant to §446.19, Code of Iowa. Thereafter, the statutory period of redemption expired and the county acquired a tax deed pursuant to §448.1, Code of Iowa. The county has purported to convey the property pursuant to §569.8, Code of Iowa, 1977, which provides as follows:

"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. 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. 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 twice, on different dates, in a newspaper or newspapers 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, not more than fifteen days prior to the date of such sale. The board of supervisors may

transfer title to real estate acquired by virtue of a tax deed to a city, a city agency, or to the Iowa housing finance authority for use in an Iowa homesteading project under section 220.14 and they need not comply with the provisions of this section."

You state that the property was advertised for sale once in a newspaper of general circulation in the county on June 23, 1977. On July 5, 1977, the property was sold for five dollars and a deed was issued to the purchaser by the board of supervisors. This deed was recorded on July 18, 1977.

As you point out, there was a lack of compliance with the notice provisions of §569.8 which require notice of the sale to be published twice, on different dates, not more than fifteen days prior to the date of such sale. Specifically, you inquire whether the purported sale, in absence of compliance with the notice provisions of §569.8, vested any right, title, or interest to the property in the purchaser.

A similar question arose in 1976 O.A.G. 713, where the county also did not comply with the notice provisions of §569.8. The Attorney General opined at page 714:

"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 deed shall be sold by the county. 1938 O.A.G. 2."

Since the notice provisions of §569.8 are mandatory, failure to comply therewith renders the purported sale void. Consequently, the purchaser acquired no right, title, or interest to the property in question.

September 13, 1977

TAXATION: Limited City Property Taxation. §384.1, Code of Iowa, 1977; §404.15, Code of Iowa, 1973; §426.2, Code of Iowa, 1977. Property located within city limits, if platted, must be so platted into lots of more than ten acres and must be used for agricultural or horticultural purposes in order to enjoy the limited taxation provisions of §384.1, Code of Iowa, 1977. (Maggio to Poppen, Wright County Attorney, 9-13-77) #77-9-3

Mr. Lee E. Poppen, Wright County Attorney: You have asked for an opinion of the Attorney General with respect to the following:

"Where a taxpayer owns property within the city limits that is being used for agricultural purposes as one large tract, but the tract has been surveyed into lots of various sizes, less than ten acres, and shapes for convenience of description at some time in the past, does the property qualify for limited taxation as agricultural land under Section 384.1?"

No, the property in question does not qualify for limited taxation as agricultural land under §384.1, Code of Iowa, 1977. That law states:

"A city may certify taxes to be levied by the county on all taxable property within the city limits, for all city government purposes. However, the tax levied by a city on *lots of more than ten acres* and the personal property thereon, occupied and used for agricultural or horticultural purposes, may not exceed thirty-three and three-fourths cents per thousand dollars of assessed value in any year. A city's tax levy for the general fund may not exceed eight dollars and ten cents per thousand dollars of taxable value in any tax year, except for the levies authorized in section 384.12." (emphasis added).

When a statute is clear and unambiguous, it is not subject to interpretation. *Clarion Ready Mixed Concrete Company v. Iowa State Tax Commission,* 1961, 252 Iowa 500, 107 N.W.2d 553. There is no room for construction or interpretation of this statute since it clearly provides, on its face, that property within city limits must be platted into "lots of more than ten acres" and used for agricultural purposes in order to enjoy the limited taxation provisions of §384.1. It is not enough that one taxpayer owns several lots which are used for agricultural purposes and which total more than ten acres in the aggregate. Section 384.1 clearly provides that each lot so used must be more than ten acres in order to enjoy limited city property taxation.

This same conclusion was reached in 1944 O.A.G. 76 and 1962 O.A.G. 444. The only difference between those opinions and this opinion is the phrasing of the statutes involved. In 1972 when the Iowa Legislature developed the Home Rule Bill, effective July 1, 1975, it repealed Chapter 404 of the Iowa Code (Acts of 64th G.A., Ch. 1088, §199) and replaced Chapter 404, in part, with present Chapter 384 of the Iowa Code (Acts of 64th G.A. Ch. 1088, §82). Thus, the predecessor to present §384.1 is former §404.15 which stated:

"Agricultural lands. No land included within the limits of any municipal corporation which is not laid off into *lots of ten acres or less,* and which is also in good faith occupied and used for agricultural or horticultural purposes nor the personal property used in connection therewith shall be taxable for any city or town purpose, except that said lands and all personal property necessary to the use and cultivation of said agricultural or horticultural lands, shall be liable to taxation, not to exceed one and one-fourth mills in any year, for municipal street purposes." (emphasis added).

Former §404.15 states in negative terms what present §384.1 states in positive terms, but the conclusion is the same in either case: Property within city limits which is used for agricultural purposes must be divided into lots of more than ten acres (each) in order to enjoy the limited taxation provisions of §384.1. See 1944 O.A.G. 76 and 1962 O.A.G. 444. If the Iowa Legislature intended a broader construction of §384.1 than that given herein, it would have so provided. Compare §426.2, Code of Iowa, 1977.

September 13, 1977

TAXATION: Omitted Property. §§427A.1, 428.4, 428.5, 428.7, Code of Iowa, 1977. Real estate which had not previously been included on tax list nor dedicated to public use may be placed on tax list and assessed without formal application or order. (Nolan to Ladegaard, Dickinson County Attorney, 9-13-77) #77-9-4

Mr. James C. Ladegaard, Dickinson County Attorney: Your letter of July 15, 1977, requests an opinion of the Attorney General on the following:

"The Proprietor's Certificate in the official plat on record of Francis Sites, Dickinson County, states 'the alleys (accesses) and parks are for the use and benefit only of such persons as may own lots therein'. However, these alleys and parks have never been put on the tax list in the name of the Francis Sites Lots Owners even though it has been on record over 50 years. Certain lot owners have now requested the Dickinson County Assessor place the parcels on the tax list.

"My question is, does the Dickinson County Assessor have the authority to put the alleys and parks on the tax list in the name of these lot owners? If so, is any formal application or order necessary."

It is the view of this office that the assessor does have authority to put such real property on the tax list. The following statutory authority appears to be pertinent:

§428.4, Code of Iowa, 1977

"Property shall be assessed for taxation each year. ...The assessment of real estate shall be the value of the real estate as of January 1 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 assessment year immediately preceding, also any real estate the assessor finds has changed in value subsequent to January 1 of the preceding real estate assessment year. ... * * *"

§427A.1, Code of Iowa, 1977

"1. * * * For the purposes of property taxation only, the following shall be assessed and taxed, unless otherwise qualified for exemption, as real property:

"a. Land and water rights. * * *"

§428.5, Code of Iowa, 1977

"When the name of the owner of any real estate is unknown, it shall be assessed without connecting therewith any name, but inscribing at the head of the page the words 'owners unknown', and such property, whether land or city lots, shall be listed as nearly as practicable in the order of the numbers thereof."

§428.7, Code of Iowa, 1977

"A description shall not comprise more than one city lot or other smallest subdivision of the land according to the government surveys, except in cases where the boundaries are so irregular that it cannot be described in the usual manner in accordance therewith. However, descriptions may be combined for assessment purposes to allow the assessor to value the property as a unit. This section shall apply to known owners and unknown owners, alike."

From all of the above, it appears that the assessor has adequate authority to place the alleys and parks of the Francis Sites on the tax list without any further formal application or order.

September 13, 1977

COUNTIES AND COUNTY OFFICERS. Incompatibility. §§336.1, 280A.12, 49.38. A county attorney may serve contemporaneously as a member of an area community college (merged area) board of directors. (Nolan to Dorothy, Van Buren County Attorney, 9-13-77) #77-9-5

Mr. James A. Dorothy, Van Buren County Attorney: On March 21, 1977, we received your letter requesting an opinion of the Attorney General on the question of whether a county attorney may serve contemporaneously as a member of the board of directors of an area community college. Your letter indicates a concern that because both offices are elective offices, it might be considered that a conflict arises from an individual's name appearing twice on the ballot.

The office of county attorney is, of course, filled at the general election, and the qualifications for such office are set forth in §336.1, Code of Iowa, 1977:

"County attorneys shall be qualified electors of their respective counties, duly admitted to practice as attorneys and counselors in the courts of this state as provided by law. No person shall be qualified for such office while his license to practice remains revoked or suspended."

The qualifications and provisions for election of members of the area school boards are set forth in §280A.12 of the Code:

"The governing board of a merged area shall be a board of directors composed of one member elected from each director district in the area by the electors of the respective district. Members of the board shall be residents of the districts from which elected. Successors shall be chosen at the annual school elections for members whose terms expire on the first Monday in October following such election... . Vacancies on the board which occur more than ninety days prior to the next regular school election may be filled at the next regular meeting of the board by appointment by the remaining members of the board. A member so chosen shall be a resident of the district in which the vacancy occurred and shall serve until a member shall be elected pursuant to section 69.12 to fill the vacancy for the balance of the unexpired term. A vacancy shall be defined as in section 277.29. No member shall serve on the board of directors of the local school district or a member of an area education agency board."

The rule against a candidate's name appearing on the ballot more than once is set forth in §49.38 of the Code:

"The name of a candidate shall not appear on the ballot in more than one place for the same office, whether nominated by convention, primary, caucus, or petition, except as hereinafter provided."

In view of the fact that the two offices in question are filled at different elections and that this would not be a case of the name of a candidate being placed on the ballot in more than one place for the "same office", we do not find that the conflict suggested by your letter exists.

There is a well-settled rule in this state that where a person holds two offices which are incompatible, the acceptance of the second vacates the first. *State ex rel LeBuhn v. White,* 257 Iowa 606, 133 N.W.2d 903 (1965). That case discussed the elements of "incompatibility" stating that they exist where the two offices are repugnant to each other in the view of the general public or where one is supervisory of the other, or where a statute precludes one officeholder from holding any other office.

A merged area board serves a geographic area generally composed of several counties, or parts thereof. The taxes which support such merged area are prorated among the respective school districts, in the proportion that the value of taxable property in each school district bears to the total value of taxable property in the area. The board of supervisors of each county is directed by statute to levy a tax sufficient to raise the amount certified by the area board of directors. (§280A.17). There does not appear to be any statutory provision indicating the power of review by the county or any of its officers for acts of the area board.

Accordingly, your question is answered affirmatively.

September 13, 1977

MUNICIPALITIES: Vacation and Disposal of Municipal Streets and Alleys — §§4.7, 364.7 and 364.12(2)(a), and Chapter 306, Code of Iowa, 1977. Chapter 364 prevails over Chapter 306 concerning the vacation and disposal of municipal streets and alleys. (Blumberg to Berger, Scott County Attorney, 9-13-77) #77-9-6

A. Fred Berger, Jr., Scott County Attorney: We have your opinion request of August 15, 1977, regarding the vacation and disposal of municipal streets. You ask whether Chapter 306 or Chapter 364 controls.

Chapter 306, 1977 Code of Iowa, concerns the establishment, alteration and vacation of highways in very general terms. Sections 306.10 through 306.17 speak to the vacation of highways and the procedures of notice and hearing that must be followed. The definitions in that Chapter are broad enough that they might include city streets. However, that is not dispositive of the issue. Your question can be answered by §4.7 of the Code. That section provides that special provisions prevail over general provisions. Chapter 306 concerns all highway systems whereas §§364.7 and 364.12(2)(a) only concern municipal streets and other property. Therefore, the requirements of Chapter 364 prevail over those in Chapter 306 regarding the disposal and vacation of municipal streets and alleys.

September 13, 1977

STATE OFFICERS AND DEPARTMENTS: RECORDS MANAGEMENT DIVISION: Destruction of Records. Chapter 77, §§304.3(7), 304.7, Code of Iowa, 1977. The State Records Commission and the Secretary of State may determine in their discretion and period of retention for applications and bonds of notaries public. (Haesemeyer to Sickles, Deputy Director, Department of General Services, 9-13-77) #77-9-7

Mr. Philip O. Sickles, Deputy Director, Department of General Services: You have requested an opinion of the Attorney General with respect to the following:

"Chapter 77 of the Code provides that the Secretary of State shall issue a Certificate of Commission to persons appointed as notaries public. Prior to issuance of the certificate of commission, the person must complete an application, obtain a character reference, and execute a bond, which is valid for a period of three years. Currently, the Office of the Secretary of State retains the original application and bond of all current and past notaries, as well as a microfilm record of all persons currently commissioned as notaries public in the State of Iowa. Chapter 77 does not specifically state the requirements for preservation or destruction of any of these records. Due to the potentional legal implications relating to destruction of records of this type, the State Records Commission has directed that an Attorney General's opinion be obtained on this matter.

"Therefore, it is respectfully requested that an opinion be written in response to the following question: Are the applications, character references and properly executed bonds which are required before issuance of a certificate required to be retained permanently as evidence by the state or does the properly notarized document with its seal serve as proof that the persons commission was valid?

"This request for an opinion is based on the following facts:

"1. The excessive amount of storage space required for expired notary

bonds coupled with little or no access required in the past 40 years.

"2. Section 77.13, 77.14, 77.15, 77.16, 77.17 and 77.18 relate directly to records keeping requirements of notaries public as well as the Secretary of State. 77.13 and 77.18 specifically state what documentation is required. This should be the legal proof of an action, not their application, bond and references."

The purpose of the notarial seal is to authenticate the document to which it is duly affixed. This has been said to be at least prima facie evidence of the notary's official character, his official signature and to be self proving. *Stephens v. Williams,* 46 Iowa 540 (1877). If the certificate states that the notary is authorized to act within the state but the seal indicates a different state, the seal will overcome the recital and the certificate is invalid. *Barber v. DeFord,* 150 N.W. 86 (Iowa 1914). As seen above, Iowa case law to date has found the document's face as evidence of notarial authentications. Thus, evidence of a person's commission as a notary has, so far as we know, never been proven by using the applications, character references or bonds, the items at issue. This would indicate that these records are not of particular importance to the state. Accordingly, it is our opinion that these records may be destroyed under certain conditions.

Section 304.3(7), Code of Iowa, 1977, provides that,

"It is the duty of the commission to determine what records have no administrative, legal, fiscal, research or historical value and should be disposed of or destroyed. The decisions of the commission shall be made by a majority vote of the entire membership."

Section 304.7 goes on to say that the State Records Commission shall adopt rules in accordance with Chapter 17A of the Code, concerning disposal of records. And finally, §304.14 provides that each agency shall submit to the commission a procedure for the management and disposal of its records. These sections, read together, indicate that the issue herein stated is to be determined by the Department of State and the State Records Commission pursuant to Iowa law.

It is our opinion that so long as there is compliance with these provisions, the conditions imposed by the Department of State and the Commission may stand as official procedure for these bodies. The Secretary of State's suggestions of ten year retention is, we think, in keeping with these standards.

September 13, 1977

CONSTITUTIONAL LAW: Adjutant General; Method of Removal from Office. Article IV, §7, Constitution of Iowa; §§29A.7, 29A.11, Code of Iowa, 1977. Statutory provision which provides the method of appointment and removal of the adjutant general is not unconstitutional. (Haesemeyer to Hargrave, State Representative, 9-13-77) #77-9-8

Honorable William J. Hargrave, State Representative: You have requested an opinion of the Attorney General with respect to the following:

"Under the Iowa Constitution it states the Governor is the commander in chief of the state militia (Art. 4, §5). Under §29A.11 it states the adjutant general can be 'removed only upon conviction of a felony or upon conviction by a court-martial or upon termination of his federal recognition.' Is the law in conflict with the constitution?"

We believe your reference to Article IV, §5, Constitution of Iowa is in error. Such Article IV, §5, relates to contested elections for governor or lieutenant governor and has nothing to do with the governor being the commander in chief of the state militia. However, Article IV, §7, is relevant to your inquiry and provides:

"Commander in chief. The Governor shall be commander in chief of the militia, the army, and navy of this State."

Also pertinent to your inquiry are §§29A.7 and 29A.11, Code of Iowa, 1977, which provide:

§29A.7

"Commander in chief. The governor shall be the commander in chief of the military forces, except so much thereof as may be in federal service. The governor may employ the military forces of the state for the defense or relief of the state, the enforcement of its laws, the protection of life and property, and emergencies resulting from disasters or public disorders as defined in section 29C.2."

§29A.11

"Adjutant general—appointment, term and removal. There shall be an adjutant general of the state who shall be appointed and commissioned by the governor upon the recommendation of a majority of the advisory council. When a majority of the members of the advisory council are in federal service in time of war, said appointment shall be made by the governor without such recommendation. The rank of the adjutant general shall be at least that of brigadier general and he shall hold office for a term of four years. At the time of his appointment he shall be a federally recognized commissioned officer of the national guard with not less than ten years military service in the armed forces of this state or of the United States, at least five of which have been commissioned service, and who shall have reached the grade of a field officer. He shall be removed only upon conviction of a felony or upon conviction by a court-martial or upon termination of his federal recognition."

It is to be observed that this constitutional provision makes no reference to an adjutant general nor to the method either of his appointment or removal. In our opinion, Article IV, §7, is not self executing. Like many constitutional provisions, it merely lays down a broad general principle which it is the province of the legislature to implement. It is well settled in Iowa that the legislature has the power to enact any kind of legislation it sees fit provided such legislation is not clearly and plainly prohibited by some constitutional provision. *Steinberg-Baum & Co. v. Countryman,* 1956, 77 N.W.2d 15, 247 Iowa 923. Certainly, there is nothing in Article IV, §7, or elsewhere in the Constitution which prohibits the general assembly from making laws with respect to the creation of the office of adjutant general and providing for the means of his appointment and removal.

Moreover, it is well settled that a statute is presumed to be constitutional and this presumption operates in favor of the constitutionality of §29A.11. The presumption is so strong that the courts will not declare an act of the legislature unconstitutional unless the conclusion is unavoidable. They will do so then only when the violation is clear, plain, palpable and free from doubt. The Iowa Supreme Court has even gone so far as to say that a person challenging the constitutionality of a statute has the burden of negativing every conceivable basis which might support it. *Dickinson v. Porter,* 1948, 240 Iowa 303, 35

N.W.2d 66. If any reasonable state of facts can be conceived which will support constitutionality, it will be sustained.

Article V, §12, of the Michigan Constitution which is similar to Article IV, §7, of the Iowa Constitution except that it also incorporates provisions parallel to §29A.7 of the Iowa Code provides

"The governor shall be commander-in-chief of the armed forces and may call them out to execute the laws, suppress insurrection and repel invasion."

In McDonald v. Schnipke, 155 N.W.2d 169 (Mich. 1968), the Michigan Supreme Court considered whether such Article V, §12, gave the states governor power to remove the adjutant general and concluded that it did not and observed:

"The Attorney General urges that by virtue of Art. 5, §12, which states that the Governor is the commander-in-chief of the militia, the Governor has inherent power to remove military officers. Reading the provisions as a whole, however, we find that (1) the Governor is the commander-in-chief and (2) by virtue of that fact he may call the armed forces out to (a) execute the laws, (b) suppress insurrection, and (c) repel invasion. We do not read this section any power of the commander-in-chief to remove or to otherwise discipline officers of the militia." 155 N.W.2d 172.

Accordingly, it is our opinion that §29A.11 is not in conflict with Article IV, §7, of the Constitution. Such §29A.11 along with §29A.7 merely implement the broad statement of constitutional policy found in Article IV, §7, of the Iowa Constitution.

September 22, 1977

SCHOOLS: Teachers. Art. III, §31, Constitution of Iowa. §§20.9, 97B.42, 97B.45, 274.1, Code of Iowa, 1977. A school board may offer a bonus to teachers who elect to retire early when such plan furthers local objectives. (Nolan to Anderson, State Representative, 9-22-77) #77-9-9

Honorable Robert T. Anderson, State Representative: Your letter of January 11, 1977, requests an opinion on the following question:

"Can a school board offer severance pay or a retirement award to a teacher for retiring early?"

Through subsequent investigation, it was ascertained by this office that the Newton Community School District had adopted such a retirement policy for the year 1977 to meet declining enrollment, save jobs for teachers who otherwise might be dismissed through staff reduction, to generate money by replacing veteran teachers with beginning teachers, to maintain a mixture of veteran teachers with less experienced teachers and to provide a financial incentive for experienced teachers to choose the early retirement option. The early retirement option was offered to teachers of the age of 60 to 64 as of September 1, 1977. The available option had to be exercised by February 25, 1977, and it is our understanding that one teacher in the Newton Community School District has chosen to receive the benefits of this retirement policy.

Teachers in Iowa are covered in the Iowa Public Employees Retirement System by the mandatory statute provisions of §97B.42, Code of Iowa, 1977, which provides:

"Each employee...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...which has been in operation prior to July 4, 1953, and was subsequently liquidated and may have thereafter been established. ...Nothing herein contained shall be construed to permit any person in public employ to be an active member of the Iowa public employees retirement system and any other retirement system in the state which is supported in whole or in part by a public contributions..."

Under IPERS, normal retirement is expected at age 65. (§97B.45). However, an employee may retire on a date coinciding with or following his 55th birthday and prior to the normal retirement date (§97B.47).

Article III, §31, of the Iowa Constitution prohibits the payment of extra compensation to any officer, public agent, or contractor, for services after the service has been rendered and further prohibits the appropriation of public money or property for local or private purposes unless allowed by 2/3 of the members of each branch of the general assembly. Where the benefit is not an award for past services but an inducement for a teacher to retire from teaching in the community, then the proposal may be viewed in the light of code sections authorizing each school district to have exclusive jurisdiction in all school matters within its territorial limits (§274.1, Code of Iowa, 1977).

Further, §20.9 gives the public employer and employee organization broad authority to negotiate collective bargaining agreements in good faith with respect to "wages, hours, vacations, insurance, holidays, leave of absence, shift differentials, overtime compensation, supplemental pay, seniority, transfer procedures, job classifications, health and safety matters, evaluation procedures, procedures for staff reduction, inservice training and other matters mutually agreed upon."

It is the view of this office that the Newton early retirement plan is not in violation of IPERS or other applicable law of Iowa and may be offered by the school board.

September 26, 1977

IPERS—Iowa Department of Job Service. §97B.23, 97B.41. Statutes must be amended by legislature to conform to new Federal laws and regulations before prime sponsor or eligible applicant is allowed to recover employer's contribution upon employee's termination. (Murray to Johnston, Polk County Attorney, 9-26-77) #77-9-10

Mr. Dan L. Johnston, Polk County Attorney: You have requested an opinion as to whether or not state law must be changed or modified by the legislature in order that a prime sponsor or eligible applicant under the Comprehensive Employment and Training Act Program (CETA), will be allowed to recover the employer's contribution upon the employee's termination. You have pointed out that Article 98.25(a)(1)(2)(3) shown on page 24524 of the Federal Register dated May 13, 1977, indicates the employee must obtain a vested interest in CETA funds paid under the Comprehensive Employment and Training Act but §97B.53 of the Code of Iowa does not immediately vest the member's rights.

We have reviewed the Comprehensive Employment and Training Act program, Title 29 U.S.C.A., Chapter 17, and particular Title VI thereof which was

amended by the Emergency Jobs Program Extension Act of 1976, Public Law No. 94-444, as well as the rules and regulations of the U.S. Secretary of Labor pertaining thereto.

As you have indicated, Article 98.25 becomes effective October 1, 1977, and it is our understanding the federal administrators of the Act have interpreted this amendment to prohibit contributions to the Iowa Public Employees Retirement System on public service contracts from federal funds after that date. Public service jobs funded under CETA have a maximum duration of twelve months, therefor the provisions of §97B.53, Code of Iowa, 1977, are pertinent in that:

97B.53 Termination of Employment. All rights to all benefits under the retirement system will cease upon a member's termination of employment with the employer prior to his retirement, other than by death, except as provided hereafter: * * *

"8. If an employee hired to fill a permanent position terminates his employment within six months from the date of employment, the employer may file a claim with the department for a refund of the funds contributed to the department by the employer for the employee."

Since participants in public service jobs funded by CETA funds have a maximum duration of twelve months, it is possible that many of these participants will exceed the six months limitation contained in 97B.52(a). If that occurs, the employer's contributions would not be refundable under the above section as it currently exists in the Code. However, 97B.41(3)(b) was amended by House File 582, 1977 regular session by adding the following new paragraph:

" 'Employee' means any individual who is in employment defined in this chapter, except: * * *

"Employees of community action programs, determined to be an instrumentality of the state or a political subdivision, unless such employees elect by filing an application with the department to be covered under the provisions of this chapter."

Under the foregoing amendment the prime sponsor will not be required to contribute the employer's share unless the employee elects to be covered under IPERS.

Since there is a possibility that some participants in public service employment may elect IPERS coverage and the employer's share would not be refundable if the employment exceeds the six months' limitation referred to above, it is the opinion of this office that §97B.53, 1977 Code of Iowa, would have to be amended to conform with the new provisions of the federal law.

September 27, 1977

MUNICIPALITIES: City Council Vacancy—§§69.12 and 372.13(2), Code of Iowa, 1977. A petition calling for a special election to fill a vacancy need not be filed with the City Council within thirty days. If the petition otherwise meets the requirements of §372.13(2), the Council must accept it and hold a special election. (Blumberg to Drake, State Senator, 9-27-77) #77-9-11

Honorable Richard F. Drake, State Senator: We have your opinion request of September 6, 1977, regarding §372.13(2), 1977 Code of Iowa. The facts,

as you indicated, are that a city council member was elected to a term from January, 1976 to January, 1980. On January 6, 1976, he resigned, and on the same day the council filled his position by appointment. On September 13, 1977, a petition, signed by the requisite number of electors was presented to the City Council asking that a special election be held in November to fill the seat for the remainder of the term. The council rejected the petition on the ground that it was not presented to it within thirty days of the vacancy. You ask whether the council properly interpreted the statute.

Section 372.13(2) provides:

"A vacancy in an elective city 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 the 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...." [Emphasis added]

There has been a question whether §372.13(2) or §69.12 is applicable. Suffice it to say that because §69.12 is general in its application, whereas §372.13(2) is special, §372.13(2) prevails for city councils. See, §4.7, Code of Iowa.

Certain portions of the above section are emphasized because they give an indication of legislative intent. It is clear that the council must fill the vacancy by appointment within thirty days for the *balance* of the unexpired term. The appointee will hold office for the *balance* of the unexpired term unless a special election is sooner held to fill the vacancy for the *remaining balance* of the unexpired term. The use of the word "balance" regarding the appointment by the council as opposed to the use of the modifier "remaining" when speaking of the balance of the unexpired term for a special election is significant.

For the first instance "balance" refers to the entire amount of time left for that office. In the second instance "remaining balance" refers to the amount of the term after a special election. Thus, the council appoints for the entire balance of the term, that is in this instance from January 6, 1976, to January, 1980, unless a special election is sooner held, i.e. held before the end of that term. This is the only way that this section can logically be interpreted. We can find nothing in that section which specifically provides the special election must be held within thirty days, or that the petition must be filed within thirty days.

The remainder of the section provides that if the petition requests, and is timely filed, the special election can be held concurrent with a pending election as defined in §69.12. The term "timely filed" refers to the provisions in the election laws regarding advance notice to a commissioner of elections of a special election. It does not refer back to the thirty day limit imposed upon the council. Finally, the langauge of the statute is mandatory in that if a valid petition is filed, a special election *shall* be called.

Accordingly, we are of the opinion that a petition requesting a special election under §372.13(2) does not have to be filed within thirty days of the vacancy. If such a petition otherwise meets the requirements of §372.13(2), a council cannot refuse to accept it, and must hold a special election.

September 27, 1977

CONSTITUTIONAL LAW: General Assembly; Statewide Health Coordinating Council — Iowa Const. art. III, §§1, 21 and 22; Public Law 93-641, 93rd Cong. Legislators cannot be appointed to serve on the Statewide Health Coordinating Council because their appointment would be a violation of the separation of powers. (Blumberg to Mickelsen, Administrative Assistant, Office of the Governor, 9-27-77) #77-9-12

Susan Mickelsen, Administrative Assistant, Office of the Governor: We have your opinion request of June 9, 1977, regarding the Statewide Health Coordinating Council pursuant to the National Health Planning and Resources Development Act of 1974. You ask whether state legislators can serve on the council.

The Act, Public Law 93-641, was enacted by Congress to assure the development of a national health policy and of effective state and area health planning and resources development programs. As outlined in Sec. 2 of the Act, because of a lack of uniformly effective methods of delivering care; maldistribution of health care facilities and manpower; and, the increasing cost of health care, it is the purpose of the Act to facilitate the development of recommendations for a national health planning policy; to augment areawide and state planning for health services, manpower and facilities; and, to authorize financial assistance for the development of resources to further that policy.

The Secretary of HEW has the duty, pursuant to §1501, to issue guidelines on the national policy regarding the supply, distribution and organization of health resources and the national health planning goals. Section 1502 outlines the priorities of the Congress, which include services for medically underserved populations; multi-institutional systems; medical group practices and health maintenance organizations; physician assistants; prevention of disease; and, education of the public, among others. The Act is implemented by a National Council on Health Planning and Development, set forth in sec. 1503, Health Systems Agencies, set forth in sec. 1512, State Administrative programs found in sec. 1522, and a Statewide Health Coordinating Council, established by sec. 1524.

Section 1524 provides for the membership on a Statewide Health Coordinating Council (SHCC). The membership shall be at least sixteen in number and shall be selected by the Governor from each of the Health Systems Agencies (HSA) in the State. In addition to other appointments from each HSA, the Governor may appoint such other persons "(including State officials, public elected officials, and other representatives of governmental authorities within the state)" as is deemed appropriate. The functions of an SHCC regarding National Health Planning and Development include the following: (1) annually review and coordinate the Health Systems Plan (HSP) and annual implementation plan (AIP) of each HSA and report to the Secretary of HEW; (2) prepare and review a State health plan made up of the HSP's within the State; (3) annually review the budget of each HSA and report of the Secretary; (4) review applications submitted by the HSA's for grants under sections 1516 and 1640; (5) advise the *State Agency* on the performance of its functions; (6) annually review for approval any State plan or application submitted to the Secretary as a condition to the receipt of any funds under this or other similar Acts. Its function regarding Health Resources Development include advice and consultation with the *State Agency* of a State Medical facilities plan, and approval of the plan. Sec. 1603. The State Agency is the Department of Health.

In a publication by the Midwest Center for Health Planning entitled "The Statewide Health Coordinating Council—Roles and Relationships", the specific functions of the SHCC and its interaction with other councils and agencies is outlined. On page 5, it is stated that the authority of the SHCC regards advice and support of the *State Agency.* Regarding planning coordination, it is stated that the "development of a uniform format is a cooperative venture involving the SHCC, and HSA's, and the *State Agency.* At page 6, further planning coordination is outlined to include the SHCC adopting and coordinating Statewide plans identified and developed by the *State Agency* in conjunction with the HSA's. Under plan development, the SHCC is responsible in the preparation of a state health plan prepared by the *State Agency.* The graph on page 7 shows an interaction between the *State Agency* and the SHCC. It is also stated there:

"Perhaps the most controversial function of the SHCC is its authority to review and approve/disapprove plans prepared by the State agencies under federal 'entitlement' programs. A number of federal programs for financing health and health-related activities through state government require preparation of an annual program. Under provisions of the Act, these program plans are subject to review and approval or disapproval by the SHCC. Thus, potentially, the SHCC has a major voice in a variety of program activities within state government which is related to health. Further, since many of the federal financing programs are formula grants—i.e., some amount of state dollars are required to match the federal dollars available—the SHCC also gains a say in the use of matching state funds."

Finally, under the discussion of the SHCC's organization it is stated that the functions carried out by the Secretary will usually be performed by the *State Agency* as a part of its support to the SHCC.

The Articles of the SHCC in Iowa provide (in article 3.03) that the preliminary State Health Plan may, as found necessary by the *State Agency,* contain such revisions to achieve their appropriate coordination and the like. Such preliminary plan shall be submitted to the SHCC. In article 3.10, it is stated that the SHCC shall review and advise the *State Agency* generally on the performance of its 'functions', including capital expenditure review process for all health and medical care services in Iowa. Finally, article 8.02 provides that the Plan Development Committee of the SHCC shall review and comment on the State Medical Facilities Plan developed by the *State Agency,* and make recommendations to the full SHCC.

We assume that your question regarding legislators serving on the SHCC is based upon our prior opinion—1976 O.A.G. 6. In that opinion we held that legislators could not serve on certain boards and commissions, relying upon three constitutional provisions. See, Iowa Const., Art. III, §§1, 21 and 22. Section 22 of Art. III provides tht no one holding any lucrative office under the United States or this State, or any other power, can hold a seat in the General Assembly. Section 21 provides that no legislator shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this State which was created or the emoluments of which were increased during such term. Pursuant to the prior opinion and the cases cited therein, a lucrative office or one for profit does not include one where expenses are merely reimbursed. Since, pursuant to the Act, only expenses are reimbursed, sections 21 and 22 of Art. III are not applicable.

Section 1 of Art. III remains. It 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.]

Powers of the executive department involve execution and administration of the laws. *State v. Bailey,* 150 S.E.2d 449 (W.Va. 1966). In *Springer v. Philippine Islands,* 1928, 277 U.S. 189, 202, 48 S.Ct. 480, 72 L.Ed. 845, it was held:

"Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."

It was held in *Book v. State Ofice Building Commission,* 238 Indiana 120, 149 N.E.2d 273, 296:

"Under the foregoing and other provisions of the Act, the executive power of apointment, administration, and enforcement thereof is vested in the Commission, and when performed by the legislative members, is not incidental to their legislative power; instead the primary purpose of the Act requires the exercise of judgment and discretion in executing a law enacted by the Legislature. The Legislature may enact, but it cannot execute laws. That is the duty of the executive department."

See also, *People v. Tremaine,* 1929, 252 N.Y. 27, 168 N.E. 817; and, for an extensive discussion on the separation of powers, *Meyers v. United States,* 1926, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160. In summary, the executive branch enforces, executes and administers the laws.

Applying the above distinctions, those courts uniformally held that legislators cannot perform any functions of the executive branch. In *People v. Tremaine,* supra, it was held (168 N.E. at 822):

"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 legislature office* and thus usurp the executive power by indirection. Springer v. Philippine Islands, 277 U.S. 189, 48 S.Ct. 480, 72 L.Ed. 845." [Emphasis added]

And, at page 828 in a concurring opinion:

"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 arive at the same conclusion." [Emphasis added]

There can be no doubt that the functions of the Department of Health fall within the executive branch. The same can be said of the SHCC. The definition of its powers and functions clearly place it within the executive. That, however, is not dispositive of the question. The state constitutional separation of powers only concerns those powers within state government the same as the

federal provision only concerns the Congress and federal agencies and the like. It is not the fact that a state legislator services on a department or commission of the federal executive branch which violates the state constitution. Rather, it is a state legislator's involvement with the state executive branch that is controlling. This involvement in the exeucitve branch is clearly outlined in the above recitation of the powers and functions of the SHCC. Of those powers and functions there is a great amount of interaction between the State Agency (Iowa Department of Health) and the SHCC. The one that is controlling is outlined in both the Midwest Center's publication and the Articles of the Iowa SHCC—that is, the power of the SHCC to have a say in the appropriations and capital expenditures to and of the State Agency and their use in conjunction with the State Plan. The *Tremaine* case is quite appropriate here, for it deals with an appropriation by the legislature and then the administration of that appropriation by legislators. As that case held that such was a violation of the separation of powers, so too must we hold. The key to Art. III, §1, is that a member of one branch cannot "exercise *any function appertaining to either of the others*...." [Emphasis added] Although there are other interactions with the State Agency which would cause us to reach a similar conclusion, we need not discuss them since the one mentioned above is dispositive of the issue. Nor do we feel that the Supremacy Clause is applicable since the Act does not appear to interfere, nor does it attempt to interfere, with local or state governments.

Accordingly, we are of the opinion that state legislators cannot be appointed to the Iowa SHCC.

September 28, 1977

TAXATION: Tax Exemption for Low-Rent Housing—§427.1(34), Code of Iowa, 1977. A project for the elderly or handicapped by a nonprofit organization which meets the low-rent or similar guidelines of a federal law, or meets the guidelines of Chapter 403A, Iowa Code, could properly be termed to meet the requirements of §427.1(34). (Blumberg to Jesse, State Representative, 9-28-77) #77-9-13

Honorable Norman G. Jesse, State Representative: We have your opinion request of September 7, 1977, regarding §427.1(34), 1977 Code of Iowa. The Federal Government has recently begun funding projects here in Iowa under the Housing and Community Development Act of 1974, 42 U.S.C. 5301. Section 202 of the Act permits loans from the Government for projects for the elderly and handicapped, and Section 8 permits rent subsidies. You also cite us to Section 202 of the 1959 Housing Act as amended. See 12 U.S.C. 170q. You ask whether a project which meets the criteria of the above federal laws falls within the tax exempt status of §427.1(34).

Section 427.1(34) provides a tax exemption for the following:

"The property owned and operated by a nonprofit organization providing low-rent housing for the elderly and the physically and mentally handicapped...."

In a recent opinion, 1976 O.A.G. 846, we held that the Legislature had failed to define "low-rent housing" in that section. Although we were not able to give a definition, since that is something the Legislature must do, we concluded: "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." Since that opinion the Legislature has not made any amendments or corrections to the section.

Although we could perceive a problem with the county auditors differing on what was a low-rent project, we felt that the above opinion would ease their burden and give some uniformity to their actions. We have not heard otherwise. However, we have been informed that because that opinion contained a discussion of an FMHA project, that the above quoted portion appears to apply only to FMHA matters. A fair reading of the opinion and the quoted sentence unquestionably leads one to the opposite conclusion. The opinion was meant to be, and is, general in its application.

Accordingly, we reiterate here what we said there: If a project for the elderly or handicapped by a nonprofit organization meets the low-rent or similar guidelines of a federal law, or meets the guidelines of Chapter 403A, 1977 Code of Iowa, it could properly be termed to meet the requirements of §427.1(34).

September 28, 1977

TAXATION: Redemptions From Tax Sales: §§447.1, 447.5, Code of Iowa, 1977. In the event a redeemer gives the county auditor a personal check, interest upon tax sale redemption should be computed to the date the check is honored. Until such personal check is honored, no redemption certificate should be issued to the redeemer nor payment made to the tax sale certificate holder. Upon redemption, no special notice thereof part from payment of the amount specified in §447.1 is required to be given by the auditor to the tax sale certificate holder. (Griger to Koepcky, Linn County Attorney, 9-28-77) #77-9-14

Eugene J. Koepcky, Linn County Attorney: You have requested the opinion of the Attorney General in your recent letter as follows:

"The Linn County Auditor's Office is continually experiencing difficulties in the procedures used for tax redemptions under Section 447.5 of the Code when an insufficient funds check is received at redemption. This creates difficulties between the Auditor's Office and the Treasurer's Office since the Treasurer will not sign the certificate of redemption until after the check used in payment has cleared the banks. The Auditor would like your opinion in answer to three specific questions.

First, does the Auditor have the authority to charge a person redeeming real estate sold for taxes additional interest when paying by personal check until the check clears the bank? And does the Auditor have the authority to control the means of payment in order to avoid waiting for a check to clear a bank?

Second, if a person redeems real estate with a personal check, does the Auditor have authority to withhold the payment to the certificate purchaser until after bank clearance if demand is made at the time of redemption under Section 447.1 of the Code?

Third, after redemption has been made does the Auditor have any duty to so inform the certificate purchaser?"

Section 447.1, Code of Iowa, 1977, provides

"Real estate sold under the provisions of this chapter and chapter 446 may be redeemed at any time before the right of redemption is cut off, by the payment to the auditor, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and four percent of such amount added as a penalty, with six percent interest per annum on the

whole amount thus made from the day of sale, and the amount of all taxes, interest, and costs paid by the purchaser or his assignee for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and six percent per annum on the whole of such amount or amounts from the day or days of payment."

Section 447.5, Code of Iowa, 1977, provides:

"The auditor shall, upon application of any party to redeem real estate sold for taxes, and being satisfied that he has a right to redeem the same upon the payment of the proper amount, issue to such party a certificate of redemption, setting forth the facts of the sale substantially as contained in the certificate thereof, the date of the redemption, the amount paid, and by whom redeemed, and make the proper entries in the book of sales in his office, and immediately give notice of such redemption to the treasurer. The certificate of redemption shall then be presented to the latter, who shall countersign it, noting such fact in the sale book opposite the entry of the sale, and no certificate of redemption shall be evidence of such redemption without the signature of the treasurer."

Your first and second series of questions are so interrelated that they will be considered together. The resolution of such questions depends upon the interpretation of the above quoted statutory provisions pertaining to redemption payment and the time which redemption is deemed to have been made, in the event the redeemer seeks to pay the required amount by personal check.

In *Reeves v. Bremer County,* 1887, 73 Iowa 165, 34 N.W. 794. The board of supervisors directed the county auditor to issue a warrant in an amount sufficient to redeem the property from tax sale. Without issuing the warrant or receiving any money for redemption, the auditor issued a certificate of redemption and the taxpayer conveyed the property to the county. The tax sale certificate holder objected to this conveyance and claimed he was entitled to a tax deed to the property. The Iowa Supreme Court agreed and stated at 73 Iowa 167:

"Code, §890, prescribes that redemption from tax sales may be made by payment to the county auditor of the amount required by law. For obvious reasons, payment is essential to authorize the redemption; the controlling reason being that the statute is so written. The auditor cannot issue a certificate which will have the effect to cut off the right of the holder of the certificate of purchase when no money is paid. He cannot be required to wait the pleasure or convenience of others for the money. It must be on hand, otherwise there is no redemption."

Indeed, Iowa law does not treat the giving of a personal check to the county treasurer as "payment" of property taxes until such time as the check is honored. In *Morgan v. Gilbert,* 1926, 207 Iowa 725, 223 N.W. 483, the taxpayer, on March 29, 1926, gave the county treasurer his personal check for the first installment of 1925 property taxes. On April 14, 1926, the treasurer deposited the check in a bank. The bank, upon which the check was drawn, closed on April 14 and, therefore, payment was not made thereon. Had the treasurer deposited the check between March 29 and April 13, the check would have been honored. The treasurer had issued a receipt showing payment of the taxes. In holding that the property taxes had not, in fact, been paid, the Iowa Court stated at 207 Iowa 728:

"The giving of the check to the county treasurer was not a payment of taxes, as required by the statute, because it was not a payment in money or in any

of the means of payment of taxes recognized by the statute. It was, in a sense, a conditional payment. The check was not honored, and the county did not receive the money for the taxes. The negligence of the treasurer in failing to present the check within the proper time is not chargeable to the county."

The statute alluded to by the Court is §445.33, Code of Iowa, 1977. While *Morgan* did not involve a redemption situation, it would seem that if a personal check does not constitute payment of taxes by the taxpayer purporting to pay them on or before the due date until the check, in fact, is honored, then it would appear that the same rule would apply to a redemption. Indeed, the Iowa Supreme Court tacitly recognized this point in *Wunschel v. Simonsen,* 1959, 250 Iowa 1099, 96 N.W.2d 432.

In *Wunschel,* the taxpayer gave the county auditor a check for redemption from a tax sale on February 4, 1957. Without waiting for the check to be honored, the auditor issued a certificate of redemption to the taxpayer. On February 11, 1957, the check was returned to the auditor marked "insufficient funds." The right of redemption expired on February 4. On February 11, the taxpayer's agent came to the auditor's office and tendered the redemption amount in cash, which tender was refused. The holder of the tax sale certificate, upon the expiration of the right of redemption, demanded either the redemption money or a tax deed. Upon discovery of the worthless check, the auditor made a notation of cancellation of the redemption on the stub of the tax sale certificate. On February 11, a treasurer's tax deed was issued, pursuant to §448.1, Code of Iowa, to the tax sale certificate holder. The Court held that no redemption had been made prior to expiration of the right of redemption and stated at 250 Iowa 1102:

"If the redemption money has not in fact been paid, because of worthless check or otherwise, no redemption has been made. *Reeves v. Bremer County,* 73 Iowa 165, 34 N.W. 794; *Rundel v. Boone County,* 204 Iowa 965, 216 N.W. 122, *Morgan v. Gilbert,* 207 Iowa 725, 223 N.W. 483."

The principle derived from the Iowa cases is clear: If the redeemer chooses to give a personal check as distinguished from cash or the equivalent thereof to the auditor, until such time as a personal check of the redeemer is honored, there is no redemption. And, this condition exists, notwithstanding that the auditor may, by negligence, delay in depositing the personal check in the bank, thus contributing to the dishonor of the check. Consequetly, the practice of the Linn County treasurer of refusing to countersign the certificate of redemption until after the redeemer's personal check has been honored by the bank it was drawn upon is totally justified. *Douglas v. Grace Building Co., Inc.,* 1975, 22 Pa. Comm. 174, 348 A.2d 35.

In Anno, 21 A.L.R.2d 1304, cases are cited in support of the following proposition:

"It would appear that the acceptance of a check or draft without objection by a tax collector, if the instrument is valid at the time received, constitutes an effectual payment as of such time, and the negligence or failure of the collector to have it cashed within the redemption period, or a delay in cashing it until after the failure of the bank upon which it is drawn, will not affect the validity of the tax payment."

However, this statement is not consistent with the Iowa cases heretofore set forth herein. Moreover, aside from the Iowa cases, it is clear from your opinion request that the personal checks, until honored, are not being accepted by the treasurer for purposes of countersigning a certificate of redemption.

Therefore, the county auditor should compute interest upon tax sale redemption, pursuant to §447.1, to the date a personal check of the redeemer is honored. While the county auditor can take personal checks in payment of the redemption amount, until such checks are honored, no redemption certificate should be issued nor payment made to the tax sale certificate holder and unless such checks are honored prior to the expiration of the right of redemption, no redemption has been made.

With reference to your third question, after redemption is made, the auditor has a duty to pay over to the tax sale certificate holder the amount specified in §447.1. However, no special notice of such redemption apart from such payment is required to be given, by any statute, by the auditor to the tax sale certificate holder. The auditor has a duty, under §447.5, to make "the proper entries" in the book of sales in his office.

September 23, 1977

STATE OFFICERS AND DEPARTMENTS: Auditor; Savings and Loans. §§17A.12, 534.3(3), Code of Iowa, 1977. In hearings before Executive Council pursuant to §534.3(3)(a)(1), reasonable notice is required by §17A.12 of the Code. The hearing proceeding may be recorded either by mechanical means or by certified shorthand reporter. (Nolan to Smith, Auditor of State, 9-23-77) #77-9-15

Honorable Lloyd R. Smith, Auditor of State: On June 20, 1977, we received the following request for an opinion from you:

"The amendments to the Articles of Incorporation and By-Laws together with related documents and correspondence are ready to be submitted to the Executive Council of Iowa for the above proposed branch office. [Des Moines Savings and Loan Association's Proposed Branch Office in Marshalltown, Iowa]. Your advice is requested concerning the proper forms and procedures to be followed for both the notice of hearing and the hearing itself."

"A copy of the notice used for hearings in the past is attached. We would like to know how much time should elapse between the notice and the hearing date. We would also like to know to what parties the notice should be sent. In the past, neither shorthand reporters nor recorders have been used at the hearings. Section 17A.12(7) would seem to require this. Your advice is requested."

Applications for proposed branch offices of savings and loans associations are initiated by an amendment to the articles and by-laws of the association stating the location of the proposed branch office. Such amendments require approval in the same general manner as the original articles pursuant to §534.3(3) (a)-(i), Code of Iowa.

Under the auditor's rules 130-2.7 when an application for approval of amendments for the purpose of establishing a branch office have been submitted to the supervisor of savings and loan associations in the auditor's office and approved by him, the following language applies:

"If the application is approved the supervisor shall give the association written notification to publish notice:

NOTICE OF FILING APPLICATION FOR THE PURPOSE OF ESTABLISHING A BRANCH OFFICE

Notice is hereby given that the _____ Savings and Loan Association, _____ Iowa, has filed with the office of Auditor of State, Savings and Loan Division, located in the State Capitol Building, Des Moines, Iowa, an 'Application for Permission to Establish a Branch Office.' Said application provides for the office to be located in the immediate vicinity of _____, Iowa. Any person may file communications in favor or in protest of said branch office at the office of Auditor of State within twenty days after the date of this publication. The application, together with all communications received in favor or in protest thereof, are available for inspection by interested persons at the aforesaid office. _____ Savings and Loan Association _____, Iowa.

The association shall publish the notice in a newspaper of general circulation in the community in which the branch office is to be located within fifteen days of the supervisor's notification to do so. A copy of the notice accompanied by a publisher's affidavit will be furnished the supervisor by the association immediately after publication."

The rule further provides that the association seeking to have the proposed branch must publish the prescribed notice in a newspaper general circulation in the community within fifteen days of the supervisors notification to do so. The publisher's affidavit is to be sent to the supervisor immediately after publication. It should be noticed that the prescribed notice gives interested persons twenty days after the date of publication to file a response either in favor of or in protest of the proposed branch office.

If protests are received the matter should be treated as a contested case before the executive council and all parties afforded an opportunity for hearings after reasonable notice in writing delivered either by personal service or certified mail return receipt requested. Section 17A.12 of the Code of Iowa sets out the requirements of the notice of hearing which shall include:

"a. A statement of the time, place and nature of the hearing.

"b. A statement of the authority and jurisdiction in which the hearing is to be held.

"c. A reference to the particular sections of the statutes and rules involved.

"d. A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application of more definite and detailed statements shall be furnished."

I have reviewed the notice of the hearing dated December 9, 1975, which was submitted with your request and that such notice complied in all respects with the requirements of Section 17A.12. In that notice a general statement of procedure is set out:

"Following the statements made by the protestant, a representative from the applicant association will be given opportunity to speak. Both the protestant and the applicant are requested to keep their representations as brief as possible."

Section 17A.12(4) provides:

"Opportunity shall be afforded all parties to respond and present evidence

and argument in all issues involved and to be represented by counsel at their own expense."

In answer to your question of how much time should elapse between the notice of the hearing and the hearing date we can only respond that the statute requires *reasonable* notice. Due to the fact that a period of twenty days precedes the setting of the date for the hearing, this could be taken into account by the executive council in setting the date for the hearing.

You also ask to what parties the notice of hearing should be sent. I would advise that the notice of hearing be sent to the applicant and to any and all parties who responded within the twenty day period to the notice published in the newspaper.

With respect to your question as to whether shorthand reporters are needed for the hearing, Section 17A.12(7) provides:

"Oral proceedings shall be opened to the public and shall be recorded either by mechanized means or by certified shorthand reporters."

You are required by statute to transmit proposed amendments to articles of incorporation to the Executive Council even in cases where the Supervisor does not recommend approval of such proposed amendments. A concise and explicit written statement of the underlying facts and reasons should accompany the Supervisor's recommendation in such cases. Further, notification of the hearing before the Executive Council is required and such notice must comply with §17A.12, *supra.*

September 26, 1977

COUNTIES AND COUNTY OFFICERS: Deputy Officers. §§340.4, 340.8, Code of Iowa, 1977. Deputies entitled to the statutory percentage of the elected officer's salary are not entitled to overtime pay benefits available to other county employees under a collective bargaining agreement. A clerk in a county office who is appointed deputy in the same office can continue to earn sick leave to be used prior to retirement. (Nolan to Burk, 9-26-77) #77-9-16

Mr. Peter W. Burk, Assistant Black Hawk County Attorney: On April 5, 1977, you requested an opinion of this office interpreting §340.4 and 340.8, Code of Iowa, 1977. Your letter states:

"Black Hawk County has a personnel policy of providing a portion of accumulated and unused sick leave benefits to its employees at retirement. In some cases, deputies are otherwise entitled to accumulated sick leave benefits.

"We are wondering whether, under the applicable law, payment of accumulated sick leave benefits to department deputies would be considered a payment in addition to the maximum compensation authorized and paid by law — and, thus, an illegal and improper payment."

With the above letter there was enclosed a copy of your memorandum opinion dated March 30, 1977, which cited 1925-26 O.A.G. 244 as authority for the conclusion that even though deputy clerks work substantial overtime hours for which they receive no compensation they are not entitled to compensation for such overtime work.

More recently, under the provisions of Chapter 20, Code of Iowa, 1977, known as the Public Employees' Employment Relations Act and particularly

§20.9, it appears that overtime compensation is a proper subject of a collective bargaining agreement between the public employer and the employee organization. Although it is clear that the supervisors may enter into such a contract to provide for overtime compensation for extra help and clerks hired to assist the various county officers, it is the view of this office that deputies entitled to the stautory percentage of the officer's annual salary are not entitled to the overtime pay benefits available to other employees under a collective bargaining agreement.

Ordinarily, the county sick leave benefit policy is applied as a fringe benefit to officers as well as employees. Such benefits in our view are not compensation for services rendered and thus would not be prohibited by the maximum salary percentage provisions of §340.4. In a 1949 opinion, 1950 O.A.G. 78, this office advised that sick leave and vacation provisions are benefits to the public employer rather than to the individual receiving them and that it is in the public interest to make provision for such sick leave and vacation in order to maintain a productive staff. In 1964 O.A.G. 118 it was said that "all elective county officers have the sole determination as to the vacation time, working hours, and sick leave to be granted to employees under their jurisdiction." However, it has been a well establihed rule that sick leave is available for use as needed and is not a benefit which can be "cashed in" when not used.

In a letter received by this office on April 27, you also raised these additional questions:

"1. Assuming that the supervisory personnel had accumulated certain sick leave benefits, not yet paid, at the time said person was made a supervisor, would that person be entitled to said payments at this time?

"2. As a collateral question, would those payments exceed the limits set by statute, would they be illegal?

"3. Assume that a deputy supervisory person, instead of receiving the maximum percentage allowed by law (for instance, 80% due the Recorder's supervisory personnel), the said person was only receiving 70% of the official's salary. Under these circumstances, would the supervisory personnel be entitled to accumulated and unpaid benefits up to an amount that would cause the total compensation to equal 80% of the official's salary, or would the payments over and above the set rate of 70% be illegal?"

The answers to the first question depends on whether under the county policy such benefits could be carried over. If a clerk in a county office was appointed deputy in the same office, such person could continue to earn sick leave to be used prior to retirement.

There is no express statutory authority for converting sick leave to cash and we find no implied power for the county to do so in the case of officers whose compensation is fixed at a statutory rate of the principal officer's salary. Thus, the payment of an unauthorized cash benefit would in our view be illegal.

The answer to your third question is included in the answers above and there would appear to be no entitlement to such unpaid benefits.

September, 1977

CONSTITUTIONAL LAW

Adjutant General; Method of Removal from Office. Article IV, §7,

Constitution of Iowa; §§29A.7, 29A.11, Code of Iowa, 1977. Statutory provision which provides the method of appointment and removal of the adjutant general is not unconstitutional. (Haesemeyer to Hargrave, State Representative, 9-13-77) #77-9-8

General Assembly; Statewide Health Coordinating Council. Article III, §§1, 21, and 22, Constitution of Iowa; Public Law 93-641, 93rd Cong. Legislators cannot be appointed to serve on the Statewide Health Coordinating Council because their appointment would be a violation of the separation of powers. (Blumberg to Mickelsen, Administrative Assistant, Office of the Governor, 9-27-77) #77-9-12

COUNTIES AND COUNTY OFFICERS

Incompatibility. §§336.1, 280A.12, 49.38, Code of Iowa, 1977. A county attorney may serve contemporaneously as a member of an area community college (merged area) board of directors. (Nolan to Dorothy, Van Buren County Attorney, 9-13-77) #77-9-5

Deputy Officers. §§340.4, 340.8, Code of Iowa, 1977. Deputies entitled to the statutory percentage of the elected officer's salary are not entitled to overtime pay benefits available to other county employees under a collective bargaining agreement. A clerk in a county office who is appointed deputy in the same office can continue to earn sick leave to be used prior to retirement. (Nolan to Burk, Assistant Black Hawk County Attorney, 9-26-77) #77-9-16

MUNICIPALITIES

City Council Vacancy. §§69.12 and 372.13(2), Code of Iowa, 1977. A petition calling for a special election to fill a vacancy need not be filed with the City Council within thirty days. If the petition otherwise meets the requirements of §372.13(2), the Council must accept it and hold a special election. (Blumberg to Drake, State Senator, 9-27-77) #77-9-11

Vacation and Disposal of Municipal Streets and Alleys. §§4.7, 364.7 and 364.12(2)(a), and Chapter 306, Code of Iowa, 1977. Chapter 364 prevails over Chapter 306 concerning the vacation and disposal of municipal streets and alleys. (Blumberg to Berger, Scott County Attorney, 9-13-77) #77-9-6

SCHOOLS

Teachers. Article III, §31, Constitution of Iowa. §§20.9, 97B.42, 97B.45, 274.1, Code of Iowa, 1977. A school board may offer a bonus to teachers who elect to retire early when such plan furthers local objectives. (Nolan to Anderson, State Representative, 9-22-77) #77-9-9

Busing. §285.1(9), Code of Iowa, 1977. Under §285.1(9), the safest and most passable route to school on to a bus route is to be determined according to safety for pedestrians. The responsibility for such determination is placed with the Area Education Agency. (Nolan to Murray, State Senator, 9-2-77) #77-9-1

STATE OFFICERS AND DEPARTMENTS

Records Management Division; Destruction of Records. Chapter 77, §§304.3(7), 304.7, Code of Iowa, 1977. The State Records Commission and the Secretary of State may determine in their discretion the period of retention for applications and bonds of notaries public. (Haesemeyer to Sickles, Deputy Director, Department of General Services, 9-13-77) #77-9-7

IPERS; Iowa Department of Job Service. §§97B.23, 97B.41, Code of Iowa, 1977. Statutes must be amended by legislature to conform to new Federal laws and regulations before prime sponsor or eligible applicant is allowed to recover employer's contribution upon employee's termination. (Murray to Johnston, Polk County Attorney, 9-26-77) #77-9-10

Auditor; Savings and Loans. §§17A.12, 534.3(3), Code of Iowa, 1977. In hearings before Executive Council pursuant to §534.3(3)(a)(1), reasonable notice is required by §17A.12 of the Code. The hearing proceeding may be recorded either by mechanical means or by certified shorthand reporter. (Nolan to Smith, Auditor of State, 9-23-77) #77-9-15

TAXATION

Tax Exemption for Low-Rent Housing. §427.1(34), Code of Iowa, 1977. A project for the elderly or handicapped by a nonprofit organization which meets the low-rent or similar guidelines of a federal law, or meets the guidelines of Chaper 403A, Iowa Code, could properly be termed to meet the requirements of §427.1(34). (Blumberg to Jesse, State Representative, 9-28-77) #77-9-13

Redemptions from Tax Sales. §§447.1, 447.5, Code of Iowa, 1977. In the event a redeemer gives the county auditor a personal check, interest upon tax sale redemption should be computed to the date the check is honored. Until such personal check is honored, no redemption certificate should be issued to the redeemer nor payment made to the tax sale certificate holder. Upon redemption, no special notice thereof apart from payment of the amount specified in §447.1 is required to be given by the auditor to the tax sale certificate holder. (Griger to Kopecky, Linn County Attorney, 9-28-77) #77-9-14

Sale of property by county acquired as a result of tax sale. §569.8, Code of Iowa, 1977. Where the county has not complied with the statutory notice provisions regarding the sale of property acquired by virtue of a tax deed, the sale is void and vests no right, title or interest to the property in the purported purchaser. (Griger to Anstey, Appanoose County Attorney, 9-9-77) #77-9-2

Limited City Property Taxation. §§384.1, 426.2, Code of Iowa, 1977; §404.15, Code of Iowa, 1973. Property located within city limits, if platted, must be so platted into lots of more than ten acres and must be used for agricultural or horticultural purposes in order to enjoy the limited taxation provisions of §384.1, Code of Iowa, 1977. (Maggio to Poppen, Wright County Attorney, 9-13-77) #77-9-3

Omitted Property. §§427A.1, 428.4, 428.5, 428.7, Code of Iowa, 1977. Real estate which had not previously been included on tax list nor dedicated to public use may be placed on tax list and assessed without formal application or order. (Nolan to Ladegaard, Dickinson County Attorney, 9-13-77) #77-9-4

STATUTES CONSTRUED

Code, 1977	Opinion
4.7	77-9-6
17A.12	77-9-15
20	77-9-16
20.9	77-9-9
29A.7	77-9-8
29A.11	77-9-8

49.38	77-9-5
69.12	77-9-11
77	77-9-7
97B.23	77-9-10
97B.41	77-9-10
97B.42	77-9-9
97B.45	77-9-9
274	77-9-9
280A.12	77-9-5
285.1(9)	77-9-1
304.3(7)	77-9-7
304.7	77-9-7
306	77-9-6
336.1	77-9-5
340.4	77-9-16
340.8	77-9-16
364.7	77-9-6
364.12(2)(a)	77-9-6
372.13(2)	77-9-11
384.1	77-9-3
426.2	77-9-3
427.1(34)	77-9-13
427A.1	77-9-4
428.4	77-9-4
428.5	77-9-4
428.7	77-9-4
447.1	77-9-14
447.5	77-9-14
534.3	77-9-15
569.8	77-9-2

Code, 1973	**Opinion**
404.15	77-9-3

CONSTITUTION OF IOWA

Article III, §1	77-9-12
Article III, §21	77-9-12
Article III, §22	77-9-12
Article III, §31	77-9-9
Article IV, §7	77-9-8

October 4, 1977

COUNTY TORT LIABILITY: §§321.252, 321.255, 321.473, 1977 Code of Iowa. The motoring public should be warned of any deficiencies in the weight carrying capacity of bridges on secondary roads. (Goodwin to Jones, Taylor County Attorney, 10-4-77) #77-10-1

Richard R. Jones, Taylor County Attorney: Your request for Attorney General Opinion indicates that Taylor County has approximately six secondary road bridges which apparently have a limited load capacity, and that Taylor County does not have the funds to replace or reconstruct those bridges. You ask "whether or not Taylor County's potential liability for any damages

arising from the use of the bridge would be eliminated by the mere posting of such signs, and, if not, what action Taylor County should take to make every possible attempt to eliminate potential liability for such damages."

The county has the authority to "prohibit the operation of trucks and commercial vehicles, or may impose limitations as to the weight thereof" on the portions of roads in question where the bridges are located under §321.473, 1977 Code of Iowa. Such truck and commercial vehicle prohibition or weight limitation thereon is to be designated by appropriate signs. Weight limitation signs are described in §2B-39 of the Iowa Manual on Uniform Traffic Control Devices (IMUTCD) adopted in accordance with §§321.252 and 321.255, 1977 Code of Iowa.

In reference to all other vehicles other than trucks and commercial vehicles the county should, in accordance with §§2C-1, 2C-2, 2C-3, IMUTCD, post warning signs which are deemed necessary to warn traffic of existing or potentially hazardous conditions "i.e. the actual weight carrying capacity of the bridges or any other deficiencies they may have. If the motorists are advised and warned of the existing and potential hazards in reference to the bridges it would appear that the county has fulfilled its duty to adequately warn the motoring public and should thereby be able to avoid liability in reference to said bridges.

October 5, 1977

GOVERNOR: STATE OFFICERS AND EMPLOYEES: GIFTS: §§68B.2 (6), 68B.5 and 68B.8, Code of Iowa, 1977. The Governor is an official as defined in §68B.2(6) and subject to the prohibitions of 68B.5 against accepting free trips, travel, and club memberships unless they are "unrelated to legislative activities or to state employment." (Turner to Rush, 10-5-77) #77-10-2

The Honorable Bob Rush, State Senator: You have requested an opinion of the Attorney General with respect to the applicability of Chapter 68B, Code of Iowa, 1977, to a trip to Taiwan by Governor Ray which was paid for by the government of that country and to membership privileges extended to the Governor by several private clubs in Des Moines. Specifically you ask:

"1. Is the Governor an 'official' as defined in Section 68B.2(6)?

"2. If so, is the Governor subject to the prohibitions against accepting gifts of Section 68B.5?

"3. If the first two questions are answered in the affirmative, has Section 68B.5 or any other provisions of the Iowa law been violated by

"a. acceptance of the trip to Taiwan;

"b. acceptance of country club memberships and privileges."

Section 68B.2(6) provides in relevant part:

"Definitions. When used in this chapter, unless the context otherwise requires: * * *

"6. 'Official' means any officer of the state of Iowa receiving a salary or per diem whether elected or appointed or whether serving full time or part time. Official shall include but not be limited to all supervisory personnel and members of state agencies and shall not include members of the general

assembly or legislative employees. * * *"

Clearly, the Governor is an "official" within this definition.

Section 68B.5 provides:

"Gifts solicited or accepted. 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 to 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."

The Governor is an "official" as that term is defined for purposes of Chapter 68B and §68B.5 applies to him as well as to other public officials.

In response to your third question, we would point out that criminal penalties are attached to violations of §§68B.3 through §68B.6. See §68B.8. It is not our policy to adjudicate the guilt or innocence of anyone of a crime. That is something which is within the province of the courts and we do not think we should presume to do so in an Attorney General's opinion. Accordingly, we cannot answer your third question. However, in prior opinions of the Attorney General we have taken the position that it is not all gifts which are prohibited by 68B.5, but only those which would be likely and intended to have the effect of influencing official action. I don't see how the Taiwan trip or the club memberships could influence any official action the Governor could take as to either Taiwan or the clubs. Perhaps Taiwan might influence a federal officer to act in its interest. But this law does not apply to federal officers. And perhaps a club membership might influence another state officer, or a local officer, to help the club. But no one has suggested how the Governor might help except by the luster and prestige his presence would add. In short, these gifts would doubtless be considered to fall within the exception to §68B.5 as "unrelated to legislative activities or to state employment."

October 6, 1977

STATE OFFICERS AND DEPARTMENTS: Peace Officers' Retirement System — §§97A.1(23) and 97A.6, Code of Iowa, 1977. A beneficiary who receives pay for an occupation greater than the difference between the retirement allowance and the average final compensation shall have the retirement allowance readjusted. A surviving spouse is not subject to §97A.6(7)(a). Those receiving an accidental disability allowance are subject to annual readjustments. A beneficiary receiving a disability allowance cannot receive a service retirement allowance unless he or she was fifty-five at the time of the disability retirement. Those terminating employment prior to age fifty-five cannot receive annual adjustments to their pensions. (Blumberg to Larson, Commissioner of Public Safety, 10-6-77) #77-10-3

Charles W. Larson, Commissioner of Public Safety: We have received your opinion request of September 14, 1977, regarding the Peace Officers' Retirement System under Chapter 97A, 1977 Code of Iowa. You ask:

"1. What is the effective date for the provisions of Section 97A.6(7)(a)?

"A. Does this section apply retrospecitvely to pension benefits that commenced prior to the effective date? If so, does it apply to accident disability,

ordinary disability, or both?

"B. If this section applies retrospectively, what portion, if any, of the benefits paid prior to the effective date must be recouped?

"2. How should 'gainful occupation' be defined? (Can the Board define by administrative rule?)

"3. Should a surviving spouse of a former member of the System, defined as a beneficiary, be subject to a limitation on his or her outside earnings from 'gainful' occupation"?

"4. In the event that the pension of an accidentally disabled beneficiary is greater than his or her average final compensation, should any part of that pension be recouped?

"5. When adjustments of disability pensions are made on account of earnings from gainful occupation pursuant to Section 97A.6(7)(a), 1977 Iowa Code, may 'pension compensation,' as defined by Section 97A.1(23), 1977 Iowa Code, be substituted for 'average final compensation' as provided in 97A.6(15) (a)?

"6. May a beneficiary retired on account of disability before attaining the age of fifty-five, but with twenty-two or more years of service, be transferred from disability retirement to service retirement upon attaining the age of fifty-five?

"7. If a member 'vests' with twenty-two years of service prior to the age of fifty-five, will that member, upon reaching the age of fifty-five, receive 'escalation' pursuant to Section 97A.6(15)?

"8. If a member 'vests' with less than twenty-two years of service, will that member, upon reaching age fifty-five receive 'escalation' pursuant to Section 97A.6(15)?"

Section 97A.6(7) (a), 1975 Code, only applied to those with an ordinary disability (not incurred in line of duty). If such a beneficiary be engaged in a gainful occupation paying more than the difference between the retirement allowance and the average final compensation, the pension shall be reduced to an amount which, with the annuity and the amount being earned by gainful occupation, will equal the average final compensation. This section in the 1977 Code, as amended by §9, Ch. 1089, 66th G.A. (1976) now includes those with an accidental disability.

A similar change was made to §411.6(7)(a) of the Code by §27, Ch. 1089, 66th G.A. (1976). In an opinion to Ruth Harkin, Story County Attorney, No. 77-5-8, and one to Representatives Walter and Conners, No. 77-5-9, both of which are enclosed, we deal with the same issue as presented in your first question. There, we held that the amendment had both a prospective and a retrospective application. That is, all those on an accidental disability on the effective date of the amendment were included. However, the recomputation would only apply from the effective date of the amendment. Since §411.6(7)(a) is similar to §97A.6(7)(a) the holdings in those opinions are applicable here.

The term "gainful occupation" within §97A.6(7)(a) is not defined. However, a statutory definition is not necessary. The word "gainful" is defined in Black's Law Dictionary, p. 807 (4th ed. 1967) to mean profitable, advantageous or lucrative. Thus, a gainful occupation can be one which is profitable or lucrative. The term "gainful occupation" has been defined in several

cases as evidence by Black's and 18 Words and Phrases. Most of the cases define the term as it is used in insurance policies. Therefore, those definitions may be very general. However, it is apparent that an occupation need not disclose profit to be gainful. Some cases hold that receiving pay for work is a gainful occupation. In any event, the first part of the section provides the answer by stating that if a beneficiary "be engaged in a gainful occupation *paying* more than the difference between" the retirement allowance and the average final compensation, the retirement allowance shall be adjusted. The word "paying" is emphasized because it is the key to your second question. This phrase obviously means that a beneficiary who is working, either for himself or others, and receives payment which is greater than what the section permits, will have his pension adjusted. The phrase is general and should be applied as such. That is not to say that rules should not be promulgated regarding this section's application. You have the authority to adopt rules in §97A.5(4). However, since the section refers to "paying" the key is what a beneficiary receives rather than what is an occupation. The word "gainful" is superfluous here.

Section 97A.6(13)(a) provides in part that in the event of the death of a member receiving an ordinary or accidental disability allowance there shall be a pension paid to the surviving spouse equal to one-half the amount received by "such deceased *beneficiary*", but not less than fifty dollars. This pension shall be paid so long as the surviving spouse does not remarry. The word "beneficiary" is emphasized because in this section it means the member receiving such an allowance. With this in mind, it becomes apparent that the use of "beneficiary" in §97A.6(7)(a) also means a member and not a surviving spouse. Thus, the amount received by a surviving spouse should not be adjusted by outside earnings.

Section 97A.6(6) sets forth the retirement allowance of a member accidentally disabled. If the member has reached the age of fifty-five, the allowance shall be a service retirement allowance consisting of an annuity of the actuarial equivalent of the accumulated contributions, plus a pension equal to one-half of the average final compensation. If the member is under the age of fifty-five, there shall be the same annuity as above, plus a pension equal to two-thirds of the average final compensation. Under your facts, many who have been on these pensions for several years, through recomputation, now receive a pension greater than what their average final compensation at the time of retirement. Thus, you ask, in question four, whether the excess above the average final compensation must be repaid to the State.

Section 97A.6(15) provides that as of the first of July of each year, the monthly pensions payable under §97A.6 shall be recomputed. However, the "pension compensation" shall be used in the formula in lieu of the average final compensation. "Pension compensation" is defined in §97A.1(23):

" '*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."

Thus, it is apparent that the Legislature intended the pension to increase over the years, if it can be assumed that the earnable compensation of an active employee in the same or similar position to the retiree increases. There

is nothing in §97A.6(15) or any other section of that chapter which provides that a pension shall not exceed the average final compensation. The only provision §97A.6(15) is that at no time shall the recomputation result in a lower monthly pension than was paid at the time of retirement or death.

In response to your fifth question, there is nothing in §97A.6(7)(a) which speaks to "pension compensation" or to an annual recomputation such as §97A.6(15). Therefore, we cannot state that pension compensation can be substituted for the average final compensation in §97A.6(7)(a).

Section 97A.6(1)(a) provides that any "member in service" may retire on a service retirement upon reaching the age of fifty-five with twenty-two years of service. The key here is the phrase "member in service." One who has retired because of disability is not in service. Thus, that person could not qualify for a service retirement upon reaching the age of fifty-five. Pursuant to §97A.6(4) and §97A.6(5) a member must be fifty-five at the time of disability or accident to receive the service retirement. Therefore, the answer to your sixth question is in the negative.

Your last two questions can be answered together. You refer to a situation where a member terminates employment prior to age fifty-five with fifteen or more years of service. You ask whether §97A.6(15) is applicable. Section 97A.6(1)(c) provides that a member with at least fifteen years service who terminates employment, other than by death or disability, shall, upon reaching retirement age, receive a service retirement allowance. That allowance would be from fifteen to twenty-one twenty-seconds of the service allowance up to twenty-one years of service. The full service allowance would be given for twenty-two or more years of service. This paragraph of subsection one was added at the same time as paragraph "e" of §97A.6(15) by §§5 and 12, Ch. 1089, 66th G.A. (1976). Section 97A.6(15)(e) reads:

"A retired member who became eligible for benefits under the provisions of subsection one (1) of this section but who did not serve twenty-two years and did not attain the age of fifty-five years prior to the member's termination of employment shall not be eligible for the annual readjustment of pensions provided for by this subsection."

It is therefore apparent that an individual who terminated employment prior to retirement age, other than by death or disability, does not receive annual readjustments under §97A.6(15).

In summary, we are of the opinion that:

1. Pursuant to our earlier opinions the amendment to §97A.6(7)(a) applies to those on an accidental disability retirement as of the effective date of the amendment, but only from that effective date.

2. "Gainful occupation" in §97A.6(7)(a) means that when a beneficiary receives payment in some occupation which is more than the difference between the retirement allowance and the average final compensation, an adjustment will be made.

3. A surviving spouse is not subject to the provisions of §97A.6(7)(a).

4. Those receiving an accidential disability allowance are subject to the annual adjustments of §97A.6(15).

5. "Pension compensation" cannot be substituted for "average final compensation" in §97A.6(7)(a).

6. A beneficiary receiving a disability allowance who was not fifty-five at the time of the disability retirement cannot receive a service retirement allowance upon reaching fifty-five.

7-8. Those terminating employment prior to retirement age do not have readjustments to their pensions under §97A.6(15).

October 12, 1977

CONSTITUTIONAL LAW: HIGHWAYS: ROAD USE TAX FUND: Article VII, Section 8 (Amendment 18) Iowa Constitution; §§312.1, 313.3, 313.4, Code of Iowa, 1977. Road Use Tax Fund cannot be expended for development and operation of motor vehicle ferry service. (Tangeman to Rigler, Chairman, Iowa Transportation Commission, 10-12-77) #77-10-4

Mr. Robert R. Rigler, Chairman, Iowa Transportation Commission: This letter is in response to your request for an Attorney General's Opinion in which you inquire as follows:

"This is written on behalf of our commission to ask your opinion as to whether it would be constitutional for us to use road use tax funds for the development and operation of a motor vehicle ferry service across the Mississippi River between Cassville, Wisconsin, and Guttenberg, Iowa. * * *"

The answer to this question entails a consideration of the constitutional provision, the statutes which have grown out of the constitutional provision and a number of cases that have considered the question or some ramification of it.

The Iowa Constitution provides in Article Seven, Section 8 (Amendment 18):

"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."

Section 312.1, Code of Iowa, 1977, provides:

"312.1 There is hereby created, in the state treasury, a road use tax fund. Said road use tax fund shall embrace and include:

"1. All the net proceeds of the registration of motor vehicles under Chapter 321.

"2. All the net proceeds of the motor vehicle fuel tax or license fees under Chapter 324 except those net proceeds allocated to the primary road fund under section 324.79.

"3. All revenue derived from the use tax under Chapter 423 on motor vehicles, trailers and motor vehicle accessories and equipment, as same may be collected as provided by section 423.7.

"4. Any other funds which may by law be credited to the road use tax fund."

Section 312.2, Code of Iowa, 1977, provides:

"312.2 Allocations from the fund. The treasurer of the state shall on the first day of each month, credit all road use tax funds which have come into his hands, to the primary road fund, the secondary road fund of the counties, the farm to market fund, and the street construction fund of cities in the

following manner and amounts:

"1. To the primary road fund 47 percent * * *"

Section 313.3, Code of Iowa, 1977, provides:

"313.3 Primary Road Fund. There is hereby created a primary road fund which shall include and embrace:

"1. All road use tax funds which are by law credited to the primary road fund.

"2. All federal aid primary and urban road funds received by the state.

"3. All other funds which may by law be credited to the primary road fund.

"4. All revenue accrued or accruing to the state of Iowa on or after January 26, 1949, from the sale of public lands within the state under acts of congress approved March 3, 1845, supplemental to the act for admission of the states of Iowa and Florida into the Union, chapters 75 and 76 (Fifth statutes pages 788 and 790) shall be placed in the primary road fund. Unless otherwise provided the primary road fund is hereby appropriated for highway construction."

Section 313.4, Code of Iowa, 1977, provides:

"313.4 Disbursement of fund. Said primary road fund is hereby appropriated for and shall be used in the establishment, construction and maintenance of the primary road system, including the drainage, grading, surfacing, construction of bridges and culverts, the elimination or improvement of railroad crossings, the acquiring of additional right of way, all other expense incurred in the construction and maintenance of said primary road and the maintenance and housing of the department. * * *"

It is apparent from the above-quoted provisions that the motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, except cost of administration are to be used exclusively for "the construction, maintenance and supervision of the public highways exclusively within the state." The cited sections of the statutes show how those funds are first placed in the "road use tax fund" and ultimately wind up on the several road funds and the street fund for cities. The primary road fund is identified, disbursement is discussed and the specific applications of the fund are declared to be "the establishment, construction and maintenance of the primary road system, including the drainage, grading, surfacing, construction of bridges and culverts, the elimination or improvement of railroad crossings, the acquiring of additional right of way, all other expense incurred in the construction and maintenance of said primary road system and the maintenance and housing of the department."

There is no mention of the use of any such funds for the development and operation of a motor vehicle ferry service or for any application of any funds in any way to a ferry service of any kind.

There are a number of cases across the United States which have dealt with the question of whether a ferry is a "highway" or "public highway". *Chick v. Newberry County and another,* 1887, 3 S.E. 787, 27 S.C. 419; *Almond v. Gilmer,* 1949, 51 S.E.2d 272, 888 Va. 822; *Wilmington Shipyard, Inc. v. North Carolina State Highway Commission,* 1970, 171 S.E. 2d 222, 6 N.C. App. 649; *Menzel Estate v. City of Redding,* 1918, 174 p. 48, 178 Cal. 475; *City of Albany v. State,* 1973, 335 N.Y.S.2d 975, 71 Misc.2d 294.

These cases hold both for and against the proposition that a ferry is a

"highway" or a "public highway". However, the cases holding in favor of the proposition are consistent in that the decision is based on a statutory provision in which the definition of "highway" or "public highway" specifically includes "ferries" or "canal or navigable rivers".

In the legal encyclopedia Corpus Juris Secundum at 40 C.J.S. 9 (§176) it is stated that

"Highway funds cannot legally be expended or disbursed for purposes other than those for which the funds have been raised, acquired or appropriated. Public funds raised, acquired or appropriated for general or specific highway purposes must be used in the manner provided by the constitution (*Frost v. State,* 172 N.W.2d 575) or statutes or designated by the voters (*Wallace v. Foster,* 241 N.W. 9; *Harding v. Board of Supervisors of Osceola County,* 237 N.W. 625)."

The case of *Chick v. Newberry County and another,* was one in which it was held that "ferry" is not included in the term highway. In the South Carolina statute, as in Section 313.4 of the Iowa Code, the term highway included specific reference to "bridges", but no reference to ferries.

The court said:

"A bridge spanning the water and connecting the bank would seem nearer to being a "highway" than a ferry boat; and as it was deemed proper or necessary to express the case of a "bridge" it would seem to be a strained construction that it was unnecessary to mention a flat boat or ferry, for the reason that it was already included in the word "highway". As the law-makers were fixing a list of exceptions to the rule it would seem that if they had intended to include a flat boat running across the river they would have said so."

The answer to your question is "no". In my opinion it would not be constitutional for the Transportation Commission to use road use tax funds for the development and operation of a motor vehicle ferry service.

October 31, 1977

MUNICIPALITIES: Housing Law — §§364.2(2), 364.2(4), 413.122 and 413.123, Code of Iowa, 1977. A municipality over 15,000 population can impose reasonable fees implementing §413.123 of the Code. (Blumberg to Willits, State Senator, 10-31-77) #77-10-5

Honorable Earl M. Willits, State Senator: We have received your opinion request concerning §413.123, Code of Iowa, 1977. Your question is since Chapter 413 applies to every city which, by the last federal census, had a population of 15,000 or more, are cities with populations between 15,000 and 25,000 precluded from establishing a reasonable schedule of fees for defraying the costs of inspection, enforcement, and administration of §413.123.

Section 413.123 provides in part:

"Cities of twenty-five thousand or more population may establish a reasonable schedule of fees for the purpose of defraying the costs of inspection, enforcement, and administration of the provisions of this section relative to multiple dwellings."

The above quoted sentence from §413.123 was added in 1963 by §1, Ch. 255, 60th G.A. (1963). At that time such an express delegation of authority was necessary to permit any city to impose such a schedule of fees. However,

the Municipal Home Rule Amendment of the Constitution makes such an express delegation unnecessary. Cities can exercise any power, not inconsistent with the laws of the general assembly, to determine their local affairs. See, §364.2(4) of the Code which provides: "An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law." Accordingly, there is no irreconcilable conflict between cities of over 25,000 population and of populations between 15,000 and 25,000 both imposing a reasonable schedule of fees to effect §413.123.

Section 364.2(2) states:

"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."

This section is in accordance with the rule of construction provided by §413.122 which states:

"Construction. The powers conferred by this chapter upon the public officials heretofore in this chapter mentioned shall be in addition to the powers already conferred upon said officers, and shall not be construed as in any way limiting their powers except as provided in section 413.9."

What we therefore have is a now meaningless provision. It provides a power that exists by home rule, and does not restrict any power because of the operation of home rule.

Accordingly, we are of the opinion that the express delegation of authority in §413.123 to cities of over 25,000 population has been rendered superfluous by the Home Rule Amendment. Moreover, such a delegation of power has no effect on the powers of cities with populations between 15,000 and 25,000. As such, any city to which §413.123 applies can impose a reasonable schedule of fees to effect it.

October 31, 1977

COUNTIES: Secondary Road Fund. §309.9, Code of Iowa, 1977. County continues to be responsible for maintenance costs, as well as responding to claims which may arise from use of a bridge that may be placed in the National Register of Historic Sites. Only if the bridge remains a part of the Secondary Road System, may secondary road funds be expended for its maintenance, upkeep and repair. (Schroeder to Anderson, Winneshiek County Attorney, 10-31-77) #77-10-6

Mr. Calvin R. Anderson, Winneshiek County Attorney: You have requested an opinion with reference to 17 bridges now a part of the Winneshiek County secondary road system, which may be placed in the National Register of Historic Sites under a proposed Upper Iowa Historic Bridge District. Your letter indicates that while most of the bridges are in use at this time, it will be necessary to replace several of them in the near future. You have raised questions concerning the responsibility of the county to preserve such bridges, particularly if the structures are not continued as a part of the secondary road system.

You have also observed that should the bridges be designated as historical sites, it will result in additional time, money and effort for the County, should it undertake any changes in their present condition or use. This would be particularly true in any highway project utilizing federal funds. Although it

might also be noted both State, (Chapter 303 of the Code), and Federal Statutes, (Title 16, §370 U.S.C.) require the observance of certain procedures, whenever a historically designated site is proposed to be altered, without regard to the source of funds being utilized or the type of property involved.

You have asked three questions, which are set forth as follows:

"1. What is the responsibility of the County for continued maintenance and for the liability on the old bridge when it is no longer needed on the county road system?

"2. Can Winneshiek County legally spend road money on the preservation of an old structure that is listed in the National Register of Historic Sites when that structure is no longer needed by the traveling public?

"3. Is it proper use of the county road funds to finance the repair and preservation of a historic structure when that structure is no longer a part of the traveled portion of the county road network?"

A general pledge of secondary road funds is found in §309.9, 1977 Code of Iowa, to-wit:

"The secondary road fund is hereby pledged to and shall be used for any or all of the following purposes at the option of the board of supervisors:

"1. Construction and reconstruction of secondary roads and costs incident thereto.

"2. Maintenance and repair of secondary roads and costs incident thereto.

"3. Payment of all or part of the cost of construction and maintenance of bridges in cities having a population of eight thousand or less and all or part of the cost of construction of roads located within a city of less than four hundred population, which lead to state parks.

"4. Special drainage assessments levied on account of benefits to secondary roads.

"5. Payment of interest on and principal of any bonds of the county issued on account of secondary roads, bridges or culverts constructed by the county.

"6. Any legal obligation or contract in connection with secondary roads and bridges which is required by law to be taken over and assumed by the county, and

"7. Secondary road equipment, materials, supplies and garages or sheds for the storage, repair and servicing thereof.

"8. For the assignment or designation of names or numbers to roads in the county and to erect, construct or maintain guideposts or signs at the intersections thereof."

The provisions of this section have been construed in making response to each of your questions.

1. In answer to the first question, whether the bridge is needed or not, on the secondary road system, so long as it remains in place and under the control of Winneshiek County, the County will bear the cost of its maintenance and the responsibility for responding to any claims for damages arising from its use.

If the bridge remains a part of the secondary road system of Winneshiek County, under these circumstances expenses incurred may be paid from

secondary road funds. However, if that portion of the road containing the bridge is vacated and abandoned (see §306.10 and following, Code of Iowa), and the bridge allowed to remain in place, any costs incurred in maintaining it as a historic relic should be paid from an account other than the secondary road fund.

If the bridge when abandoned, is to be disposed of such as through relocation, demolition or gift, the County may expend secondary road runds actually necessary to accomplish that purpose.

If it is proposed to repair or replace any bridge as a part of Federal Aid highway project, there are steps that are required by 49 U.S.C. §1653(f), necessitating observance of the procedures that are mandated by that part of the federal code which restricts the use of any land, from a significant historical site, (so called 4(f) land).

Thus a federal aid project would recognize that procedures required by this statute are a part of the project costs, and would thus participate in those expenses. However, once a project is completed, Federal highway funds would not participate in any continuing costs associated with a bridge, maintained as a historical site.

2. As set forth in the answer to your first question, Winneshiek County cannot spend secondary road funds to preserve a bridge simply because it is in the National Register of Historic Sites, if that bridge is no longer a part of the secondary road system of the county.

3. In answering your third question, I am assuming you are referring to the expenditure of funds solely for the purpose of repairing and preserving a historic structure, which in this instance happens to be a bridge. The answer is again no, if that structure is not a part of the secondary road system. If its continued existence is because it is of historic interest the statute does not envision expenditure of local secondary funds.

Thus a bridge(s) currently a part of the Winneshiek County Secondary Road System, and likely to be placed in the National Register of Historic Sites, must remain a part of the secondary road system, to allow the Board of Supervisors to expend secondary road funds on its upkeep and repair. However, so long as it remains the property or Winneshiek County, whether on the road system or not, the responsibility for maintaining the structure and defending against claims arising out of its use will rest with the County as in the case of any other property under its jurisdiction.

Section 309.9 does not envision the use of secondary road funds to restore and maintain a historic site, which happens to be a bridge. A bridge(s) placed in the National Register of Historic Sites requires the County to observe the requirements of both state and federal statutes whenever it is likely the property will be disturbed. However, unless the proposed action is directly related to a secondary road project, those funds may not be utilized to effect a change in the bridge.

October 31, 1977

MUNICIPALITIES: Civil Service and Pensions — §§400.27 and 411.8(1), (3), Code of Iowa, 1977. Compensation to police officers for a ten minute briefing prior to the normal eight hour shift should be included in the computations for contributions to the annuity and pension funds. A civil service

commission has authority to hear and determine matters involving shift changes. (Blumberg to Ashcraft, State Senator, 10-31-77) #77-10-7

Honorable Forrest F. Ashcraft, State Senator: We have your opinion request of October 13, 1977, regarding Chapters 400 and 411, 1977 Code of Iowa. Your first question concerns whether a paid ten minute briefing period for police officers prior to their normal eight hour shift should be included as regular pay for purposes of the pension contribution. Your second question concerns the authority of a civil service commission, to rule upon a firefighter's shift change instituted by the Fire Chief.

Section 411.8(1) provides for the members' contribution to the annuity savings fund. Such contributions shall be a percentage of the members' compensations. Subsection three (3) of §411.8 provides for the pension accumulation fund. The members' contributions shall be an amount equal to one and twenty-one hundredths percent of the compensation. The word "compensation" is used in both subsections, but is not defined anywhere in the chapter. Thus, there does not appear to be limitation on what the compensation is that the pension and annuity contributions are based upon. Accordingly, the payment for the ten minute briefing period can be used for computing those contributions.

Section 400.27 provides that the civil service commission shall have jurisdiction to hear and determine *all* matters involving the rights of civil service employees, and may affirm, modify or reverse any case on its merits. This section is very general in its wording. The cases under that section are not very helpful. In *Sandahl v. City of Des Moines,* 1940, 227 Iowa 1310, 290 N.W. 697, the Court interpreted this section regarding the words "hear and determine", but that case concerned the commission's prosecution of an employee for discharge. *McMahon v. City of Des Moines,* 1942, 232 Iowa 240, 4 N.W.2d 866, concerned the commission's authority to determine a matter where two individuals had been appointed to the same position. However, the decision resulted in a discharge of one of the employees. Finally, *Brightman v. Civil Service Commission of City of Des Moines,* 171 N.W. 2d 612 (Iowa 1969), concerned the authority of the commission to determine a pay raise given to some employees but not others. The Court held that the commission had jurisdiction to determine such a matter. However, the question there was whether the pay raises to others resulted in a demotion. All the cases on this section concern demotions, discharges and questions of appointments. We cannot state, because of the broad language of this section, that the commission has no authority to hear and determine matters involving shift changes. However, if the commission reverses or modifies the shift change there should be a finding that the rights of the employee have been affected.

October 1977

CONSTITUTIONAL LAW

Highways; Road Use Tax Fund. Article VII, §8 (Amendment 18) Iowa Constitution; §§312.1, 313.3, 313.4, Code of Iowa, 1977. Road use tax fund cannot be expended for development and operation of motor vehicle ferry service. (Tangeman to Rigler, Chairman, Iowa Transportation Commission, 10-12-77) #77-10-4

COUNTIES AND COUNTY OFFICERS

County Tort Liability. §§321.252, 321.255, 321.473, Code of Iowa, 1977.

The motoring public should be warned of any deficiencies in the weight carrying capacity of bridges on secondary roads. (Goodwin to Jones, Taylor County Attorney, 10-4-77) #77-10-1

Secondary Road Fund. §309.9, Code of Iowa, 1977. County continues to be responsible for maintenance costs, as well as responding to claims which amy arise from use of a bridge that may be placed in the National Register of Historic Sites. Only if the bridge remains a part of the Secondary Road System, may secondary road funds be expended for its maintenance, upkeep and repair. (Schroeder to Anderson, Winneshiek County Attorney, 10-31-77) #77-10-6

MUNICIPALITIES

Housing Law. §§364.2(2), 364.2(4), 413.122 and 413.123, Code of Iowa, 1977. A municipality over 15,000 population can impose reasonable fees implementing §413.123 of the Code. (Blumberg to Willits, State Senator, 10-31-77) #77-10-5

Civil Service and Pensions. §§400.27 and 411.8(1) (3), Code of Iowa, 1977. Compensation to police officers for a ten minute briefing prior to the normal eight hour shift should be included in the compensations for contributions to the annuity and pension funds. A civil service commission has authority to hear and determine matters involving shift changes. (Blumberg to Ashcraft, State Senator, 10-31-77) #77-10-7

STATE OFFICERS AND DEPARTMENTS

Peace Officers' Retirement System. §§97A.1(23), 97A.6, Code of Iowa, 1977. A beneficiary who receives pay for an occupation greater than the difference between the retirement allowance and the average final compensation shall have the retirement allowance readjusted. A surviving spouse is not subject to §97A.6(7)(a). Those receiving an accidental disability allowance are subject to annual readjustments. A beneficiary receiving a disability allowance cannot receive a service retirement allowance unless he or she was fifty-five at the time of the disability retirement. Those terminating employment prior to age fifty-five cannot receive annual adjustments to their pensions. (Blumberg to Larson, Commissioner of Public Safety, 10-6-77) #77-10-3

Governor; Gifts. §§68B.2(6), 68B.5 and 68B.8, Code of Iowa, 1977. The Governor is an official as defined in §68B.2(6) and subject to the prohibitions of §68B.5 against accepting free trips, travel, and club memberships unless they are "unrelated to legislative activities or to state employment." (Turner to Rush, State Senator, 10-5-77) #77-10-2

STATUTES CONSTRUED

Code, 1977	Opinion
68B.2(6)	77-10-2
68B.5	77-10-2
68B.8	77-10-2
97A.1(23)	77-10-3
97A.6	77-10-3
309.9	77-10-6
312.1	77-10-4
313.3	77-10-4
313.4	77-10-4
321.252	77-10-1

321.255	77-10-1
321.473	77-10-1
364.2(2)	77-10-5
364.2(4)	77-10-5
400.27	77-10-7
411.8(1)(3)	77-10-7
413.122	77-10-5
413.123	77-10-5

CONSTITUTION OF IOWA

Article VII, §8	77-10-4

November 1, 1977

TAXATION: Iowa Chain Store Tax Act applicable to dissimilar business under unit control: §§424.2(6), 424.2(7), 424.2(8), 424.4, Code of Iowa, 1977. The Iowa Chain Store Tax Act does not require that substantially the same type of business be conducted at all stores under unit control in order to constitute a chain. That portion of 1936 O.A.G. 180, 182, to the contrary is overruled. (Murray to Bair, Director, Iowa Department of Revenue, 11-1-77) #77-11-1

G. D. Bair, Director, Iowa Department of Revenue: You have requested an opinion of the Attorney General on the question of whether different stores which are operated in a manner to come within the ambit of the Iowa Chain Store Tax Act must, as a prerequisite thereto, be engaged "in substantially the same type of business." As you point out, the Attorney General, in an opinion dated June 14, 1935, and found in 1936 O.A.G. 180, affirmatively so ruled by opining that a person who owned a drygoods store in one Iowa city, a grocery store in another and a clothing store in a third city, would not be conducting a business in Iowa by a system of chain stores. The rationale for this conclusion is set forth in 1936 O.A.G. 180, 182, as follows:

"Although Section 2e of the act is broad enough to include drygoods, groceries and clothing stores within its definition of 'business', still this office is of the opinion that to constitute a 'chain' the different stores under unit control or management, must be engaged in substantially the same type of business. Thus, several drygoods stores or several clothing stores under unit management, ownership and control would constitute a chain under the meaning of the act. The tax is imposed upon every person in the State of Iowa engaged in conducting 'a business' by a system of chain stores. It is the conducting of 'a business' by a system of chain stores that is taxable. The words 'a business' are clearly descriptive and characteristic. They limit the applicability of the 'chain' to a single business, whatever that may be. Conducting a grocery store in one town, a dry goods store in another town and a clothing store in a third town would not be conducting 'a business' as contemplated by the act in the three different towns. It would be conducting three different types of business in three different towns, none of which would have any relationship to the others."

The Iowa Chain Store Tax Act of 1935 is contained in Chapter 424, Code of Iowa, 1977. As the Act connotes, it was adopted in 1935. See chapter 75, Acts of 46th G.A. (1935). Section 424.2(6), Code of Iowa, 1977, is identical with §2e of the Act as adopted in 1935. Section 424.2(8), Code of Iowa, 1977, is identical with §2g of the Act. These statutory provisions were cited by the Attorney General in rendering the aforesaid opinion. The tax is imposed by

§424.4, Code of Iowa, 1977, on a graduated scale of fixed dollar amounts according to the number of stores in the chain. *Tolerton & Warfield Co. v. Iowa State Board of Assessment & Review,* 1936, 222 Iowa 908, 270 N.W. 427.

Section 424.2(6) defines "Business" as follows:

" 'Business' includes any merchandising activity engaged in by any person or caused to be engaged in by him with the object of gain, profit, or advantage, either direct or indirect."

Section 424.2(7), Code of Iowa, 1977, defines "Store" as follows:

" 'Store' means any store or stores, or any mercantile or other establishment in which tangible goods, wares, or merchandise of any kind are sold or kept for sale at retail."

Section 424.2(8) defines "Conducting a business by a system of chain stores" in relevant part:

" '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."

The aforementioned statutory definitions are controlling in the interpretation of the Iowa Chain Store Act. 1976 O.A.G. 458. Moreover, these statutory definitions are in pari materia with each other and with the whole Chain Store Act. Id at page 458. In construing statutes, all parts of legislative enactments should be considered together and no undue importance should be given to any single or isolated portion. *Iowa Nat. Industrial Loan Co. v. Iowa Department of Revenue,* 1974, Iowa, 224 N.W.2d 437. A statute should be accorded a sensible, practical, workable and logical construction. *Matter of Bliven's Estate,* 1975, Iowa, 236 N.W.2d 366.

While the Attorney General, in the 1935 opinion, stated that the definition of "Business" in the Act was broad enough to include dissimilar stores (and such a result would undoubtedly be conceded under the definition of "Store"), he reached his conclusion that different businesses would not be included in the same chain on the basis of the use of the words "a business" in the definition of "conducting a business by a system of chain stores" in §424.2(8). Consequently, it is clear that the opinion did not consider the entire Chain Store Act, but did give undue importance to isolated words taken out of context. Indeed, the meaning of the term "business" in §424.2(8) should be determined in light of the definition of "Business" in §424.2(6) which obviously cannot be restricted to some nebulous concept of "a single business". Also, an examination of Chapter 424 of the Code will not disclose any legislative intent to restrict the parameter of the Chain Store Tax Act to stores doing "substantially the same type of business".

Moreover, the interpretation rendered in the 1935 opinion creates an ambiguity in the meaning of the statute and does not accord a sensible, workable, or logical construction. The statutory definitions quoted above, as well as the remainder of the Act, disclose a legislative intent to tax a chain on the

basis of the number of Iowa stores where tangible goods, wares, or merchandise of any kind are sold or offered for sale at retail, unless the exemptions in §§424.3 and 424.16, Code of Iowa, 1977, are applicable. Consequently, it should make no difference whether a chain has stores selling drygoods, stores selling clothing, or stores selling groceries in order to determine the applicability of the tax and the number of stores in the chain. Such is the clear and unambiguous language in the Chain Store Act. However, to require all stores in a chain to engage in substantially the same type of business interjects an irrelevant element which can give rise to unlimited problems in administration of the tax for the state and taxpayers and which has no relationship as to whether a chain of stores under unit control exist. What is "substantially the same type of business"? Is a person who owns a men's clothing store and a women's clothing store in "subsantially the same type of business"? Other situations, too numerous to mention, exist and can be listed to show such ambiguity. Furthermore, while under the 1935 opinion, a person who owned a drygoods store, grocery store, and clothing store would not be operating a chain, a person who owned three stores where groceries, drygoods, and clothing are similarly sold in each would be. Thus, it can readily be seen that the 1935 opinion does not accord a sensible, practical, workable and logical construction of the Chain Store Act. Rather, the opinion advances a vague concept as to what type of merchandise is sold in each store of the chain, rather than the mere statutory requirement that goods, wares and merchandise be sold at each store in such chain.

The phrase "conducting a business by a system of chain stores" in §424.2(8) when used in the Chain Store Act clearly has reference to each chain of stores under common ownership or operation, as defined in the statute. Thus, if a person owns or operates thirty Iowa retail stores, that person is "Conducting a business by a system of chain stores" with one chain of thirty stores, notwithstanding that each store may sell similar or dissimilar goods, wares, or merchandise. The unambiguous language in the statute requires this interpretation.

Finally, it would not be irrelevant to point out that in *Tolerton & Warfield Co. v. Iowa State Board of Assessment & Review, supra*, where the plaintiff operated fifty grocery stores and one gasoline service station in Iowa, both the plaintiff and the State Board conceded that plaintiff was engaged in "conducting a business by a system of chain stores" in Iowa and the tax, if due, would be computed on the basis of fifty-one Iowa stores. See 3317 Abstracts and Arguments, May term, 1936, p. 142.

Therefore, it is the opinion of this office that the Iowa Chain Store Act does not require that "substantially the same type of business" be conducted at all stores under unit control in order to constitute a chain. That portion of the opinion of the Attorney General in 1936 O.A.G. 180, 182, which conflicts with the instant opinion is overruled.

November 1, 1977

MUNICIPALITIES: State Building Code — §§103A.10(3), 364.1 and 364.2(3), Code of Iowa, 1977. The State Building Code for factory-built structures prevails over any local building regulation on factory-built structures. (Blumberg to Weisner, Office of Planning and Programming, 11-1-77) #77-11-2

Mr. G. R. Weisner, Office of Planning and Programming: We have your

opinion request of October 10, 1977, regarding the State Building Code. The City of Burlington has adopted an ordinance rquiring a certain type of conduit wiring in factory-built structures. The State Building Code, pursuant to Chapter 103A of the Code, permits another type of conduit wiring in factory-built structures. You ask whether the Burlington ordinance is valid.

Section 103A.10(3), 1977 Code of Iowa, provides:

"Provisions of the state building code relating to the manufacture and installation of factory-built structures *shall apply throughout the state.* Factory-built structures approved by the commissioner *shall be deemed to comply with all building regulations* applicable to its manufacture and installation and *shall be exempt from any local building regulations." (Emphasis added.)*

As can be seen from this provision, the State Building Code prevails. All factory-built structures approved by the State Building Code Commissioner *shall* be deemed to comply with *all* building regulations and *shall* be exempt from *any* local building regulation.

Assuming that the city is attempting to exercise its home rule powers, Burlington, or any other municipality, cannot circumvent the State Building Code for factory-built structures. A city can exercise its home rule powers only if not limited by the Constitution and not inconsistent with a statute. See, §364.1. An exercise of municipal power is inconsistent with a statute if it is irreconcilable with that statute. See, §364.2(3). There can be no doubt that any ordinance prescribing something other than what is in the State Building Code for factory-built structures would be inconsistent and irreconcilable with the State Building Code and §103A.10(3).

Accordingly, we are of the opinion that the State Building Code on factory-built structures prevails over any local building regulation on factory-built structures.

November 10, 1977

STATE OFFICERS AND DEPARTMENTS: Public Agency under the Open Meeting Law. §§28A.1, 28A.3, Code of Iowa, 1977. A nonprofit corporation is not a "public agency" under the open meeting statutes. (Robinson to Gettings, State Representative, 11-10-77) #77-11-3

The Honorable Don E. Gettings, State Representative: You have asked for an Attorney General's Opinion on the question that I have paraphrased as follows:

The Board of Directors of the Southern Iowa Economic Development Association [SIEDA] voted 11 to 1 to close the meeting to deal with the discharge of one of its employees. The employee involved did not want a closed meeting, and asked for an open meeting. Since the employee asked for an open meeting, has the Board of Directors the right to deny the employee an open meeting?

Our investigation reveals that SIEDA is a non-profit corporation authorized under Chapter 504A, Code of Iowa, 1977. Thus, the controlling question presented in this opinion request is whether or not such a nonprofit corporation is a "pubic agency" within the meaning of the open meeting statute, Chapter 28A, The Code. In our opinion, it is not.

Section 28A.1, Code of Iowa, 1977, provides in pertinent part:

...All meetings of the following public agencies shall be public meetings open to the public at all times,...

1. Any board, council, or commission created or *authorized by the laws of this state.*

2. Any board, council, commission, ... or *tax-supported district in this state.*

3. Any committee of any such board, council, commission, trustees, or governing body.

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. [Emphasis added.]

There are two Iowa Supreme Court cases that interpret Chapter 28A. Both are helpful, but neither are directly on point. The first is *Dobrovolny v. Rinehart,* 173 N.W.2d 837 (Iowa 1970). The court held that failure to provide advance public notice did not invalidate the Board of Education's action. A page 840 of 173 N.W.2d, the court outlined the rules of statutory construction to be used in interpreting this statute in order to give effect to the intention of the legislature. Applying these rules, we do not believe it was the intent of the legislature to subject meetings of every nonprofit corporation to the open meetings law. Had the legislature intended such a result, it could have stated these intentions very clearly. It is significant that it did not. *See First National Bank of Ottumwa v. Bair,* 252 N.W.2d 723, 725 (Iowa 1977).

Greene v. Athletic council of I.S.U., 251 N.W.2d 559 (Iowa 1977), is a 5-to-4 Iowa Supreme Court decision which held that the Iowa State University Athletic Council is subject to the open meetings law because it was "authorized by the laws of the state". The majority based its opinion in part on the fact that the Board of Regents was empowered by §262.12, The Code, to delegate its statutory powers and duties to institutional officials. While we recognize nonprofit corporations are "authorized by the laws of the state", we do not believe it was the intent of the legislature to include these private corporations within the definition of a "public agency" under Chapter 28A, The Code.

Because of our decision that SIEDA is not a public agency, we do not reach the other questions raised.

November 10, 1977

WORKERS' COMPENSATION: Public Records. Sections 17A.3(d), 68A.1, 68A.2, 68A.7, 68A.8, 85.27, 86.10, 86.11, Code of Iowa, 1977. Records in the Iowa Industrial Commissioner's Office are public records as defined and delimited in Chapter 68A of the Code. Hospital records and medical records contained in the claim files in the Iowa Industrial Commissioner's Office are open to public inspection; such records do not qualify as confidential records exempt from disclosure. (Jackwig to Landess, Iowa Industrial Commissioner, 11-10-77) #77-11-4

Mr. Robert C. Landess, Iowa Industrial Commissioner: In your letter dated September 21, 1977, you request an opinion in regard to whether records in your office are open to public inspection and whether any restrictions apply. Moreover, concerning §68A.7(2), Code of Iowa, 1977, which provides that "[h]ospital records and medical records of the condition, diagnosis, care, or treatment of a patient or former patient, including outpatient"

shall in general be kept confidential despite the fact that they may otherwise be public records, you specifically ask:

"Does this section require us to keep confidential hospital and medical records which are contained in our claim files which have been filed either by claimant or representative of the employer concerning the condition, diagnosis, care or treatment of a workers' compensation claimant; or do the words, 'patient or former patient' modify this section so that it applies only to records which are kept by agencies of which the individual is a patient, former patient, or outpatient?"

First, in response to your general inquiry regarding the status of your records it is the opinion of the Attorney General that the records in the Iowa Industrial Commissioner's Office are open to public inspection pursuant to §68A.1, Code of Iowa, 1977, which defines "public records" as follows:

"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."* (Emphasis supplied.)

Accordingly, restrictions enumerated and described in Chapter 68A of the Code apply to the records in the Iowa Industrial Commissioner's Office. Section 68A.2, Code of Iowa, 1977, contains the following general exemption from disclosure:

"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."* (Emphasis supplied.)

Section 68A.7, Code of Iowa, 1977, contains the following specific exemptions from disclosure:

"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 made 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."

In response to your inquiry regarding §68A.7(2)—which both asks whether hospital records and medical records contained in the claim files in the Iowa Industrial Commissioner's Office are exempt from disclosure and offers as an analysis that the words "patient or former patient" may modify the exemption so as to limit its application to agencies of which an individual is a patient or former patient, it is the opinion of the Attorney General that such hospital records and medical records are not confidential records of the sort contemplated by the §68A.7(2) exemption from disclosure.

This opinion does not rest on the suggested analysis. Particular hospital records and medical records kept by an agency of which an individual is a patient or former patient may be public records or not; however, once such records become part of a claim file in the Iowa Industrial Commissioner's Office they are public records and it is the Iowa Industrial Commissioner who becomes the custodian of such records and who is authorized to release information contained in such records.

It should be noted that "[t]he provisions of Chapter 68A do not make access to public records dependent on the identity of the person in possession of them. . . ." *Des Moines Register & Tribuine v. Osmundson,* 248 N.W.2d 493, 501 (Iowa 1976). "It is the nature and purpose of the document, not the place where it is kept, which determines its status." *Linder v. Eckard,* 261 Iowa 216, 152 N.W.2d 833, 835 (1967). Therefore, this opinion does rest on the following considerations:

(1) Whereas §68A.7(2) may be viewed as a provision for confidentiality similar to the traditional physician-patient privilege recognized by courts, it is a general statutory provision and does not prevail over the specific waiver apparent in §85.27, Code of Iowa, 1977, which provides in relevant part as follows:

"Any employee, employer or insurance carrier making or defending a claim for benefits agrees to the release of all information to which they have access concerning the employee's physical or mental condition relative to the claim and further waives any privilege for the release of such information. Such information shall be made available to any party or their attorney upon request. Any institution or person releasing such information to a party or their attorney shall not be liable criminally or for civil damages by reason of the release of such information. If release of information is refused the party requesting such information may apply to the industrial commissioner for relief. The information requested shall be submitted to the industrial commissioner who shall determine the relevance and the materiality of the information to the claim and enter an order accordingly."

(2) The Code does not limit the ramifications of the §85.27 waiver by any reference to the confidentiality of such information or to the need to exempt such information from public disclosure once it becomes part of a claim file in the Iowa Industrial Commissioner's Office. Compare §86.10, Code of

Iowa, 1977, which specifies that information obtained as a result of an inspection of an employer's books, records and payrolls "shall be used for no other purpose than to advise the commissioner or insurance association with reference to" determining the correct wage expenditure, the number of employees and "such other information as may be necessary for the uses and purposes of the commisioner in the administration of the law". Likewise, compare §86.11, Code of Iowa, 1977, which explains the procedure to be followed by employers in filing reports of injuries but which clearly specifies that any such "report to the industrial commissioner of the injury shall be without prejudice to the employer or insurance carrier and shall not be admitted in evidence or used in trial or hearing before any court, the industrial commissioner or his deputy except as to the notice under §85.23". In both of these examples, the Legislature seemingly acted pursuant to §68A.2 in exempting from disclosure that information which otherwise entered the Iowa Industrial Commissioner's claim files and became part of the public record. The Legislature did not enact a similar provision with regard to §85.27.

(3) Furthermore, every case decision of the Iowa Industrial Commissioner's Office must set forth the findings of fact and conclusions of law upon which it is based. *Catalfo v. Firestone Tire & Rubber Co.,* 213 N.W.2d 506 (Iowa 1973). The typical workers' compensation case usually entails a great deal of medical evidence which must be weighed by the person deciding the claim. Accordingly, decisions usually refer to much of the material from the hospital records and medical records. It should be noted that §17A.3(d), Code of Iowa, 1977, requires an agency decision be made available for public inspection. Only "to the extent required to prevent a clearly unwarranted invasion of personal privacy" must the agency delete identifying details and, in each such case, fully explain such deletions in writing. In accordance with the basic concept that public records embrace "not only what is *required* to be kept but also what is *convenient* and appropriate to be preserved as evidence of public action" (*Linder*, supra, at 835), the public has an interest in all of the medical evidence and not in just those portions quoted in the decision.

(4) Finally, §68A.8, Code of Iowa, 1977, affords an opportunity to challenge the disclosure of hospital records or medical records contained in a claim file in the Iowa Industrial Commissioner's Office:

"In accordance with the rules of civil procedure the district court may grant an injunction restraining the examination (including copying) of a specific public record, if the petition supported by affidavit shows and if the court finds that such examination would clearly not be in the public interest and would substantially and irreparably injure any person or persons. The district court shall take into account the policy of this chapter that free and open examination of public records is generally in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others."

The public interest in knowing the evidence and rationale upon which workers' compensation cases are determined greatly outweighs any possibility of inconvenience or embarrassment to any one individual.

November 14, 1977

SCHOOLS: Area Education Agency. §§273.2, 273.3(2), 273.7, 273.9, 273.10, Code of Iowa, 1977. School districts are required by §273.9 to pay for programs and services received from the Area Education

Agency. An Area Education Agency is not authorized to assess school districts for programs and services which are furnished to others unless sixty percent of all districts in the area request services to be provided to all jointly. (Nolan to Tauke, State Representative, 11-14-77) #77-11-5

Honorable Tom Tauke, State Representative: This is written in response to your request for an opinion on questions which you submitted concerning the legality of charges made by Area Education Agency #1 (Keystone AEA) to local school districts:

"1. Is an area education agency authorized by law to asess a local school district for any program, service materials, or administrative costs, whether such costs are related to programs or services mandated or to programs or services which the agency has elected to provide?

"2. Is an area education agency legally entitled, pursuant to the goal of equalization, to assess a local school district for programs, services, materials, or related costs which the district has not in fact received?

"3. Is an area education agency authorized by law to act as a purchasing agent or jobber for one or more local school districts when claims for such purchases must be processed through the agency accounts and then assessed to the local school districts?

"4. If an area education agency has assessed any local school district for any costs not authorized by law, is the agency required to return such funds to the local school districts; and, if so, when, in what manner, and from which accounts?"

Taking your questions in order, the views of this office are as follows:

1. An area education agency is authorized by law to charge a local school district for programs, service materials and administrative costs which the agency has provided. Under §273.9(1) school districts are required to pay for such programs and are expected to "include expenditures for the programs and services in their budgets". Under §273.2 the AEA is required to provide educational services and programs as set forth in Chapter 273 and Chapter 281 and it is also authorized to provide certain additional programs "within the limits of funds available". Included among the programs which may be provided are in-service training programs and educational data processing. With respect to media production, §273.10 provides authority for the AEA to purchase or lease equipment or facilities for media production or reproduction subject to approval of the State Board of Public Instruction and excluding television production or transmission except as provided by contracts with the State Educational, Radio and Television Facility Board.

2. An area education agency is legally entitled to charge a local school district only for such programs, services, materials, or related costs as it has in fact provided to such district. (§273.9)

It is contemplated that each school district will budget for and receive state aid for media services pursuant to §442.27 of the Code. Such state aid when paid to the school district goes to the general fund and may be used for any general fund purpose.

Also, pursuant to §273.7 additional services may be provided to all school districts in the area within the financial capabilities of the area education agency where sixty percent of the number of local school districts located in the area education agency or boards representing sixty percent of the

enrollment of the school districts in said agency request such additional services in writing. In such limited case a school district might be assessed for a service provided to all the districts jointly but which it did not use.

3. We find no specific authority for the AEA to act as a purchasing agent or jobber for local school districts. However, it is our view that such service might be contemplated by §273.7 when requested by sixty percent of the number of local school boards or school boards representing sixty percent of the enrollment in the school districts located in the agency.

4. If an AEA has improperly assessed a local school district for costs not authorized by law it is the opinion of this office that the agency would be required to refund the amount improperly charged to the local school district as soon as possible from the funds available pursuant to §273.3(2).

November 14, 1977

MOTOR VEHICLES: Certificate of Title. §§321.1(1), (2), (34), 321.18, 321.44, 321.45(1), (2), (3), 321.46, 321.47, 321.48(1), 321.49(1), 321.52(1), 321.101(4), 321.102, 321,104, 321.482, Code of Iowa, 1977. Regs. 820-[07,D], 11.1(321), (1), (5), Iowa Administrative Code, 1975. Vehicular certificates of title is prima facie evidence of ownership. The purpose of certificate of title is to provide an exclusive means of establishing vehicle ownership and affecting transfer of title. Title is statutorily necessary to transfer, sell, destroy, or replace an engine in a vehicle, with accompanying penalties for noncompliance with title requirements. (Dundis to Hansen, State Senator, 11-14-77) #77-11-6

Willard R. Hansen, State Senator: Your letter of August 6, 1977, requests an Attorney General's opinion on the following questions (numbered accordingly in the body of this opinion):

(1) Is a certificate of title for a motor vehicle evidence of ownership and proof of same?

(2) What is the purpose of the vehicular certificate of title?

(3) Is a certificate of title statutorily necessary in any way to:

a) transfer a vehicle?

b) sell a vehicle?

c) destroy a vehicle?

d) replace an engine?

(4) What penalties exist, if any, for noncompliance with the certificate of title requirements concerning the four acts stated in question (3)?

By way of preface, §321.18, Code of Iowa, 1977, declares that "[e]very motor vehicle, trailer, and semitrailer when driven or moved upon a highway shall be subject to the registration provisions of this chapter...", with certain limited exceptions cited.

Section 321.1(1) and (2), Code of Iowa, 1977, states:

"1. 'Vehicle' means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway. 'Vehicle' does not include:

"a. Any device moved by human power.

"b. Any device used exclusively upon stationary rails or tracks.

"c. Any steering axle, dolly, or other integral part of another vehicle, except an auxiliary axle as defined in subsection 69, which in and of itself is incapable of commercially trasnporting any person or property but is used primarily to support another vehicle.

"d. Any integral part of a truck tractor or road tractor which is mounted on the frame of the truck tractor or road tractor immediately behind the cab and which may be used to transport persons and property but which cannot be drawn upon the highway by the truck tractor or another motor vehicle.

"2. 'Motor vehicle' means every vehicle which is self-propelled but not including vehicles known as trackless trolleys which are propelled by electric power obtained from overhead trolley wires, but not operated upon rails. The terms 'car', 'new car', 'used car' or 'automobile' shall be synonymous with the term 'motor vehicle'."

(1) According to regulatory definition incorporated into the Iowa Code, the term "certificate of title", when the certificate is in proper form, means a document evidencing ownership of a motor vehicle. Iowa Department of Transportation Regulation 820-[07,D]11.1 (321) and 11.1(1), I.A.C., Transportation, July 1, 1975, declares:

"Definitions. The definitions in section 321.1 of the Code are hereby made part of this chapter, in addition the following words and phrases, when used in chapter 321 or this chapter shall have the meanings respectively ascribed to them, except when the context otherwise requires.

11.1(1) *Certificate of title* means a document issued by the appropriate official which contains a statement of the owner's title, the name and address of the owner, a description of the vehicle, a statement of all security interests and such additional information as may be required under the laws or rules of the jurisdiction in which such document was issued, *and which is recognized as a matter of law as a document evidencing ownership of the vehicle described thereon.* The terms 'title certificate', 'title only', and 'title' shall be synonymous with the term 'certificate of title'." [Emphasis added]

As to *proof* of ownership, the Iowa Supreme Court has interpreted §321.45, Code of Iowa, 1977, in addition to other Chapter 321 sections dealing with certificate of title, as indicating that title duly assigned constitutes a *prima facie* case of ownership. In other words, a presumption is created which can be overcome by demonstrating an inclusion in one or more of the four "exceptions" listed in §321.45(2). *Six v. Freshour,* 1975, 231 NW 2d 588; *State Automobile and Casualty Underwriters v. Farm Bureau Mutual Insurance Company,* 1964, 131 NW 2d 265; *Hartman v. L. R. Norman,* 1962, 112 NW 2d 374.

Section 321.45(1) and (2) states:

"1. No manufacturer, importer, dealer or other person shall sell or otherwise dispose of a new vehicle subject to registration under the provisions of this chapter to a dealer to be used by such dealer for purposes of display and lease or resale without delivering to such dealer a manufacturer's or importer's certificate duly executed and with such assignments thereon as may be necessary to show title in the purchaser thereof; nor shall such dealer purchase or acquire a new vehicle that is subject to registration without obtaining from the seller thereof such manufacturer's or importer's certificate. In addition to the assignments stated herein, such manufacturer's or importer's certificate shall contain thereon the identification and description of the

vehicle delivered and the name and address of the dealer to whom said vehicle was originally sold over the signature of an authorized official of the manufacturer or importer who made the original delivery.

". . . .

"2. No person shall acquire any right, title, claim or interest in or to any vehicle subject to registration under this chapter from the owner thereof except by virtue of a certificate of title issued or assigned to him for such vehicle or by virtue of manufacturer's or importer's certificate delivered to him for such vehicle; nor shall any waiver or estoppel operate in favor of any person claiming title to or interest in any vehicle against a person having possession of the certificate of title or manufacturer's or importer's certificate for such vehicle for a valuable consideration *except in case of:*

"a. The perfection of a lien or security interest by notation on the certificate of title as provided in section 321.50, or

"b. The perfection of a new security interest in new or used vehicles held as inventory for sale as provided in Uniform Commercial Code, chapter 554, Article 9, or

"c. A dispute between a buyer and the selling dealer who has failed to deliver or procure the certificate of title as promised, or

"d. Except for the purposes of section 321.493.

"*Except in the above enumerated cases, no court in any case at law or equity shall recognize the right, title, claim or interest of any person in or to any vehicle subject to registration sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued or assigned in accordance with the provisions of this chapter.*" [Emphasis added]

As stated by §321.45(1), even initial sales from automobile manufacturers to dealers for the purpose of lease or resale require delivery to the dealer of a "manufacturer's or importer's certificate" that has been duly executed and with the necessary assignments to show title in the purchaser. The last paragraph of §321.45(2) applies to *both* certificates of title and manufacturer's or importer's certificates. As this indicates, these particular certificates are of the same evidential value as certificates of title.

Iowa Department of Transportation Regulation 820-[07,D] 11.1(5) states:

"*Manufacturer's statement of origin* means a certification signed by the manufacturer or importer, that the vehicle described therein has been transferred to the person or dealer named therein and that the transfer is the first transfer of the vehicle in ordinary trade and commerce. The description shall include the make, model, style, vehicle identification number and other information which may be required by statute or rule. The terms 'manufacturer's certificate', 'importer's certificate', 'MSO' and 'MCO' shall be synonymous with the term 'manufacturer's statement of origin'."

In our opinion, when all procedural requirements in the Iowa Code dealing with certificates of title and manufacturer's certificates are fulfilled, those certificates constitute evidence of ownership of the vehicle in question. This evidence *can* constiute proof of same, but is subject to rebuttal along the lines cited above.

(2) The purpose of the vehicular certificate of title is not set down specifically in the Iowa Code of Department of Transportation Regulations.

However, the Iowa Supreme Court has interpreted the purpose of this law:

"There are many sections in Chapter 321 of the 1962 Code which relate to title and registration rquirements. They reveal a legislative purpose to prevent fraud in the purchase and sale of motor vehicles generally, and provide an exclusive method of transfer of title thereto except those which fall within the exceptions enumerated. . . . In several cases we have considered and applied this announced purpose." *Durant-Wilton Motors, Inc. v. Tiffin Fire Association,* 1969, 164 NW 2d 829, 831.

Farmers Butter and Dairy Cooperative v. Farm Bureau Mutual Insurance Company, 1972, 196 NW 2d 533, has agreed with *Durant, supra,* that the purpose of the certificate of title requirements is to provide an exclusive means of establishing motor vehicle ownership and affecting transfer of title. That case also cited a Drake Law Review article [Hudson, Iowa Motor Vehicle Certificate of Title Law, 3 Drake L. Rev. 3, 3-4 (1953)]:

"It is assumed that the purpose of the change from the existing registration system to a certificate of title laws system was to prevent theft of motor vehicles.

". . . .

" 'However, the essential feature of the system is that the certificate of title issued for each motor vehicle and other vehicles subject to registration will be a part of a chain of title, as certificates are assigned and new certificates issued. It is designed to show ownership interests and encumbrances on the title certificate'." *Farmers Butter and Dairy Cooperative,* 196 NW 2d at 538 (as cited from *Northern Insurance Co. v. Miller,* 1964, 256 Iowa 764, 768, 129 NW 2d 28, 30).

(3) (a) Section 321.45(2), Code of Iowa, 1977, expressly states that no person shall acquire nor shall the courts recognize any right, title, claim or interest in any vehicle subject to registration "sold or disposed of, or mortgaged or encumbered" unless evidenced by a certificate of title or manufacturer's or importer's certificate.

Section 321.45(3) and 321.46, Code of Iowa, 1977, states in affirmative wording that definite procedures involving certificates of title must be complied with by the owner *and* the transferee, pointing to the necessity of involvement with the actual title certificate for both parties. Section 321.45(3) provides in part that, "[u]pon the transfer of any registered vehicle, the owner, except as otherwise provided in this chapter, shall endorse an assignment and warranty of title upon the certifiate of title for such vehicle with a statement of all liens and encumbrances thereon, and he shall deliver the certificate of title to the purchaser or transferee at the time of delivering the vehicle except as otherwise provided in this chapter."

Section 321.46 additionally provides that the "purchaser or transferee shall immediately apply for and obtain from the county treasurer of his residence a transfer of registration and a new certificate of title for such vehicle except as provided in section 321.48", and that the prior owner shall be, presented with that application. Further, "[u]pon filing the application for a registration transfer and a new title, the applicant shall pay a fee of two dollars"

Section 321.47, Code of Iowa, 1977, states that inheritance, devise or bequest, order in bankruptcy, insolvency, replevin, foreclosure or execution are examples of a "*transfer* of ownership. . . by operation of law" [emphasis added]. These transfers also require surrender of the prior certificate of title or the manufacturer's or importer's certificate. However, here, "when that is not possible, upon presentation of satisfactory proof to the county treasurer

of ownership and right of possession to such vehicle and upon payment of a fee of two dollars and the presentation of an application for registration and certificate of title" the applicant may be issued a new registration card and certificate of title for the vehicle.

Replacing the engine of a motor vehicle for another engine, selling a vehicle to satisfy an artisan's lien as provided in Chapter 577, Code of Iowa, 1977, or to satisfy a landlord's lien or a storage lien as provided in Chapters 570 and 579, Code of Iowa, 1977, respectively or repossessing a vehicle upon default in performance of the terms of a security agreement are additional acts covered by that part of §321.47 cited above. Slightly varying procedures are also provided in §321.47 for persons entitled to the possession and ownership of a vehicle under the laws of descent and distribution of an interstate's property.

In sum, it is quite clear that subject to specific Iowa Code exceptions and limitations a certificate of title is statutorily necessary to transfer a vehicle.

(b) As already indicated by the Iowa Code sections cited above, the act of transferring a vehicle would certainly encompass selling it. Therefore, certificate of title is also necessary to sell a vehicle.

Section 321.48(1), Code of Iowa, 1977, does state one limitation on title requirements in this area. A transferee or purchaser of a vehicle "who holds the same for resale and operates the same only for purposes incident to resale" and who complies with the other procedures outlined by that section, "shall not be required to obtain transfer of registration or a new certificate of title but upon transferring his title or interest to another person shall execute and acknowledge an assignment and warranty of title upon the certificate of title assigned to him and deliver the same to the person to whom such transfer is made".

(c) A certificate of title is statutorily necessary to destroy a vehicle in that it must be surrendered to the county treasurer. Section 321.52(1), Code of Iowa, 1977, declares:

"1. When a vehicle is permanently dismantled or destroyed so that it can no longer be used on the public highway or is sold by the owner, dealer or otherwise, for junk, the owner shall detach the registration plates and registration card and surrender same along with the certificate of title to the county treasurer who shall cancel same on his records and forward the certificate of title to the department. The certificate of title surrendered by the owner shall have noted thereon the purpose of cancellation and the name of the purchaser if sold for junk and such notation shall be duly signed by the owner. The department shall notify the title issuing county, if other than the county where title was surrendered, authorizing the treasurer to cancel and destroy all records pertaining to the particular vehicle. The department is not authorized to make a refund of license fees on a dismantled, destroyed or junked vehicle unless and until the certificate of title thereto has been surrendered."

(d) A certificate of title is necessary to replace an engine of a motor vehicle with another one to the extent provided in §321.47, already cited in (3) (a).

In addition, "[t]he director is authorized to enforce such rules governing registration as may be deemed necessary by the commission and compatible with the public interest with respect to the change or substitution of one engine in place of another in any motor vehicle". §321.44, Code of Iowa, 1977. The term "director" is defined as "the director of the state department of transportation or his designee" by §321.1(34), Code of Iowa, 1977.

(4) Statutory penalties do exist for noncompliance with the certificate of title requirements concerning each one of the acts stated in (3) (a)-(d).There are, first, Iowa Code sections of general effect on all four acts. Section 321.482, Code of Iowa, 1977, states:

"It is a misdemeanor for any person to do any act forbidden or to fail to perform any act required by any of the provisions of this chapter unless any such violation is by this chapter or other law of this state declared to be a felony. . . .

"Every person convicted of a misdemeanor for a violation of any of the provisions of this chapter for which another penalty is not provided shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days." [Emphasis added]

Section 321.104, Code of Iowa, 1977, declares that "it is a misdemeanor, punishable as provided in section 321.482" for a person to commit certain acts, as well as (5), violating "any of the other provisions of this chapter or any lawful rules promulgated pursuant to the provisions of this chapter". Section 321.98, Code of Iowa, 1977, states that no person shall operate upon a highway any vehicle unless valid registration and certificate of title has been issued for such vehicle, any violation of this section being "a misdemeanor punishable as provided in section 321.482."

Other sections deal more specifically with the acts in question. Section 321.101, Code of Iowa, 1977, provides:

"The department is hereby authorized to suspend or revoke the registration of a vehicle, registration card, registration plate, or any nonresident or other permit in any of the following events"

". . . .

"4. When the department determines that the required fee has not been paid and the same is not paid upon reasonable notice and demand."

Applying to manufacturer, transporter, or dealer transfers is §321.102, Code of Iowa, 1977:

"The department is also authorized to suspend or revoke a certificate or the special plates issued to a manufacturer, transporter, or dealer upon determining that any said person...failed to give notices of transfer when and as required by this chapter."

Likewise, §321.104, already cited in part, declares tht it is also a misdemeanor, punishable as provided in section 321.482 for a person to commit the following acts:

"2. For a dealer, or a person acting on behalf of a dealer to acquire, purchase, hold or display for sale a motor vehicle without having obtained a manufacturer's or importer's certificate or a certificate of title, or assignments thereof, unless otherwise provided in this chapter."

". . . .

"4. Any person whoever shall purport to sell or transfer a motor vehicle, trailer or semitrailer without delivering to the purchaser or transferee

thereof a certificate of title or a manufacturer's or importer's certificate thereto duly assigned to such purchaser as provided in this chapter."

Finally, §321.49(1), Code of Iowa, 1977, states:

"If an application for transfer of registration and certificate of title is not submitted to the county treasurer of the residence of purchaser or transferee within five days of the date of assignment or transfer of title, a penalty of five dollars shall accrue against said vehicle, and no registration card or certificate of title shall thereafter be issued until penalty is paid."

November 16, 1977

STATE OFFICERS AND DEPARTMENTS: Code Editor; Publication of the Iowa Administrative Code. §17A.6(1), Code of Iowa, 1977. §17A.6(1) does not preclude the Code Editor from publishing supplements to the Iowa Administrative Code containing notices of intended action, by the "session law" version of adopted rules, actions taken by the Administrative Rules Review Committee and the Committee's agenda, in a pamphlet form punched for inclusion in a supplement binder, plus separate loose-leaf replacement pages for the I.A.C. compilation itself. (Turner to Doderer, State Senator, 11-16-77) #77-11-7

Honorable Minnete F. Doderer, State Senator: I have your request for an opinion of the attorney general as follows:

"Does Code Section 17A.6(1) preclude the Code Editor from publishing supplements to the Iowa Administrative Code containing notices of intended action, by the 'session law' version of adopted rules, actions taken by the Administrative Rules Review Committee and the Committee's agenda, in a pamphlet form punched for inclusion in a supplement binder, plus separate loose-leaf replacement pages for the I.A.C. compilation itself?"

In my opinion the system you suggest may be properly implemented under the provisions of §17A.6(1), Code of Iowa, 1977, if the Code Editor approves.

November 17, 1977

COUNTY OFFICERS: County Auditor. §§309.34, 309.43, Code of Iowa, 1977. Recording requirements of §§309.34 and 309.43 of the Code necessitate enrollment of required road information in a road book by the county auditor. (Tangeman to Anstey, Appanoose County Attorney, 11-17-77) #77-11-8

Mr. W. Edward Anstey, Appanoose County Attorney: This is in response to your request for an opinion of the Attorney General in which you ask the following questions.

"Pursuant to the request of the Appanoose County Board of Supervisors I am writing to request an Attorney General's Opinion concerning the necessity of maintaining a separate road book pursuant to Section 309.34 and 309.43 of the 1977 Code of Iowa. The question specifically presented by our situation is this:

"May the Auditor and County Board of Supervisors fulfill the recording requirements imposed by the above referenced sections by means of including the matter required to be recorded in the minute book of the Board of Supervisors in lieu of maintaining a separate road book. Are the provisions of Section 309.34 and 309.43 of the 1977 Code of Iowa mandatory in requiring separate recordation of these matters."

Sections 309.34 and 309.43 of the Code of Iowa, 1977, read as follows:

"309.34 RECORD REQUIRED After the construction program or project is finally determined, the county auditor shall record the same at length in a county road book."

"309.43 RECORD OF BIDS All bids received shall be publicly opened, at the time and place specified in the advertisement, and shall be recorded in detail, in the road book, by the county auditor; and the county engineer shall in all instances of day labor, private or public contracts, file a detailed cost accounting sheet with the county auditor; said book and cost sheets shall at all times be open to public inspection."

It seems clear to me that the legislative intent in these statutes is to make all road information referred to in the two statutes a readily available public record by having the county auditor write the information in a book referred to as the "Road Book".

To place the required information in the minutes of the Board of Supervisors is not to record it "in detail" or "at length" in the road book, as required by the statutes quoted above.

The writing of the information in the minutes of the County Board of Supervisors apparently does not make such information as readily available as the legislature considers necessary otherwise the legislature would not have specifically required the recording of such information in a "road book".

In summary, the answers to your questions are that the recording requirements of Sections 309.34 and 309.43, Code of Iowa, 1977, are not satisfied by enrolling the road information in the minutes of the County Board of Supervisors and that the cited code requirements are mandatory.

November 17, 1977

COUNTY OFFICERS: Wage Collection Law Section 91A.3, Code, 1977; Wages of Deputy Sheriff's, Section 340.8, Code, 1977. The Wage Collection Law does not allow a Board of Supervisors to authorize wages in excess of the statutory maximum. (McGrane to Johnson, Deputy Commissioner of Labor, 11-17-77) #77-11-9

Mr. Walter H. Johnson, Deputy Commissioner of Labor, Bureau of Labor: You requested an opinion on the following question:

"May the wages of a Deputy County Sheriff be withheld pursuant to the provisions of Section 340.8 of the Code of Iowa, even though Section 91A.3 of the Code of Iowa requires payment of wages earned by the employee, and the County Board of Supervisors has approved the payment of the wages to the County Deputy Sheriff?"

Section 340.8, Code of Iowa, 1977, provides in pertinent part:

"Deputy Sheriff. Each deputy sheriff shall receive as his annual salary as follows:

1. The first deputy sheriff...not more than eighty-five percent of the amount of the salary of the sheriff... .

2. All other deputy sheriff's...not to exceed the salaries of the first... deputies. * * *

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 Board of Supervisors may certify to the county auditor of any

such 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 amounts authorized above."

Section 91A.3, Code of Iowa, 1977, provides generally that an employer shall pay all wages due its employees less any lawful deductions. Implicit in this general provision is the requirement that the wages be lawful. In any case the specific limitation on wages of deputies would prevail over the general provision that wages must be paid.

Therefore, despite the requirement of payment of all wages earned by an employee under Iowa Code Section 91A.3, if the Board of Supervisors has authorized wages in violation of Section 340.8, such wages may be withheld.

Iowa Code Section 332.3(10) gives the Board of Supervisors the power:

"To fix the compensation for all services of county and township officers not otherwise provided by law, and to provide for the payment of same."

Section 340.8 does provide for the compensation of deputy sheriffs, so there is no authority for the supervisors to go outside of that provision.

The Iowa Supreme Court has held that the allowance or payment of other or greater compensation to a public officer than that fixed by law for his services is unauthorized and void. *Adams County v. Hunter,* 78 Iowa 328, 43 N.W. 208 (1889). An Attorney General's Opinion of November 19, 1976, said that the Board of Supervisors does have the general authority to pay overtime wages to county employees but this authority cannot circumvent the statutory provisions limiting salaries. 1976 O.A.G. 856. In another opinion, this office concluded that the Board of Supervisors had no discretionary authority to approve a salary increase for a deputy clerk which would exceed the statutory maximum. 1976 O.A.G. 6353.

The Board of Supervisors does not have legal authority to issue wages in excess of the limitations in Section 340.8 so any attempt to do so is invalid. County warrants are valid instruments only when the Board of Supervisors has legal authority to issue them. *Harrison County v. Ogden,* 165 Iowa 325, 145 N.W. 681 (1914).

While, as noted above, Section 91A.3 provides that an employer shall pay all wages due its employees, when the employer, the Board of Supervisors, has illegally authorized wages to an employee, such authorization is invalid and such wages are not due the employee. Therefore in a situation where Section 340.8 has been violated by the Board of Supervisors, Section 91A.3 does not apply. It is therefore our opinion that payment authorized by the Board in excess of the statutory maximum may be withheld.

November 28, 1977

MUNICIPALITIES: Incompatibility. The positions of city council member and school board member are not incompatible. (Blumberg to Spear, State Representative, 11-28-77) #77-11-10

Honorable Clay Spear, State Representative: We have your opinion request of November 10, 1977. You ask whether it is incompatible for a person to hold a position on a city council and school board simultaneously, citing to an opinion dated April 6, 1964.

That opinion held that the positions of mayor and school board member were incompatible because both are certifying bodies and a conflict arose when the same person was participating in both budgets and levies. In *State ex rel. Crawford v. Anderson,* 1912, 155 Iowa 271, 136 N.W.2d 128, and *State ex rel. LeBuhn v. White,* 1965, 257 Iowa 660, 133 N.W.2d 903, it was held that the test of incompatibility is whether there is an inconsistency in the functions of both, such as where one is subordinate to the other or has a revisory power over the other, or where both are inherently inconsistent and repugnant.

We can find nothing relating to both positions which would fall within the pronouncement of the above cases. Accordingly, we are of the opinion that the positions of city council and school board member are not incompatible. This opinion supersedes the one of April 16, 1964.

November 29, 1977

CRIMINAL LAW: Good time and honor time calculations. Sections 246.38, 246.39 and 246.41. Good time should not be assigned to an inmate of a correctional institution in a lump sum at the beginning of his sentence, but should be calculated based upon his good behavior between annual periods of review. One cannot forfeit good time in amounts greater than one has earned by good behavior. When the warden and director of corrections grant honor time status to an inmate they are certifying that the inmate's conduct justifies trust or that he is employed outside the walls of the institution. Honor time should be credited toward the period required between reviews for the purpose of granting good time credit. (Williams to Burns, Commissioner, Department of Social services, 11-29-77) #77-11-11

Mr. Kevin J. Burns, Commissioner of Social Services: Your letter of July 22, 1977, requests an opinion of the Attorney General with respect to the following:

"1. Presently when an inmate enters the custody of the Division of Adult Corrections he receives credit for reduction of sentence [246.39] based upon the length of his sentence. For example, an individual serving a ten year sentence will receive 45 months of good time credit based upon the ten year sentence. Other persons who read the statute feel that the reduction of sentence should be granted based upon the number of years actually served and contingent upon good behavior. Your opinion as to the proper application of this section is requested.

2. Section 246.41 requires a forfeiture of the reduction of sentence given in Section 246.39 based upon inmates' violation of rules. Depending upon the answer to question number one, it is requested that you set out the maximum of good time which may be forfeited by an inmate during the time he is serving his sentence.

3. The special reduction allowed under Section 246.43 provides that an inmate who is employed in the service of the institution outside the wall or who may be listed as a "trusty" may be granted a special reduction of sentence. Please give your opinion indicating what inmates may be listed as "trusties" for purposes of this section.

4. If an individual were sentenced to a term of, for example, one year in the Penitentiary and during that year failed to gain any special reduction of sentence under 246.43 and in addition thereto lost all of his "good time"

under Sections 246.39 and 246.41, would it be possible for him to be legally confined in the Penitentiary for a period in excess of the one year if a portion of that time were spent in solitary confinement (See Section 246.38)?

5. Is an inmate entitled to good time or honor time credit for time which he spends in the following situations:

a. Time spent in the county jail prior to commitment.

b. Time spent in the county jail after commitment and prior to transportation to the institution.

c. Time spent while out of the institution by reason of post conviction applications, hearings, new trials, etc.

d. Time spent on probation.

e. Time spent on parole.

f. Time spent on parole when it is determined that he was in violation of his parole by the Parole Board in their revocation proceedings.

g. Time spent hospitalized at University Hospitals after becoming an inmate.

h. Time spent in solitary confinement.

i. Time when outside the State of Iowa for trial on a detainer in another state.

j. Time spent outside the institution as a witness in (1) a civil case, (2) a criminal case, (3) a civil case relating to the conditions of his confinement.

After answering each of the above questions, a summary opinion indicating the correct way to calculate the length of an inmate's sentence based upon these satutes would be appreciated."

In response to your request, we shall attempt to answer the questions submitted in the order in which they were presented.

I

The reduction of sentences of convicts by allowance of credit for good conduct is purely a matter of legislative control. Good conduct statutes are framed with the intention of improving prison discipline, and have that effect if their enforcement is allowed. The credits are said to be in the nature of a payment or reward by the state to the inmate for his good behavior, in order to stimulate him to conform to the rules of the institution and to avoid the commission of crimes during his imprisonment. 60 Am. Jr. 2d Penal and Correctional Institutions, paragraph 58; 72 C.J.S. Prisons, paragraph 21.

In examining good time statutes, the intent of the legislature, as expressed in the language of the statute, should be adhered to. 72 C.J.S. Prisons, Section 21.

In determining the manner in which the good time statutes should be administered, one must consider both Sections 246.39 setting out the reduction of sentence and Section 246.41 governing the forfeiture of reduction. The relevant portion of those statutes are as follows:

"§246.39. Reduction of sentence. Each prisoner who shall have no infraction of the rules of discipline of the penitentiary or the man's or women's

reformatory or laws of the state, recorded against him, and who performs in a faithful manner the duties assigned to him, shall be entitled to a reduction of sentence as follows, and if the sentence be for less than a year, then the pro rata part thereof:

1. On the first year, one month.
2. On the second year, two months.
3. On the third year, three months
4. On the fourth year, four months.
5. On the fifth year, five months.
6. On each year subsequent to the fifth year, six months."

"§246.41. Forfeiture of reduction. A prisoner who violates any of such rules shall forfeit the reduction of sentence earned by him as follows:..."

These Sections have appeared in the Iowa Code in essentially the same form since 1897. The only major difference between the present Sections which have been unchanged for 50 years and those originally enacted is that the 40th General Assembly in 1923-24 eliminated from the Section a chart listing the number of years of sentence, the good time granted, the total good time made and the time to be served if full time made.

In order to interpret the manner in which good time is granted to an inmate, it is necessary to read each of these Sections and to attempt to give meaning to all parts of them.

It should be noted that Section 246.41 refers back to Section 246.39 when it states that "a prisoner who violates any of such rules shall forfeit the reduction of sentence *earned by him...*" It is clear that the Iowa statute in Section 246.39 establishes a condition precedent to the granting of good time, that condition precedent being that the prisoner "shall have no infraction of the rules of discipline of the penitentiary or the men's or women's reformatory or laws of the state recorded against him, and who performs in a faithful manner the duties assigned to him." This viewpoint is born out by earlier opinions of this office, including the opinion dated July 17, 1899. This conclusion has also been reached in considering a similar statute by the Supreme Court of Arizona. *Batey v. Shute,* 95 P. 2d 563 (Arizona 1939).

The remaining question to be answered is whether the review and granting of good time should be done at the end of each full year of incarceration or whether the review should be done in such a manner that the total time served in incarceration plus the good time to be earned for that year totals one year. In answering this question, two matters must be considered. First, good time statutes are supposed to be interpreted, where it is questionable, in a manner such as will allow the inmate the maximum amount of credit. *In re Blocker,* 193 P. 546 (Colorado 1920). In addition, consideration of the chart referred to above which was included in the Code Section until being removed by the 40th General Assembly, strongly indicates that credit is to be given on a sentence in such a manner that the period of time served prior to review plus the time earned equals one year.

In summary, the answer to your first question is:

1. An inmate should not be assigned his good time in a lump sum at the beginning of his sentence.

2. An inmate must meet the conditions precedent relating to his good behavior before he can be granted good time for any year.

3. An inmate is entitled to review of his record for the purpose of considering him for an award of good time when the number of months served for the particular year of the sentence plus the amount of good time which may be awareded equals one year. It should be noted that honor time earned under the provisions of Section 246.43 should be counted in computing the amount of time served.

II

While every violation of an institutional rule which demands punishment works a forfeiture of good time earned (O.A.G. 1900-1901 p. 91), it is only possible to take away from an inmate that amount of good time which he has earned. For example, an individual serving a ten year sentence who has completed one year of such sentence and earned one month of good time can only forfeit that one month of good time which he has earned. It is not possible for him to forfeit good time which he has not yet earned or in excess of that amount which has been granted to him.

III

A statute such as Iowa's honor time statute which grants a prisoner additional credit on his sentence beyond good time credit while he is performing an assignment of confidence or trust should be accorded such status only when his conduct justifies trust, the purpose of the additional honor time credits being to encourage a prisoner to comply with the prison regime and to work faithfully. *Rogers v. State,* 5 Arizona app. 157, 424 P.2 199 (1967).

The Iowa honor time statute, Section 246.43 reads as follows:

"§246.43. Special reduction. Any prisoner in either of said institutions who may be employed in any service outside the walls of the institution, or who may be listed as a trusty, may, with the approval of the state director, be granted a special reduction heretofore authorized, at the rate of ten days for each month so served."

The elements of this Section would be as follows:

1. either, (a) that the inmate be employed in service outside the walls or (b) that he be listed as a trusty
2. with the approval of the state director
3. earns an additional credit of ten days per month on his sentence.

It is clear that the warden of the institution has the authority to place an individual on honor roll status with approval of the state director and that the warden may himself, without further approval of the state director, remove an individual from the honor roll preventing his future accumulation of honor time.

The troublesome area of granting "honor contract" status is the definition of the word "trusty". While there are certainly no court cases deciding the meaning of the word "trusty" there is some authority to provide guidelines of such definition. *Webster's New World Dictionary* defines a trusty as a convict given special privileges as a trustworthy person (trustworthy meaning one that is dependable; that can be relied upon). One court which has examined a statute of this type indicates that such individual is performing an assignment

of confidence and trust beyond the simple requirement of performing labor which is required of all inmates.

When the warden recommends an individual for an honor contract, and that individual is approved by the director, they are certifying that such individual either is employed in service outside the walls or falls within the above definitions of "trusty".

IV

According to Section 246.38 of the 1977 Code of Iowa, all inmates are deemed to be serving their sentence from the day they are received into the institution but not while in solitary confinement for violation of the rules of the institution. As a consequence, if an individual spends more time in solitary confinement for disciplinary reasons than he has totaled between his good time credits and his honor time credits, then in fact it would be possible to extend his actual term of confinement beyond the calendar length of his sentence. This same question was considered by this office in relation to another similar statute a number of years ago. O.A.G. 1899, p. 193, O.A.G. 1906 p. 177.

V

CLASSIFICATION	GOOD TIME	HONOR TIME
a. Time spent in county jail prior to commitment.	entitled	not entitled
b. Time spent in county jail after commitment and prior to transportation to the institution.	entitled	not entitled
c. Time out of the institution out in custody by reason of post conviction applications, hearings, new trials, etc.	entitled	entitled
d. Time sent on probation.	not entitled	not entitled
e. Time spent on parole.	not entitled	not entitled
f. Time spent on parole when it is determined that he was in violation of his parole by the Parole Board in their revocation proceedings.	not entitled	not entitled
g. Time hospitalized at University Hospitals after becoming an inmate.	entitled	entitled
h. Time spent in solitary confinement.	not entitled	not entitled
i. Time outside Iowa for trial on a detainer.	entitled	entitled
j. Time outside the institution as a witness.	entitled	entitled

VI

One additional question is raised and should be addressed in connection with the calculation of an inmate's sentence when he is receiving both good time and honor time credit. That question is as follows:

Is the special reduction given for honor time to be subtracted from the end

of an individual's sentence, thereby in effect shortening it, or is such credit to be given as an additional bonus which shortens the actual calendar period between reviews for the purpose of granting good time credit?

While the Code appears to be silent with respect to this matter except for the use of the words "special reduction" the granting of good time based upon the entire sentence would preclude giving the honor time statute the construction which would reduce the length of the sentence by crediting time at the end. This is further bolstered by the Opinions referred to earlier requiring, in cases where construction is at question, the interpretation which would result in a shorter sentence.

It is therefore concluded that the honor time credit should be calculated in crediting the individual years toward completion of one's sentence rather than deducting it from the end of the sentence.

VII

An outline of the proper method of calculating sentence lengths and expiration dates within the framework of this Opinion has also been requested. An outline of the recommended procedure to follow in crediting good and honor time and calculating expiration dates follows:

UPON ADMISSION OF A NEW INMATE:

1. Enter sentence as received from Court, length (i.e. 10 years).
2. Give credit for jail, mental health institute time, etc. and adjust expiration date accordingly.
3. Set date for FIRST GOOD TIME REVIEW as follows:

   IF THE PERSON DOES NOT HAVE AN HONOR CONTRACT:

   11 months from date of admission less days credit given for jail time, etc.

   IF THE PERSON HAS AN HONOR CONTRACT:

   251 days later less jail credits.

$$\text{DERIVATION}\quad \frac{11 \text{ months X } 30.43 \text{ days less jail credits}}{1.33 \text{ (Honor Time Factor)}}$$

ON THE FIRST GOOD TIME REVIEW DATE

1. Determine if good time is to be given.
2. IF GOOD TIME IS GIVEN:
   a. Enter, "FIRST YEAR OF SENTENCE COMPLETED"
   b. Set next review as follows:
      (1) If the person does not have an honor contract

      TEN MONTHS FROM FIRST REVIEW DATE

      (2) If the person HAS an honor contract
      229 days from First Review Date

$$\text{DERIVATION}\quad \frac{10 \text{ months X } 30.43 \text{ days}}{1.33 \text{ (Honor Time Factor)}} \quad \text{EQUALS 229 DAYS}$$

3. IF GOOD TIME IS NOT GIVEN:
   a. IF THE PERSON HAS NO HONOR CONTRACT:
      (1) SET THE SECOND REVIEW DATE AS FOLLOWS:

      11 months after the first review date

      (2) 1 month after the first review date, enter "FIRST YEAR OF SENTENCE COMPLETED"
   b. IF THE PERSON HAS AN HONOR CONTRACT:
      (1) SET THE SECOND REVIEW DATE AS FOLLOWS:

      252 days after the First Review Date

      DERIVATION

      $$\frac{\text{11 months X 30.43 Days/Month}}{\text{1.33 (Honor Time Factor)}} \quad \text{EQUALS 252 DAYS}$$

      (2) 23 days later, enter "FIRST YEAR OF SENTENCE COMPLETED"

      DERIVATION

      $$\frac{\text{30.43 Days/Month X 1 Month}}{\text{1.33 (Honor Time Factor)}} \quad \text{EQUALS 23 DAYS}$$

ON THE SECOND GOOD TIME REVIEW DATE

1. Determine if good time is to be given.
2. IF GOOD TIME IS GIVEN:
   a. Enter, "SECOND YEAR OF SENTENCE COMPLETED"
   b. Set next review as follows:
      (1) If the person DOES NOT HAVE an honor contract.

      NINE MONTHS AFTER SECOND REVIEW DATE

      (2) If the person HAS an honor contract.

      206 days after Second Review Date

      DERIVATION

      $$\frac{\text{9 months X 30.43 Days/Month}}{\text{1.33 (Honor Time Factor)}} \quad \text{EQUALS 206 DAYS}$$

3. IF GOOD TIME IS NOT GIVEN:
   a. IF THE PERSON HAS NO HONOR CONTRACT:
      (1) SET THE THIRD REVIEW DATE AS FOLLOWS:

      11 months after the Second Review Date

      (2) TWO MONTHS AFTER SECOND REVIEW DATE, enter "SECOND YEAR OF SENTENCE COMPLETED"
   b. IF THE PERSON HAS AN HONOR CONTRACT:
      (1) SET THE THIRD REVIEW DATE AS FOLLOWS:

251 days after the Second Review Date

DERIVATION

$$\frac{\text{11 months X 30.43 Days}}{\text{1.33 (Honor Time Factor)}} \quad \text{EQUALS 251 DAYS}$$

(2) 46 days later, enter "SECOND YEAR OF SENTENCE COMPLETED"

DERIVATION

$$\frac{\text{2 months X 30.43 Days/Month}}{\text{1.33 (Honor Time Factor)}} \quad \text{EQUALS 46 DAYS}$$

ON THE THIRD GOOD TIME REVIEW DATE

1. Determine if good time is to be given.
2. IF GOOD TIME IS GIVEN:
   a. Enter, "THIRD YEAR OF SENTENCE COMPLETED"
   b. Set next review as follows:
      (1) If the person DOES NOT HAVE an honor contract

      EIGHT MONTHS After the Third Review Date

      (2) If the person HAS an honor contract

      183 days after the Third Review Date

      DERIVATION

      $$\frac{\text{8 months X 30.43 Days Per Month}}{\text{1.33 (Honor Time Factor)}} \quad \text{EQUALS 183 DAYS}$$

3. IF GOOD TIME IS NOT GIVEN:
   a. IF THE PERSON HAS NO HONOR CONTRACT
      (1) Set the Fourth Review Date as follows:

      11 months from the review date

      (2) Three months after the third review date, enter,

      "THIRD YEAR OF SENTENCE COMPLETED"

   b. IF THE PERSON HAS AN HONOR CONTRACT
      (1) Set the Fourth Review Date as follows:

      251 days from date of Third Review

      DERIVATION

      $$\frac{\text{11 months X 30.43 Days/Month}}{\text{1.33 (Honor Time Factor)}} \quad \text{EQUALS 251.68 DAYS}$$

      (2) 69 days after Third Review Date, enter, "THIRD YEAR OF SENTENCE COMPLETED"

      DERIVATION

      $$\frac{\text{3 months X 30.43 Days Per Month}}{\text{1.33 (Honor Time Factor)}} \quad \text{EQUALS 68.63 DAYS}$$

ON THE FOURTH GOOD TIME REVIEW DATE:

1. Determine if good time is to be given.
2. IF GOOD TIME IS GIVEN:
   a. Enter, "FOURTH YEAR OF SENTENCE COMPLETED"
   b. Set next review as follows:
      (1) If the person DOES NOT HAVE an honor contract

      SEVEN MONTHS AFTER FOURTH REVIEW DATE

      (2) If the person HAS an honor contract

      160 days after Fourth Review Date

      DERIVATION

      $$\frac{\text{7 months X. 30.43 Days}}{\text{1.33 (Honor Time Factor)}} \text{ EQUALS 160.15 DAYS}$$

3. IF GOOD TIME IS NOT GIVEN:
   a. IF THE PERSON HAS NO HONOR CONTRACT
      (1) Set the Fifth Review Date as follows:

      11 months after the FOURTH REVIEW DATE:

      (2) Four months after the Fourth Review Date, enter,

      "FOURTH YEAR OF SENTENCE COMPLETED"

   b. IF THE PERSON HAS AN HONOR CONTRACT:
      (1) Set the Fifth Review Date as follows:

      252 days from the date of fourth review date

      DERIVATION

      $$\frac{\text{11 months X 30.43 Days Per Month}}{\text{1.33 (Honor Time Factor)}} \text{ EQUALS 251.68 DAYS}$$

      (2) 92 days after Fourth Review Date, enter,
      "FOURTH YEAR OF SENTENCE COMPLETED"

      DERIVATION

      $$\frac{\text{4 months X 30.43 Days Per Month}}{\text{1.33 (Honor Time Factor)}} \text{ EQUALS 91.51 DAYS}$$

ON THE FIFTH GOOD TIME REVIEW DATE:

1. Determine if good time is to be given.
2. IF GOOD TIME IS GIVEN
   a. Enter, "FIFTH YEAR OF SENTENCE COMPLETED"
   b. Set the next review as follows:
      (1) If the person DOES NOT HAVE an honor contract

      6 months after the Fifth Review Date

      (2) If the person HAS an honor contract:

137 days after the Fifth Review Date

DERIVATION

6 months X 30.43 Days Per Month EQUALS 137.27 DAYS

1.33 (Honor Time Factor)

3. IF GOOD TIME IS NOT GIVEN:

a. IF THE PERSON HAS NO HONOR CONTRACT:

(1) Set the Sixth Review Date as follows:

11 months after the FIFTH REVIEW DATE

(2) Five months after the Fourth Review Date, enter, "FIFTH YEAR OF SENTENCE COMPLETED"

b. IF THE PERSON HAS AN HONOR CONTRACT:

(1) Set the Sixth Review Date as follows:

251 days after the Fifth Review Date

DERIVATION

11 months X. 30.43 Days Per Month EQUALS 251.68 DAYS

1.33 (Honor Time Factor)

(2) 115 days after the Fifth Review Date, enter, "FIFTH YEAR OF SENTENCE COMPLETED"

DERIVATION

30.43 Days Per Month X 5 Months EQUALS 114.4 DAYS

1.33 (Honor Time Factor)

ON THE SIXTH AND ALL SUCCESSIVE REVIEW DATES:

1. Determine if good time is to be given.

2. IF GOOD TIME IS GIVEN:

a. Enter of record ".....YEAR OF SENTENCE COMPLETED"

b. Set the next review as follows:

(1) If the person DOES NOT HAVE an honor contract

SIX MONTHS AFTER THE SCHEDULED REVIEW DATE

(2) If the person HAS an honor contract:

137 days after the scheduled date of review

DERIVATION

6 months X 30.43 Days Per Month EQUALS 137.27 DAYS

1.33 (Honor Time Factor)

3. IF GOOD TIME IS NOT GIVEN:

a. IF THE PERSON HAS NO HONOR CONTRACT:

(1) Set the next review date as follows:

12 months from the present scheduled review date.

(2) Six months from this scheduled review date, enter, "..... year of sentence completed"

b. IF THE PERSON HAS AN HONOR CONTRACT

(1) Set the next date of review as follows:

274 days from this scheduled review date

DERIVATION

$$\frac{\text{12 months X 30.43 Days Per Month}}{\text{1.33 (Honor Time Factor)}} \text{ EQUALS 274.56 DAYS}$$

(2) 138 days after scheduled review date, enter, "..... year of sentence completed"

DERIVATION

$$\frac{\text{6 months X 30.43 Days Per Month}}{\text{1.33 (Honor Time Factor)}} \text{ EQUALS 137.27 DAYS}$$

IF YOU HAVE TO CALCULATE A REVIEW DATE FOR A PORTION OF A YEAR,

1. Figure the number of days left without any good or honor time credit.

2. Multiply that number of days times the appropriate factor as determined by this chart, giving the number of days required to serve the remaining portion of the sentence.

Year of Sentence	Person has honor contract	Has no honor contract
1st	.69	.915
2nd	.627	.83
3rd	.565	.75
4th	.50	.67
5th	.44	.58
6th and all succeeding	.376	.50

3. This figures the number of days left to serve.

IF A PERSON IS GIVEN AN HONOR CONTRACT DURING A GIVEN YEAR:

1. Calculate the number of days from the date he receives the honor contract until his next review date.

2. Divide that number of days by the Honor time factor (1.33).

3. Set a new review date by adding the number of days found in No. 2 to the date he got the honor contract. (Drop off decimal portions of days.)

IF A PERSON LOSES AN HONOR CONTRACT DURING A GIVEN YEAR:

1. Calculate the number of days from the date of loss of honor contract until the next review date.

2. Multiply the number of days by the honor time factor (1.33).

3. Set the new review date by adding the number of days in No. 2 to the date the honor contract was lost.

IF A PERSON LOSES AND THEN RECOVERS AN HONOR CONTRACT DURING A YEAR BUT NO CALCULATION AFFECTING THE REVIEW DATE WAS MADE DURING THE TIME THE PERSON HAD THE HONOR CONTRACT.

1. Multiply the number of days the person had the honor contract by .33.

2. Round this number off to the next higher number and that number of days to the next review date, setting a new review date.

IF A PERSON GETS AN HONOR CONTRACT AND LOSES IT IN THE SAME YEAR BUT NO CALCULATION AFFECTING THE REVIEW DATE WAS MADE DURING THE TIME THE PERSON HAD THE HONOR CONTRACT.

1. Multiply the number of days the person had the contract by .33.

2. Round this number off to the next higher number and subtract that number of days from the next review date, setting a new review date.

IF A PERSON LOSES GOOD TIME CREDITS:

1. Move the review date into the future the number of days lost.

IF A PERSON SPENDS TIME IN SOLITARY CONFINEMENT:

1. Move the review date into the future the number of days lost.

IF A PERSON IS OUT ON ESCAPE, or otherwise loses credit for time,

1. Move the next review date into the future the number of days lost.

IF A PERSON RECEIVES A CONSECUTIVE SENTENCE:

1. Enter the sentence showing the total length of the sentences as the number of years' credits he must have for release.

DURING THE FINAL YEAR OF SENTENCE:

Plan to have a review several weeks prior to the actual review date to determine if the person is to receive the good time credits needed to complete the year or whether he will have to remain beyond the review date.

IF A PERSON RECEIVES DISCIPLINARY REPORTS during the period after he has been reviewed for good time credits and denied but before the scheduled time for crediting him for completion of the year, such reports shall not affect the determination of his qualification for good time during the following review period.

November 29, 1977

ELECTIONS: Ballot Issues; Support by nonprofit corporations. §56.29 (1), Code of Iowa, 1977. A local chamber of commerce is prohibited from raising money and utilizing its staff personnel to present one side of an election issue. (Haesemeyer to Thatcher, Webster County Attorney, 11-29-77) #77-11-12

Mr. William J. Thatcher, Webster County Attorney: You have requested an opinion of the Attorney General on the question of whether or not it would be lawful under §56.29, Code of Iowa, 1977, for the Fort Dodge Chamber of Commerce to raise money and utilize their staff personnel to present one side of an election issue, specifically a proposal for a civic center.

Section 56.29(1) provides:

"Except as provided in subsection 3 of this section, it shall be unlawful for any insurance company, savings and loan association, bank, and corporation organized pursuant to the laws of this state or any other state, territory, or foreign country, whether for profit or not, or any officer, agent, representative thereof acting for such insurance company, savings and loan association, bank, or 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, except that such resources may be so expended in connection with a utility franchise election held pursuant to section 364.2, subsection 4, however all such expenditures shall be subject to the disclosure requirements of this chapter."

With exceptions not here relevant, this section by its plain terms clearly provides that any nonprofit corporation shall not as an entity contribute any money, property, labor, or a thing of value, directly or indirectly, for the purpose of influencing any elector. Subsection 3 of §56.29 does make it permissible for an organization such as the Fort Dodge Chamber of Commerce to use its money, property, labor or any other thing of value owned by it for the purpose of soliciting its stockholders, administrative officers and members for contributions to a committee sponsored by it. However, that does not appear to be what is involved in your question in that as I understand the matter the Fort Dodge Chamber of Commerce would itself be directly involved in the public ballot issue.

Accordingly, it is our opinion that it would be a violation of §56.29(1) for the Fort Dodge Chamber of Commerce to raise money and to involve its staff personnel in the presentation of one side of an election issue.

November 29, 1977

STATE OFFICERS AND DEPARTMENTS: Dual employment by state employee. §79.1, Code of Iowa, 1977. The same individual may hold two part-time jobs with the State of Iowa. (Haesemeyer to Mosher, Deputy Citizens' Aide, 11-20-77) #77-11-13

Ms. Ruth L. Mosher, Deputy Citizens' Aide: You have requested an opinion of the Attorney General and state:

"Does Section 79.1 or any other Section of the Iowa Code prohibit an individual from working part-time for two state agencies during the same pay period, if the employee works 40 or less combined hours?

"For example, could a young man working as a night security guard on weekends for Vocational Rehabilitation also work part-time during week days for the Liquor Commission?

"An opinion dated September 16, 1970, a copy of which is attached, is being cited by the Comptroller's office as authority to refuse the above described employment. We feel that the attached opinion is not relevant in the situation here described."

In our opinion, employment of the type you describe is not prohibited.

The 1970 opinion of the Attorney General to which you make reference, 1970 O.A.G. page 710, rests in part upon an even earlier opinion of the Attorney General, 1922 O.A.G. page 286. Both of these two opinions make the broad statement that employees of the State working for a stated salary are not entitled to additional compensation from the State unless expressly

provided for by statute. These opinions, considered along with Iowa case law recognizing no distinction between salary and wages, *Morris v. Hosmer,* 182 Iowa 883, 166 N.W. 295 (1918); *Buckley v. Deegan,* 244 Iowa 503, 57 N.W.2d 196 (1953), would seem to indicate that anyone working for the State, whether paid a salary or hourly wages, is limited to the compensation from only one position for the State for all services rendered, unless additional compensation is expressly provided for by statute.

These Attorney General opinions, and the public policy and statutory language upon which they are based, however, may be distinguished upon a more careful reading of the same.

The 1922 opinion involves a situation in which one Nourse was paid a per diem amount as well as his expenses to appear as a witness before the Interstate Commerce Commission while occupying a salaried position at Iowa State University in Ames. The opinion states:

"Persons in the employment of the state, working for a stated salary, are not entitled to other compensation from the state unless it is expressly provided for by statute."

The opinion stated that it would be against public policy for the State to pay Nourse as a witness when the State had already paid him for that same time by virtue of his salaried position with the University. In other words, a state employee should not be paid twice for the same time period. This public policy, however, is not violated when one holds two part-time jobs, one on weekends and the other on week days, both with the State, since the State is not paying twice for the same period of time. Thus, the 1922 opinion is distinguishable from the circumstances presented by your question.

Similarly, the 1970 Attorney General's opinion is inapplicable to the circumstances here presented. The 1970 opinion states:

"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."

As authority for this conclusion the opinion cites the earlier 1922 opinion and §79.1, Code of Iowa, which the opinion views as a codification of the public policy on which the 1922 opinion was based. However, as we have seen, the public policy in question does not prevent dual employment where an employee is not being paid for the same time period.

Beyond this, §79.1 by its own express terms does not apply to the circumstances you present. It provides in relevant 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 Chapter 91A 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. . . ."

The very language of this section makes it apparent that it applies only where the general assembly specifically appropriates a salary for a position different from the salary authorized for the position by an existing statute. The evident object of this part of the section quoted is that under such circumstances, only the salary for which an appropriation has been specifically made

by the general assembly should be paid the occupant of the position. The salaries for the positions you describe, however, are neither provided for by an existing statute nor itemized as a specific line item in an appropriation Act of the general assembly. Section 79.1 therefore does not operate to prevent the payment of two salaries for the part-time positions you describe.

November 30, 1977

COUNTIES AND COUNTY OFFICERS: County clerk; Satisfaction of judgments. §§624.20 and 624.37, Code of Iowa, 1977. A judgment is not satisfied until acknowledged by the claimant on the record of such judgment at which time the clerk shall at once enter a memorandum thereof in the judgment docket. (Haesemeyer to Burroughs, 11-30-77) #77-11-14

Honorable Cliff Burroughs, State Senator: Pursuant to your letter and a telephone conversation with Walter Wilhelm, Clerk of District Court, Butler County, you have requested an opinion from this office as to the procedure to be followed and the duties which are incumbent on the clerk under §§624.20 and 624.37, Code of Iowa, 1977. Such sections provide:

§624.20

"Satisfaction of judgment. Where a judgment is set aside or satisfied by executive or otherwise, the clerk shall at once enter a memorandum thereof on the column left for that purpose in the judgment docket."

§624.37

"Satisfaction of judgment-penalty. When the amount due upon judgment is paid off, or satisfied in full, the party entitled to the proceeds thereof, or those acting for him, must acknowledge satisfaction thereof upon the record of such judgment, or by the execution of an instrument referring to it, duly acknowledged and filed in the office of the clerk in every county wherein the judgment is a lien. A failure to do so for thirty days after having been requested in writing shall subject the delinquent party to a penalty of fifty dollars, to be recovered in an action therefor by the party aggrieved."

Specifically, your question refers to the situation in which a third party, intent on purchasing a particular parcel of property, pays a judgment so that the lien may be removed and the property sold. What procedure should the clerk take with regard to the release of the lien under the code sections above. Is the satisfaction of the judgment complete upon payment to the clerk or upon receipt by the claimant (party entitled to the proceeds of the judgment)?

For example, a judgment is paid to the clerk who now becomes liable for those funds. Sections 682.38 and 606.3, see also *Morgan v. Long,* 29 Iowa 434 (1870); *In re Mairn's Estate,* 227 N.W. 586 (Iowa 1929). What if he at once releases the lien, mails a check in the amount of the judgment to the claimant's last known address, the money is physically lost, the claimant has no knowledge of the payment, release or loss and subsequently comes to execute on the judgment, the property has been sold, there is nothing on which to execute, who bears the loss? Is the clerk liable?

This situation or one similar to it may occur if the clerk follows §624.10 without regard to §624.37, i.e., by releasing the lien without first satisfying the claimant. The clerk then becomes liable for the lost monies. *Mahaska County v. Searle,* 44 Iowa 492 (1876).

Under Iowa law statutory provisions are to be read together to give effect

to all. §4.4 This is the case with §§624.20 and 624.37. The procedure followed by the clerk in complying with §624.20 should include full compliance with the provisions of 624.37 when a lien is involved. This means that the satisfaction of the judgment is not complete until the claimant *acknowledges* satisfaction of the judgment (under §624.37), at which time the clerk shall at once enter memorandum and release the lien (under §624.20). This procedure, when followed, alleviates the problem of liens being released and property being sold before claimants are in possession of monies therefrom. This procedure, by assuring receipt of the monies by the claimant, also immunizes the clerk from liability.

November 30, 1977

CRIMINAL LAW: Retroactivity of the Iowa Criminal Code as applied to sentence lengths of persons convicted of substantive crimes under the old Criminal Code. Section 801.5. Persons sentenced for violations of the old Criminal Code will not have their maximum sentence length shortened by virtue of the provisions of the new Iowa Criminal Code. (Williams to Burns, Commissioner of the Department of Social Services, 11-30-77) #77-11-15

Mr. Kevin J. Burns, Commissioner, Iowa Department of Social Services; You have requested an opinion of the Attorney General relating to the matter of whether the length of sentence of individuals who have been sentenced prior to January 1, 1978, will be shortened by virtue of the provisions of Section 801.5, paragraph 3, of the new Criminal Code (Chapter 1245, 66th General Assembly, Chapter 4, Section 528).

Section 801.5, paragraph 1, of the new Criminal Code provides as follows:

"Except as provided in subsections 2 and 3 of this section, this Act does not apply to offenses committed before its effective date. Prosecutions for offenses committed before the effective date are governed by the prior law, which is continued in effect for that purpose, as if this Act were not in force. For purposes of this section, an offense is committed before the effective date if any of the elements of the offense occurred before that date."

Your question relates to the statutory construction of Section 801.5, paragraph 3, which is one of the subsections setting out those matters which apply the new Criminal Code to offenses committed prior to it becoming effective.

Section 3 from its construction is meant to apply to those matters affecting an individual in the manner of his release from custody either upon discharge of his sentence or by virtue of probation or parole. It includes such things as any changes which might be made as to monetary amounts paid to individuals at the time of their release from custody, the manner in which parole and probation matters including revocation proceedings will be handled and other matters of this type. In view of the fact that the new Criminal Code in many cases provides for minimum sentences prior to eligibility for parole consideration and may in fact provide for lengthier periods of supervision for individuals on probation or parole, the clause was included which says:

"Except that the minimum or maximum period of their detention or supervision shall in no case be increased."

In summary, this section is meant to apply to those matters involving procedures of release from custody and the operations of probation and parole

but such Section cannot properly be construed to require the automatic shortening of sentences of individuals who, if they were to have been sentenced for the same crime under the new Criminal Code would have received shorter sentences. It should also be noted that such construction would require the review of the sentence of every person who is confined or under the supervision of the Division of Corrections and would have required reviewing factual matters of convictions to determine the appropriate degrees of crimes so that each individual sentence could have been fitted into the framework of the new Criminal Code. It would seem abundantly clear from the legislative history of this act including the fact that the legislature did not set up any mechanism for taking such action that such was not their intent.

November 30, 1977

STATE OFFICERS AND DEPARTMENTS: Board of Regents; Appointments. §§262.3, 262.6, Code of Iowa, 1977. Where the Governor did not make appointments to the Board of Regents prior to adjournment of the regular session of the legislature, appointments made subsequently to fill vacancies on the board are valid. (Nolan to Rush, State Senator, 11-30-77) #77-11-16

Honorable Bob Rush, State Senator: This is written in response to your request for an opinion on the question of whether the appointments of Constance Belin, Peter Wenstrand and Percy Harris to the State Board of Regents were made in conformance with statutory provisions of Chapter 262 and whether such appointments are valid. In your letter requesting such an opinion you state:

"...essentially, the question concerns whether the Governor adhered to the mandates contained in Chapter two-hundred-sixty-two (262), Code 1977, in making these appointments and submitting them to the Senate. The portions of that chapter pertinent to this question provide:

'262.2 TERM OF OFFICE. The term of each member of said board shall be for six years. The terms of three members of the board shall expire on the first day of July of each odd-numbered year.

'262.3 APPOINTMENT. *During each regular session of the legislature, the governor shall appoint,* with the approval of two-thirds of the members of the senate, *three members of said board to succeed those whose terms expire on the first day of July next thereafter.'* [Emphasis supplied].

"According to records maintained in the Office of the Secretary of the Senate, it is apparent that the terms of Board members John Baldridge, Margaret Collison and Steven Zumbach expired on July 1, 1977 — in conformance with Section 262.2, Code, 1977. In filling the vacancies created by the expiration of those terms, the Governor sent to the Senate on July 7, 1977, the names of Constance Belin, Peter Wenstrand, and Percy Harris for appointment to the State Board of Regents for regular six-year terms 'commencing July 1, 1977, and ending June 20, 1983'."

"...the 1977 Regular Session of the Sixty-seventh General Assembly convened on January 10, 1977, and adjourned sine die on June 13, 1977... ."

It is undisputed that the Governor did not send the names of his appointees to the Senate for Ratification prior to the expiration of existing terms as indicated by Section 262.3. However, the language of that statute may be considered as being merely directory. *Vale v. Messenger,* 168 N.W. 281, 1918 Iowa, holds that the term "shall" may be so construed when no advantage is lost,

no right destroyed and no benefit is sacrificed either to the public or to the individual.

Code Section 262.3 was last amended by the Acts of 1965 (61 G.A.) Chapter 68, Section 14. Accordingly, since Section 262.3 was enacted prior to July 1, 1971, Code Section 4.1 (36) does not require that "shall" be construed to impose a duty.

Under §262.6 when a vacancy on the Board of Regents occurs during the time when the general assembly is not in session, the Governor is directed to fill such vacancy by appointment and the appointment will expire "at the end of thirty days after the general assembly next convenes". Since the terms of three of the board members expired on July 1, 1977, and there was no provision for them to hold over, the action of the governor in filling such vacancies on July 7, 1977, in the opinion of this office, is valid.

November 30, 1977

COUNTIES AND COUNTY OFFICERS: Incompatibility, county attorney and city attorney; §341.7, Code of Iowa, 1977. Offices of county attorney and city attorney are incompatible and a city attorney contracting to undertake the duties of special county counsel by implication resigns the office of city attorney. (Nolan to Merritt, State Senator, 11-30-77) #77-11-17

Honorable Milo Merritt, State Senator: This is written in response to your request for an opinion of this office in regard to conflicts of interest between county attorneys and city attorneys. There was enclosed with your request a copy of an agreement drawn between the Chickasaw County Board of Supervisors and William L. Wegman of New Hampton, Iowa. Mr. Wegman is regularly employed as City Attorney for the City of New Hampton, Iowa, and pursuant to a contract entered into with the Board of Supervisors of Chickasaw County on July 25, 1977, has been employed by the county as "special county counsel" to undertake the following duties:

"The Attorney shall be responsible for prosecution of any criminal causes, including prosecutions of felonys, indictable misdemeanors, misdemeanors and traffic cases; and of quasi-criminal matters including juvenile causes, parole and probation revocations, contempt of court proceedings, and the like; and shall serve as trial counsel in civil litigations, including any suits by and against the County, uniform support recovery actions, paternity suits, adoption proceedings, and proceedings in the interest of children in need of assistance; and shall provide other and additional services in research, drafting, policy analysis, consultation with County Officers, preparation of legal opinions, and conducting any schools or courses of instruction; all as he shall be specifically and separately requested to do so by the Chickasaw County Attorney, in writing, as to each service so performed.

"(a) Nothing herein contained shall be construed to require The Attorney to provide any legal service or to do any act, resulting in any conflict of interest, direct or indirect, on account of his employment on an annual basis as the City Attorney for any municipality in Chickasaw County, Iowa."

Authority for the contract between the board of supervisors and the attorney hired as "special county counsel" may be found in §341.7, Code of Iowa, 1977, which provides in pertinent part as follows:

"The county attorney may with the approval of a judge of the district court procure such assistants...but nothing in this chapter shall prevent the board of supervisors from employing an attorney to assist the county

attorney in any cause or proceedings in which the state or county is interested. The compensation allowed to any such assistants shall be paid out of the court fund of the county."

It appears that the contract in question has been drafted with an attempt to avoid any possible conflict of interest in the part of the attorney thus engaged as a special counsel for the county. Nonetheless it is the view of this office that the office of special counsel for the county is essentially the same as that of assistant county attorney and thus is incompatible with the office of city attorney. In an opinion dated July 14, 1976, this office, relying on a prior opinion 1940 O.A.G. 162, advised that sound reasons exist for holding that such offices are incompatible including the disposition of fines and court costs depending upon whether the offense is charged as a city or state violation as well as the recognized impropriety of one individual attempting to serve two masters. Accordingly, following the rule set forth in *State ex rel. LeBuhn v. White,* 1975, 257 Iowa 660, into a contract with the county for employment as special county counsel under the terms discussed above he effectively vacated his position as city attorney. The general rule in this state is that when a person accepts appointment to two incompatible offices he vacates or by implication resigns the one held first.

November, 1977

COUNTIES AND COUNTY OFFICERS

County Auditor. §§309.34, 309.43, Code of Iowa, 1977. Recording requirements of §§309.34 and 309.43 of the Code necessitate enrollment of required road information in a road book by the county auditor. (Tangeman to Anstey, Appanoose County Attorney, 11-17-77) #77-11-8

Incompatibility; county attorney and city attorney. §341.7, Code of Iowa, 1977. Offices of county attorney and city attorney are incompatible and a city attorney contracting to undertake the duties of special county counsel by implication resigns the office of city attorney. (Nolan to Merritt, State Senator, 11-30-77) #77-11-17

County clerk; satisfaction of judgments. §§624.20 and 624.37, Code of Iowa, 1977. A judgment is not satisfied until acknowledged by the claimant on the record of such judgment at which time the clerk shall at once enter a memorandum thereof in the judgment docket. (Haesemeyer to Burroughs, State Senator, 11-30-77) #77-11-14

Wage Collection; wages of deputy sheriffs. §§91A.3, 340.8, Code of Iowa, 1977. The Wage Collection Law does not allow a board of supervisors to authorize wages in excess of the statutory maximum. (McGrane to Johnson, Deputy Commissioner of Labor, 11-17-77) #77-11-9

CRIMINAL LAW

Retroactivity of the Iowa Criminal Code as applied to sentence lengths of persons convicted of substantive crimes under the old Criminal Code. §801.5, Code of Iowa, 1977. Persons sentenced for violations of the old Criminal Code will not have their maximum sentence length shortened by virtue of the provisions of the new Iowa Criminal Code. (Williams to Burns, Commissioner, Department of Social Services, 11-30-77) #77-11-15

Good Time and honor time calculations. §§246.38, 246.39 and 246.41, Code of Iowa, 1977. Good time should not be assigned to an inmate of a correctional institution in a lump sum at the beginning of his sentence, but

should be calculated based upon his good behavior between annual periods of review. One cannot forfeit good time in amounts greater than one has earned by good behavior. When the warden and director of corrections grant honor time status to an inmate they are certifying that the inmate's conduct justifies trust or that he is employed outside the walls of the institution. Honor time should be credited toward the period required between reviews for the purpose of granting good time credit. (Williams to Burns, Commissioner, Department of Social Services, 11-29-77) #77-11-11

ELECTIONS

Ballot Issues; Support by nonprofit corporations. §56.29(1), Code of Iowa, 1977. A local chamber of commerce is prohibited from raising money and utilizing its staff personnel to present one side of an election issue. (Haesemeyer to Thatcher, Webster County Attorney, 11-29-77) #77-11-12

MOTOR VEHICLES

Certificate of Title. §§321.1(1), (2), (34), 321.18, 321.44, 321.45(1), (2), (3), 321.46, 321.47, 421.48(1), 321.49(1), 321.52(1), 321.101(4), 321.102, 321.104, 321.482, Code of Iowa, 1977. Regs. 820-[07,D] 11.1 (321), (1), (5), Iowa Administrative Code, 1975. Vehicular certificates of title is prima facie evidence of ownership. The purpose of certificates of title is to provide an exclusive means of establishing vehicle ownership and affecting transfer of title. Title is statutorily necessary to transfer, sell, destroy, or replace an engine in a vehicle, with accompanying penalties for noncompliance with title requirements. (Dundis to Hansen, State Senator, 11-14-77) #77-11-6

MUNICIPALITIES

State Building Code. §§103A.10(3), 364.1 and 364.2(3), Code of Iowa, 1977. The State Building Code for factory-built structures prevails over any local building regulation on factory-built structures. (Blumberg to Weisner, Office of Planning and Programming, 11-1-77) #77-11-2

Incompatibility. The positions of city council member and school board member are not incompatible. (Blumberg to Spear, State Representative, 11-28-77) #77-11-10

SCHOOLS

Area Education Agency. §§273.2, 273.3(2), 273.7, 273.9, 273.10, Code of Iowa, 1977. School districts are required by §273.9 to pay for programs and services received from the Area Education Agency. An Area Education Agency is not authorized to assess school districts for programs and services which are furnished to others unless sixty percent of all districts in the area request services to be provided to all jointly. (Nolan to Tauke, State Representative, 11-14-77) #77-11-5

STATE OFFICERS AND DEPARTMENTS

Public Agency under the Open Meeting Law. §§28A.1, 28A.3, Code of Iowa, 1977. A nonprofit corporation is not a "public agency" under the open meeting statutes. (Robinson to Gettings, State Representative, 11-10-77) #77-11-3

Code Editor, Publication of the Iowa Administrative Code. §17A.6(1), Code of Iowa, 1977. Section 17A.6(1) does not preclude the Code Editor from publishing supplements to the Iowa Administrative Code containing notices of intended action, by the "session law" version of adopted rules, actions taken by the Administrative Rules Review Committee and the Committee's

agenda, in a pamphlet form punched for inclusion in a supplement binder, plus separate loose-leaf replacement pages for the I.A.C. compilation itself. (Turner to Doderer, State Senator, 11-16-77) #77-11-7

Board of Regents; Appointments. §§262.3, 262.6, Code of Iowa, 1977. Where the Governor did not make appointments to the Board of Regents prior to adjournment of the regular session of the legislature, appointments made subsequently to fill vacancies on the Board are valid. (Nolan to Rush, State Senator, 11-30-77) #77-11-16

Dual employment by state employee. §79.1, Code of Iowa, 1977. The same individual may hold two part-time jobs with the State of Iowa. (Haesemeyer to Mosher, Deputy Citizens' Aide, 11-29-77) #77-11-13

TAXATION

Iowa Chain Store Tax Act applicable to dissimilar business under unit control. §§424.2(6), 424.2(7), 424.2(8), 424.4, Code of Iowa, 1977. The Iowa Chain Store Tax Act does not require that substantially the same type of business be conducted at all stores under unit control in order to constitute a chain. That portion of 1936 O.A.G. 180, 182, to the contrary is overruled. (Murray to Bair, Director, Department of Revenue, 11-1-77) #77-11-1

WORKERS' COMPENSATION

Public Records. §§17A.3(d), 68A.1, 68A.2, 68A.7, 68A.8, 85.27, 86.10, 86.11, Code of Iowa, 1977. Records in the Iowa Industrial Commissioner's Office are public records as defined and delimited in Chapter 68A of the Code. Hospital records and medical records contained in the claim files in the Iowa Industrial Commissioner's Office are open to public inspection; such records do not qualify as confidential records exempt from disclosure. (Jackwig to Landess, Iowa Industrial Commissioner, 11-10-77) #77-11-4

STATUTES CONSTRUED

Code, 1977	Opinion
17A.3(d)	77-11-4
17A.6(1)	77-11-7
28A.1	77-11-3
28A.3	77-11-3
56.29(1)	77-11-12
68A.1	77-11-4
68A.2	77-11-4
68A.7	77-11-4
68A.8	77-11-4
79.1	77-11-13
85.27	77-11-4
86.10	77-11-4
86.11	77-11-4
91A.3	77-11-9
103A.10(3)	77-11-2
246.38	77-11-11
246.39	77-11-11
246.41	77-11-11
262.3	77-11-16
262.6	77-11-16
273.2	77-11-5

273.3(2)	77-11-5
373.7	77-11-5
273.9	77-11-5
273.10	77-11-5
309.34	77-11-8
309.43	77-11-8
321.1(1)(2)	77-11-6
321.18	77-11-6
321.44	77-11-6
321.45	77-11-6
321.46	77-11-6
321.47	77-11-6
321.48(1)	77-11-6
321.49(1)	77-11-6
321.52(1)	77-11-6
321.101(4)	77-11-6
321.102	77-11-6
321.104	77-11-6
321.482	77-11-6
340.8	77-11-9
341.7	77-11-17
364.1	77-11-2
364.2(3)	77-11-2
424.2(6)	77-11-1
424.2(7)	77-11-1
424.2(8)	77-11-1
424.4	77-11-1
624.20	77-11-14
624.37	77-11-14
801.5	77-11-15

December 1, 1977

COURTS: Small claims; representation by counsel. §§631.5, 631.11 and 631.14, Code of Iowa, 1977. An attorney representing a client in small claims proceedings is entitled to participate fully in such proceedings, to ask questions, make objections and advance arguments. (Haesemeyer to Taylor, State Senator 12-1-77) #77-12-1

Honorable Ray Taylor, State Senator: You have requested an opinion of the Attorney General with respect to the right to speak of attorneys representing clients in small claims court. A situation has been brought to your attention by a constituent who claims that a particular full time magistrate refuses to let attorneys participate in small claims proceedings. It is alleged that the magistrate has stated that the Code technically only requires that he allow attorneys for parties to be present, but does not require him to let them speak. Thus, in his Court, parties may bring their attorneys but they are not allowed to ask questions or participate. This results in the absurd practice of the attorneys writing out the questions they desire to ask, handing them to the magistrate who then reads them.

In our opinion an attorney representing a client in small claims proceedings is entitled to participate fully in such proceedings, to ask questions, make objections and advance arguments. Section 631.5, Code of Iowa, 1977, provides

in relevant part:

"1. Appearance. A defendant may appear in person or by attorney, and by the denial of a claim a defendant does not waive any defenses. * * *

"6. Notification to parties. When a small claim is set for hearing the clerk immediately shall notify by ordinary mail each party or the attorney representing the party, and the judicial officer to whom the action is assigned, of the date, time and place of hearing. * * *

"7. Default. If a defendant fails to appear and the clerk in accordance with subsection 4 determines that proper notice has been given, judgment shall be rendered against the defendant by the clerk if the relief is readily ascertainable. If the relief is not readily ascertainable the claim shall be assigned to a judicial magistrate for determination and the clerk shall immediately notify the plaintiff or his attorney and the judicial magistrate of such assignment by ordinary mail."

Section 631.11(2) provides:

"2. Evidence. The court shall swear the parties and their witnesses, and examine them in such a way as to bring out the truth. The parties may participate, either personally or by attorney. The court may continue the hearing from time to time and may amend new or amended pleadings, if justice requires."

Section 631.14 provides:

"Representation in small claims actions. Actions constituting small claims may be brought or defended by an individual, partnership, association, corporation, or other entity. In actions in which a person other than an individual is a party, that person may be represented by an officer or an employee. Any person, however, may be represented in small claims action by an attorney."

It is clear from the foregoing that a person may be represented in a small claims action by an attorney. However, the question remains as to whether or not the right to have an attorney present who is not permitted to speak or ask questions satisfies this right to representation. Chapter 610, and particularly §610.14 and §610.16 in setting up the duties and powers of an attorney at law imply that a person may speak and act only through his attorney. One should note also that the Iowa Rules of Civil Procedure contain many instances that again imply the notion that a party may act through his attorney.

Iowa case law further supports this right. In *Shores v. Iowa Chemical,* 222 Iowa 347, 268 N.W. 581 (1936), the Iowa Supreme Court said that an attorney hired by a client to represent him in litigation has full charge of the case as far as the remedy and procedure are concerned. the court also said earlier that an attorney, by his general employment, is authorized to do all acts necessary or incidental to prosecution or defense which pertain to the remedy pursued, and the choice of proceedings, the manner of trial, and the like are all within the sphere of his general authority. *Ohlquest v. Farwell,* 71 Iowa 231, 32 N.W. 277 (1887).

Accordingly, it is our opinion that if a party in a small claims action so desires, he may be represented by an attorney and that such attorney may participate fully as a legal representative of his client in the trial of the case.

December 1, 1977

LIBRARIES: Service to County. §303B.9, Code of Iowa, 1977. Cities are not required to enter into unfavorable contracts to provide library services to persons living outside the corporate limits of such city and regional library services will not be terminated if other statutory requirements are met. (Nolan to Porter, State Librarian, 12-1-77) #77-12-2

Mr. Barry L. Porter, State Librarian: You have requested an opinion on the question of whether the Southwest Regional Library Administrator may withhold services to the city library of Hamburg, Iowa, because the Hamburg Library Board is unwilling to contract with the county board of supervisors to provide library services to people living in the unincorporated area of the county. You have advised us that three other libraries in Fremont County have agreed to provide such library services under a contract with the county board of supervisors.

The specific questions which you have presented have to do with §303B.9 of the 1977 Code of Iowa as follows:

"1. If the city does not accept the county money, is that a decrease of tax support making Hamburg ineligible for regional services?

"2. If Hamburg does not contract with the county, does the regional library have the authority to withhold regional library services from them?"

Section 303B.9, Code of Iowa, 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 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 thereof 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 jurisdiction."

After July 1, 1977, the city is required to levy a tax of at least six and three-fourths cents per thousand dollars assessed value or to fund its library maintenance effort through some source other than taxation in an amount equal to or greater than the amount of money which is required to be raised by taxation. Funds obtained through gifts, grants, or from contracts to provide services to other political subdivisions may be used to satisfy the maintenance fund requirement.

The purpose of the regional library system statute is to make library services available to all individuals in the state and to "encourage local financial support of public library service." (§303B.1). There is nothing in the statute however, which requires a city to become party to an unfavorable contract to provide library services to individuals residing outside the city's corporate limits. Ordinarily it might be assumed that encouraging individuals living outside of town to come in and receive library services would be advantageous to the city especially where the cost of providing such services is defrayed by payments from a county fund. However, under the statute the only obligation of the city is not to decrease its own local tax effort.

If the city does not elect to accept county money and continues its local

tax support at the level that it was on July 1, 1977, the city would continue to be eligible for regional services. The enforcement authority given to the regional administrator under the code does not authorize such regional administrator to withhold library services to a city merely because it does not contract with the county to provide library services for people outside that city.

December 2, 1977

SCHOOLS: Compulsory Education. Chapter 299. Local school board has authority to determine "equivalency" of proposed home instruction and is responsible for evaluating the home instruction program according to standards set by §257.25 and the State Board of Public Instruction rules. (Nolan to Anderson, Winneshiek County Attorney, 12-2-77) #77-12-3

Mr. Calvin R. Anderson, Winneshiek County Attorney: Your letter of October 11, 1977, requested an opinion of this office on two questions concerning the compulsory education provisions of Chapter 299 of the Iowa Code. Specifically you have asked:

"1. Does a local Board of Education have the authority to rule on the 'equivalency' of proposed home instruction, or is it the responsibility of the State Department of Public Instruction?

"2. In the event that a local Board does rule that the proposed home instruction is 'equivalent' instruction, whose responsibility is it to evaluate the private school program on which the home instruction is based as well as the educational progress of the child?"

The statutory language with which we are concerned is found in Section 299.1. This provision states:

"Any person having control of any child over seven and under sixteen years of age, in proper physical and mental condition to attend school, shall cause said child to attend some public school for at least twenty-four consecutive school weeks in each school year, commencing with the first week of school after the first day of September, unless the board of school directors shall determine upon a later date, which date shall not be later than the first Monday in December. * * *

"In lieu of such attendance such child may attend upon equivalent instruction by a certified teacher elsewhere."

Two earlier opinions from this office have dealt with the subject of the duty of enforcing the provisions of the compulsory education act. The first of these, 1906 O.A.G. 130 advised that the duty of determining whether a private or parochial school is complying with the law in respect to teaching common school branches (grade school courses) rests on the president of the school board of the district where the school exists. That opinion further advised that the duty of enforcing the provisions of the compulsory education act was intended by the legislature to be imposed upon the school boards since the language of the law subjected the president and members of the board to penalty if they fail to enforce the provisions of the act after having received notice of the violation. This responsibility is now placed with the designated truant officer pursuant to §299.10 of the Code.

The 1906 opinion contained the following advice which appears to have application to the situation you present:

"What has been said with reference to private and parochial schools applies with full force to children or wards under private instruction;

and whether such private instruction is given in compliance with the provisions of the statute is the matter which may be investigated by the board of directors of the district to the same extent and effect as such question may be investigated when it relates to private or parochial schools. No provision is made in this statute for an examination of a private instructor for the purpose of determining his or her compentency but the competency of such instructor is involved in the teaching of the branches required by statute, and in making an investigation for the purpose of determining whether the statute is being complied with, the question of the competency of the private instructor should be inquired into by the board as one of the facts involved.

"The branches of study which are required by statute to be taught in the public, private and parochial schools, or by a private instructor, can only be taught by a person competent to teach the same; and it necessarily follows that if the person attempting to teach such branches in either case is incompetent and unable to teach the same, it cannot be said that the pupils of the school, or those under private instruction, are taught the branches required by statute."

In an opinion dated January 17, 1928, at 1928 O.A.G. 293 the following appears:

"The enforcement of the above statute [section 4413, 1927] and the compulsory education statute is delegated to the board of education and other officers. Any officer charged with this duty may determine for himself whether or not the instruction is equivalent and, if not, prefer charges against the parent.

"It is then a question for the court and the jury to determine whether or not there has been a violation of the statute and, if so, to inflict the penalty prescribed."

At the present time a local school district must meet the approval standards established by the State Board of Public Instruction based upon an educational program as set forth in §257.25 of the Code. There is a private school advisory committee established pursuant to §257.30 of the Code and the duties of such committee include advising the State Board of Public Instruction on matters affecting private schools including but not limited to the establishment of standards for teacher's certification and the establishment of standards for, and approval of, all private schools.

Accordingly it is our view that the determination of the equivalency of instruction is to be determined by the local school board and such determination must take into consideration the requirements set by Section 257.25 of the Iowa Code and also the standards established by the State Board of Public Instruction for the approval of nonpublic schools as authorized by such statute.

The answer to your second question appears to lie in the language of §299.3 of the Code which requires each private school to file notices with the secretary of the school district "once during each school year, and at anytime when requested in individual cases" to certify the course of study pursued by each child, the texts used and the names of teachers. This section of the Code further provides that "the secretary shall retain one of the reports and file the other with the secretary of the area education agency." Such filing should make it possible for the school board to obtain assistance from the area education agency if research or educational planning is required by the board to make its evaluation of the equivalency of instruction.

December 7, 1977

ELEVATOR CODE: Chapter 104. The State Elevator Code and rules promulgated in furtherance thereof supercede local conflicting regulations. (McGrane to Johnson, Bureau of Labor, 12-7-77) #77-12-4

Mr. Walter Johnson, Deputy Commissioner, Bureau of Labor: You have requested an opinion on:

"[W]hether the Bureau of Labor has sole authority to determine the rules in, around, and affecting elevators or whether that authority is jointly shared. Also does a conflict exist where a political subdivision has any rule affecting the elevator installation or only if actual opposition exists?"

Particularly your letter asked about the conflict between city fire marshals who contend that sprinkler systems should be installed in elevator shafts, and the labor department elevator rules which do not permit them because of the danger of shorting of elevator equipment.

The Bureau of Labor does not have the sole authority to determine rules in, around, and affecting elevators. Such authority may be jointly shared by other governmental subdivisions so long as their exercise does not conflict with the State Elevator Code, Chapter 104. Where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a governmental subdivision may make such additional reasonable regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality and the fact that an ordinance enlarges provisions of the statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirements for all cases to its own prescriptions. *City of Des Moines v. Reiter,* 251 Iowa 1206, 102 N.W.2d 363 (1960); *Gannett v. Cook,* 245 Iowa 750, 61 N.W. 2d 703, 706 (1953). No such limitation exists in the statute at hand. Municipal regulation is not precluded simply because the legislature has taken some action in reference to the same subject. *Fireman's Insurance Co. of Washington, D.C. v. Washington,* 483 F.2d 1323 (D.C. Cir. 1973); Md. & D.C. Rifle & Pistol Assn. v. Washington, 442 F.2d 123 (1971).

Under Chapter 104, the labor commissioner is authorized to promulgate standards governing maintenance, construction, alteration and installation of new facilities, and inspection and testing of new and existing installations, as necessary to provide for public safety and to protect public welfare. Any ordinance or resolution relating to inspection, construction, installation, alteration, maintenance or operation of facilities within city or subdivision limits which conflicts with Chapter 104 or any rules set forth by the commissioner is void.

Generally, conflicts which would render an ordinance invalid exist only when both the ordinance and the statute contain express or implied terms that are irreconcilable with each other. *Mangold Midurst Co. v. Village of Richfield,* 274 Minn. 347, 143 N.W.2d 815, 816 (1966). Conflict exists where the ordinance permits what the statute forbids or where the ordinance forbids what the statute expressly permits. *Arrow Club Inc. v. Nebraska Liquor Control Commissin,* 177 Neb. 686, 131 N.W.2d 134, 139 (1964); *Schneiderman v. Sesansten,* 121 Ohio St. 80, 167 N.E. 158 (1929); *Power v. Nordstrom,* 150 Minn. 228, 184 N.W. 967, 969 (1921). An irreconcilable conflict between the ordinance and the statute would compel nullification of the ordinance. *City of Davenport v. Claeys,* 204 Iowa 907, 119 N.W. 2d 755,

758 (1963).

If then, the Bureau of Labor has determined that a rule is necessary to provide for public safety and to protect pubic welfare in the use of elevators, such rules supercede similar provisions contained in building codes of this state or its subdivisions, Section 104.2, Code of Iowa, (1977), and orders any provisions which are in actual opposition to the rule void, Section 104.15, Code of Iowa (1977).

The Bureau of Labor regulations adopt many of the American National Standard Safety Code, ANSI A17.1 Standards. Regulation 72.3(104) adopts rule 102.2 prohibiting installation of pipes or ducts conveying gases, vapors or liquids not used in connection with the operation of the elevator in any hoistway, machine room or machinery space. Exception (3) states that pipes for sprinklers may be installed subject to certain conditions. Bureau of Labor regulation 71.1(35) defining "may" states that where it is used it shall be construed as permissive. The Bureau of Labor has determined that because of the danger of electrical shorting which could cause injury or death, sprinkler systems should not be permitted in elevator machine rooms over elevator shafts.

The provision of the Uniform Building Code which Marshalltown has adopted, and which the Marshalltown Fire Marshal seeks to apply, requires sprinkler systems in hospitals with certain exceptions. Elevator machine rooms are not included in such exceptions. It is our opinion that, the Bureau of Labor rule and the Building Code provision are in direct conflict, and therefore, the provision the fire marshal seeks to apply is void. We believe that the city and state regulations may coexist, but a conflict arises when the city regulation interferes with or prevents full enforcement and implementation of the state regulation. When this occurs, as in this one, the city regulation must yield.

December 7, 1977

SCHOOLS: School Boards: §279.32, Code of Iowa, 1977. School board members may be reimbursed for actual and necessary expenses including expenses incurred in attending national school board conventions in distant states. (Nolan to Taylor, State Senator, 12-7-77) #77-12-5

Honorable Ray Taylor, State Senator: This is written in response to your request for an opinion on the question of whether school board members may be reimbursed for their expenses in attending the National School Board Convention in distant states.

Section 279.32, Code of Iowa, provides in pertinent part:

"Actual and necessary expenses, including travel, incurred by the board or individual members thereof in the performance of official duties may be paid or reimbursed."

The answer to your question depends in the first instance upon whether or not by official action of the board one or more members is designated to represent the board at such meetings out of state. The character of the representation also depends to some extent upon whether or not useful information will be brought back to the school district. There are of course other factors which may be considered. However, the statutes of this state do not prohibit the use of public tax money for this purpose and therefore the justification

of such expenditures is a matter which depends to a great degree upon the discretion of the members of the school board.

December 7, 1977

SCHOOLS: Educational Program: Discrimination; §§280.3, 257.25, 277.28, 66.1(1), 4.4, Code of Iowa, 1977. Statute mandating school board members to stop discrimination in any educational program on basis of "race, color, creed, sex, marital status or place of national origin" is enforceable in the same manner as state approval standards for schools. In addition, a board member failing to discharge the duties of his office may be subject to removal from office by court action. (Nolan to Benton, State Superintendent of Pubic Instruction, 12-7-77) #77-12-6

Honorable Robert D. Benton, State Superintendent of Public Instruction: This is written in answer to your letter of September 9, 1977, requesting an opinion on the last sentence of §280.3, Code of Iowa, 1977. The language in question provides:

"...The board of directors of a public school district shall not allow discrimination in any educational program on the basis of race, color, creed, sex, marital status or place of national origin."

Implementation of this language appears to be a problem. Specifically you ask:

"1. Is this provision of the Code enforceable?

"2. If the answer to question number one is in the affirmative, what procedure or methods are evident in the Code for enforcement?

"3. What are the consequences of noncompliance with this provision?"

In construing the statutory language set out above, we are prompted to follow the rules of statutory construction set forth in §4.4, Code of Iowa, 1977, which provides:

"In enacting a statute, it is presumed that:

"1. Compliance with the Constitutions of the state and of the United States is intended.

"2. The entire statute is intended to be effective.

"3. A just and reasonable result is intended.

"4. A result feasible of execution is intended.

"5. Public interest is favored over any private interest."

It is our view that the language in question which is a part of §280.3 is an enforceable statutory provision. When read in connection with the preceding language in the paragraph in which it appears, the board of directors of a public school is required to establish the "minimum educational program for their schools in accordance with the curriculum set forth in §257.25." Accordingly, the language in question is to be enforced in the same manner as §257.25 is enforced through the maintenance of approval standards by the state department of public instruction.

It is evident from the Code that duties required by the language cited above are part of the duties of the board of directors of the public school district. Each member of the board is required to take the oath of office

(§277.28) under which such board member swears to "faithfully and impartially...discharge the duties of the office." A school board must, therefore, act not only to establish the various minimum programs for the schools in their jurisdiction but must also keep informed as to administration of such programs in the school.

In the event that board members do not seriously attempt to carry out such duties, the consequences of noncompliance could include removal of the school from the approved list of schools pursuant to §257.25(11), or possible removal of board members from office by court action pursuant to §66.1(1) of the Code of Iowa.

December 8, 1977

MUNICIPALITIES: Incompatibilities: §359.36, Code of Iowa, 1977. The position of city council member is incompatible with township trustee, chief of a volunteer fire department, and deputy sheriff. That of council member and volunteer fireman is not incompatible. (Blumberg to Bordwell, Washington County Attorney, 12-8-77) #77-12-7

Richard S. Bordwell, Washington County Attorney: We have your opinion request of November 18, 1977, regarding several questions of incompatibility of offices. You specifically asked:

"1. Are the positions of city council member and township trustee incompatible?

"2. Are the positions of city council member and member of that city's volunteer fire department incompatible? Does it make any difference if the city council member is also an officer in the city fire department?

"3. Are the positions of city council member and deputy sheriff of the county in which the city is located compatible? Does it make any difference if the city involved has contracted with the county for the county to provide a law enforcement service?"

The leading case on incompatibility of offices is *State ex rel. Crawford v. Anderson,* 1912, 155 Iowa 271, 273, 136 N.W. 128. It was held therein:

"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. Catell, 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'."

See also, *State ex rel. LeBuhn v. White,* 1965, 257 Iowa 606, 133 N.W.2d 903.

In response to your first question, we direct your attention to §359.36,

1977 Code of Iowa. That section provides for a joint cemetery board consisting of the township trustees and city council members for the maintenance of cemeteries. A city council member could not also be a township trustee under these circumstances. Accordingly, pursuant to the above cases the positions of city council member and township trustee are incompatible.

Your second question presents an opposite result. Pursuant to an earlier opinion, 1972 O.A.G. 594, we held that the position of city council member is not incompatible with membership on a volunteer fire department. We see no reason to change that result. However, a council member cannot be the fire chief since any business or contracts between the volunteer fire department and the city will be done through the council and fire chief.

Your final question is whether an incompatibility exists between a council member and county deputy sheriff. There can be no doubt that where a municipality has a contract with the sheriff's department to provide law enforcement that the two positions would be incompatible. If it is incompatible when such a contract is made, then it must also be incompatible at all other times, for it is not the making of the contract that results in the incompatibility but rather the fact that such contracts and similar agreements and cooperation can be made at any time. If an incompatibility exists it is at the time of taking the latter office rather than a point in the future when a specific contract is made.

In summary, we are of the opinion that the position of city council member and township trustee, volunteer fire chief and deputy sheriff are incompatible. That of council member and volunteer fire department member are not incompatible.

December 8, 1977

STATE OFFICERS AND DEPARTMENTS: Executive Council: Closing Offices, Inclement Weather. §§18.1, 19A.9(6), 29C.2, 29C.6, Code of Iowa, 1977. The Executive Council has the authority to close state offices and determine hours to be worked during critical situations. (Haesemeyer to Wellman, Secretary, Executive Council of Iowa, 12-8-77) #77-12-8

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to your letter of December 5, 1977, in which you state that the Executive Council has requested an opinion of the Attorney General with respect to the following questions:

"1. Does the Executive Council have the authority to make a decision relative to hours to be worked during critical situations?

"2. Does Chapter 29C, Code of Iowa, 1977, influence the establishment of policy pertaining to compensation of employees in the event of inclement weather and the decision to close facilities?"

In response to your first question, historically the Executive Council has always exercised the authority to determine when state offices in Des Moines would be closed due to inclement weather. I have been unable to ascertain the origin of this long standing practice and we have been unable to find any statutory basis for this custom. It may have arisen because prior to the creation of the Department of General Services, the Superintendent of Buildings and Grounds was appointed by the Executive Council and was responsible to it. Whatever the basis for the Executive Council's exercise of the power, there does not appear to be any clear cut delegation of statutory authority to any other

officer or department to make decisions of this type although it could be argued that perhaps the Merit Employment Commission has some authority in these respects by virtue of §19A.9(18) dealing with "Attendance Regulations." Also, the Office of Disaster Services has established an exhaustive and comprehensive plan for dealing with such things as bomb threats, tornadoes, and public disorders. In any event, the members of the Executive Council constitute all the state-wide elected officials except the Attorney General and Lieutenant Governor and are probably the most suitable body to exercise the authority to close the public buildings in Des Moines in the event of inclement weather. And in our opinion, in view of the fact that they have always done so and since no one else has the power, the Executive Council should continue to exercise this authority.

Chapter 29C entitled "Disaster Services and Public Disorders" establishes the state office of Disaster Services and confers upon the Governor and upon the executive heads of governing bodies of the political subdivisions of the state certain emergency powers. Section 29C.2 defines disaster and public disorder as follows:

" 'Disaster' means manmade catastrophes and natural occurrences such as fire, flood, earthquake, tornado, windstorm, which threaten the public peace, health, and safety of the people or which damage and destroy public or private property. The term includes enemy attack, sabotage, or other hostile action from without the state.

" 'Public disorder' means such substantial interference with the public peace as to constitute a significant threat to the health and safety of the people or a significant threat to public or private property. The term includes insurrection, rioting, looting, and persistent violent civil disobedience."

Probably a blizzard or snow storm could be said to fit this definition of "disaster." Under §29C.6, the Governor may:

" * * *

"1. After finding a disaster exists or is imminently threatened, proclaim a state of disaster emergency. This proclamation shall be in writing, indicate the area affected and the facts upon which it is based, be signed by the governor, and be filed with the secretary of state. A state of disaster emergency shall continue for thirty days, unless sooner terminated or extended in writing by the governor. The general assembly may, by concurrent resolution, rescind this proclamation. If the general assembly is not in session, the legislative council may, by majority vote, rescind this proclamation. Rescission shall be effective upon filing of the concurrent resolution or resolution of the legislative council with the secretary of state. A proclamation of disaster emergency shall activate the disaster response and recovery aspect of the state, local and interjurisdictional disaster emergency plans applicable to the political subdivision or area in question and be authority for the deployment and use of any forces to which the plan applies, and for use or distribution of any supplies, equipment, and materials and facilities assembled, stockpiled, or arranged to be made available. * * *"

In addition to the foregoing, the governor, under §29C.6, is given sweeping emergency powers, including suspension of the provisions of any regulatory statute prescribing the procedures for conduct of state business, delegating any administrative authority vested in him under the chapter and providing for the subdelegation of any such authority, utilizing all available resources of the state government to cope with the disaster, transferring the direction, personnel, or functions of state departments and agencies, directing the evacuation of all or

part of the population from any stricken or threatened area, and, controlling ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises in such area.

While we do not think that the disaster emergency provisions were intended to be used to close the Statehouse in the event of a snow storm, it seems that theoretically if the governor were willing to proclaim a state of disaster emergency that he would have the authority to close public buildings in Des Moines. However, we doubt very much whether he would want to do this since under §29C.6(1), the proclamation of disaster emergency automatically activates the disaster response and recovery aspect of the state, local and interjurisdictional disaster emergency plans and is authority for the deployment and use of any forces to which the plan applies. In other words, it seems to us that the proclamatin of a disaster emergency would be an overresponse to a snow storm. In any event, although Chapter 29C might be a basis for the governor to close public buildings, we can find nothing in it which could fairly be said to influence the establishment of a policy pertaining to compensation of employees in the event of inclement weather.

December 9, 1977

SCHOOLS: Conflict of Interest. §301.28, Code of Iowa, 1977. (1) Section 301.28 is limited in scope and does not preclude treasurer of school district from acting as agent of company providing group health insurance to school district. (2) County attorney should not be placed in position of advising the County Board of Supervisors on the appointment of a special prosecutor in action against school board members previously represented by county attorney. (Nolan to Millen, State Representative, 12-9-77) #77-12-9

Honorable Floyd H. Millen, State Representative: We have your letter requesting an Attorney General's opinion on the problems set out as follows:

"1. Is it a conflict of interest, under Section 301.28, 1977 Code of Iowa, for the treasurer of a school board (who is also the daughter-in-law of the board president) to carry all the medical insurance for the school district?

"2. Can the county attorney, who represents the school board in legal actions, appoint or assist the county board of supervisors in appointing, an attorney to represent a person who brings action against the school board president for a possible violation of the law in conducting meetings of the board?

"3. Under Section 279.11, 1977 Code of Iowa, can a charge be filed against the school board because of the fact that no second and third grade classes are held in an attendance center used for those grades the previous year?

"In explanation, these grades were moved after the department of public instruction advised the local school board that grades K-5 would be housed in the attendance center in question and the parents were not notified of this change, the only notification was in the local paper.

"4. Is it a conflict of interest for a county attorney who represents local school boards to become a director of an Area Community College serving the same area of the state?

"5. Since the county attorney is the legal advisor for the school board, can the president of the board hire outside counsel to represent him in a suit brought against him stemming from actions taken in his official capacity and charge those expenses back to the school district?"

In answer to the above questions we advise:

1. Code §301.28 provides:

"It shall be unlawful for any school director, officer...to act as agent for any school textbooks or school supplies during such terms of office or employment, and any school director, officer...who shall act as agent or dealer in school textbooks or school supplies, during the term of such office or employment, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof, be fined not less than ten dollars nor more than one hundred dollars, and pay the costs of prosecution."

It is the opinion of this office that medical insurance does not properly come under the term "textbooks and school supplies." Under Section 279.28 the school board is authorized to pay out of the general fund the cost of insurance for school property and also to purchase "dictionaries, library books, including books for the purpose of teaching vocal music, maps, charts, and apparatus for the use of the schools... ." Authority for the purchase of group health or medical service for the employees of the school district is provided in §509A.1 of the Code and the contract made by the board of directors may be either with a nonprofit corporation operating under Chapter 509A or Chapter 514 of the Code or with any insurance company having a certificate of authority to transact an insurance business in this state "with respect to a group insurance plan, which may include life, accident, health, hospitalization and disability insurance."

Accordingly, the answer to your first question must be that a conflict of interest does not exist under §301.28 where the school treasurer is an agent for an insurance company which has the contract for the group health insurance under Chapter 509A.

2. As we understand your second question, it is the view of this office that the county attorney should not be placed in a position of advising the board of supervisors on the appointment of a special prosecutor where members of the school board represented by the county attorney are charged with violation of the open meetings law. Section 336.3 provides:

"In the case of absence, sickness, or disability of the county attorney and his deputies, the court before whom it is his duty to appear, and in which there may be business requiring his attention, may appoint an attorney to act as county attorney, by order to be entered upon the records of the court, and he shall receive out of the compensation allowed to the county attorney, in proceedings before a judicial magistrate, such sum as the board of supervisors shall determine to be reasonable for the services rendered, and if in proceedings before a district associate judge or a district judge, such sum as the judge shall determine to be a reasonable compensation, and, while acting under said appointments, he shall have all the authority and be subject to all the responsibilities herein conferred upon county attorneys."

It should also be noted that Section 336.5 of the Code prohibits the county attorney from accepting any "fee or reward from or on behalf of anyone for services rendered in any prosecution or the conduct of any judicial business... ."

3. The answer to your third question is presently being litigated in the case entitled *Van Buren Community School District v. Iowa Department of Public Instruction and State Board of Public Instruction,* No. 22051 in the District Court of Iowa in and for Van Buren County. Accordingly, we must

decline to answer the question which you presented.

4. Question number four has been previously answered in an opinion issued to Mr. James Dorothy, Van Buren County Attorney, on September 13, 1977. In that opinion we said:

"A merged area board serves a geographic area generally composed of several counties, or parts thereof. Taxes which support such merged area are prorated among the respective school districts, in the proportion that the value of the taxable property in such school district bears to the total value of taxable property in the area. The board of supervisors of each county is directed by statute to levy a tax sufficient to raise the amount certified by the area board of directors. (§280A.17). There does not appear to be any statutory provision indicating the power of review by the county or of any of its officers for the acts of the area board."

Accordingly, the opinion advised that the county attorney may serve contemporaneously as an elected member of the merged area board.

5. The answer to your fifth question is to be found in Section 279.37:

"In all cases where actions may be instituted by or against any school officer to enforce any provision of law, the board may employ counsel, for which the school corporation shall be liable."

December 9, 1977

STATE OFFICERS AND DEPARTMENTS: Secretary of Agriculture; Soybean Promotion Board, Ex Officio Member. §185.10, Code of Iowa, 1977. Ex officio members of the Iowa Soybean Promotion Board and any other boards, commissions and councils, where a statute does not otherwise specifically provide, are entitled to notice of all meetings, are counted in determining a quorum and are entitled to vote the same as any other member. (Haesemeyer to Lounsberry, Secretary of Agriculture, 12-9-77) #77-12-10

Honorable Robert H. Lounsberry, Secretary of Agriculture: By your letter of November 29, 1977, you have requested an opinion of the Attorney General on the question of whether or not ex officio members of boards or commissions have voting privileges.

Specifically, you are concerned about the Soybean Promotion Board of which you are an ex officio member by virtue of §185.10, Code of Iowa, 1977, which provides:

"Ex officio members. The secretary, the dean of the college of agriculture of Iowa State University of Science and Technology, and the director of the Iowa Development Commission, or their designees, and two representatives of first purchaser organizations shall serve on the board as ex officio members. One each of the two first purchaser representatives shall be appointed by, and serve at the pleasure of, the Iowa grain and feed association and the farmers grain dealers association of Iowa."

There is nothing in this statutory provision specifically providing that ex officio members do not have voting privileges and the term itself does not carry that connotation. A comparison of §185.10 with §196A.5 will demonstrate that when the legislature wanted to provide that ex officio members of a board, commission or council were to have no voting rights they expressly so provided. Such §196A.5 provides:

"Composition of council. The Iowa egg council established under this

chapter shall be composed of four egg producers, one from each district; two egg processors; and one hatchery man who shall be appointed pursuant to this chapter. The secretary or his representative, the director of the Iowa Development Commission, and the chairman of the poultry science section of the department of animal science at Iowa State University of Science and Technology or his representative shall serve as ex officio non-voting members of the council. The council shall annually elect a chairman from its membership."

If the term "ex officio" standing by itself carried with it a lack of voting privileges, it would have been unnecessary to include the word "non-voting" in §196A.5. But as the Supreme Court has said, "courts should endeavor to construe statutes so no part will be rendered superfluous, and effect ordinarily should be given to every provision of a statute." *Board of Directors of Menlo Consolidated School District of Menlo v. Blakesley,* 240 Iowa 910, 36 N.W.2d 751 (1949).

Section 4.1 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. * * *"

Webster's New World Dictionary, Second College Edition, defines "ex officio" as meaning, "By virtue of one's office, or position." There is nothing in the common approved usage of the term which infers non-voting membership.

In a parliamentary sense, the term is used and defined in both *Robert's Rules of Order* and *Mason's Manual of Legislative Procedure.* And the accepted definition appearing in both publications specifically provides that there is no distinction between ex officio members and other members of a board as regards voting rights.

Robert's Rules of Order, §48 provides as follows, inter alia:

"Ex Officio Board Members

"Frequently boards include ex officio members; that is, persons who are members of the board by virtue of an office or committee chairmanship held in the society, or in the parent state or national society or federation of some allied group, or — sometimes in boards outside of organized societies — by virtue of a public office. In the executive board of a society, if the ex officio member of the board is under the authority of the society (that is, if he is a member, officer, or employee of the society), there is no distinction between him and the other board members. If the ex officio member is not under the authority of the society, he has all the privileges of board membership, including the right to make motions and to vote, but none of the obligations — just as in a case, for example, where the governor of a state is ex officio a trustee of a private academy."

Paul Mason's Manual of Legislative Procedure provides as folllows, inter alia:

"Sec. 587. Ex Officio Officers

"1. An ex officio officer is one who holds a particular office by reason

of holding another office. A charter may provide, for instance, that the mayor be ex officio a member of the city council, or that the president of the council be chairman of the finance committee. In such cases, whoever is elected as mayor automatically becomes a member of the city council, and whoever is selected as chairman is always, and without any further action, chairman of the finance committee.

"2. It is a common practice, particularly in local governments, to tie different units of the government together by making certain officers ex officio members of boards, commissions or committees. Boards having important, but limited, duties are often composed of a group of officers serving ex officio as a board for some special purpose.

"3. When an officer is an actual working member of a board or committee, he is in exactly the same position as if he were selected in some other manner except perhaps that he gets no extra compensation for his ex officio duties. He is entitled to notice of all meetings, is counted in determining a quorum and vote necessary, and votes like any other member."

Thus, ex officio members of the Iowa Soybean Promotion Board and any other boards, commissions and councils where a statute does not otherwise specifically provide are entitled to notice of all meetings, are counted in determining a quorum and are entitled to vote the same as any other member. The correctness of this conclusion may be demonstrated by the fact that if this were not so, the Bonus Board established under Chapter 35 and the Appeal Board established under Chapter 23 would be unable to function since these bodies are made up entirely of ex officio members.

December 22, 1977

CONSTITUTIONAL LAW; STATE OFFICERS AND DEPARTMENTS: Art. I, §1, 6; Art VI, §1, Art. VII, §1; Art. VIII, §1, 3, Iowa Constitution; §§185C.1(5), 185C.2, 185C.8, 185C.21, 185C.26, 185C.29, 185C.30, 185C.34, 1977 Code of Iowa. Ch. 185C establishing a corn promotion board is not unconstitutional as creating a special privilege, pledging the credit of the state or causing it to assume debts or liabilities of a corporation, or creating a corporation by special laws. (Haskins to Miller, State Representative, 12-22-77) #77-12-11

Honorable Kenneth D. Miller, State Representative: You have requested an opinion of the Attorney General as to the constitutionality in several respects of the corn promotion scheme authorized by Ch. 185C, 1977, Code of Iowa. In responding to your letter, I have attempted to respond to what I believe is the essence of your concerns.

By way of background, Ch. 185C was enacted in 1966 and empowers the Iowa Secretary of Agriculture to conduct a referendum to determine whether a promotional order shall be placed in effect. §185C.2. If a promotional order is approved in the referendum, an Iowa corn promotion board is established. §185C.3. The corn promotion board then establishes an assessment rate and pursuant to the promotional order, assessments are collected and paid into a corn promotion fund. §185C.21. Moneys collected and placed in the fund are subject to audit by the auditor of state. §185C.26.

The assessment rate may not exceed one-tenth of one cent per bushel on corn produced in Iowa and sold to a first purchaser. §185C.21. The funds raised by these assessments, after deduction for the costs of elections, referendums and administrative costs of the corn promotion board, are allocated to

organizations selected by the corn production board and can be used only for research, promotions and education in cooperation with agencies equipped to do this kind of work. §185C.29.

Your first question is whether the system created by Ch. 185C violates Art. I, §§1 and 6, Iowa Constitution. Art. I, §1 states:

"All men are by nature, free and equal, and have certain inalienable rights — among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."

Art. I, §6 states:

"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."

Your concern is that a system utilizing state resources to enhance the position of private corn producers in effect grants them a special privilege. However, under the case law, if a statute creates a benefit which serves the overall public interest, it will not be held unconstitutional merely because a private interest is incidentally benefited thereby. A case which is relevant here is *Richards v. City of Muscatine,* 237 N.W.2d 48 (Iowa 1975), which upheld the constitutionality of certain urban renewal statutes being attacked under, inter alia, Art. I, §6. the court stated:

"In divisions VI and VIII of their brief, plaintiffs argue that allocation of taxes under §403.19 violates the quoted constitutional section because the allocation uses tax revenues to enable the urban renewal developer to obtain property at a cost lower than he would otherwise have to pay.

"Plaintiffs' argument is contrary to the rationale of *Webster Realty Co. v. City of Ft. Dodge,* 174 N.W.2d 413 (Iowa). There the plaintiff claimed that Chapter 403 gave special privileges to those who lived in the urban renewal area. This court rejected the claim, saying the fact that one class incidentally benefits more than another does not 'destroy the public character of urban renewal or make it vulnerable to the attack that is a special privilege law.' 174 N.W.2d at 416.

"Another decision contrary to plaintiffs' position is *Green v. City of Mt. Pleasant,* 256 Iowa 1184, 1199, 131 N.W.2d 5, 15. There the plaintiff claimed that a statute authorizing a city to construct and lease industrial plants and to issue bonds to finance such projects violated §6 of article 1 because it permitted persons engaged in manufacturing, processing, or assembling agricultural or manufactured products to borrow money at a lower rate than persons not qualifying under the act. This court found no violation of the constitution even though the statute benefited some members of the community more than others.

"The leading case construing §6 of article I is *Dickinson v. Porter,* 240 Iowa 393, 35 N.W.2d 66. This court there upheld a statute which gave a property tax credit to the owners of agricultural land in school districts where the millage for the general school fund exceeded 15 mills. In doing so the court stated, 'If there is any reasonable ground for the classifications in this law and it operates equally upon all within the same class, there is uniformity in the constitutional sense and no violation of [§6 of article I].' 240 Iowa at 400, 35 N.W.2d at 72. *See also Lee Enterprises, Inc. v. Iowa State Tax Comm'n,* 162 N.W.2d 730, 753 (Iowa)."

Here, the rationale of *Richards* applies: while corn producers are the direct beneficiaries of the promotion efforts of the corn promotion board, the entire State of Iowa can be seen as the ultimate beneficiary of a statutory scheme which promotes corn production. It hardly needs mentioning that corn production makes a not insubstantial contribution to the economy of Iowa.

In *Dickinson v. Porter,* cited in the foregoing quotation, the Iowa Supreme Court noted the importance of agriculture to the state's economy and said:

"The power of state legislatures to adjust their tax laws in order to encourage an industry or undertaking deemed vital to the welfare of the state or in furtherance of some related principle of public policy has frequently been upheld.

"The governor of the state in commenting upon the report of the school code commission said in his message to the legislature that enacted this law, 'We all know that agriculture is Iowa's basic resource. Upon its prosperity depends the prosperity of our great number of small businesses and communities.'

"*Our state constituion contains the express mandate, 'The General Assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement.'* Art. IX 2d div., sec. 3. (Emphasis supplied)

"We have frequently referred to agriculture as the basic industry in this state. *See* for example *Blume v. Crawford County,* 217 Iowa 545, 550, 551, 250 N.W. 733, 92 A.L.R. 757; *Clear Lake Co-op. Live Stock Shippers' Ass'n. v. Weir, supra* 200 Iowa 1293, 1298, 206 N.W. 297. The *Blume* case (217 Iowa 545, 250 N.W. 735) upholds a law directing county boards of supervisors to appropriate funds raised by taxation to county farm bureaus under certain conditions and says a statute in aid of agriculture 'is not repugnant to any constitutional provision.' The plain inference from the opinion is that what benefits agriculture benefits the state as a whole. Other decisions generally like the *Blume* case appear in Annotation, 92 A.L.R. 768, 770.

"It is not debatable that *it is part of the public policy of this state, evidenced by our constitution and numerous statutes, to encourage agriculture. It seems equally plain the encouragement of our basic industry serves the public interest.* (Emphasis supplied)"

In evaluating any constitutional challenge to a statute, the following principles enumerated in *Keasling v. Thompson,* 217 N.W.2d 687, 689 (Iowa 1974), must be kept in mind:

"Ordinarily, statutes, with notable exceptions not here involved, regularly enacted by the legislature will be accorded a strong presumption of constitutionality and all reasonable intendments must be indulged in favor of the validity of the legislation attacked. One who challenges legislation on constitutional grounds has the burden to negate every reasonable basis upon which the statute may be sustained. Where the constitutionality of a statute is merely doubtful or fairly debatable, the courts will not interfere. Thus a statute will not be declared unconstitutional unless it clearly, palpably and without doubt, infringes the constitution. *Hearth Corporation v. C-B-R Development Co., Inc.,* Iowa, 210 N.W.2d 632, 637; *State v. Vick,* Iowa, 205 N.W.2d 727, 729, and the many authorities cited in these opinions. The legislature is given wide discretion in defining the limits of classes when a statute involves classification of persons or things. If a classification is reasonable and operates equally upon all within the class, it is a valid classification. *Brown Enterprises, Inc. v. Fulton, Iowa,* 192 N.W.2d 773, 776 and citations."

We would also point out that attacks on similar statutes in other states were all unsuccessful. The leading case is *Floyd Fruit Co. v. Florida Citrus Commission* (1937), 128 Fla. 565, 175 So. 248, 112 A.L.R. 562, upholding a tax of one cent per box of oranges grown in the state of Florida to be used for advertising the fruit, thereby stimulating the industry. The Court held that it was an *excise* tax, for a *public* purpose. See also the following:

City of Jacksonville v. Oldham, 112 Fla. 502, 150 So. 619 (upholding property tax for advertisements of the city).

Miller v. Michigan State Apple Commission, (1941), 296 Mich. 248, 296 N.W. 245 (upholding tax of one cent per bushel on apples grown in Michigan, payable by the grower, when shipped — the tax to be used for research and advertising).

Louisiana State Dept. of Agriculture v. Sibille, (1945) 207 La. 877, 22 So. 2d 202 (upholding tax of one cent per bushel on sweet potatoes, for purposes of advertising).

State v. Enking, (1938) 59 Idaho 321, 82 P.2d 649 (upholding tax on apples, prunes, potatoes and onions produced in Idaho to be used for sales promotion by advertising).

State v. F. H. Vahlsing Co., (1952, Maine) 88 A.2d 144 (upholding tax of one cent per barrel on potatoes grown in Maine, to be used for research and sales promotion). This opinion is very well written. The court reviews the cases mentioned above, and says (88 A.2d at 148):

"Where the industry involved has been of sufficient size and importance, and especially where the welfare of agriculture has been concerned, a tax levied for its support such as this, to wit, a tax for the benefit of agriculture as an industry, as distinguished from grants to those engaged therein, has almost invariably been held as levied for a public use."

Torigian v. Saunders (1959), 77 S.D. 610, 97 N.W.2d 586 (upholding excise tax on butterfat, with the funds administered by the Dairy Association, similar to the Iowa law).

Robison v. Dwyer (1961) ____ Wash. ____, 364 P.2d 521 (upholding Washington Agricultural Enabling Act and wheat assessment and marketing order to be administered by a wheat commission).

We should also note that the Iowa soybean checkoff was upheld by the Polk County district court in the case of *Oehlert et al. v. Liddy et al.,* Law No. 133, decided February 29, 1972.

Your next question is whether the scheme created in Ch. 185C violates Art. VII, §1, Iowa Constitution, and Art. VIII, §3, Iowa Constitution. Art. VII, §1, states:

"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."

Art. VIII, §3, states:

"The State shall not become a stockholder in any corporation, nor shall it assume or pay the debt or liability of any corporation, unless incurred in time of war for the benefit of the State."

Your concern is apparently that Ch. 185C lends the taxing authority of the State for the benefit of private individuals. But it should be pointed out that the State in no way lends its own credit or moneys for corn promotion. The only moneys expended for corn promotion are those which have been raised through the assessments levied at the time of first purchase of the corn. It is true that a state official — the Iowa Secretary of Agriculture — does set the procedure in motion by requesting an initial referendum and determining whether a promotional order shall be placed in effect. But no state moneys as such are spent. In any event, the case of *Merchants Union Barb-Wire Co. v. Brown,* 64 Iowa 275, 20 N.W. 434 (1884), would seem to preclude any constitutional challenge. There, the Court upheld, against a challenge under Art. VIII, §3, to an Act appropriating a sum to aid the Farmers' Protective Association, a corporation organized to provide the farmers of the state with barbed wire at actual cost of manufacture. And, as to Art. VII, §1, that section has been construed only to preclude the state from acting as a surety; the state may still incur primary liability consistent with that section. See *Richards v. City of Muscatine, supra,* at 63; *Edge v. Brice,* 253 Iowa 710, 716, 113 N.W.2d 755, 758 (1962); *Grout v. Kendall,* 195 Iowa 467, 473, 192 N.W. 529, 531 (1923). Here, Ch. 185C does not cause the state to assume any liability at all, much less to act as surety.

Your next question is whether Ch. 185C violates Art. VIII, §1, Iowa Constitution, which states:

"No corporation shall be created by special laws; but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided."

Under §185C.34, 1977 Code of Iowa, the corn promotion board is expressly deemed not to be a state agency. Therefore, you in effect argue the legislature has created, in Ch. 185C, a corporation — the corn promotion board — by special laws and has thereby violated the prohibition on the creation of such by special laws. It is established that a branch of the government is not considered to be a "corporation" under Art. VIII, §1. See *Iowa Eclectic Medical College Ass'n. v. Schrader,* 87 Iowa 659, 55 N.W. 24, 27-28 (1893). It is our position that, regardless of whether the legislature may have classified the corn promotion board as not being a state agency, it is in fact one for purposes of Art. VIII, §1. Therefore, it is irrelevant that it was created through the device of a special law. The legislature, by classifying the corn promotion board as not being a state agency has merely affected the applicability to it of particular laws, as for example, the Iowa Public Officials Act dealing with conflicts of interests, §68B.2(7), 1977 Code of Iowa.

You also complain about the constitutionality under Art. I, §6, of various restrictions which you feel have been placed upon producers who, under §185C.2 may vote in a referendum to determine whether a promotional order shall issue. §185C.1(5) defines the term "producer" as follows:

" 'Producer' means any individual, firm, corporation, partnership, or association engaged in this state in the business of producing and marketing in their name at least two hundred fifty bushels of corn in the previous marketing year."

In implementing Ch. 185C, the Iowa Department of Agriculture has adopted regulations relating to the corn referendum. 30—2.2(3) (e) (159) IAC defines a "producer" for purposes of a corn referendum as follows:

" 'Producer' in a referendum under S.F. 449, Acts 66th G.A., means any individual, firm, corporation, partnership, or association engaged in this state in the business of producing and marketing in their name at least two hundred fifty bushels of corn in the previous marketing year."

It is clear that this definition accords with that found in §185C.1(5). As to its constitutionality, the following from *Richards v. City of Muscatine, supra* at 61, is relevant here:

"This court has said of §30 of article III as well as of §6 of article I, 'If there is any reasonable ground for the classifications in this law and it operates equally upon all within the same class, there is... no violation of [§30 of article III].' *Dickinson v. Porter, supra,* 240 Iowa at 400, 35 N.W.2d at 72. We have already concluded that a reasonable basis exists for the classification in §403.19. We find no invalidity here."

In our opinion it is reasonable for the legislature to limit those who can vote in a corn referendum to producers who have produced and sold at least two hundred and fifty bushels of corn in the previous marketing year. *United States v. Rock Royal Cooperative,* 307 U.S. 533, 83 L.Ed. 1446 (1938), *Lee Enterprises, Inc. v. Iowa State Tax Commission, 162 N.W.2d 730 (Iowa 1969), Knudson v. Lindstrum,* 233 Iowa 709, 8 N.W.2d 495 (1943), *Child v. Warne,* 15 Cal. Rptr. 437 (1961), *Oehlert et al. v. Liddy et al.,* Polk County District Court, Law No. 133, decided February 29, 1972.

Accordingly, we find Ch. 185C to be constitutional. The principles on which we rely in reaching this conclusion would generally also support the constitutionality of the other chapters of the code dealing with agricultural product checkoffs.

As indicated earlier we have attempted to respond to the substance of your concerns. Your actual letter is quite long and raises many questions, many of them hypothetical. However, we discern the burden of your complaint to be a question as to the constitutionality of Ch. 185C under the provisions of the constitution we have discussed herein.

December 23, 1977

COUNTIES: LAW ENFORCEMENT; Deputy sheriffs. Off-duty employment of sheriffs' deputies as security guards is not prohibited by Iowa law. (Linge to Bordwell, Washington County Attorney, 12-23-77) #77-12-12

Mr. Richard S. Bordwell, Washington County Attorney: You have requested an opinion about the employment of county sheriffs' deputies for various public and private purposes.

You have asked if a business may hire full-time or part-time deputies to act as security guards on their off-duty hours and if the deputies could legally wear their regular uniforms, badges and insignias. Further, you asked if a deputy would have arrest powers of a private citizen or of a peace officer.

This office has stated on several occasions that a private corporation may not make an agreement with the sheriff's department to pay for "special deputies" whose only duties will be to perform services for the private corporation. 1962 O.A.G. 99; 1974 O.A.G. 580; O.A.G., Linge to Representative Svoboda, Jauary 11, 1977.

By specifying that a business would hire only *off-duty* sheriff deputies, your question appears to raise an issue not covered by these opinions.

The Iowa Supreme Court has recognized that although a deputy sheriff is on call twenty-four hours a day, *City of Emmetsburg v. Gunn,* 1957, 249 Iowa 297, 303, 86 N.W.2d 829, 833, he or she is not "on duty" during that entire period. Only when he or she is performing law enforcement activities during regularly scheduled hours or when called for special duty may he or she be considered "on duty." *Hansen v. State,* 1958, 249 Iowa 1147, 91 N.W.2d 555.

In 1968, this office opined that a sheriff may accept an outside employment, but relying on *State v. Hinshaw,* 1924, 197 Iowa 1265, 198 N.W. 634, added the provision that any such employment must not interfere with "his first and paramount duty...to perform all of the duties of his office." 1968 O.A.G. 946. In *State v. Hinshaw,* 1924, 197 Iowa 1265, 198 N.W. 634, the Iowa Supreme Court held that a public official could lawfully engage in a private business and retain the profits therefrom, even though the opportunity for conducting that business arose out of his position as a public official..

The *Hinshaw* court established a test that must be applied in any determination of the legality of off-duty employment by public officials: A. No state money or property should be used in conducting the business; B. The business should not cause him or her to neglect his or her official duties; C. There should be no concealment or misrepresentation of the fact that the official is acting solely as a private business person; D. The official should not use his or her official position to coerce or compel others to do business with him or her; and E. The services the official performs as a private business person are not services he or she is required to perform by virtue of his or her official position. *State v. Hinshaw, supra,* at 1271-72, 637. If all of these conditions are met, the private employment is not prohibited by law:

A public officer is not required to give every instant of his time to the partners and fellow officers. The public may also be placed in danger if the officer has not had sufficient rest time to be alert for his primary job — law enforcement.

National Advisory Committee on Criminal Justice Standards and Goals, *Private Security* 232 (1976).

"[S]leeping on duty is a serious violation" of the officer's obligation to the public, "disruptive of departmental efficiency, discipline and morale," and is grounds for dismissal from the police force. *Petraitis v. Board of Fire & Police Comm'rs.,* 1975, 31 Ill. App. 3d 864, 335 N.E.2d 126, 120, 130. *See also, Marsh v. Hanley,* 1975, 50 A.D.2d 687, 375 N.Y.S.2d 409; *Haywood v. Municipal Ct. of Boston,* 1971, 359 Mass. 760, 271 N.E.2d 591 Sections 341A.11 (1) and (3), Code of Iowa, 1977.

Regulations restricting outside employment may also be necessary to "insure that the officers are available for police duty 24 hours a day." *Cox v. McNamara,* 1972, 8 Or. App. 242, and, 493 P.2d 54, 56, *cert.* denied, 1972, 409 U.S. 882. The Kentucky Supreme Court, faced with an argument that low pay by the police department made outside employment necessary, upheld the department's regulation as reasonable to safeguard the public's interest that the officers " not be subject to outside interests which might conflict with their official duties by...occupying time during which they are at least potentially on call.... " 88 A.L.R. 2d 1235. *Hopwood v. City of Paducah,* 1968 424 S.W.2d 134, 137 (Ky.).

The Iowa Court refused to invalidate a Davenport ordinance prohibiting outside employment of police officers:

"The purpose of this provision is apparently to insure that the police officers will not have divided loyalties as between their public and private employers; that they will be available in case of emergencies as the ordinance requires, even when they are off duty; and that they will be in condition, both physical and mental, to perform their official functions when and as they should. A policeman who has worked for several hours at manual labor for a private employer may not be as efficient or alert in attending to the matters required of him as a peace officer. These considerations in themselves demonstrate that Section 7(d), *supra,* is not so clearly arbitrary or unreasonable that we may strike it down."

Jurgens v. Davenport, R.I. & N.W. Ry. Co., 1958, 249 Iowa 711, 716, 88 N.W. 2d 797, 801.

If sheriff's deputies accept employment as security guards, they and the sheriff should be aware of the possibility that such work may inhibit their ability to competently and efficiently perform their public duties, and may also interfere with their obligation to respond when called for special duty.

B. *Conflict of Interest.* Section 739.10, Code of Iowa, 1977, makes criminal a county officer's acceptance of "any valuable consideration...other than the compensation allowed him by law, conditioned upon said officer's doing or performing any official act,...or...refraining from doing or performing" an official act. The Iowa court discussed the purpose behind this and other similar Iowa statutes, relying on federal law:

"The iniquity of the procuring of public officials, be it intentional or unintentional, is so fatally destructive to good government that a statute designed to remove the temptation for a public official to give preferment to one member of the public over another...is a reasonable and proper means of insuring the integrity, fairness and impartiality of the administration of the law."

United States v. Irwin, 1965, 354 F.2d 192, 196 (2d Cir.), *cert.* denied, 1966, 383 U.S. 967, quoted in *State v. Prybil,* 1973, 211 N.W.2d 308, 311-12 (Iowa).

Similar statutes in other states have been held to authorize limitations on outside employment during the peace officer's off-duty hours. "[T]he sheriff, like a private employer, may impose working conditions in his discretion ....He must be on guard against conflicts of interest in law enforcement." *Croft v. Lambert,* 1960, 228 Or. 76, and, 357 P.2d 513, 515, 88 A.L.R.2d 1227, 1231 (Or.), construing Section 204.685(5), Or. Rev. Stat. Such regulations "promote the public interest and strengthen the faith and confidence of the people...in the integrity of their government." Chapter 16, Utah Code Ann. §2, as amended, Chapter 128, Laws of Utah, Replacement Vol. 74, p. 153 (supp. 1969), quoted in *Fisher v. Marsh,* 1970, 477 P.2d 148, 150 (Utah). *See also, Cox v. McNamara,* 1972, 8 Or. App. 242, 493 P.2d 54; *State v. Loopis,* 1971, 257 So.2d 17 (Fla.), construing Section 112.313 (6), Fla. Stat. Ann. (West).

There is also a possibility that the deputies' loyalty to a private employer might cause them "to neglect or subvert" their obligation to their public employer, *Hopwood v. City of Paducah,* 1968, 424 S.W.2d 134, 137 (Ky.).

Police officers, working for a local doctor who came under suspicion of illegal acts, were asked to give up their private employment by the city council. When the council's act was challenged by the officers, the court held:

"This conflict of interest was sufficient to require the city council to demand that the plaintiffs make a choice between the two jobs. Failure by the city council to have taken such action would have amounted to dereliction of duty

on its part."

Bell v. Gayle, 1974, 384 F. Supp. 1022, 1025, (N.D. Tx.). *See,* Section 341A.11 (2), Code of Iowa, 1977.

A related problem concerns the possibility that the officer may be held to an accounting of profits earned in the outside employment if it is later determined that he or she was acting "under color of office," 1962 O.A.G. 142, 143, that is, receiving compensation for services which he or she was required by law to perform in his or her official capacity. *See e.g., Baldwin v. Stewart,* 1929, 207 Iowa 1135, 222 N.W. 348 (district court clerk); *Burlingame v. Hardin County,* 1917, 180 Iowa 919, 164 N.W. 115 (district court clerk); 1972 O.A.G. 541 (county treasurer); 1964 O.A.G. 125 (sheriff); 1962 O.A.G. 142 (county recorder).

When public law enforcement officers act as private security guards, they might be considered to be supplying services normally provided by the county and thus be required to account for any compensation received from the private employer. The Iowa court in *State v. Hinshaw, supra,* at 1271, 637, examined the evidence to insure that "[n]o compulsion was used in any way by [the warden] in his official capacity," before approving the business conducted by the defendant.

Some writers have stated that the law enforcement officer's provision of his or her services as a private security guard is a misuse of public office because it promotes "unfair competition" with private citizens. National Advisory Committee on Criminal Justice Standards and Goals, *Private Security* 233 (1976).

"The public law enforcer utilizes his uniform, equipment and experience for those 'after hours' assignments....[T]he mere fact that the public law enforcer has 'public' assets to utilize makes him a more desirable public service in such a sense that he cannot, if wholly consistent with public duties, perform any other service or earn money from any other source. His first and paramount duty is to perform all of the requirements of his office; but he is not barred, because he holds public office, from investing his funds in a legitimate business enterprise, nor prohibited from receiving profits from an independent business in which he may have an interest."

Id. at 1272, 637.

Examples of other restrictions on private employment of public officials may be found in Chapter 68B, Code of Iowa, 1977 (Conflicts of Interest) and in 1970 O.A.G. 55 (incompatible activities).

It is, therefore, our opinion that off-duty employment of sheriff's deputies as security guards is not prohibited by Iowa law so long as the employment does not present a conflict of interest, is not incompatible with peace officer duties (*e.g.,* employed by an illegal business) and passes the *Hinshaw* test.

In 1974, this office concluded that, if a peace officer intended to engage only in patrol or guard duty and other noninvestigatory work as a security guard, he or she would need and could be issued a private detective license pursuant to Sections 80A.3 and 80A.4 of the Iowa Code. 1974 O.A.G. 630. We noted that these particular duties did not necessarily involve a conflict of interest with his or her public duties as a peace officer, distinguishing an earlier Attorney General's Opinion. *Id.* at 631, citing 1970 O.A.G. 55. It is important that the sheriff and his or her deputies be made aware of particular sources of conflict when a peace officer engages in outside employment:

A. *The deputy's "first and paramount duty" to the public.*

Many police departments have enacted regulations either completely prohibiting or at least restricting employment of police officers during their off-duty hours by private persons. Constitutional challenges have been raised claiming that such regulations deny police officers "privileges and immunities" available to other government employees, *Croft v. Lambert,* 1960, 228 Or. 76, 357 P.2d 513, 517, 88 A.L.R.2d 1227, or denial of the right to "acquire and protect property." *Hopwood v. City of Paducah,* 1968, 424 S.W.2d 134, 135 (Ky.).

These challenges have generally been unsuccessful because it is recognized that the public has a strong interest in their police officers being "competent, alert, and effective." *Croft v. Lambert, supra* at 518, 1233. A public employer may properly restrict the number of hours spent in outside employment because of "the special hazards to which policemen's duties expose them and the greater physical fitness which policemen need to adequately discharge their duties." *Geary v. Allegheny Co. Retirement Bd.,* 1967, 426 Pa. 254, 260, 231 A.2d 743, 746, 1971, 3 Pa. Comm. Ct. 349, 281 A.2d 920, 922 quoted in *Brenckle v. Township of Shaler.* A law enforcement officer who spends his or her off-duty hours working for a private employer may not get the rest he or she needs to effectively carry out duties to his or her primary employer, the public.

Dividing loyalties between the police department and a secondary occupation may affect a moonlighting officer's obligation to the department. A law enforcement officer's job is important and delicate and demands alertness at all times. Secondary employment can have an adverse effect on an officer's obligation to the department and to the public. Alertness may be jeopardized by lack of adequate physical and mental rest between shifts. Impaired judgment and reflexes brought on by months of 16-hour work days can jeopardize the lives of law enforcement investment for industry to employ, thus stepping on the toes of the private sector.

Id., quoting Private Security Advisory Council's Law Enforcement/Private Security Relationship Committee.

The deputies should be made aware of the potential for conflicts of interest in the employment you describe.

C. *The Public's Image of Law Enforcement Personnel.* There is a very great potential for public confusion when law enforcement officers wear their official uniforms while working for a private employer. The National Advisory Committee on Criminal Justice Standards and Goals report on Private Security, *supra,* discusses several such problems.

First, there may be confusion as to the possibility that public funds are being used for private purposes. *See* Article 3, Section 31, Constitution of Iowa. Section 332.10, Code of Iowa, 1977, states that a sheriff's uniform "shall at all times remain the property of the county." The cost of these uniforms, under Section 337A.3, is to be assessed against the county. Section 337A.2 authorizes the county board of supervisors to provide the sheriff and his deputies with uniforms and badges to be worn "when on duty." Section 337A.2. A deputy may not use public property except as authorized by law. *See Carter v. Jernigan,* 1975, 227 N.W.2d 131, 134 (Iowa).

It may be argued that the deputies, by wearing their uniforms while in the

employ of the private business, are furthering the public purpose the sheriff's uniform is intended to serve. "A distinctive uniform not only identifies a police officer to those who need his services, but also provides a high level of police visibility that offers some degree of deterrence to crime." National Advisory Commission on Criminal Justice Standards and Goals, *Police* 516.

However, the use of the sheriff's uniforms by the off-duty deputies might have unfortunate consequences, as well. Members of the general public may "mistakenly believe them to be police officers capable of performing regular police functions," *Id.*, at 518, whereas, in fact, "their powers and prerogatives are generally the same as those of ordinary citizens," *Id.* at 517. Off-duty officers serving private employers have only private citizens' arrest power. *State v. Weston,* 1896, 98 Iowa 125, 131, 67 N.W. 84. *See generally,* Section 755.5, Code of Iowa, 1977.

Further, the sight of officers wearing their publicly provided uniforms while working in some types of business may have a "detrimental effect on the image of the police force." *Cox v. McNamara,* 1972, 8 Or. App. 242, 443 P.2d 54, 56, *cert. denied,* 1972, 409 U.S. 882.

[A] law enforcement officer has an obligation to help upgrade the department's image. Secondary employment in certain areas — for example, a business associated with alcohol — could have a degrading effect on the law enforcement department's image.

National Advisory Committee on Criminal Justice Standards and Goals, *Private Security* 232 (1976).

As a "guardian of the public safety, he must, at all times — on duty as well as off duty — conduct himself in public in such a manner so as not to destroy the public confidence in his integrity." *Short v. Looney,* 29 N.Y.2d 578, 579, 324 N.Y.S.2d 309, 310 (1971) (Jasen, J., dissenting).

The Minneapolis, Minn., city council, at a public hearing, heard complaints that city policemen, employed by local liquor establishments, were enforcing discriminatory practices of their private employers. Minneapolis Tribune, June 1, 1977, at 1B, Col. 3. A spokesperson of the Urban League remarked:

"If the only law-enforcement mechanism we have is employed by the bar, then who do we turn to to enforce the law?

"Policemen cannot be objective in enforcing the law in bars if they are employed by the owners of the bars, she said."

Id. at Col. 4.

Courts have upheld disciplinary actions against law enforcement personnel who, during their off-duty hours, have been found to have engaged in conduct which reflected adversely on the image of the law enforcement agency. *Short v. Looney,* 1971, 29 N.Y.2d 309; *Campbell v. City of Hot Springs,* 1961, 341 S.W.2d 225 (Ark.). See also Section 341A.11(2), Code of Iowa, 1977; *Millsap v. Cedar Rapids Civil Service Com.,* 1977, 249 N.W.2d 679 (Iowa). Although a deputy's association with a business might not appear to be harmful to the image of the sheriff's department, it is possible that in the assignment of duties by the business, the deputy may be given orders to do some acts which would not be in keeping with his or her image as a law enforcement officer.

It is therefore our opinion that the deputies should not wear the sheriff's

uniforms if they accept employment by a business.

D. *Potential Liability of the Sheriff's Department.* In upholding a state statute prohibiting off-duty employment of sheriff's deputies, Or. Rev. Stat., Section 204.685(5), the Oregon court cited the sheriff's potential liability "for errors and omissions by certain of his employees" as a rational reason for the prohibition. *Croft v. Lambert*, 1960, 228 Or. 76, 357 P.2d 513, 515, 88 A.L.R.2d 1227, 1231 (Or). *See generally,* Section 341.1, Code of Iowa, 1977. When a peace officer takes action which may be considered 'official,' while performing duties assigned by his or her private employer, the public employer may be asked to accept the responsibility for such conduct.

Unless questions concerning liability for false arrest, injury, or death are resolved before a law enforcement officer accepts a private security position, the taxpayer may end up underwriting the cost of a damage award against a law enforcement agency stemming from an incident occurring in the course of the law enforcement officer's secondary employment.

National Advisory Committee on Criminal Justice Standards and Goals, *Private Security* 233 (1976).

The Iowa Supreme Court has been faced with such a problem. In *Hobbs v. Illinois Central R.R. Co.,* 1917, 182 Iowa 316, 165 N.W. 912, passengers on a railroad sued the railroad company and two of its watchmen for false arrest and malicious prosecution. The railroad argued that, although the watchmen, who were given peace officer authority by a city, were on duty as railroad employees, they were acting as peace officers, not railroad employees, and therefore the city, not the railroad, should be held responsible for their acts. *Id.* at 330, 916.

The Hobbs Court described the issue as a question of fact. Thus, if a peace officer were to act in his or her peace officer capacity while employed by another, the officer could be said to be acting on behalf of the law enforcement agency and that agency might be held responsible for the consequences.

Your second question concerning the capacity of public agencies to reach agreements under Chapter 28E, Code of Iowa, 1977, with the county sheriff's office to procure the presence of law enforcement officers at certain activities sponsored by the public agencies will be answered in a separate opinion.

December 27, 1977

CRIMINAL LAW: BRIBERY: GIFTS & GRATUITIES: PUBLIC OFFICIALS. §§68B.5, 739.1, 739.2 and 741.1, Code of Iowa, 1977. §§721.2(3), 722.1 and 722.2, Supplement to the Code of Iowa, 1977. On or after January 1, 1978, any person who offers, promises or gives anything of value or any benefit to any legislator or other public official with intent to influence the act, vote, opinion, decision or exercise of discretion of such legislator or public official with respect to his services as such, whether in a particular act or generally, is guilty of bribery, a Class D felony. Soliciting or knowingly receiving any promise or anything of value or any benefit given with intent to so influence is a Class C felony. "Person," as an offeror, is broadly enough defined by §4.1(13) to include another state officer or legislator, or even a governmental subdivision or agency, as well as a lobbyist or association. There is no express exception in the statute for a pass to a theatre, entry to a private club, a ticket to a ball game, a free lunch or even a cup of coffee or a ride downtown from the Statehouse, although the courts and prosecutors might react to some of these as *de minimus non curat lex* (the law does not

concern itself with trifles). A public official, elected or appointed (or even "selected" to an office not yet taken), should act with prudence and exercise caution to see that he is always paying his own way and not accepting "anything of value or any benefit" no matter how slight or insignificant, if it is given with intent to influence his act or actions. (Turner to Daggett, State Representative, 12-27-77) #77-12-13

The Honorable Horace Daggett, State Representative: You have requested an opinion of the attorney general as to how the bribery sections of the new criminal code revision, which takes effect on January 1, 1978, will affect you and other legislators. Specifically you say:

"Because I am a state representative, I have been invited to some dinners and cocktail parties customarily held at the commencement of each session of the general assembly by various persons and associations. For example, I am invited to a steak dinner by the board of directors of a college, to a dinner of a municipal chamber of commerce at a steak house, to a dinner with a high school superintendent, to a dinner by rural water associations and to a cocktail party of an association, all of which are to be held in the first two weeks of January, 1978.

"In the past, such individuals and associations have ordinarily used such occasions to express their positions regarding various services, appropriations, revenue measures, proposed legislation or other issues expected to confront the General Assembly.

"It appears to me that under the provisions of the new criminal code, Ch. 1245, §§2201 and 2202, Division XXII, Acts of the 66th G.A., 1976 session, page 572, that the offer of these dinners, if they are with intent to influence my 'act, vote, opinion, judgment, decision or exercise of my discretion,' would constitute bribery, a class D felony, and that if I 'knowlingly receive' any of these things of value, as a state representative, knowing that they were intended to influence my 'act, vote, opinion, judgment, decision or exercise of discretion' I might be guilty of accepting a bribe, a class C felony. I would appreciate your official opinion.

"While you're at it, I would also like to know whether a legislator who accepts a pass to a theater, entry to a private club which charges dues to its members, a ticket to a ball game, a free lunch or even a cup of coffee or a ride downtown from the Statehouse, from a lobbyist, or even from another state official or legislator, and who in the process attempts to so influence him, would be in violation of these sections."

The foregoing sections which you have cited have now been numbered by the code editor as §§722.1 and 722.2 of the Supplement of the Code of Iowa, 1977. In pertinent part they provide as follows:

"722.1 *Bribery.* A person who offers, promises or gives anything of value *or any benefit* to any person who is serving or has been elected...appointed ...to serve in a public capacity...with intent to influence the act, vote, opinion, judgment, decision or exercise of discretion of such capacity commits a class D felony. In addition, any person convicted under this section shall be disqualified from holding public office under the laws of this state." (Emphasis added.)

"722.2 *Accepting Bribe.* Any person who is serving or has been elected... appointed...to serve in a public capacity...who shall solicit or knowingly receive any promise or anything of value *or any benefit* given with the intent to influence the act, vote, opinion, judgment, decision or exercise of discretion of such person commits a class C felony. In addition, any person convicted under this section shall be disqualified from holding public office under the laws of this state." (Emphasis added.)

§4.1(13), Code of Iowa, 1977, defines person as follows:

"Unless otherwise provided by law 'person' means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity."

Thus it would seem from the clear words of this new law that any of those individuals or associations you have mentioned who, on or after January 1, 1978, offer or give any of the things you have specified, all of which are either of value or benefit, would be guilty of bribery *if* the offer or gift was made with the intent to influence a legislator's act, vote, opinion, judgment, decision or exercise of discretion with respect to his services as a legislator (whether in a particular act or generally)[1] And it appears that a legislator would be guilty of accepting a bribe if he solicited or knowingly accepted or received any such promise or thing of value, knowing that it was given with such intent.

Obviously, intent to influence an official in his acts generally is much easier to prove than intent to influence a particular act. Cf. *State v. Prybil, supra,* interpreting §741.1, the present "Gratuities and Tips" statute, which is a commercial bribery statute as well as one which covers public officials. (§741.1 has been replaced by these new sections, including §721.2(3), Supplement 1977.)

In short, it appears less difficult to prosecute and obtain a conviction for bribery or accepting a bribe under these new sections than under those they replace. Moreover, the Watergate syndrome is expected to make prosecutions in these areas more likely. *67 A.L.R.3d 1234, 1236.*

Section 68B.5, Code of Iowa, 1977, 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."

We have interpreted the language at the end of this section, "...gifts which are unrelated to legislative activities or to state employment" to mean that gifts, even if in excess of $25.00 are not prohibited unless they are likely and intended to have the effect of influencing legislative action or state employment. 1968 O.A.G. 752. As so construed §68B.5 is, in terms of the conduct proscribed and insofar as state officers and employees are concerned, similar

[1]These new sections are couched in terms which clearly refer to influencing an official "with respect to his or her services" generally, rather than with respect to any particular act of the official. *See State v. Prybil,* 211 N.W.2d 308, 67 A.L.R.3d 1222 (Iowa 1973). In contrast, the present bribery sections, 739.1 and 739.2, Code of Iowa, 1977, which will be repealed on January 1, 1978, require proof of intent to influence an official's *particular* "act, vote, opinion, or judgment in any matter, question, cause or proceeding which may be pending, or which may legally come or be brought before him in his official capacity" (§739.1) or "under the agreement or with the understanding that his vote, opinion, decision, or judgment shall be given in any particular manner or upon any particular side of any question, cause, or other proceeding which is or may by law be brought before him in his official capacity" (§739.2).

in many respects to provisions found in Chapters 739 and 741 of the present Code as well as §§721.2(3), 722.1 and 722.2 of the new Criminal Code to take effect January 1, 1978. However, while the present Chapters 739 and 741 will be repealed as of January 1, 1978, to be replaced by corresponding provisions of the new Criminal Code, §68B.5 is not repealed. Thus, it would appear that as of January 1, 1978, essentially the same conduct will be prohibited by §68B.5, 721.2(3) and 722.1. Under the rules of construction laid down in §4.7:

"Conflicts between general and special statutes. 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."

Section 68B.5 appears to be a special statute since it applies only to state officers and employees and §721.2(3) and 722.1 would appear to be general provisions in that they apply to public officials at all levels of government. Under these circumstances, one might conclude that §68B.5 would prevail over the provisions of the new Criminal Code. However, in view of *State v. Books,* 225 N.W.2d 322 (Iowa 1975), we do not believe the Iowa Supreme Court would reach that result. That case involved the giving of gifts and gratuities to a county employee in connection with the sale of chemicals and supplies to the county. The charge was a violation of §741.1, which provides:

"It shall be unlawful for any agent, representative, or employee, officer or any agent of a private corporation, or a public officer, acting in behalf of a principal in any business transaction, to receive, for his own use, directly or indirectly, any gift, commission, discount, bonus, or gratuity connected with, relating to, or growing out of such business transaction; and it shall be likewise unlawful for any person, whether acting in his own behalf or in behalf of any copartnership, association, or corporation, to offer, promise, or give directly or indirectly any such gift, commission, discount, bonus, or gratuity.

"The provisions of this section shall not be construed to apply to officials or employees of the state of Iowa nor to legislators or legislative employees."

In its opinion, the court noted that Chapter 68B and Chapter 739 of the present Code also bear on the conduct of public officials and employees. In *State v. Books,* the defendant claimed that §741.1 denied him equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States because it excepted from its provisions officials and employees of the state while including all other public officials and employees. The Iowa Supreme Court agreed, rejecting the State's contention that any constitution infirmity in §741.1 was cured by the existence of §68B.5 which by its terms applied only to state employees. In its opinion, the Court observed:

"We recognize the effect of this opinion is to make state employees subject to both 741.1 and section 68B.5, a matter concerning which the legislature might desire to take corrective action."

In view of *State v. Books,* we do not believe we can conclude that the general special rule would operate to preempt the new provisions of the Criminal Code as to state officials, not withstanding the fact that to a significant extent they are duplicated by §68B.5.

With reference to the value of the thing offered or given, 12 Am.Jur.2d 752, *Bribery,* §7 provides:

"§7. *Value of Bribe.* It seems that a bribe must involve something of value

that is used to influence action or nonaction. Value, though, is determined by the application of a subjective, rather than an objective, test, and the requirement of value is satisfied if the thing has sufficient value in the mind of the person concerned so that his actions are influenced. A bribe need not be anything of a pecuniary or intrinsic value. It is sufficient if the receiver gets anything of value to himself. Thus, a bribe need not consist of money. It may be a check or a promissory note. Solicitation of sexual favors may constitute solicitation of a bribe. Further, the consideration for a bribe may be something from which the offeror hopes to gain a political advantage. Again, giving or offering price advantages to officials to induce them to take action desired by the giver or offeror may be a bribe."

It should be noted here that in *State v. Prybil, supra,* the Iowa Supreme Court carved out an exemption for the "ordinary business luncheon" saying:

"There is however one question of law raised in this assignment of error which can be decided. That is whether §741.1 is violated by a contractor's payment of the expense of an ordinary business luncheon with a public officer at which a past or future transaction is discussed.

"We do not believe such payment is a prohibited gift of gratuity. The statute is directed toward conduct by its nature calculated to undermine an employer's relationship of trust with his employee. To be corrupt the influence must involve the transfer of something of value for the employee's own private use. At an ordinary business luncheon the employee is on his employer's business and not in any substantial sense receiving an inducement to breach his trust. He would frequently prefer to be somewhere else. The motivating factor for the occasion is the employer's business and not the private interest of the employee.

"Apart from our interpretation of legislative intent in §741.1, there is additional authority for recognizing this distinction. This kind of occasion was an early exception to common law bribery. 3 Coke, Institutes, 145 (1648). It is also an exception to the analogous federal statute, 18 U.S.C. §201 (18 USCS §201), recognized in Executive Order 11222, establishing "Standards of Ethical Conduct for Governmental Officers and Employees," Part II, b(2). 18 U.S.C.A. §274 (18 USCS §274). Federal employees are expressly permitted to accept 'food and refreshments available in the ordinary course of a luncheon or dinner or other meeting or on inspection tours where an employee may properly be in attendance.' We believe the same conduct is permitted under §741.1.

"But free dinner and drinks at a supper club in celebration of a large purchase by the county, if proven, would not be in the same category. Similarly, a gift of books or payment of convention hotel expense would ordinarily be no different under the statute than an outright payment in cash to the public officer for his own use and, if related to a business transaction, would constitute prohibited corrupt influence."

In *State v. Kessler,* 213 N.W.2d 671 (Iowa 1973), the Supreme Court dismissed the State's appeal of a directed verdict for the defendant county supervisor, prosecuted for receiving gifts and gratuities in violation of §741.1, although noting that based on *Prybil* the State met its burden by showing a series of transactions and a connection between the gift or gratuity and the series or any transaction in the series.

In *State v. Bartz,* 224 N.W.2d 632 (Iowa 1974), the Supreme Court reviewed the entire record, reversed the trial court, and removed from office two county supervisors who had loosely managed county funds, accepted gratuities from contractors with whom they were required to deal in their official

capacities, and who had claimed payment for mileage not travelled. In this case the supervisors were guests on an expense-paid fishing trip to a resort in Minnesota. They and their wives were also guests on an expense-paid trip to a baseball game in Minneapolis. A contractor testified that these trips were in consideration for small favors previously extended by defendants, although the supervisors denied they had extended favors to anyone. The Court found the trips violative of §741.1, saying:

"In a prosecution brought under the provisions of §741.1, the Code, we held the acceptance of hospitality by county supervisors from private persons, when related to a business transaction, constitutes prohibited corrupt influence. *State v. Prybil,* 211 N.W.2d 308 (Iowa 1973). Our holding in *Prybil,* while in relation to a criminal prosecution rather than a civil action for removal of a public officer, is nonetheless pertinent to the matter before us.

"The fact that §741.1 is a penal statute and therefore must be narrowly construed and interpreted, and §66.1(3) is a civil statute and may be more broadly interpreted is no reason for not relating them to each other in pari materia. See *Goldman v. State,* Tex.Civ.App., 277 S.W.2d 217, 222. See also Sutherland Statutory Construction, 4th Ed., Vol. 2A, §51.03, page 298, and Vol. 3, §59.08-59.09, page 26, et seq. We feel §741.1 should be considered in pari materia with Chapter 66, The Code, and particularly §66.1(3) thereof.

"In Prybil, quoting from *United States v. Irwin,* 354 F.2d 192, 196 (2d Cir. 1965), cert. den. 383 U.S. 967, 86 S.Ct. 1272, 16 L.Ed.2d 308 [where the 2nd Circuit Court of Appeals construed 18 U.S.C. §201(f) and (g), a statute similar to §741.1, The Code], we said:

" 'The statute does not require proof the transaction is corrupt, only that the transaction is the reason for the payment. If it is, the payment is corrupt but not necessarily the transaction. It is not necessary for the Government to show that the gift caused or prompted or in any way affected the happening of the official act or had anything to do with its nature or manner or means by which it was performed.' Prybil, supra, 211 N.W.2d at p. 312.

"Reading §§741.1 and 66.13 in pari materia, and applying the standard of proof enunciated in Prybil with regard to prosecutions under the former to removal actions under the latter, we must conclude defendants' misconduct here in accepting favors from private contractors constitutes strong evidence of corruption under Ch. 66 just as it would violate §741.1."

It is virtually impossible to guess whether our Supreme Court would extend the "ordinary business luncheon" exemption which in *Prybil* it discovered in §741.1, based largely upon a Presidential executive order pertaining to an analogous federal statute, to situations involving these new sections of the Iowa Criminal Code. We do note that §§722.1 and 722.2 add the words "or any benefit" to "anything of value" and presume these words must have been intended to have some additional prohibitive significance. We will not engage in speculation as to their precise purpose or effect. The legislature, not the courts or the attorney general, should make the law and supply whatever clarification is necessary.

We do predict the Court will continue to consider all statutes pertaining to official corruption *in pari materia* and will construe them together in determining legislative intent. But in absence of statutory amendment, legislators should heed the warnings in the annotation entitled "*Furnishing Public Official With Meals, Lodging, or Travel, or Receipt of Such Benefits, as Bribery*" in *67 A.L.R.3d 1231,* which says *inter alia:*

"The public official who has long been accustomed to accepting 'small' favors from those who were affected by the official's decisions would be well advised to reject those favors in the future. Bribery statutes, which have been unused since their enactment at the turn of the century, are being dusted off and applied to surprised officials. It would seem that public officials would be best advised to avoid even the appearance of undue influence by keeping at arm's length all who are affected by their decisions."

It is clear from *Prybil* and *Bartz* that, with the exception of the ordinary business luncheon, §741.1 did not require the State to prove that the gratuity caused or in any way affected the happening of an official act, or had anything to do with its nature or the manner or means by which it was performed, in order to convict a public officer thereunder. With these new sections (722.1 and 722.2) any gratuity, even the business lunch or a cup of coffee is suspect.

It will be interesting to see how individual prosecutors, with their widely differing philosophies, will decide which cases to prosecute and how they will draw the line, if any, between an ordinary and an extra-ordinary business lunch — or distinguish any lunch from a small, free dinner or a drink at a tavern, cocktail lounge or country club. Most will doubtless take shelter in that vast, seemingly endless, refuge called "prosecutorial discretion" and prosecute what they, in their wisdom and with their fears and prejudices, consider to be the more flagrant cases.[2] Certainly, few of our present county attorneys would bother to prosecute for gifts of free coffee or automobile rides, whether they consider them a violation of the law or not. *De minimus non curat lex* (the law does not concern itself with trifles).

In any case, it is no less difficult to predict the action of prosecutors in this area than it is the legislative forays of the court seemingly required by unclear laws or occasioned by what Justice Holmes called "the felt necessities of the times,"—and should have added "as influenced by the newspapers." Meanwhile, and until the statutes are clarified, members of the present General Assembly, most of whom participated in enactment of this new law, will have to be content with the guidance of their individual consciences in this shadowy area.

Most officials would quite truthfully and honestly insist that their actions could not be influenced by such a small gift as an association dinner for legislators, although at the same time admitting that otherwise they might not listen to the association's views. There is nothing legally or even morally wrong in an official's being influenced only by listening. But an official's receiving a thing of value, even for merely listening to one trying to influence his action, has always been suspect if not universally regarded as accepting a bribe, particularly when, whether influenced or not, the official acts or votes as though he had been influenced. "Meat and drink" were expressly excepted at common law, according to Sir Edward Coke, 3 Coke, Institutes 145 (1648); 67 A.L.R.3rd 1231, 1235. Cocktails and dinners are not expressly excepted in either the present or these new sections. But under the present sections (before 722.1 and 722.2), to constitute bribery they would have had to be connected to a particular transaction.

[2]Perhaps it is worth nothing that prosecutors are sometimes actually threatened with salary and budget cuts, reduction of powers, smaller offices and other legislative reprisals by those who hold the purse strings.

It is my understanding that because of §§722.1 and 722.2 some associations, on advice of their attorneys, have already cancelled regular dinners given in past years. For example, the Iowa Association of Electric Cooperatives has cancelled its annual "Get Acquainted Dinner" for the Governor, state officials and members of the state legislature on the opening day of the legislative session.

For these reasons, any public official, elected or appointed (or even "selected" for an office he has not yet taken), should act with prudence and exercise caution to see that he is always paying his own way and not accepting "anything of value or any benefit" no matter how slight or insignificant, *if* it is given with intent to influence his act or actions. *See* also §721.2(3), Supplement to the Code of Iowa, 1977.[3]

* * *

"3. Requests, demands, or receives from another for performing any service or duty which is required of him or her by law, or which is performed as an incident of his or her office or employment, any compensation other than the fee, if any, which he or she is authorized by law to receive for such performance."

December 29, 1977

ENVIRONMENTAL PROTECTION: National Pollution Discharge Elimination System Permit Delegation—Chapter 455B, Division III; 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 after Chapter 28E agreement as to such administration. (Davis to Crane, Executive Director, Department of Environmental Quality, 12-29-77) #77-12-14

Mr. Larry E. Crane, Director, Iowa Department of Environmental Quality: In accordance with your request that our opinion of September 27, 1976, be updated on the basis of the current state statutes and regulations, as requested by the United States Environmental Protection Agency Regional Counsel, we have reviewed the laws of Iowa and the rules promulgated thereunder and hereby issue the following:

ATTORNEY GENERAL'S STATEMENT

I hereby certify, pursuant to §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 "Program Description" submitted by the Iowa Department of Environmental Quality (hereafter I.D.E.Q.).

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.*

[3]§721.2 provides in pertinent part: "Any public officer or employee, or any person acting under color of such office or employment, who knowingly does any of the following, commits a serious misdemeanor:

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 Polution Control Act, as amended, 33 U.S.C. 1251 *et seq.* (Hereinafter "the FWPCA" or "the Act"). [*Federal Authorities* FWPCA §§301(a), 402(a)(1), 402(b)(1)(A); 40 C.F.R. §124.10.]

State Statutory or Regulatory Authority:

Sections 455B.45; 455B.32(2); 455B.32(3); 455B.33(4); 455B.48, Code of Iowa, 1977, and Chapters 17, 19 and 20 of Title 400 of the Iowa Administrative Code.

Remarks of the Attorney General:

The laws of the State of Iowa require in Section 455B.48 that no pollutant may be discharged into any water of the State without a permit from the I.D.E.Q. The authority for the issuance of such permits to any discharger, new or old, is contained in Section 455B.45.

It must be noted that the 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 the laws nor regulations of the State of Iowa incorporate the scheme set out in Section 301(b) of the Federal Water Pollution Control Act.

Section 455B.32(3) specifically authorizes the adoption of pretreatment or effluent standards promulgated pursuant to Sections 301, 306 or 307 of the Federal Water Pollution Control Act, which adoption has been effectuated in Chapter 17 of Title 400 of the Iowa Administrative Code.

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:

Sections 455B.45, 455B.30(7), 455B.30(5), 455B.32(3), Code of Iowa, 1977, and Rule 17.9 of Title 400 of the Iowa Administrative Code and Section 455A.25, Code, 1977, administered by the Iowa Natural Resource Council.

The same statutory permit requirements administered by the I.D.E.Q. are effective for the subsurface disposal of pollutants as for surface disposal since the specific inclusion of injection wells within the "sewer system" definition of §455B.30(5) in 1976. Injection wells have been regulated in Iowa since 1957 under Section 455A.25 administered by the Iowa Natural Resources Council.

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

Sections 455B.32(2), (3); 455B.33(4); 455B.35; 455B.36(1); and Chapters 17 and 19 of Title 400 of the Iowa Administrative Code.

Remarks of the Attorney General:

The State of Iowa acting through her general assembly and the Iowa Water Quality Commission has apparently surrendered her sovereignty to the Federal Environmental Protection Agency, as required above, over future determination of the needs of the State in the water quality area as the 1977 amendments to the water quality portion of Chapter 455A and the rules adopted in Chapters 17 and 19 of Title 400 of the Iowa Administrative Code particularly Rule 17.2, amply demonstrate.

Iowa has not, however, established ocean discharge criteria since the last area ocean receded from the State about two million years ago and the necessity for such criteria is therefore nonexistant. Additionally there would appear to be ample time available for the promulgation of rules enforcing such criteria if any ocean attempted to reinvade its ancestral sea bottom.

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:

Sections 455B.33(4); 455B.32(1), (2), (3), (6), Code of Iowa, 1977, and Chapters 17, 19, and 20 of Title 400 of the Iowa Administrative Code.

Remarks of the Attorney General:

Since the 1976 amendments, the law of Iowa has provided, in §455B.33, that "a permit shall not be issued to operate or discharge from any disposal system unless the conditions of the permit assure that any discharge from the disposal system meets or will meet all applicable....Federal...effluent standards and the issuance of the permit is not otherwise prohibited by the Federal Water Pollution Control Act Amendments of 1972."

This standard has been applied to the above considerations in Rules 17.6 through 17.8 and 19.6 which contain the required criteria.

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:

Sections 455B.33(4), 455B.32(3) and subrule 19.6(4) of Title 400 of the Iowa Administrative Code.

Remarks of the Attorney General:

The Executive Director of I.D.E.Q. has specific authority to schedule compliance in issued permits under Section 455B.33(4).

3. *Authority to Deny Permits in Certain Cases.*

State law 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(b)(6), 402(d)(2), and 208(e); 40 C.F.R. §§124.41 and 124.46.]

State Statutory and Regulatory Authority:

Section 455B.33(4), Code of Iowa, 1977; Subrules 17.1(2) to 17.1(5) and

Subrule 19.6(1) of Title 400 of the Iowa Administrative Code.

Remarks of the Attorney General:

Section 455B.3(4) of the 1977 Code of Iowa purports to allow a permit to "discharge from any disposal system to be issued only if the issuance of the permit is not...prohibited by the Federal Water Pollution Control Act Amendments of 1972." This general language does not do or mean exactly what it would appear to do or mean upon first reading. It incorporates the FWPCA amendments of 1972 as they existed on July 1, 1976, the date of enactment of the Iowa law. Incorporation of laws of the United States, such as this, are only retrospective not prospective, that is a state may adopt existing federal legislation by reference but it may not delegate its powers to the federal government. *People v. Downes,* 212 N.W.2d 314, 49 Mich. App. 532 *reversed* on other grounds 228 N.W.2d 212, 394 Mich. 17; *Anderson v. Tiemann,* 155 N.W. 2d 322, 182 Neb. 393, *appeal dismissed* 88 S.Ct. 1418, 390 U.S. 714, 20 L.Ed.2d 254.

Further Rules 17.1(1), 17.1(13), 17.1(4) and 17.1(6) are unconstitutional as an unauthorized attempt by I.D.E.Q. to delegate to instrumentalities of the federal government the authority delegated to I.D.E.Q. as a state agency by the legislature. A state cannot vest in the federal government regulatory power which the Constitution vests in the state. U.S. Constitution, Amendment 10; *Duke Power Co. v. Greenwood County,* 19 F. Supp. 932, *affirmed* 91 F.2d 665, *affirmed* 58 S.Ct. 306, 320 U.S. 485, 82 L.Ed. 381.

The paragraphs above do not mean that there is no way to insure that no joint N.P.D.E.S. permit will be issued in the above delineated circumstances.

As stated in my first opinion on this matter (1976 O.A.G. 791 at 795), the appropriate approach is through an agreement between E.P.A. and I.D.E.Q. under Chapter 28E (specifically §28E.9) of the 1977 Code of Iowa. Such a contract or agreement is generally recognized as both constitutional and beneficial. 81A C.J.S. States §28. The Iowa General Assembly has given specific approval thereto. Section 455B.36, Code of Iowa, 1977, and the rules found unconstitutional above may properly be adopted after consummation of such an agreement, assuming incorporation of such conditions therein.

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:

Sections 455B.32(3); 455B.33(4); 455B.45, Code of Iowa, 1977, and Subrule 19.3(7) of Title 400 of the Iowa Administrative Code.

Remarks of the Attorney General:

No statutory limitations presently exist 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 specific 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 (in accordance with such methods, at such locations, at such intervals, and in such manner as may be described); 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 time 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 publicly 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), 402(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:

Sections 455B.3(8); 455B.32(3); 455B.32(9); 455B.33(1); 455B.33(2); 455B.33(4); 455B.45 and Chapter 18, subrule 19.6(5)(c) and Rule 19.8 of Title 400 of the Iowa Administrative Code.

Remarks of the Attorney General:

With the caveat that Rule 18.13 is unconstitutional under the legal rationale set out in the paragraph three remarks and that I have not in paragraphs one and two and will not hereafter mention such unconstitutionality, the broad rule-making authority and specific authorization for inspection in the Iowa statutes grant specific authorization for these requirements, which have been promulgated in the cited rules.

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 conditions 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:

Sections 455B.33(3); 455B.33(9); 455B.33(4); 455B.45, Code of Iowa, 1977, and Rule 18.10, and subrule 19.6(5)(d) of Title 400 of the Iowa Administrative Code.

Remarks of the Attorney General:

The Iowa General Assembly has delegated specific authority to I.D.E.Q. to promulgate the rules necessary to meet these requirements and the agency has responded with rules mandating the requirements herein.

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:

Sections 455B.3(8); 455B.32(2); 455B.32(9); 455B.33(1); 455B.33(2); 455B.33 (3); 455B.33(4); Code of Iowa, 1977, and Rules 17.4, 17.5, Subrule 18.10(2) and subsubrule 19.6(5)(e) of Title 400 of the Iowa Administrative Code.

Remarks of the Attorney General:

No statutory or constitutional authority exists for the State of Iowa to insure that industries pay the user charges and construction cost recovery mandated by Section 204B of the Federal Act. These requirements are, of course, mandated in the contracts by which the publicly owned treatment works received 75% of their construction costs from the Federal Government and could be required to repay that amount if they don't comply. As to b. and c. above, specific statutory authority and rules promulgated thereunder mandate compliance.

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).

State Statutory and Regulatory Authority:

Sections 455B.32(5); 455B.32(6); 455B.33(4), Code of Iowa, 1977, and Rule 19.5 of Title 400 of the Iowa Administrative Code.

Remarks of the Attorney General:

Statutory authority and rules thereunder cited along exists for public hearing with adequate notice thereof, which meets federal requirements.

Subparagraphs (a) and (b) of this paragraph should be covered in the agreement between the Iowa Department of Environmental Quality and the United States Environmental Protection Agency as per Paragraph 3 hereof.

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 requirements or as a result of 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; Sections 455B.7(1); 455B.33(4); 455B.40, Code of Iowa, 1977, and Rules 51.1; Chapter 52; Subrule 19.5(5) of Title 400 of the Iowa Administrative Code.

Remarks of the Attorney General:

Federal requirements are fully covered by the statutes and rules 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 in 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:

Sections 455B.32(3); 455B.33(3); 455B.33(4); 455B.34, Code of Iowa, 1977, and Subrule 19.3(11); subsubrule 19.6(5)(b) of Title 400 of the Iowa Administrative Code.

Remarks of the Attorney General:

The requirements are fully covered by the statutes and rules cited above.

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)(C), 402(h), 504; 40 C.F.R. §124.73.]

State Statutory and Regulatory Authority:

Sections 455B.34; 455B.44 and 455B.49, Code of Iowa, 1977, and Rules 17.4, 17.5, 17.6, and 17.8 of Chapter 400 of the Iowa Administrative Code.

Remarks of the Attorney General:

The requirements of this section are fully covered in the cited statutes and rules. Section 455B.43 sets up a method of administrative abatement of violations of the Iowa water quality law, including summary administrative abatement if determined to be necessary by the executive director. The cited rules deal with both treatment and pre-treatment standards.

Iowa law includes a civil penalty of $5,000 per day for violation of the Iowa water quality law or any permit, rule, standard or order issued thereunder or in the alternative a criminal penalty of $10,000 per day for each day of violation for discharge of pollutants in violation of law or a permit limitation 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 device 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 for violations of law or any permit or rules issued under the Iowa water quality law. 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:

The Iowa Water Quality Commission adopted a resolution on September 28, 1977, which states:

"If a member of the Water Quality Commission receives, or during the previous 2 years received, a significant portion of the member's income directly from NPDES permit holders or applicants for an NPDES permit, the member shall not take any part in the consideration or decision of the appeal of the grant, denial, modification, suspension or revocation of an NPDES permit or any condition thereof.

"For the purposes of this resolution:

" 'Significant portion of the member's income' means 10 percent of gross personal income for a calendar year, except that it shall mean 50 percent of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving such portion pursuant to retirement, pension or similar arrangement.

" 'Income' includes retirement benefits, consultant fees and stock dividends.

"Income is not received 'directly or indirectly from NPDES permit holders or applicants for an NPDES permit' where it is derived from mutual-fund payments or from other diversified investments of which the recipient does not know the identity of the primary sources of income.

" 'NPDES permit holders or applicants for an NPDES permit' does not include any agency of state government."

Such resolutions were not adopted as a rule under the Iowa Administrative Procedure Act, but as an internal resolution of the Commission. It is directory as to commission action but carries no sanctions for violation and may be altered at any meeting. It does not meet the federal requirements. However, if adopted as a requirement in the 28E Agreement necessary before implementation of the delegation of NPDES authority to the Iowa Department of Environmental Quality, it would have the force and effect of law.

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.

December 29, 1977

TOWNSHIPS: Fire Protection—§§359.42 and 359.43, Code of Iowa, 1977. A township may levy a tax for fire protection, when there are no current expenses, in anticipation of future needs. (Blumberg to Anderson, Howard County Attorney, 12-29-77) #77-12-15

Mark B. Anderson, Howard County Attorney: We have your opinion request of December 8, 1977. You ask whether a township can levy a tax for fire protection, when there are no current expenses, for the purpose of anticipating the purchase of equipment to supplement or replace the existing equipment.

Section 359.42, 1977 Code of Iowa, mandates that townships are responsible for fire protection. Section 359.43 authorizes townships to levy a tax for providing fire protection. There is nothing in that section which limits the tax to current expenses. We see nothing wrong in a township anticipating future needs. Accordingly, we are of the opinion that a township may continue to levy a tax for fire protection when there are no current expenses, for the anticipation of future needs to supplement or replace existing equipment.

December 29, 1977

COUNTIES: Recorder. §409.1, Code of Iowa, 1977; Chapter 117, Acts, 67th G.A., 1977 Session. County recorder cannot refuse to record a properly described and acknowledged conveyance on ground that the original proprietor has failed to file a subdivision plat. (Nolan to Erhardt, Wapello County Attorney, 12-29-77) #77-12-16

Mr. Samuel O. Erhardt, Wapello County Attorney: You have requested an opinion interpreting §409.1, Code of Iowa, 1977, as amended by Chapter 117, Acts of the 67th General Assembly, 1977 Session. In your letter you state:

"Chapter 409.1 of the Code of Iowa requires that a proprietor of a parcel of land who divides the land into three or more parts shall cause a plat to be filed with the County Recorder prior to the conveyance of title to said parcels of land.

"The Recorder was of the opinion that she could refuse to record a Deed until platting requirements as outlined in Chapter 409 were fulfilled.

"Now the question has arisen as to whether the Chapter gives the Recorder the authority to refuse to record a Deed when deemed appropriate.

"The problem arises when a person to plat, starts the platting procedure, executes a Deed and the buyer records it prior to the filing of the plat, then the original owner who started to plat the land and hasn't completed it is no longer the owner of said property.

"If the Recorder may refuse a Deed this would aid in enforcing Chapter 409. Again the question is: may the Recorder refuse to record a Deed until the requirements are met?"

It is the opinion of this office that the recorder cannot refuse to record a Deed which is properly acknowledged and submitted for filing for record pursuant to Chapter 558 of the Code. Chapter 409 requires that the proprietor of land which is subdivided into three or more parcels file a proper plat of such subdivision. Section 409.45 provides for the enforcement of this Chapter through a penalty for the sale of each lot or part of lots sold, disposed of, leased or offered for sale. The recorder can properly refuse to record any plat which does not meet the requirements of Chapter 409. However, with respect to the recording of an instrument of conveyance affecting any one of the lots in a subdivision, the recorder should look to the requirements of Chapter 568 rather than Chapter 409.

December, 1977

CONSTITUTIONAL LAW

State Officers and Departments. Art. I, §§1, 6; Art. VI, §1, Art. VII, §§1, 3, Iowa Constitution; §§185C.1(5), 185C.2, 185C.8, 185C.21, 185C.26, 185C.29, 185C.30, 185C.34, 1977 Code of Iowa. Chapter 185C establishing a corn promotion board is not unconstitutional as creating a special privilege, pledging the credit of the state or causing it to assume debts or liabilities of a corporation, or creating a corporation by special laws. (Haskins to Miller, State Representative, 12-22-77) #77-12-11

COUNTIES AND COUNTY OFFICERS

Law Enforcement; Deputy Sheriffs. Off-duty employment of sheriffs' deputies as security guards is not prohibited by Iowa law. (Linge to Bordwell, Washington County Attorney, 12-23-77) #77-12-12

Recorder. §409.1, Code of Iowa, 1977; Chapter 117, Acts, 67th G.A., 1977 Session. County recorder cannot refuse to record a properly described and acknowledged conveyance on ground that the original proprietor has failed to file a subdivision plat. (Nolan to Erhardt, Wapello County Attorney, 12-29-77) #77-12-16

COURTS

Small Claims; Representation by counsel. §§631.5, 631.11 and 631.14, Code of Iowa, 1977. An attorney representing a client in small claims proceedings is entitled to participate fully in such proceedings, to ask questions, make objections and advance arguments. (Haesemeyer to Taylor, State Senator, 12-1-77) #77-12-1

CRIMINAL LAW

Bribery, Gifts and Gratuities: Public Officials. §§68B.5, 739.1, 739.2, and 741.1, Code of Iowa, 1977. §§721.2(3), 722.1 and 722.2, Supplement to the Code of Iowa, 1977. On or after January 1, 1978, any person who offers, promises or gives anything of value or any benefit to any legislator or other public official, with intent to influence the act, vote, opinion, decision or exercise of discretion of such legislator or public official with respect to his services as such, whether in a particular act or generally, is guilty of bribery, a Class D felony. Soliciting or knowlingly receiving any promise or anything of value or any benefit given with intent to so influence is a Class C felony. "Person," as an offeror, is broadly enough defined by §4.1(3) to include another state official or legislator, or even a governmental subdivision or agency, as well as a lobbyist or association. There is no express exception in the statute for a pass to a theatre, entry to a private club, a ticket to a ball game, a free lunch or even a cup of coffee or a ride downtown from the Statehouse, although the courts and prosecutors might react to some of these as *de minimus non curat lex* (the law does not concern itself with trifles). A public official, elected or appointed (or even "selected" to an office not yet taken), should act with prudence and exercise caution to see that he is always paying his own way and not accepting "anything of value or any benefit" no matter how slight or insignificant, if it is given with intent to influence his act or actions. (Turner to Daggett, State Representative, 12-27-77) #77-12-13

ELEVATOR CODE

Chapter 104, Code of Iowa, 1977. The State Elevator Code and rules promulgated in furtherance thereof supercede local conflicting regulations. (McGrane to Johnson, Bureau of Labor, 12-7-77) #77-12-4

ENVIRONMENTAL PROTECTION

National Pollution Discharge Elimination System Permit Delegation. Chapter 455B, Division III, Code of Iowa, 1977. 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 after Chapter 28E agreement as to such administration. (Davis to Crane, Executive Director, Department of Environmental Quality, 12-29-77) #77-12-14

LIBRARIES

Service to County. §303B.9, Code of Iowa, 1977. Cities are not required to enter into unfavorable contracts to provide library services to persons living outside the corporate limits of such city and regional library services will not be terminated if other statutory requirements are met. (Nolan to Porter, State Librarian, 12-1-77) #77-12-2

MUNICIPALITIES

Incompatibilities. §359.36, Code of Iowa, 1977. The position of city council member is incompatible with township trustee, chief of a volunteer fire department, and deputy sheriff. That of council member and volunteer fireman is not incompatible. (Blumberg to Bordwell, Washington County Attorney, 12-8-77) #77-12-7

SCHOOLS

Compulsory Education. Chapter 299, Code of Iowa, 1977. Local school board has authority to determine "equivalency" of proposed home instruction and is responsible for evaluating the home instruction program according to standards set by §257.25 and the State Board of Public Instruction rules. (Nolan to Anderson, Winneshiek County Attorney, 12-2-77) #77-12-3

Conflict of Interest. §301.28, Code of Iowa, 1977. (1) Section 301.28 is limited in scope and does not preclude treasurer of school district from acting as agent of company providing group health insurance to school district. (2) County attorney should not be placed in position of advising the County Board of Supervisors on the appointment of a special prosecutor in action against school board members previously represented by county attorney. (Nolan to Millen, State Representative, 12-9-77) #77-12-9

Educational Program; Discrimination. §§280.3, 257.25, 277.28, 66.1(1), 4.4, Code of Iowa, 1977. Statute mandating school board members to stop discrimination in any educational program on basis of "race, color, creed, sex, marital status or place of national origin" is enforceable in the same manner as state approval standards for schools. In addition, a board member failing to discharge the duties of his office may be subject to removal from office by court action. (Nolan to Benton, State Superintendent of Public Instruction, 12-7-77) #77-12-6

School Boards. §279.32, Code of Iowa, 1977. School board members may be reimbursed for actual and necessary expenses including expenses incurred in attending national school board conventions in distant states. (Nolan to Taylor, State Senator, 12-7-77) #77-12-5

STATE OFFICERS AND DEPARTMENTS

Secretary of Agriculture; Soybean Promotion Board; Ex Officio Member. §185.10, Code of Iowa, 1977. Ex officio members of the Iowa Soybean Promotion Board and any other boards, commissions and councils, where a statute

does not otherwise specifically provide, are entitled to notice of all meetings, are counted in determining a quorum and are entitled to vote the same as any other member. (Haesemeyer to Lounsberry, Secretary of Agriculture, 12-9-77) #77-12-10

Executive Council; Closing Offices, Inclement Weather. §§18.1, 19A.9(6), 29C.2, 29C.6, Code of Iowa, 1977. The Executive Council has the authority to close state offices and determine hours to be worked during critical situations. (Haesemeyer to Wellman, Secretary, Executive Council of Iowa, 12-8-77) #77-12-8

TOWNSHIPS

Fire Protection. §§359.42 and 359.43, Code of Iowa, 1977. A township may levy a tax for fire protection, when there are no current expenses, in anticipation of future needs. (Blumberg to Anderson, Howard County Attorney, 12-29-77) #77-12-15

STATUTES CONSTRUED

Code, 1977	Opinion
4.4	77-12-6
18.1	77-12-8
19A.9(6)	77-12-8
29C.2	77-12-8
29C.6	77-12-8
66.1(1)	77-12-6
68B.5	77-12-13
104	77-12-4
185.10	77-12-10
185C.1(5)	77-12-11
185C.2	77-12-11
185C.8	77-12-11
185C.21	77-12-11
185C.26	77-12-11
185C.29	77-12-11
185C.30	77-12-11
185C.34	77-12-11
257.25	77-12-6
277.28	77-12-6
279.32	77-12-5
280.3	77-12-6
299	77-12-3
301.28	77-12-9
303B.9	77-12-2
359.36	77-12-7
359.42	77-12-15
359.43	77-12-15
409.1	77-12-16
455B	77-12-14
631.5	77-12-1
631.11	77-12-1
631.14	77-12-1
721.2(3)	77-12-13
722.1	77-12-13

722.2 77-12-13
739.1 77-12-13
739.2 77-12-13
741.1 77-12-13

CONSTITUTION OF IOWA

Art. I, §§1, 6 77-12-11
Art. VI, §1 77-12-11
Art. VII, §1 77-12-11
Art. VIII, §§1, 3 77-12-11

67th GENERAL ASSEMBLY

Senate File 117 77-12-16

January 3, 1978

MOTOR VEHICLES: Vehicle Identification Numbers — Forfeiture of Vehicles. §§321, 1 (36), (75), 321.4, 321.43, 321.45, 321.48, 321.85, 321.86, 321.87, 321.88, 321.89, Code of Iowa, 1977. Ia. Department of Transportation Regs. 820-[07,D] 11.1(321), (1), (12), 820-[07,D]11.51(1), Iowa Administrative Code, 1975. No forfeiture provisions are authorized for a vehicle seized under the altered VIN number under §321.84. An individual claiming return of a vehicle under §321.87 must demonstrate ownership, properly identify it, and pay appropriate costs. Once an individual has complied with the requirements of §321.87, the custodians of the vehicle no longer have the responsibility of securing a new VIN number for the vehicle involved, or holding it until one has been applied for. (Dundis to Kopecky, Linn County Attorney, 1-3-78) #78-1-1

Eugene J. Kopecky, Linn County Attorney's Office: In your letter of October 17, 1977 you state that the Linn County Sheriff's Office has seized and is in possession of a motor vehicle with an altered VIN number, but that an investigation of the origin of said alterations has concluded that no criminal acts were committed by the individual claiming to be the present owner of the vehicle. There were no other criminal charges brought, and the vehicle in question was not seized under relevant search warrant provisions of the Iowa Code.

You ask three questions:

"1. Given the facts mentioned above, is there any authority for forfeiting the motor vehicle to their county?

"2. If not, must the sheriff's office arrange for a new identification number to be issued prior to releasing the vehicle to the owner?

"3. Must the vehicle be returned to the owner?

By way of Preface, §321.1 (75), Code of Iowa, 1977 provides a definition of the term "VIN number":

" 'Vehicle identification number' or the initials VIN mean the numerical and alphabetical designations affixed to vehicle or a component part of a vehicle by the manufacturer of the department or affixed by, or caused to affixed by, the owner pursuant to rules promulgated by the department as a means of identifying the vehicle."

Iowa Department of Transportation Regulation 820-[07,D]11.1(12), IAC 7/1/75 further explains:

"Vehicle identification number means the numerals and letters, if any, affixed to a vehicle by the manufacturer or the department as a means of identifying the vehicle. *The term 'serial number,' 'factory number,' 'VIN,' and when appropriate 'motor number,' shall be synonymous with the term 'vehicle identification number'." [emphasis added]*

Regulation 820-[07,D] 11.1 (321), which encompasses 11.1 (12) above states that "[t]he definitions in section 321.1 of the Code are hereby made part of this chapter, in addition the following words and phrases, when used in chapter 321 or this chapter shall have the meanings respectively ascribed to them, except when the context otherwise requires."

Concerning your first question, §321.84, Code of Iowa, 1977 provides the authorization for a peace officer to seize a vehicle when the vehicle identification number or component parts number "has been altered, defaced or tampered with," and when that officer "has reasonable cause to believe that the possessor of the vehicle or component part wrongfully holds it." However, no forfeiture is authorized for a vehicle seized under §321.84. A different procedure is expressly provided in following sections.

Section 321.85, Code of Iowa, 1977 provides for the officer having custody of a vehicle seized under §321.84 notifying the Department of Transportation of possession and providing a full description. Section 321.86, Code of Iowa, 1977 directs that the director of the Department of Transportation "shall, if the owner appears of record in his or her office, notify the owner of the fact that the vehicle or component part is in custody of the officer, and if not of record in his or her office, ... shall mail the description to the county treasurer of each county."

Section 321.87 and 321.88, Code of Iowa, 1977 are key provisions. Section 321.87 states:

"If, within forty days thereafter, the owner of the vehicle or component part appears and properly identifies it, the officer having the vehicle or component part in his or her custody shall deliver it to such owner upon payment by him or her of the costs incurred incident to the apprehension of the vehicle or component part and the location of the owner."

Section 321.88 goes on to declare:

"If the owner does not appear within forty days, the motor vehicle shall be deemed abandoned and the officer having possession of the motor vehicle shall proceed as provided in section 321.89, subsections 3 and 4."

Section 321.89(4), Code of Iowa, 1977 provides that following the notification provisions of subsection 3, an abandoned vehicle *shall* be sold at public auction. This is the only disposition provided for an operable vehicle.

Accordingly, given the facts mentioned above, there is no authority for forfeiting the motor vehicle to the county.

The preceding answer leads into your third question inquiring whether the vehicle in question must be returned to the alleged owner.

Section 321.87 requires that the custodian of the vehicle must return it to the "owner" who "properly identifies" it, and then only after the payment of certain costs by that owner.

Section 321.1, Code of Iowa, 1977 provides that the words and phrases defined in that section "when used in this chapter shall, for the purpose of this

chapter, have the meanings respectively ascribed to them." Subsection 36 defines the term "owner":

" 'Owner' means a person who holds the *legal title* of a vehicle, or in the event a vehicle is the subject of a security agreement with an immediate right of possession vested in the debtor, then such debtor shall be deemed the owner for the purpose of this chapter." [emphasis added]

Iowa Department of Transportation Regulation 820-[07,D] 11.1(1), IAC, 7/1/75 states:

"Certificate of title means a document issued by the appropriate official which contains a statement of the owner's title, the name and address of the owner, a description of the vehicle, a statement of all security interests and such additional information as may be required under the laws or rules of the jurisdiction in which such document was issued, and which is recognized as a matter of law as a document evidencing ownership of the vehicle described thereon. *The terms 'title certificate', 'title only', and 'title' shall be synonymous with the term 'certificate of title'."* [emphasis added].

Section 321.45, Code of Iowa, 1977 states that except for certain specified exceptions "no court in any case at law or equity shall recognize the right, title, claim or interest of any person in or to any vehicle subject to registration sold or disposed of, or mortgaged or incumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued or assigned in accordance with the provisions of this chapter."

It is our opinion that the vehicle in question does not have to be returned to the person claiming ownership until that person has demonstrated such ownership as defined above, and has properly identified it and paid the costs required by §321.87.

Finally, if the above requirements are met and the Sheriff's Office is eventually obligated to return the vehicle to the alleged owner, the question arises as to their responsibility in arranging for a new VIN number for that vehicle prior to its release. Section 321.43, Code of Iowa, 1977 merely states the department "is authorized to assign a distinguishing number to a vehicle or auxiliary axle whenever the serial number thereon is destroyed or obliterated and to issue to the owner a special plate bearing such distinquishing number which shall be affixed to the vehicle or auxiliary axle in a position to be determined by the director". The placement of responsibility for making application for that new number is not specifically mentioned.

Section 321.4, Code of Iowa, 1977 states that the state department of transportation commission "is authorized to adopt and promulgate administrative rules governing procedures as may be necessary to carry out the provisions of this chapter..." In tracking §321.43, Iowa Department of Transportation Regulation 820-[07,D] 11.51(1), IAC, 7/1/75 states:

"Whenever the original vehicle identification numberplate affixed to a vehicle has been lost, stolen, removed, mutilated or obliterated or when such number has been affixed to a vehicle in a manner other than by a plate affixed to such vehicle and such number has been removed, mutilated, or obliterated, the owner of such vehicle, or the person holding lawful custody thereof, if such vehicle is held under the provisions of section 321.84 or 321.89, shall make application to the department, or an 'application for an assigned vehicle identification number' form provided for that purpose, which may be obtained from any county treasurer or from the department, for an assigned vehicle identification number." [emphasis added]

The wording of this regulation would seem to indicate that responsibility for the VIN number application is on either the owner or the person holding lawful custody. Departmental regulations do not address themselves to the custodian's duty to hold the vehicle until the owner has personally applied for the VIN number.

However, §321.87 directs that after its stated requirements are met, the officer having custody of the vehicle "shall" deliver it to the owner. The wording of this statute indicates that the officer has the duty at that point to release the vehicle. No authority contrary to this directive appears anywhere in Chapter 321 of the Code. Any interpretation of Reg. 820-[07,D] 11.51 (1) which would impose further performances by the owner before release of the vehicle by the officer would therefore be in conflict with §321.87. As already stated, the promulgation of administrative rules has been authorized only to carry out the povisions of chapter 321. Therefore §321.87 would take precedence.

In addition, once the requirements of §321.87 have been met, the owner is entitled to legal possession of the vehicle. The officer involved would no longer have "lawful custody" at that time, and would arguably no longer come within the provisions of Reg. 820-[07,D] 11.51 (1).

It is our opinion that once an established owner has complied with the requirements of §321.87, the sheriff's office no longer has responsibility for securing a new VIN number for the vehicle involved, or holding it until one has been applied for. It must return the vehicle without further delay.

January 4, 1978

SCHOOLS: Reorganization. §275.3, Code of Iowa, 1977. A school district is not precluded by statute from reorganizing into two high school districts if the resulting districts meet the requirements of Chapter 275 and the voters approve such reorganization. (Nolan to Conlon, State Representative, 1-4-78) #78-1-2

The Honorable Walter Conlon, State Representative: On March 1, 1977 you submitted the following question for an opinion of the Attorney General:

"Can a high school district in the state of Iowa reorganize itself into two high school districts if both of the resulting districts meet and/or exceed the minimum standards of section 275.3 of the Code of Iowa?"

Although the emphasis in the past several years has been on enlarging school districts rather than the creation of new smaller school districts to replace a large district, it is the opinion of this office that your question should be answered affirmatively. In order to accomplish the change from one to two school districts in a given geographical area, the procedures outlined in §275.5 of the 1977 Code of Iowa should be followed:

"Any proposal for a merger, consolidation or boundary change of local school districts shall first be submitted to the area education agency board for approval before being submitted at an election... Such proposal may provide for reducing an existing school district to less than four government sections..."

It should also be noted that under §275.1 the expressed policy of the state is to encourage the reorganization of school districts into such units as are "necessary, economical and efficient and which will ensure an equal educational opportunity to all children of the state". This section further authorizes the area

education agency boards to initiate detailed studies and surveys of school districts for the purposes of promoting reorganization in order to effect more economical operation and the attainment of higher standards of education in the schools.

Under §257.9 the statutory provisions of §275.1 to §275.5 relating to studies, surveys, hearings and adoption of plans are made a mandatory prerequisite to effectuation of any proposal. Code §275.12 provides for the filing of a petition requesting the change of the existing plan on file with the area education agency, and subsequent sections of the Code provide for the necessary hearings and decision by the area education agency board prior to the calling of an election on the question of whether the proposed school corporation should be established according to the area education agency plan.

Accordingly, although there appears to be no recent precedent, there would be no statutory prohibition precluding a school district from dividing into two districts if all of the conditions of minimum standards are met at each of the two proposed new districts and the voters approved such reorganization.

January 4, 1978

SCHOOLS: Regents; Trusts. §262.9, Chapter 28A, Chapter 68A, Code of Iowa, 1977. (1) Regents may not transfer state funds to non-profit foundations designated by the Regents to administer trusts without legislative authorization. (2) Where such foundations are designated by the Regents to accept and administer trusts for the benefit of Regent institutions the non-profit foundation becomes a public agency and is subject to open meetings and open records laws. (Nolan to Poncy and Dyrland, State Representatives, 1-4-78) #78-1-3

The Honorable Charles N. Poncy and Honorable Terry Dyrland, State Representatives: You have requested an opinion of this office on three questions arising from the enactment of House File 1098, Laws of the 66th General Assembly, 1976. That legislation amended §262.9 of the Code of Iowa, to empower the State Board of Regents to "authorize non-profit foundations acting soley for the support of the institutions governed by the board to accept and administer trusts deemed by the board to be beneficial".

The questions you raised are as follows:

"1. May the board of regents transfer state funds to these foundations without legislative appropriations review and authorization?

"2. Since the foundation exists for the sole purpose of supporting the regents institutions and since the regents share responsibility for the trusts under the above law, are these foundations subject to the provisions of the open meeting law (Chapter 28A, Code) and the open records law (Chapter 68A).

"3. Are these foundations private charities or public agencies?"

In answer to your first question, it is the opinion of this office that the State Board of Regents may not transfer state funds to such foundations without appropriations. However, it appears that this statute comtemplates not that the Board of Regents will transfer state funds to such foundation, but that the Board of Regents may exercise the power of appointment and designate such foundations to be the trustees or co-trustees with the Board of Regents of such funds as may be given by gift or bequest from an individual citizen or a gift from a corporate entity.

In answer to your second question, it is our opinion that the open meetings and open records law would apply to the activities of such foundation where the foundations are appointed or designated by the Board of Regents to act in the place of the Board in the acceptance or administration of trusts. In such situation, the foundation takes on the character of a governmental entity and accordingly, it is subject to the open meetings law. See *Greene vs. Iowa State University Athletic Council,* 251 N.W.2d 559, 1977.

The third question which you present is answered in part by our second answer. Where the Board of Regents makes the designation contemplated by §262.9 the foundation becomes a public agency.

January 6, 1978

SCHOOLS: Teacher Contracts. §279.13, Code of Iowa, 1977. A local school board correctly uses a single written contract to set forth all duties, including extracurricular duties, which are to be performed by a teacher and for which the teacher is to be compensated. (Nolan to Spear, State Representative, 1-6-78) #78-1-4

The Honorable Clay Spear, State Representative: We have received your letter which states as follows:

"Please inform me whether, in your opinion, a school district may enter into more than one contract with a teacher. Teachers in the Fort Madison Community School District have requested that they have one contract for regular teaching duties and a separate contract for extracurricular activities. The school board has taken the position that a single contract must be awarded for all duties. This position is based on Chapter 279 of the Iowa Code which refers to teacher contracts in the singular—"The contract may include... The contract is invalid if...The contract shall be signed...The contract shall remain in force..."

Section 279.13, Code of Iowa, 1977 applies. This section provides in pertinent part:

"1. Contracts with teachers...shall be in writing and shall state the number of contract days, the annual compensation to be paid, and any other matters as may be mutually agreed upon. The contract may include employment for a term not exceeding the ensuing school year, except as otherwise authorized.

"The contract is invalid if the teacher is under contract with another board of directors to teach during the same time period until a release from the other contract is achieved. The contract shall be signed by the president of the board when tenered, and after it is signed by the teacher, the contract shall be filed with the secretary of the board before the teacher enters into performance under the contract.

"2. The contract shall remain in force and effect for the period stated in contract and shall be automatically continued for equivalent periods except as modified by mutual agreement of the board of directors and the teacher or as terminated in accordance with the provisions specified in this chapter..."

A careful review of the foregoing language leads us to the conclusion that the statute contemplates a single contract between the board of directors of the school district and a teacher to cover all activities which might be required of such certified employee of the school district. It applies to extracurricular activities requiring certified personnel such as speech, music, dramatic or athletic coaching. Maintenance of a library or journalism activity, supervision of field trips and all other activities authorized and sponsored by the school

district would, we believe, fall into this category. Since §301.28 of the Code specifically precludes teachers from acting as an agent or dealer for textbooks or school supplies we assume that this type of contract between the board and a teacher is not included in your question.

On the other hand, there may be a situation where a school teacher might also be a schoolbus driver. In such situations the extracurricular activity does not require that the individual be certified within the meaning of §279.13. While we do not see the need for separate contracts covering the two distinct types of duty, there appears to be no law precluding separate contracts of this type. However, by long standing practice, the general rule appears to be that all matters pertaining to the employement of an individual by a local school board will be covered in a single written agreement.

Further, the provisions of Chapter 20 of the 1977 Code of Iowa pertaining to collective bargaining have been examined and do not reveal any provisions inconsistent with the single contract conclusion. Accordingly it is our view that a school board position on a single contract is supportable.

January 6, 1978

PHYSICIANS AND SURGEONS: Midwifery—§§148.1 and 152.1, Code of Iowa, 1977. The practice of midwifery can be considered to be the practice of medicine and surgery. One who assists licensed physicians in the administration and treatment of pregnancies and deliveries could be considered to be within the practice of nursing. (Blumberg to Davitt, State Representative, 1-6-78) #78-1-5

Honorable Philip Davitt, State Representative: We have your opinion request of December 19, 1977, regarding midwifery. You asked:

Can [midwives] assist licensed doctors in the delivery of babies?

Can these midwives deliver babies under the immediate supervision of licensed doctor (when the doctor is present at the time of the delivery)?

Can the midwife deliver babies when not under the supervision of a doctor?

Your questions are two-fold. First, is midwifery the practice of medicine and surgery? Second, is midwifery the practice of nursing?

"Midwifery" is defined in 70 C.J.S., *Physicians and Surgeons,* §1, p. 808 (1951), as the "practice of obstetrics." "Obstetrics" is defined on page 809 as the branch of medical science having to do with the care of women during pregnancy and birth. The two terms appear to be interchangeable. There can be no doubt that obstetrics falls within the practice of medicine and surgery. 70 C.J.S., *Physicians and Surgeons,* §10(h); §148.1, 1977 Code of Iowa.

Section 148.1 provides:

"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 2538, 1927, Code of Iowa was basically the same, except that subsection three was not present. In *State v. Hughey*, 1929, 208 Iowa 842, 226 N.W. 371, this section was interpreted. There, an individual treated people by the laying on of hands. He contended that such was not within the statutory definition of medicine and surgery because he did not prescribe or furnish medicines, nor perform surgery. The Court held (208 Iowa at 846-847):

"The argument for defendant is that, inasmuch as he gave no medicine, he could not be guilty of practicing medicine. The term 'practice of medicine' is defined by Section 2538. It is not confined to the administering of drugs. Under this statute, one who publicly professes to be a physician and induces others to seek his aid as such is practicing medicine. Nor is it requisite that he shall profess in terms to be *physician*. It is enough, under the statute, if he publicly profess to assume the duties incident of the practice of medicine. What are 'duties incident to the practice of medicine?' Manifestly, the first duty of a physician to his patient is to diagnose his ailment. Manifestly, also, a duty follows to prescribe the proper treatment therefor. If, therefore, one publicly profess to be able to diagnose human ailments, and to prescribe proper treatment therefor, then he is engaging in the practice of medicine, within the definition of Section 2538."

See also, *State v. Howard*, 1933, 216 Iowa 545, 245 N.W. 871, and *State ex rel. Bierring v. Robinson*, 1945, 236 Iowa 752, 19 N.W. 2d 214.

In 1972 OAG 64, we held that unlicensed physician's assistants could not practice medicine. This opinion was prior to the enactment of Chapter 148B of the Code. The question presented was whether a "physician's assistant" who handled routine matters such as nursing home call, physical exams for school children, laboratory work, and the like was practicing medicine without a license. Citing to *Hughey* and *Howard*, we held that a "physician's assistant" could not legally "practice" because what one normally did fell within either medicine and surgery or nursing, and because there was no statute specifically recognizing them.

The same can be said of midwifery. Although not having a practical, as opposed to legal, definition of either midwifery or obstetrics, it can hardly be disputed that the treatment given to a pregnant woman and the delivery clearly fall within the scope of medicine and surgery. Until the Legislature recognizes midwifery, an unlicensed "midwife" who administers to and treats pregnant women and delivers babies outside the supervision of a licensed physician, is practicing medicine without a license. Even if a licensed physician is present, if an unlicensed midwife does all of the same a violation of the law would still exist.

Assisting a licensed physician is somewhat different. Although many of the things a midwife would normally do to assist a physician would fall within the practice of nursing for which a license is required pursuant to Section 152.1 of the Code, we are not prepared to state that at no time may an unlicensed individual assist a licensed physician in a birth. There may be singular instances when, during a delivery, a physician needs assistance and only an unlicensed individual is present. However, if an unlicensed individual holds oneself out as being a midwife and/or holds oneself out at being able to do any or all of the things a midwife would normally do; an unlicensed person on a frequent or regular basis does these things, then and in that event, a court could properly hold that one has practiced medicine and surgery or nursing without a license.

Accordingly, we are of the opinion that an unlicensed "midwife" who administers to or treats pregnancies and delivers babies, whether within or without

a licensed physician's supervision, can be considered to be practicing medicine and surgery without a license. An unlicensed person who assists a licensed physician in administering or treating pregnancies and deliveries could be considered practicing nursing without a license.

January 9, 1978

CRIMINAL LAW: BRIBERY: GIFTS & GRATUITIES: PUBLIC OFFICIALS: SPOUSES. §§4.1(3), 68B.2(7) and 68B5, Code of Iowa, 1977. §§722.1 and 722.2, Supplement to Code of Iowa, 1977. The new bribery sections (722.1 and 722.2 of the Supplement) are not applicable to spouses of public officials so as to prohibit them from receiving gifts, including brunches and teas, nor does the gift statute (§68B.5) prohibit them if the value therof is not $25 or more. (Turner to Danker, State Representative, 1-9-78) #78-1-6.

The Honorable Arlyn Danker, State Representative: You have requested an opinion of the attorney general as to whether the bribery statutes of the new criminal code revision, which took effect on January 1, 1978, will affect the spouses of the legislators. For example, you state that your wife and the wives of other legislators, have been invited to brunches by the Parent Teachers Association and the Iowa Medical Society. Moreover, the Legislative Ladies League is sometimes invited to brunches or teas at the Governor's Mansion.

It is assumed in all cases that the spouse does not pay his or her own cost of these brunches and teas and that such activities would be proscribed by the new bribery statutes if the beneficiary were a member of the General Assembly, public official or public employee (hereinafter referred to as "public official.") See OAG, Turner to Representative Daggett, December 27, 1977, which is incorporated herein.

In my opinion, the new bribery sections (722.1 and 722.2, Supplement to the Code of Iowa, 1977) are not applicable to spouses of public officials. They are directed at the public official himself and do not relate, directly or indirectly, to his or her spouse (although of course a spouse of a public official could conceivably be guilty of bribing that official).

In contrast, §68B5, Code of Iowa, 1977, does prohibit the spouse of a state public official or member of the General Assembly from directly or indirectly soliciting, accepting, or receiving any gift having a value of $25 or more. See §68B.2(7), which by its express terms makes the chapter applicable to *"wives* and unemancipated minor children" or members of the General Assembly and others specified therein. "Wives" includes "husbands."§4.1(3). And see 1976 OAG 523, in which we said 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 and that the same donor could make a gift of $25 to each without being in violation of §68B.5.

Thus, spouses of legislators may receive gifts, including brunches and teas, if the value thereof is not $25 or more.

January 10, 1978

CRIMINAL LAW: BRIBERY: CAMPAIGN CONTRIBUTIONS: PUBLIC OFFICIALS. §4.7 and Ch. 56, Code of Iowa, 1977. §§722.1 and 722.2, Supplement to the Code of Iowa, 1977. Ch. 56, the Campaign Finance Disclosure law is a special statute which is in irreconcilable conflict with the new

bribery sections (722.1 and 722.2 of the Supplement), which are general provisions. Thus Ch. 56 prevails and ordinarily a campaign contribution would not violate these bribery sections, at least when the contribution complies with the Campaign Finance Disclosure Act. (Turner to Harbor, State Representative, 1-10-78) #78-1-7

The Honorable William H. Harbor, State Representative: You have requested an opinion of the attorney general as to whether campaign contributions can be "construed as payment for a favor or seeking a favor from the candidate" and in violation of the bribery sections of the new criminal code, effective January 1, 1978.

As noted in my opinion to Representative Daggett, dated December 27, 1977, §§721.1 and 722.2, Supplement to the Code of Iowa, 1977, proscribe "offers, promises or [gifts] of value or any benefit to any person who is serving or has been elected, selected, appointed, employed or otherwise engaged to serve in a public capacity" if the same is "with intent to influence the act, vote, opinion, judgment, decision or exercise of discretion of such person with respect to his or her services in such capacity..." That opinion is incorporated herein.

§§722.1 and 722.2 are general statutes governing bribery, Ch. 56, Code of Iowa, 1977, the Campaign Finance Disclosure law, which was not altered by the criminal code revision, is a special comprehensive statute governing campaign contributions, among other things. It specifically contemplates contributions to political candidates, either directly or through committees, and thus obviously conflicts with the general bribery statutes.

§4.7, Code of Iowa, 1977, provides:

"4.7 *Conflicts between general and special statues.* 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."

When one statute deals with a subject in general terms and another in a more detailed way, the two shall be harmonized if possible. *Northern Natural Gas Co. v. Forst*, 209 N.W. 2d 692 (Iowa 1973). When a general statute, standing alone, would include the same matter as a special statute and thus conflict with it, the special act will be considered an exception to or qualification of the general statute and will prevail over it, whether it was passed before or after such general enactment. *State v. Halverson*, 261 Iowa 530, 155 N.W. 2d 177 (1967).

In my opinion to Representative Daggett, I suggested that the ordinary rule governing conflicts between general and special statutes had been held inapplicable by the Iowa Supreme Court to the conflict between the gift statute (§68B.5) and the former bribery statutes, all of which were considered *in pari materia* and construed together in *State v. Books*, 225 N.W. 2d 322 (Iowa 1975). But in that instance the Court was able to harmonize the two statutes and, with a substantial modification of the commercial bribery statute (741.1) on constitutional grounds, to give effect to both.

But in this instance, a construction that a campaign contribution would violate the new bribery sections would be irreconcilable and would almost totally obliterate Ch. 56, which allows such contributions when publicly disclosed and as provided therein. The Campaign Finance Disclosure statute should be considered an exception or qualification of the general bribery

provisions. *State v. Halverson*, supra.

For these reasons, it is our opinion that the Campaign Finance Disclosure Act (Ch. 56) prevails and that ordinarily a campaign contribution would not violate these bribery sections, at least when the contribution complies with Chapter 56.

January 10, 1978

SCHOOLS: Collective Bargaining Agreements. §§20.26, 56.1, Code of Iowa, 1977. Payroll deductions for employee representative organization membership cannot properly be used for political contributions distributed by the political action committee of the employee organization. (Nolan to Branstad, State Representative, 1-10-78) #78-1-8

The Honorable Terry E. Branstad, State Representative: You inquired about the legality of actions in school districts whereby pursuant to collective bargaining agreements, periodic amounts are deducted from the pay checks of employees for dues to their representative organization. Your letter states that some school districts have learned that some of the money included in such dues deductions are used for political contributions distributed by the political action committee of the employee organization.

The questions which you presented are:

"1. Does 'dues deduction' under Chapter 20 of the Code of Iowa include sums specifically designated for political contributions?

"2. Does the Campaign Finance Disclosure Law (Chapter 56) prohibit a system of political contributions described in the facts above?"

In answer to your first question, §20.26 of the 1977 Code of Iowa specifically prohibits "any direct or indirect contribution out of the fund of an employee organization to any political party or organization or in support of any candidate for elective public office." It is our view that the provisions of §20.26 apply to funds obtained by the employee organization by virtue of such payroll deduction for dues.

In answer to your second question, the following applies. Under §56.1(§), a political committee is defined as: "a committee but not a candidate's committee which shall consist of persons organized for the purpose of accepting contributions, making expenditures, or incurring indebtedness in the aggregate of more than one hundred dollars in any one calendar year for the purpose of supporting or opposing a candidate for public office or ballot issue". Section 56.3 requires the committee treasurer, to make a detailed and exact accounting of all contributions made to or for the political committee and the names and mailing addresses of every person making contributions in excess of $10.

Accordingly, it is the view of this office that a negative response should be given your second question due to the lack of sufficient facts to support an opinion. However, the system of political contributions described in your letter, may be effectively precluded by the provisions of Chapter 20 of the Code unless the individual is making a "personal contribution" of the type covered by §20.26 and the union collector merely acts as his agent for that limited purpose.

January 13, 1978

CRIMINAL LAW: BRIBERY: PUBLIC OFFICIALS: OUT-OF-STATE

TRIPS. 722.1 and 722.2, Supplement to the Code of Iowa, 1977. In determining whether the Executive Council should approve out-of-state trips for public officials and employees when the costs are to be paid by an out-of-state university or some other outside organization or institution, even with the help of federal funds, the Council should determine whether there is any intent to influence the act, vote, opinion, judgment, decision or exercise of discretion of the public official or employee. In making this determination, factors which could be considered are the nature of the organization, the purpose of the trip, the type of employment and duties of the employee or official, the amount of expenses involved and past relationships between the employee or official and the organization in question. (Turner to Wellman, Secretary, Executive Council, January 13, 1978.) #78-1-9

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Reference is made to your letter of January 9, 1978, in which you state:

"The Executive Council, in meeting held this date, after having reviewed the weekly departmental submission of requests for out-of-state travel authority deferred approving numerous requests listed on the agenda which indicated that the trip expenses were to be paid by an association, institute or organization in which the state employee making the trip, may or may not be a member, and further deferred giving approval for out-of-state trips on which all costs are to be paid by an out-of-state University through federal funds from the Rehabilitation Services Administration, with the directive given this Office to request an opinion as to whether the Executive Council can approve requests for out-of-state travel authority to be paid for by sources detailed herein or whether their authority is limited to approving travel, the costs of which, are to be paid by appropriated state funds or by federal funds already on hand in departments who are, or are to be, recipients of federal grants."

In my recent opinion on the bribery and gifts and gratuities provisions of the new Criminal Code which took effect January 1, 1978, I pointed out that on or after January 1, 1978, any person who offers, promises or gives anything of value or any benefit to any legislator or other public official or employee with the intent to influence the act, vote, opinion, decision or exercise of discretion of such legislator, public official or employee with respect to his services as such whether in a particular act or generally would be guilty of bribery. O.A.G. Turner to Daggett, December 27, 1977. Thus, we went on to caution,

"*. . . any public official, elected or appointed (or even 'selected' for an office he has not yet taken), should act with prudence and exercise caution to see that he is always paying his own way and not accepting 'anything of value or any benefit' no matter how slight or insignificant, if* it is given with intent to influence his act or actions. . ."

It should be noted however that in each instance in order for a violation of the bribery and gifts statutes to exist, the gift would have to have been given, offered, or promised with the intent of influencing the public officer or employee's act or actions. For this reason, it is impossible for us to generalize with respect to the payment of trip expenses by outside organizations or institutions. All we can suggest to you is that you examine each request for approval for out-of-state travel where another organization is going to be paying the costs of the trip on an individual case by case basis and determine as best as you can whether you feel the requisite intent is present. Factors which you could consider among others are the nature of the organization, the purpose of the trip, the type of employment and duties of the employee or official, the amount of the expenses involved and past relationships between the employee or official and the organization in question.

January 16, 1978

STATE OFFICERS AND DEPARTMENTS: Public Employment Relations Board; §20.19, Code of Iowa, 1977. The Public Employment Relations Act neither requires the parties to seek a mediator through the Public Employment Relations Board, nor does it authorize the PER Board to interfere with the independently-established impasse resolution procedure. (Condon to Anderson, State Representative, 1-16-78) #78-1-10

The Honorable Robert T. Anderson, State Representative: Reference is made to your letter of January 2, 1978, in which you stated:

"The City of Newton and the Newton Association of Professional Firefighters have agreed upon an independent impasse procedure, pursuant to Section 20.19 of the Code of Iowa. The agreed upon procedure provides for a mediator who is not connected with the Iowa Public Employment Relations Board, specifically one from the Federal Mediation and Conciliation Service. The parties have attempted to implement this independent inpasse procedure, but were informed that they must seek their mediation services throught the Iowa PER Board.

"I am requesting opinions from the Attorney General's Office regarding the following:

May the Board inject into independently negotiated impasse procedures which do not involve the Board?

If such interference by the Board delays achieving a proposed contract, may the Board be charged with interfering with the bargaining process?

Does such interference by the Board in the absence of rules established under the Administrative Procedures Act exceed the power of the Board and violate the intent of Section 20.19?"

The intent of Section 20.19, Code of Iowa, 1977, is to allow the public employer and the employee organization to establish an impasse resolution procedure that may utilized by them during the course of negotiation on collective bargaining agreement in lieu of the three-step plan prescribed by the legislature in §§20.20.-.22. Section 20.19 provides as follows:

"20.19 Impasse procedures—agreement of parties. 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 procedure provided in sections 20.20 to 20.22 shall apply."

In Section 20.19, the legislature imposes only two requirements on the public employer and the employee organization. The parties shall attempt to establish an impasse resolution procedure as the first step in performance of their duty to bargain, and the procedure shall provide for implementation not later than 120 days prior to the certified budget submission date of the public employer.

In response to your question, the Public Fmployment Relations Act neither requires the parties to seek a mediator through the Public Employment Relations Board, nor does it authorize the PER Board to interfere with the independently-established impasse resolution procedure.

However, the Act does not empower the parties to compel an independent

third entity to comply with the terms of their §20.19 impasse procedure. The City of Newton and the Newton Association of Professional Firefighters may provide in their agreement for a Federal Mediation and Conciliation Service Mediator, but as long as the FMCS is not also a party to that agreement, the FMCS may refuse the parties' request for a mediator.

Clearly, the Iowa courts will not enforce an agreement against a person who is not a party to the agreement because a contract is not enforceable against a party unless made by him or someone authorized to act for him. The rights of a third party ordinarily cannot be adversely varied by an agreement to which he is not a party or by which he is not otherwise bound. *Fairway Center Corp. v. U.P.I. Corp., 502 F.2d 1135 (8th Cir. 1974); Stead v. Sampson, 1916, 173 Iowa 563, 155 N.W. 976; Herington Livestock Auction Co. v. Verschoor,* 179 N.W.2d 49 (Iowa 1970); *Compaino v. Kuntz,* 226 N.W. 2d 245 (Iowa 1975).

Thus, the parties should consult FMCS before relying on the availability of a mediator for implementation of their impasse resolution procedure for otherwise the parties may find it necessary to seek the assistance of the PER Board to secure a mediator.

January 23, 1978

COUNTIES: Conservation Board — land purchase contracts — Section 111A.6, Code of Iowa, 1977. County Conservation Boards may not enter into land purchase contracts which provide for deferred payments in an amount exceeding one-fourth of the annual conservation fund levy. (Peterson to Harbor, State Representative, 1-23-78) #78-1-11

Honorable William H. Harbor, State Representative: By letter dated January 18, 1978, you have requested the Opinion of the Attorney General with respect to the acquisition of certain lands by the Page County Conservation Board on land purchase contract. The proposed contract provides for an initial payment of $48,000 from unencumbered funds in the conservation fund, an installment of $48,000 in each of the three succeeding fiscal years, and a final payment of $25,571.33 in fiscal 1981-1982. We are advised by the Page County Auditor's Office that the levy of a tax of one mill on the dollar of the assessed valuation of all real and personal property subject to taxation within Page County currently produces approximately $81,000.

Such purchases are governed by Section 111A.6, Code of Iowa, 1977, which in pertinent part, states:

"111A.6 Funds-tax levy-gifts-anticipatory bonds. Upon the adoption of any county of the provisions of this chapter, the county board of supervisors of such county may. . . levy or cause to be levied an annual tax, in addition to all other taxes, of not more than one mill on the dollar of the assessed valuation of all real and personal property subject to taxation within such county. . . which tax shall be collected by the county treasurer as other taxes are collected and shall be paid into a separate and distinct fund to be known as the county conservation fund, to be paid out upon the warrants drawn by the county auditor upon requisition of the county conservation board for the payment of expenses incurred in carrying out the powers and duties of said conservation board. The county conservation board shall have no power or authority to contract any debt or obligation in any year in excess of the moneys in the hands of the county treasurer immediately available for such purposes, *except the board of supervisors may authorize deferred payments for land acquisition purchases not to exceed one-fourth of the annual conservation fund levy nor to extend over a period of ten years. . .*" (Emphasis supplied)

Applying the expressly stated limitations of §111A.6 to the contract at hand, deferred payments thereunder are limited to one-fourth of the annual conservation levy of approximately $81,000 or about $20,250 and the board is without authority to enter into a contract requiring annual payments in excess of that amount.

Where the language of a statute is plain and the meaning clear, courts are not permitted to search for a meaning beyond the statute itself, *In re Johnson's Estate, 213 N.W.2d 536, (Iowa 1973); State v. Hocker,* 201 N.W.2d 74 (Iowa 1972), *Richardson v. City of Jefferson,* 257 Iowa 709, 134 N.W.2d 528 (1965); *Kruck v. Needles,* 144 N.W.2d 296 (Iowa 1966).

Further, the legislature clearly intended that the authority to make such installment purchases of land be subject to the limitations imposed in the authorizing amendment. §111A.6 was amended in 1971 (Ch. 126, Acts of the 64th G.A. 1971 Session) by adding that portion emphasized above thereby authorizing installment purchases of land within the limitations stated therein as to the amount of each annual installment and the period thereof.

The only legitimate purpose of statutory construction and interpretation is to ascertain the legislative intent, and when the language of a statute is so clear, certain and free of ambiguity and obscurity that its meaning is evident from a mere reading, canons of statutory construction are unnecessary, as there is no need of construction and interpretation. *Consolidated Freightways Corp. of Del. v. Nicholas,* 137 N.W.2d 900 (Iowa 1965).

We have no information on and express no opinion as to the merits of the land purchase itself or the plans and programs of the Page County Conservation Board, nor do we have any specific suggestions for financing the proposed project beyond suggesting that consideration be given to (1) amending the statute to permit encumbering a larger share of the annual conservation levy to finance installment purchases of land, (2) lengthening the payment period to reduce the annual payment to an amount permitted by §111A.6d or (3) undertaking a bond issue in compliance with the procedure requirements of §111A.6.

In summary, we are of the opinion that county conservation boards may not enter into land purchase contracts which provide for deferred payments in an amount exceeding one-fourth of the annual conservation fund levy.

January 23, 1978

CONSTITUTIONAL LAW: SCHOOLS: MANDATORY IMMUNIZATION: DUE PROCESS: COMPULSORY ATTENDANCE LAWS. Amendment XIV, Constitution of the United States Chapters 139 and 299, Code of Iowa, 1977. H.F. 163, Acts of the 67th G.A., First Session (1977). (1) Iowa school district officials have the legal authority to refuse to readmit students at the beginning of the second semester of the 1977-1978 school year, who were enrolled at the beginning of the school year, on the basis that they have not complied with the immunization requirements of House File 163. (2) Procedural due process should be afforded each student denied permission to attend school under House File 163 and, except where there is absolutely no factual dispute, at least perfunctory notice and hearing should be given. (3) The compulsory attendance provisions of Chapter 299 would not apply to students excluded from school to noncompliance with the immunization requirements of House File 163. (Turner to Benton, Superintendent of Public Instruction, 1-23-78) #78-1-12

Robert D. Benton, Ed. D. Superintendent, State Department of Public Instruction: Reference is made to your letter of December 28, 1977, in which you state:

"Your opinion is requested on a matter of immediate importance. The Health Department has promulgated rules implementing immunization provisions of House File 163 (1977), which are found in Chapter 470-7, Iowa Administrative Code. I have no qualms about the value of such legislation, or that the schools play under such legislation. In fact, I fully support such legislation. My primary concern is with rule 470-7.10 which establishes the effective date as the beginning of the second semester of the 1977-78 school year for elementary and secondary schools.

"The Health Department is attempting to prohibit 'admission' of students, many of which may already be enrolled. House Files 163 (1977). §2, impliedly requires school officials to prevent the enrollment of improperly immunized students. There is considerable difference in meaning between the terms 'admission' and 'enrollment.' While I do not question the application of the statute and rules to students seeking enrollment because of transfer or to students seeking enrollment next fall, I cannot help but wonder whether the application of the statute and rules in the middle of the current school year to students already enrolled is legally proper.

"My questions, then, are as follows:

"1. Does an Iowa school district official have the legal authority to refuse to readmit students at the beginning of the second semester of the 1977-78 school year, who were enrolled at the beginning of the school year, on the basis that they have not complied with the immunization requirements of House File 163 (1977) and Chapter 470-7, Iowa Administrative Code?

"2. If the answer to the above is in the affirmative, what procedural due process requirements, if any, must be provided by a school district which refuses to readmit such students the second semester of the 1977-78 school year?

"3. If the answer to the first question is in the affirmative, may the compulsory attendance provisions of Chapter 299 be enforced against parents who refuse or neglect to obtain the proper immunization and whose children are not allowed to be readmitted the second semester of the 1977-78 school year?"

I

House File 163, Acts, 67th G.A., First Session (1977),[1] is:

"An Act Relating to the Immunization of persons *attending* elementary or secondary schools or licensed child care centers and to the authority of the State Department of Health to modify immunization requirements for *admission* to school." (Emphasis added)

It amends Chapter 139, Code of Iowa, 1977, by adding to such chapter, among other things, the following:

* * *

[1]The constitutionality of House File 163 has heretofore been considered by this office and it was our conclusion that the bill was constitutional. O.A.G. Blumberg to Taylor, State Senator, 7-14-77. The Linn County District Court has also upheld the constitutionality of the measure in *Cretsinger, et al. v. Cedar Rapids Community School District Board, et al.*, #Eq.-2338, decided January 11, 1978.

"2. No person shall be *enrolled* in any licensed child care center, elementary or secondary school in Iowa without evidence of adequate immunization against diptheria, pertussis, tetanus, poliomyelitis, rubeola and rubella, except as provided in subsections three (3) and four (4) of this section.

* * *

"8. The state department of health in consultation with the superintendent of public instruction shall promulgate rules for the implementation of this Act and shall provide those rules to local school boards and local boards of health.

* * * (Emphasis added)

The explanation accompanying House File 163 provides:

"This bill provides that with certain exceptions every person shall be immunized against diptheria, pertussis, rubeola, rubella, tetanus and poliomyelitis before *entering* any elementary or secondary school or licensed child care center in the state." (Emphasis added)

Pursuant to the authority conferred upon it by §8 of House File 163, the Iowa Department of Health, in accordance with the provisions of Chapter 17A, promulgated rules relative to the immunization of persons attending elementary or secondary schools or licensed day care centers. Rule 470-7.10(139) provides:

"Effective date. As a prerequisite to *admission,* an applicant shall present (1) a certificate of immunization, or (2) a provisional certificate of immunization, or (3) a certificate of immunization exemption by the beginning of the second semester of the 1977-78 school year in an elementary or licensed child care center.

"This rule is intended to implement House File 163, sections 5 and 6, Acts of the Sixty-seventh General Assembly." (Emphasis added)

Thus, we are presented with a situation where the title of the act in question uses the terms "attending" and "admission", the body of the act speaks in terms of "enrolled", the explanation accompanying the act utilizes "entering" and the rules promulgated to implement the act use the term "admission." Under these circumstances, it is hardly surprising that your question arose, and we are now called upon to determine whether "enrolled" as used in §2 of House File 163 refers to an event which occurs only at the beginning of each school year so that students presently attending public schools and licensed day care centers could not now, at the beginning of the second semester, be sent home from school for failing to furnish certificates of immunization or exemption as the Health Department rule requires. That is, since they "enrolled" in September, 1977, and will not be required to enroll again until Septermber, 1978, have they escaped the requirements of House File 163 between those dates? Or does the term "enrolled" connote a continuing status enjoyed by all school children in good standing which may be withdrawn for cause at any time during the course of the school year and more particularly as is now occurring at the beginning of the second semester pursuant to the Health Department Rule?[2]

[2]In other words, does the ambiguous language "No person shall be enrolled..." mean no person shall *stay* enrolled or does it mean no person shall be *permitted* to enroll?

The matter is further complicated by the fact that the origins of House File 163 can be traced back to the Second Session of 66th General Assembly in 1976. At that time, House File 1143 was introduced in the House by the Human Resources Committee. Such House File 1143 was very similar to what was later to become House File 163 in the 67th General Assembly except that it used the term "admitted" where House File 163 uses the term "enrolled." We have been unable to determine what motivated the Human Resources Committee to offer this amendment to the bill. In any event, although House File 1143 as amended passed the House, it did not pass the Senate in that session. Thus, it was reintroduced in the First Session of the 67th General Assembly and ultimately became House File 163, the Act in question.

It appears that the authors of House File 163 and the officials charged with its enforcement and implementation have used the terms "attending," "admitted," "entering," and "enrolled" more or less interchangeably. This is not particularly surprising. As the Arizona Supreme Court said in the case of *Long v. Dick:*

"It will be noticed that the statute speaks of 'days in which a pupil is enrolled in...four subjects...' The word 'enroll' is defined by Webster's New International Dictionary (2d Ed) as 'to register or enter in a list.' We recognize that the words 'enroll', 'register', and 'matriculate' are often used interchangeably to mean to be admitted to membership in a body or society, particularly in schools of advanced learning..." 87 Ariz. 25, 347 P.2d 581, 80 A.L.R.2d 949, 951 (1959).

Upon consideration of all the foregoing, it is our conclusion that the term "enrolled" in the context in which it is found in House File 163 refers to a continuing status rather than to an isolated event which occurs in a moment in time at the beginning of each school year or when a student transfers or enters kindergarten for the first time. Or to put it another way, "No person shall be enrolled" means no person shall attend.

Just as a lawyer may be first admitted to the bar upon successfully passing the bar examination and meeting the other qualifications prescribed therefore, it is still common to use ther term "admitted" to describe his continuing eligibility to practice law. For example, it is not uncommon to ask a lawyer in what states or courts he is admitted? Similarly, a soldier may enlist or a person may be commissioned as an officer in the Armed Forces and those are events which occur at the beginning of their terms of service as such enlisted men or commissioned officers. But it is also quite usual to refer to them during such service as commissioned officers or enlisted men, thereby connoting a continuing status in the Armed Forces. Another example would be an ordained minister.

This construction of the term "enrolled" comports fully with the conclusions reached by the Linn County District Court in *Cretsinger, et al. v. Cedar Rapids Community School District Board, et al., supra,* at Footnote (1). In its decision, the District Court said:

"The Court must define what the term 'enrolled' means. Does it mean enrolled for the first time in a school or does it mean enrolled each quarter, semester or tri-semester? A student gets grades and credits that can be transferred after each of these divisions, which for convenience, I will refer to as semesters. Assuming the need and effectiveness of mass immunization, at least in the eyes of the Legislature, it is difficult to believe that only kindergarten or preschool children would be subject to the vaccination enrollment law. This would make, at least, a thirteen-year project from those who have not been

immunized. It would only apply to transfer students from out of town or students who transfer within the school system, from one high school to another or one grade school to another, because it states no person shall be enrolled in any school, giving certain types of schools. It would appear then to apply to drop outs who re-enroll, if this is the term 'enroll', meaning enrolling in a school for the first time.

"The Court cannot believe that the Legislature intended such a definition which would detract from the immediacy and need of this law, as they have so defined."

This construction also comports with the practice of schools, particularly high school, and colleges, which almost universally require registration for courses of study at the beginning of each semester, trimester or quarter. If a student does not register, he cannot attend.

Beyond this, defining "enrolled" as we now do, would appear to be consistent with the rules of construction laid down in §4.6 of the Code, viz. (1) The object sought to be obtained, (2) the circumstances under which the act was passed, (3) legislative history, (4) the consequences of a particular construction, (5) the administrative construction, and (6) the preamble or statement of policy.

As stated by the Supreme Court of Iowa in *State, ex rel. Turner v. Koscott Interplanetary, Inc.,* 191 N.W.2d 624, 629 (Iowa 1971):

"A law providing regulations conducive to public good or welfare, such as suppression or fraud, is ordinarily remedial and as such liberally interpreted."

Also, in *Johnson County v. Gurnsey Association of Johnson County,* 232 N.W.2d 84, 87 (Iowa 1975):

"Additionally, it must be noted that a law providing regulations conducive to the public good and welfare, is ordinarily remedial, and as such liberally interpreted"

Certainly, House File 163 provides regulations conducive to the public good and welfare in eradicating communicable diseases and as such must be accorded a liberal construction to promote its ends. It is true that by reason of its inclusion in Chapter 139 of the Code, a violation of House File 163 would entail possible criminal penalties under §139.32 which makes the violation of any provision of that chapter a misdemeanor. However, in our opinion this does not make House File 163 a penal as opposed to remedial statute. As the Court said in *Koscott supra,* at page 629 referring to the consumer fraud law:

"Admittedly the act is editorially set forth in the criminal section of our code, but that alone is not determinative—(citations omitted). *Neither would this enactment be instantly subject to strict interpretation even if a penalty could also be imposed thereunder."* (Emphasis added)

This, in answer to your first question, it is our opinion that an Iowa school district official has the duty to refuse to readmit students at the beginning of the second semester of the 1977-1978 school year, who were enrolled at the beginning of the school year, on the basis that they have not complied with the immunization requirements of House File 163.

II

You next ask what procedural due process requirements, if any, must be

provided by a school district which refuses to readmit such students the second semester of the 1977-1978 school year. In answering this second question it is perhaps appropriate to separate it into two parts. The first concerns itself with those students who have not filed anything. The second involves those who have filed either a validation or immunization or an exemption from immunization for medical or regilious reasons of questionable sufficiency.

Education is not a fundamental right guaranteed by the Constitution. *Goss v. Lopez,* 419 U.S. 465, 95 S.Ct. 729, 42 L.Ed2d 725 (1975). However, as stated in that case, once a state mandates and provides for the right to education, the constitutional requirements of due process apply. *Goss* involved an appeal by various administrators of the Columbus, Ohio Public School System challenging the judgment of a three judge federal court declaring that various high school students in the Columbus, Ohio Public School System were denied due process of law contrary to the command of the Fourteenth Amendment by reason of their temporary suspension for periods of up to ten days from their high schools without a hearing either prior to suspension or within a reasonable time thereafter.[3] The Supreme Court concluded that at the very minimum students facing suspension must be given some kind of notice and afforded some kind of hearing although it did recognize that there may be exceptional instances where a hearing could be had within a reasonable time after the suspension or expulsion. In its opinion, the Court articulated two principal reasons for its decision: the stigma which would attach to the student suspended or expelled and the necessity for a fair determination of disputed facts. As stated by the Court:

"If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." 42 L.Ed.2d at 735.

As to factual disputes, the Court said:

"The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process." 42 L.Ed.2d at 736.

While requiring a notice of hearing of some kind, the Court did indicate that the timing and content of the notice and the nature of the hearing will depend on the appropriate accommodation of competing interests involved. And that,

[3]A case more directly in point, at least as to the due process and religious exemption aspects of House File 163, is *Avard v. Dupuis, 376 F. Supp. 479 (D.C.N.H. 1974). There the district court stated flatly: "Since the State elected to provide a religious exemption from vaccination, the plaintiff has a constitutionally protected right to procedural due process in the state...procedures whereby a determination of whether to issue such a[n] [exemption] will be made. Raper v. Lucey, 488 F.2d 748, 751 (1st Cir. 1973.)"*

"There need be no delay between the time 'notice' is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is." 42 L.Ed.2d at 739.

Unlike *Goss,* there would normally be no stigma attached to a failure to produce evidence of immunization. However, Goss is analogous on the issue of fact disputes. For instance, if the admitting official disputes the fact that a student is adequately immunized and, therefore, neither the validation nor the student are accepted, a fact dispute may arise as to the adequacy of the immunization. So too with respect to religious exemptions. A school district may believe that the religious denomination of the applicant does not contain practices against immunization, a circumstance which certainly would generate a fact dispute. Indeed a dispute could even exist as to whether or not the particular student had in fact turned in an immunization certificate or exemption certificate. However, where there is no dispute as to the student's failure to file anything, we are inclined to think that procedural due process would not come into play.[4] Also, we are inclined to think that in the usual case only a relatively informal type of procedural due process need be afforded the suspended student. As stated by the Court in Goss:

"We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with *short* suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness..." (Emphasis added)

Since the penalty for failure to comply with House File 163 is not a short ten day suspension as in the case of *Goss* but a suspension of indefinite duration or until the requisite immunization certificate or certificate of exemption is furnished, the Supreme Court if faced with the question well might require the full panoply of trial type due process. As noted in *Goss:*

"We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures..."

Thus, it is our opinion that procedural due process should be afforded each student denied permission to attend school under House File 163 and that,

[4]However, even here *Goss* might require notice and hearing: "Requiring that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension, will add little to the fact-finding function where the disciplinarian himself has witnessed the conduct forming the basis for the charge. But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what deems the proper context." 42 L.Ed2d at 740.

except where there is absolutely no factual dispute, at least perfunctory notice and hearing should be given.[5]

This notice need be no more than a letter by ordinary mail to the student at his last known address telling him he may appear at a specific time and place and present whatever excuses, explanations or other defenses he may have for his failure to be properly immunized or his failure to file a proper immunization certificate or exemption. A copy of this letter should also be mailed to the parent or guardian of the student, especially if he is not yet in high school.

There is no reason why substantial numbers of students can't be handled at the same hearing. Due process does not require a separate, private hearing for each student if each can be given an opportunity to be heard and to present his own separate defense.

In absence of an epidemic no student should be refused enrollment unless he and his parent or guardian have had *prior* notice and opportunity to be heard.

III

Your final question relates to the compulsory attendance provisions of Chapter 299 and whether or not they may be enforced against parents who refuse and neglect to obtain the proper immunization and whose children therefore are not allowed to attend school beginning with the second semester of the 1977-178 school year.

Section 299.1, provides in relevant part:

"Attendance requirement. Any person having control of any child over seven and under sixteen years of age, in proper physical and mental condition to attend school, shall cause said child to attend some public school for at least twenty-four consecutive school weeks in each school year, commencing with the first week of school after the first day of September, unless the board of school directors shall determine upon a later date, which date shall not be later than the first Monday in December.

* * *"

Section 299.6, provides:

"Violations. Any person who shall violate any of the provisions of sections 299.1 to 299.5, inclusive, shall be fined not less than five dollars nor more than twenty dollars for each offense."

In our opinion the compulsory attendance provision of Chapter 299 would not apply to students excluded from school for noncompliance with House File 163. It is to be observed that the attendance requirements found in §299.1 set forth above apply only to children "in proper *physical* and mental condition." Arguably, a student who was refused permission to attend a school for non-compliance with the immunization requirements of House File 163 could be said to be in improper physical condition. In other words, being immunized against certain communicable diseases can be a part of one's physical condition. However, there are additional reasons for concluding as we do.

[5]Unless it is well documented that there is no factual dispute with either the student or his parent or guardian, we recommend notice and hearing. See footnote 4. *supra.*

An annotation entitled "Power of Municipal or School Authorities to Prescribe Vaccination or Other Health Measures as a Condition of a School Attendance" found in 93 A.L.R. 1413, contains a subdivision devoted to compulsory education provisions. It is stated therein:

"With but few exceptions, it has been held that the prescribing of health measures as a condition of school attendance is not inconsistent with compulsory education laws."

Close analysis of the cases cited as supporting this statement discloses that they do not involve the enforcement of the criminal penalties contained in the compulsory school attendance laws but were merely attacks on the immunization statutes and regulations on the grounds that such were inconsistent with statutes mandating compulsory school attendance. In the relatively few cases which we have been able to find which directly address the question of whether or not a parent or guardian could be punished for violation of compulsory attendance statutes where the child in question had been excluded from school by school authorities for failure to obtain required immunization, the courts held that criminal sanctions could not be applied. *State v. Miday,* 140 S.E.2d 325 (N.C. 1965) is a case in point. There, the North Carolina Supreme Court said:

"With respect to the defendant's conviction for failing to send his child to school as required by G.S. §115-166, it appears that the defendant did everything within his power to keep his child in school except to waive what he believed to be his rights under G.S. §130-93.1(h). So long as the defendant, in good faith, was asserting his rights as he conceived them under the statute, in our opinion he was not subject to conviction under G.S. §115-166."

Other cases supporting this proposition are *Commonwealth v. Smith,* 9 Pa. Dist. R 625 (Penn. 1900); *State v. Cole, et al,* 119 S.W. 424 (Mo. 1909). But see *Cude v. State,* 377 S.W.2d 816 (Ark. 1964). However, it should be noted that entirely apart from the provisions of §1(2) of House File 163 prohibiting enrollment of children lacking the requisite immunizations, §1(1) places an affirmative duty on each parent or guardian to have his or her minor children immunized against the designated diseases and any violation of Chapter 139 of the Code of which House File 163 becomes a part is a misdemeanor under §139.32, punishable by imprisonment not to exceed thirty days, or a fine not to exceed one hundred dollars. Section 903.1(3), Supplement to the Code of Iowa, 1977.

We can, however, conceive of a situation where a parent or guardian might be subject to the compulsory attendance laws if acting in bad faith. An example would be a parent of a fully immunized student who was unsuccessful in efforts to keep his child out of school for reasons unrelated to immunization who refused to file an immunization or exemption certificate merely to achieve that end.

January 4, 1978

ELECTIONS: Constitutional Law; Voter Registration; Contracts. Article I, §21, Constitution of Iowa; §47.5, Code of Iowa, 1977. An amendment to the election law will not operate to invalidate pre-existing contracts as such would be a law impairing the obligation of contracts in violation of the Constitution. (Haesemeyer to Nelson, State Registrar of Voters, 1-4-78) #78-1-13

Mr. Dale L. Nelson, State Registrar of Voters: You have asked our opinion

regarding the validity of a contract between Iowa Data Processing Corporation and Johnson County for voter registration data processing services. It is helpful here to review the facts.

Johnson County contracted with Iowa Data on November 15, 1972 for two years of service. Paragraph three of that agreement provides:

"3. This agreement shall be in full force and effect for a period of two years after the date of execution, and shall be *extended* from year to year unless notice be given by one of the parties to the other in writing prior to 90 days of the termination of the original agreement or any extension thereof."

In accordance with such paragraph three, the contract was extended on November 15, 1974, November 15, 1975 and November 15, 1976. On December 3, 1976, Johnson County served written notice to Iowa Data that they would terminate the contract on November 14, 1977. This complied with the 90 day notice requirement and operated to terminate all obligations thereunder.

The Sixty-sixth Iowa General Assembly in 1976 passed Chapter 1075 which among other things, amended §47.5 of the Code to read in part as follows:

"Purchasing by competitive bidding.

"1. The commissioner shall take bids for goods and services which are needed in connection with registration of voters or preparation for or administration of elections and which will be performed or provided by persons who are not employees of the commissioner under the following circumstances:

"a. In any case where it is proposed to purchase data processing services. The commissioner shall give the registrar written notice in advance on each occasion when it is proposed to have data processing services, necessary in connection with the administration of elections, performed by any person other than the registrar or an employee of the county. Such notice shall be made at least thirty days prior to publication of the specifications.

It has been suggested that Johnson County could not validly extend its preexisting contract with Iowa Data from and after May 14, 1976 when the amendment to §47.5 became effective since this procedure did not involve a competive bidding procedure.

It is not our opinion that this contention is wrong and that a valid contract existed between Johnson County and Iowa Data until November 14, 1977.

The original contract and all extensions thereof may be considered the same contract, *Kollock v. Kaiser,* 73 N.W. 776 (Wis. 1897). (See generally, *Williston on Contracts, Corbin on Contracts*). It is by this authority that we must apply Article I, §21 of the Iowa Constitution. Section 21 provides:

"No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed."

Subject to this constitutional provision, the fact that the amendment to Iowa Code §47.5(1)(a) became law in 1976 renders it ineffective as applied to contracts in existence at the time of its passage.

January 24, 1978

AGRICULTURE: Soybean Promotion Board. §§185.11, 185.13 and 185.34, Code of Iowa, 1977. It is not an abuse of discretion as a matter of law for the Iowa Soybean Promotion Board to employ as its executive director an individual employed as a field representative by the American Soybean

Association and share his salary costs with that organization. (Haesemeyer to Lounsberry, Secretary of Agriculture, 1-24-78) #78-1-14

Honorable Robert H. Lounsberry, Secretary of Agriculture: Reference is made to your letter of December 2, 1977, in which you state:

"The purpose of the Iowa Promotion Board, as provided in §185.11 is as follows:

"1. Enter into contracts or agreements with recognized and qualified agencies or organizations for the development and carrying out of research and education programs directed toward better and more efficient production, marketing, and utilization of soybeans and soybean products.

"2. Provide methods and means, including, but not limited to, public relations and other promotion techniques for the maintenance of present markets.

"3. Assist in development of new or larger markets, both domestic and foreign, for soybeans and soybean products.

"Work for prevention, modification, or elimination of trade barriers which obstruct the free flow of soybeans and soybean products to market.

"The individual employed by the Iowa Soybean Promotion Board is also employed as a field representative by both the American Soybean Association and the Iowa Soybean Association, however, in the dual field representative capacity he is only paid by the American Soybean Association. While the objective of these two organizations may be in harmony with those of the Iowa Soybean Promotion Board, the method of achieving these objectives may be in conflict. 25% of his salary is derived from the American Soybean Association and 75% from the Iowa Soybean Promotion Board.

"The Iowa Soybean Promotion Board is charged, in §185.12, with performing all acts reasonably necessary to effectuate the purposes of that chapter. Inasmuch as the triple responsibilities of this one employee could result in such divided loyalties that the best interests of the statutory based Iowa Soybean Promotion Board would not be represented, the following question is asked:

"Does this appointment constitute an abuse of discretion?"

To carry out the purpose of the Iowa Soybean Promotion Board as quoted by you from §185.11, Code of Iowa, 1977, the Board has been given broad powers and duties which are contained in §185.13, as follows:

"Powers and duties. The board may:

"1. Employ and discharge assistants and professional counsel as necessary, prescribe their duties and powers, and fix their compensation.

"2. Establish offices, incur expenses, and enter into any contracts or agreements necessary to carry out the purposes of this chapter.

"3. Adopt, rescind, and amend all proper and necessary rules for the exercise of its powers and duties.

"4. Enter into arrangements for collection of the assessment on Iowa grown soybeans from persons purchasing soybeans outside of Iowa."

It is presumably, pursuant to this grant of power, that the Iowa Soybean Board has employed an executive director and fixed his compensation. In answer to your question, we cannot say as a matter of law that the Iowa Soybean Promotion Board has abused its discretion in working out the 75%/25% salary

arrangement described by you. Certainly as you point out, the Iowa Soybean Promotion Board, the American Soybean Association and the Iowa Soybean Association all share in common an interest in promoting soybeans and while the method of achieving the objective might not always coincide, it would be for the Iowa Soybean Promotion Board to decide whether this created such a problem as to make it impossible for the executive director to be paid in the manner described.

I would point out also that under §185.34 it is specifically provided:

"The Iowa soybean promotion board shall not be a state agency."

Thus, we are not confronted with a situation where a state employee might conceivably be working for a private employer with interests conflicting with those of his public employer but with an essentially private sector arrangement.

January 24, 1978

STATE OFFICERS AND DEPARTMENTS: Iowa Public Employees Retirement System; Years of Service. §§97B.41, 97B.42 and 97B.53, Codes of Iowa, 1958 and 1966. An individual in continuous public employment since 1958 whose earnings were below the IPERS minimum from January, 1958 to January 1, 1961 and from July 4, 1965 to January 1, 1968, and who has received a refund on October 22, 1965, was an "employee" at all times after January 1, 1961, and not terminated and would not properly request a refund of contributions paid into IPERS. IPERS could not grant a claim for refund submitted by one yet an "employee" under the 1966 provisions. He should be allowed to repay his refund together with appropriate interest compounded annually; and be credited with service from and after January 1, 1961. (Haesemeyer to Longnecker, Administrator, State Retirement System, 1-24-78) #78-1-15

Mr. Ed R. Longnecker, Administrator, State Retirement System: You have requested an opinion of the Attorney General with respect to the following:

"The question has arisen as to whether a member's years of service credit should include periods in which he made no contributions to IPERS because his earnings from public employment were too low to permit IPERS deductions. (The minimum taxable wage was $200 per calendar quarter until July 4, 1965, when it was changed to $300 per calendar quarter.)"

Your question is prompted by the situation of one particular employee who has been employed in the public sector since at least 1958.

Beginning January 1, 1958, the individual was employed in town government existing until January 31, 1969, at which time he became an employee of the State and has continued as an employee of the State to and including this date. For the following periods, inclusive, the subject's wages were:

January 1, 1958, through February 1, 1959—$30.00 per month;

February 1, 1959, through January 1, 1961—$50.00 per month;

January 1, 1961, through August 1, 1966—$75.00 per month;

August 1, 1966, through January 1, 1968—$95.00 per month;

January, 1968, through January 31, 1969—$120.00 per month.

Respecting the subject's income from January 1, 1958, to January 1, 1961, IPERS deductions were not taken. This accords with the definition in §97B.42,

Code of Iowa, 1958, excluding from the term "employee" §97B.41(3)(b), Code of Iowa, 1958, those whose monetary remuneration is less than $200.00 per calender quarter.

For the same statutory reasons, however, deductions were made starting January 1, 1961, through July 4, 1965, at which later time the Two Hundred Dollar floor was raised to Three Hundred Dollars (as well as certain other significant changes to be discussed hereinafter).

On or about October 5, 1965, the subject made claim for refund of the IPERS deductions taken for the period of January 1, 1961, through July 4, 1965. On or about October 22, 1965, the subject was paid a refund of $150.42.

It is this state of facts which has prompted your question in the form you have asked it.

The subject, no doubt anticipating retirement and seeking the maximum retirement pension, contends "... they [IPERS] erred when they notified me I was eligible for refund and refunded my contributions...I feel that I should return the refund plus interest and be credited with membership from January 1, 1961."

For the purposes of this analysis, the following statutes (in effect until July 4, 1965) of the 1958 Code of Iowa read:

Section 97B.42:

Mandatory Membership. Each employee whose employment commences after July 4, 1953...or any publicly elected official of the state or any of its political subdivisions...shall become a member upon the first day of the month in which such employee is employed. He shall continue to be a member so long as he continues to be in public employment...The term 'employee' as used herein shall not include any individual performing any service in any calendar quarter in which the remuneration for such service does not equal or exceed the sum of Two Hundred Dollars...."

Section 97B.41(10):

" 'Service' means uninterrupted service under this chapter by an employee from the date he last entered employment of the employer until the date his employment shall be terminated by death, retirement, resignation or discharge... ."

Section 97B.53(5):

"Any member who elects not to withdraw his accumulated contributions upon termination of employment may at any time request the return of his accumulated contributions, but if he receives such return of contributions he shall be deemed to have waived all claims for any other benefits from the fund."

Regarding the above quoted statutes, a couple of pertinent observations will demonstrate the IPERS *lack* of power to pay the subject the amounts he claimed.

First of all, prior to 1965 all public employees were mandatory members of IPERS under the definition of "employee" in §97B.42. The single exception from "employeeship" hence, mandatory membership, is that in which one otherwise an employee earns less than Two Hundred Dollars per quarter. Under this definition of "service", §97B.41(10), one must first be an "employee" before one begins "uninterrupted service" for his public employer.

The last paragraph of §97B.53(5) is directed to any "member". "Member" is defined in §97B.41(8) to mean one who is a member of the retirement system. But, returning to §97b.42, it appears that one not an "employee" and thus not under the "mandatory membership" directive of §97B.42 is not also a "member" of IPERS within the meaning of §97b.41(8). Thus, while §97B.53, last paragraph is concerned with IPERS "members" as a matter of pure logic, *a fortiori,* it must also apply to one not a member.

The last paragraph of §97B.53(5) is the statutory grant by which one could claim an IPERS refund. It is contructed to allow an IPERS member either to leave his contributions in the fund or withdraw them when he chooses if that member terminates his public employment. The import of the last clause of that paragraph is unmistakable as may be judged from its text: "...but if he [member] receives such return of contributions he shall be deemed to have waived all claims for any other benefits from the fund."

It is our conclusion that the subject was not an "employee" respecting his employment between January 1, 1958, and January 1, 1961, since between these time periods, the subject's earnings were less than Two Hundred Dollars per calendar quarter. Since the subject was not an "employee" until January 1, 1961, when his earnings went over the Two Hundred Dollar floor, he was not subject to the "mandatory membership" provisions of §97B.42, nor within the meaning of the statute was he in "service" while employed between January 1, 1958, and January 1, 1961. Thus, the subject as neither an "employee" nor "member" could have submitted a claim for refund at any time prior to January 1, 1961, when his pay went over Two Hundred Dollars per calendar quarter and he became an "employee" within the meaning of the Code.

It is to be observed that the claim for refund was made October 5, 1965 and it was not until October 22, 1965 that it was paid. Such refund must of course be viewed in light of the law existing at that time. It was effective July 4, 1965, that Chapter 97B was changed in certain basic regards. These statutory changes may be found reflected in the 1966 Code of Iowa.

To begin with, the July 4, 1965 amendments changed §97B.42 by deleting the exclusion of the old section whereby one earning less than Two Hundred Dollars per calendar quarter was not an "employee". Under the 1965 changes, subject was an "employee" [§97B.41(3)(b)] in the "employment" [§97B.41(2)] of his "employer" [§97B.41(3)(a)]. Also, under the 1965 changes, the subject was an "employee" despite the failure to meet the changed $300 per calendar quarter minimum.

Thus, as an "employee", the subject was in "service" [§97B.41(14)] as a "member" [§97B.41(8) and §97B.42] albeit a "member" whose status was "inactive" [§97B.41(10)] because his pay was less than the calendar quarter contribution minimum.

While the last paragraph of §97B.53(5) remained unchanged in the 1966 Code, it is to be remembered that §97B.53(5) empowered the administrator to pay a claim for refund only to those "employees" who had *terminated* their public service.

In other words, since the subject was an "employee" on and after January 1, 1961, there was no statutory authority in the 1958 Code allowing "employees" to withdraw their IPERS contributions. See §97B.53, Code of Iowa, 1958. As this remained the law in the 1966 Code, the subject could not properly submit a

claim for refund at any time after January 1, 1961, nor could IPERS legally pay a refund, if a claim were made.

To summarize, it is our opinion that (1) the subject was an "employee" on and after January 1, 1961; (2) that subject, as an "employee" at all times after January 1, 1961, and not terminated, could not properly request a refund of contributions paid into IPERS; (3) that IPERS could not grant a claim for refund submitted by one yet an "employee" under the 1966 Code provisions; and (4) that the subject should be allowed to repay his refund together with appropriate interest compounded annually; and (5) be credited with service from and after January 1, 1961.

January 25, 1978

STATE OFFICERS AND DEPARTMENTS: Transportation of convicted persons to state institutions. §901.7 Code supplement, 1977, 337.11(10) and (12), 337.12, Code of Iowa, 1977, Rule 24c(1) Criminal Procedure. The sheriff has the responsibility of transporting the convicted person to the proper state institution. The sheriff is entitled to charge and collect the statutory fee for same from the committing county. Upon receipt of the person at the institution, the state becomes responsible for such individual including the cost of incarceration. (Robinson to McCauley, Director of Division of Adult Corrections, 1-25-78) #78-1-16

Mr. Roland McCauley, Director, Division of Adult Corrections: You recently stated that §901.7, Supplement to the Code of Iowa, 1977, containing Criminal Law and Criminal Procedure [Code Supplement 1977] has been cited as authority for the proposition that the director of adult corrections is to transport the convicted defendant after sentencing to the proper state institution. This is based, in part, on the language in that section which commits the person to the director, and the clerk of court is to immediately notify the director of this committment.

In our opinion the sheriff has the responsibility of transporting the convicted person to the proper state institution. The sheriff is entitled to charge and collect the statutory fee for same from the committing county. Upon receipt of the person at the institution, the state becomes responsible for such individual including the cost of incarceration. This opinion is based upon the following analysis.

Section 901.7, Code Supplement, 1977, provides:

In imposing a sentence of confinement for more than one year, the court shall commit the defendant to the custody of the director of the division of adult corrections. Upon entry of judgment and sentence, the clerk of the district court immediately shall notify the director of such commitment. The court shall make such order as is appropriate for the temporary custody of the defendant pending the defendant's transfer to the custody of the director.

The rules of statutory construction to interpret this section as well as others to be cited are well set forth in *Doe v. Ray,* 251 N.W.2d 496, 500-501 (Iowa 1977):

In interpreting these statutes we are guided by familiar principles of statutory construction. Of course, the polestar is legislative intent. *Iowa Dept. of Rev. v. Iowa Merit Employ. Com.* Iowa, 243 N.W.2d 610, 614; *Cassady v. Wheeler,* Iowa, 224 N.W.2d 649, 651. Our goal is to ascertain that intent and, if possible, give it effect. *State v. Prybil,* Iowa, 211 N.W.2d 308, 311; *Isaacson v. Iowa State Tax Commission,* Iowa, 183 N.W.2d 693, 695. Thus, intent is shown by construing the statute as a whole. In searching for legislative intent we consider

the objects sought to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than on which will defeat it. *Peters v. Iowa Epm. Security Com.*, Iowa, 235 N.W.2d 306, 310; *Iowa Nat. Indus. Loan Co. v. Iowa State, Etc.*, Iowa, 224 N.W.2d 437, 440. However, we must avoid legislating in our own right and placing upon statutory language a strained, impractical or absurd construction. *Cedar Mem. Park Cem. Assn. v. Personnel Assoc., Inc.*, Iowa, 178 N.W.2d 343, 347.

Finally, we note that in construing a statute we must be mindful of the state of the law when it was enacted and seek to harmonize it, if possible, with other statutes relating to the same subject. *Egan v. Naylor*, 208 N.W.2d 915, 918 and citations.

In applying these rules to the situation presented, we must also consider Rule 24c(1), Criminal Procedure, a part of §813.2, Code Supplement, 1977, which provides:

c. EXECUTIONS OUTSIDE COUNTY; CONFINEMENT.

(1) Under all other judgments for confinement, *the sheriff shall deliver a certified copy of the execution with the body of the defendant to the keeper of the jail or penitentiary in which the defendant is to be confined in execution of the judgment,* and take his or her receipt therefor on a duplicate copy thereof, which the sheriff must forthwith return to the clerk of the court in which the judgment was rendered, with the sheriff's return thereon, and a minute of said return shall be entered by the clerk as a part of the record of the proceedings in the cause in which the execution issued. [Emphasis added.]

A straight-forward interpretation of this rule leads to the conclusion that the sheriff is responsible for the transportation of the prisoner to the penitentiary.

Being "mindful of the state of the law when" the criminal code was passed, we next consider §337.11(10) and (12), The Code, pertaining to sheriff's fees. Section 337.11(10) and (12) provides:

337.11 Fees

The sheriff shall charge and be entitled to collect the following fees:

10. Mileage in all cases required by law, going and returning, provided that this subsection shall not apply where provision is made for expenses, and in no case shall the law be construed to allow both mileage and expenses for the same services and for the same trip. In case the sheriff transports by auto, one or more persons to any state institution or any other destination required by law,... he shall be entitled to but one mileage at the rate prescribed herein, the mileage cost thereof to be prorated to the respective persons transported...

12. For conveying one or more persons to any state, county, or private institution by order of court, or commission, he shall be allowed his necessary expenses, for himself and such person or persons, and in addition thereto, three dollars per hour for the time necessarily employed in going to and from such institution, same to be charged and accounted for as fees. Should the sheriff or deputy sheriff need any assistance in taking any person to any such institution, the same shall be furnished at the expense of the county.

The annotations to this section reveal no "modern" cases on the subject, but they do provide some interesting reading as to the development of the law in this area. See *Wapello County v. Monroe County*, 39 Iowa 349 (1874); *Bringolf v. Polk County*, 41 Iowa 554 (1875); *Maynard v. Cedar County*, 51 Iowa 430, 1 N.W. 701 (1879); *Barnes v. Marion County*, 54 Iowa 482, 6 N.W. 697 (1880);

Harding v. Montgomery County, 55 Iowa 41, 7 N.W. 396 (1880).

Section 337.12, The Code, provides:

337.12 Costs—when payable by county

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 out of the general fund or the court fund. [Emphasis added.]

Thus, when an offender is sentenced to the penitentiary, upon incarceration, he is maintained at state expense. §218.1, The Code. The cost and expenses incident to that commitment are the responsibility of the committing county pursuant to §§337.11(12) and 337.12, The Code. See also 1966 O.A.G. 394.

January 30, 1978

CONSTITUTIONAL LAW: GENDER: SEXES: MEN. Article I §§1 and 9; Art. II, §1; Art. VI, §1, Constitution of Iowa, 1857. §4.1(3), Code of Iowa, 1977. Wherever the word "men" appears in the Constitution of Iowa, it is intended to be construed in a generic sense, to designate all human beings. Where it is intended to designate only male persons, the word "male" is expressly used, such as in Art. VI, §1, which provides that the militia shall be composed of all able-bodied male citizens. (Turner to Smalley, State Representative, 1-30-78) #78-1-17

Honorable Douglas R. Smalley, State Representative: You have requested an opinion of the attorney general as to whether the term "men" in the Constitution of Iowa includes females. Specifically you say:

"Under §4.1(3), Code of Iowa, 1977, governing construction of statutes, it is provided:

'Words of one gender include the other genders.'

"While no similar provision expressly appears in the Constitution of Iowa, 1857, I would appreciate your opinion as to whether the constitution would also be construed so as to define words therein such as 'man', 'men', 'he', 'him', and 'his' in their generic sense as human beings, including females, rather than to import only the masculine gender 'male.'

"For example, Art. I, §1, Constitution of Iowa, provides:

'All *men* are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."

"Does 'men' as used therein include persons of the feminine gender—women? If so, is this true of all provisions of the Constitution?"

In my opinion, wherever the word "men" appears in the Constitution of Iowa, 1857, it is intended to be construed in its generic sense, to designate all human beings. In those instances in which the framers of our constitution have intended to designate only male persons, the word "male" has been expressly used. Thus, we find that the rights or duties to vote, to be a member of the General Assembly, and to serve in the militia, were initially accorded only to "white

male" citizens. (Art. II, §1; Art. III, §§4 and 5; and Art. VI, §1). The qualification "white" was defined by the amendments of 1868.

Women were given the right of suffrage by the 19th Amendment of the Constitution of the United States in 1920, after a proposal to strike the word "male" from Art. II, §1, was defeated in Iowa in 1916. The 19th Amendment was deemed to be self-executing and in the Iowa Supreme Court "by the inherent force" of the 19th Amendment's language "as a part of the supreme law of the land" found that no further legislation was required by Congress or the General Assembly, and no additional amendment to Article II, §1, was necessary "to enlarge the electorate and create practical universal suffrage." *State v. Walker,* 192 Iowa 823, 185 N.W. 619, 622-623 (1921).

In 1926, an amendment deleted the word "male" from Article III, §4, pertaining to the qualifications for membership in the General Assembly.

In *State v. Walker,* supra, our highest court, viewing jury service as a duty rather than a right, held that women, on becoming electors "by the inherent force of" the 19th Amendment, "were automatically placed in a class which made them eligible for jury duty." But the court also found that the legislature might properly either limit jury eligibility to males or impose jury duty upon qualified citizens who are not entitled to vote. The court then considered whether Article I, §9 limited eligibility for jury service to men. This section of Iowa's constitution provides:

"The right of trial by jury shall remain inviolate; but the General Assembly may authorize a trial by jury of a less number than twelve *men* in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law." (Emphasis on "men" added.)

The court found that it is the number that is guaranteed and not the qualifications. The qualifications may be fixed by either the Constitution or the General Assembly but they are not fixed in Article I, §9. The court held that "we are not bound, in the interpretation of a jury under the fundamental law of Iowa, to construe the word 'man' other than in its generic sense."

"We hold therefore that the Nineteenth Amendment perforce extended suffrage to women in the state of Iowa, and since jury service by statute is made dependent upon the right to vote, that, with the extension of the franchise to a citizen class, ipso facto that class is made eligible to jury service and subject to the exemptions of the law, and that no inhibition exists in the state Constitution" [which would prohibit jury service by women].

Thus, on this occasion when the Iowa Supreme Court was squarely presented with the issue, "men" in the Iowa Constitution was construed in its generic sense to include women.

I cannot conceive of a holding today that the words of Article I, §1, "All men are by nature, free and equal..." mean "Males are by nature, free and equal." Indeed, such a construction seems to render the adjective "All" superfluous. It would also suggest that, although the word "male" was deleted by amendment from the qualifications for membership in the House of Representatives (Art. III, §4), the pronouns "his" and "he" following the antededent "citizen" therein would nevertheless, in absence of "or her" and "and she," render women ineligible for such membership. Similarly, masculine pronouns appearing alone in other provisions such as those providing that the Governor (and other state officers) "shall hold *his* office for four years...and until *his* successor is elected

and qualifies (See Amendment 1 of the Amendments of 1972) would, under such a construction, mean that women could not hold any elected state office. Our Supreme Court would consider such an interpretation in violation of the equal protection clause of the 14th Amendment to the Constitution of the United States, if not absurd. *Redmond v. Carter,* 247 N.W.2d 268 (1976 Iowa.)

English has no third person pronoun to refer to individuals of both sexes at the same time. But we must often refer to nouns that apply to both male and female. The most usual and most satisfactory way is to use *he or his* alone even when some of the persons meant are female, since *he* can be regarded as referring to *person* as much as to *man:*

Mr. Smith and Miss Jones led the debate, each giving his opinion of the bill.

There is considerable discussion whether a man or a woman will be appointed to the office. Whoever receives the appointment will find his task a difficult one.

Sometimes when the typical individuals or the majority of the group referred to would be women, the use of *her* is proper:

Each one of the teachers in that school is required to submit her report to the principal in person.

Sometimes both *he* and *she* are used:

A legislator gives his or her own opinions on matters of policy and often persuades others to think as he or she does. (Either of the two pronouns would be better in this sentence than both of them.)

Every legislator wishes to present a bill desired by his or her constituents. (*His or her* sounds pedantic here. *His* alone would be better.)

Two pronouns are almost always clumsy and ordinarily no more accurate than one since the meaning is usually determined by the antecedent.

The General Assembly has in recent years passed amendments and bills which do little or nothing but add "or she" after "he" or "and hers" after "his." This seems unnecessary since the legislature is its own lexicographer and, as you point out, §4.1(3) provides that in construing statutes "Words of one gender includes the other genders."

On rare occasions, one even sees an amendment or bill presented in which tense is changed in midsentence by use of a plural pronoun such as "they" or "their" apparently for the purpose of avoiding the awkward use of both he or she:

A legislator may introduce any bill they please!

In any case, these bills and amendments are not relevant in interpreting the meaning to be accorded to "he," "his" and "him" in the Constitution.

For all of these reasons, it is my opinion that unless a provision of the Iowa Constitution refers specifically to male or female it applies equally to each sex or gender. And the only remaining provision I have found which still applies only to "male citizens" is Article VI, §1:

"The militia of this State shall be composed of all able-bodied *male* citizens, between the ages of eighteen and forty-five years..."

January, 1978

AGRICULTURE

Soybean Promotion Board. §§185.11, 185.13 and 185.34, Code of Iowa, 1977. It is not an abuse of discretion as a matter of law for the Iowa Soybean Promotion Board to employ as its executive director an individual employed as a field representative by the American Soybean Association and share his salary costs with that organization. (Haesemeyer to Lounsberry, Secretary of Agriculture, 1-24-78) #78-1-14

CONSTITUTIONAL LAW

Schools: Mandatory Immunization; Due Process; Compulsory Attendance Laws. Amendment XIV, Constitution of the United States Chapters 139 and 299, Code of Iowa, 1977. H.F.163, Acts, 67th G.A., First Session (1977). (1) Iowa school district officials have the legal authority to refuse to readmit students at the beginning of the second semester of the 1977-1978 school year, who were enrolled at the beginning of the school year, on the basis that they have not complied with the immunization requirements of House File 163. (2) Procedural due process should be afforded each student denied permisssion to attend school under House File 163 and, except where there is absolutely no factual dispute, at least perfunctory notice and hearing should be given. (3) The compulsory attendance provisions of Chapter 299 would not apply to students excluded from school for noncompliance with the immunization requirements of House File 163. (Turner to Benton, Superintendent of Public Instruction, 1-23-78) #78-1-12

Gender; Sexes; Men. Article I, §§1 and 9; Art. II, §1; Art. VI, §1, Constitution of Iowa, 1857. §4.1(3), Code of Iowa, 1977. Wherever the word "men" appears in the Constitution of Iowa, it is intended to be construed in a generic sense, to designate all human beings. Where it is intended to designate only male persons, the word "male" is expressly used, such as in Art. VI, §1, which provides that the militia shall be composed of all able-bodied male citizens. (Turner to Smalley, State Representative, 1-30-78) #78-1-17

COUNTIES AND COUNTY OFFICERS

Conservation Board-land purchase contracts. §111A.6 Code of Iowa, 1977. County Conservation Boards may not enter into land purchase contracts which provide for deferred payments in an amount exceeding one-fourth of the annual conservation fund levy. (Peterson to Harbor, State Representative, 1-23-78) #78-1-11

CRIMINAL LAW

Bribery; Public Officials; Out-of-State Trips. §§722.1 and 722.2, Supplement to the Code of Iowa, 1977. In determining whether the Executive Council should approve out-of-state trips for public officials and employees when the costs are to be paid by an out-of-state university or some other outside organization or institution, even with the help of federal funds, the Council should determine whether there is any intent to influence the act, vote, opinion, judgement, decision or exercise of discretion of the public official or employee. In making this determination, factors which could be considered are the nature of the organization, the purpose of the trip, the type of employment and duties of the employee or official, the amount of expenses involved and past relationships between the employee or official and the organization in question. (Turner to Wellman, Secretary, Executive Council of Iowa, 1-13-78) #78-1-9

Bribery; Campaign Contributions; Public Officials. §4.7 and Chapter 56,

Code of Iowa, 1977. §§722.1 and 722.2, Supplement to the Code of Iowa, 1977. Chapter 56, the Campaign Finance Disclosure Law is a special statute which is in irreconcilable conflict with the new bribery sections (722.1 and 722.2, of the Supplement), which are general provisions. Thus, Chapter 56 prevails and ordinarily a campaign contribution would not violate these bribery sections, at least when the contribution complies with the Campaign Finance Disclosure Act. (Turner to Harbor, State Representative, 1-10-78) #78-1-7

Bribery; Gifts and Gratuities; Public Officials; Spouses. §§4.1(3), 68B.2(7) and 68B.5, Code of Iowa, 1977. §§722.1 and 722.2, Supplement to the Code of Iowa, 1977. The new bribery sections (722.1 and 722.2 of the Supplement) are not applicable to spouses of public officials so as to prohibit them from receiving gifts, including brunches and teas, nor does the gift statute (§68B.5) prohibit them if the value thereof is not $25 or more. (Turner to Danker, State Reprensentative, 1-9-78) #78-1-6

ELECTIONS

Constitutional Law; Voter Registration; Contracts. Article I, §21, Constitution of Iowa; §47.5, Code of Iowa, 1977. An amendment to the election law will not operate to invalidate pre-existing contracts as such would be a law impairing the obligation of contracts in violation of the Constitution. (Haesemeyer to Nelson, State Registrar of Voters, 1-4-78) #78-1-13

MOTOR VEHICLES

Vehicle Identification Numbers-forfeiture of Vehicles. §§321.1(36), (75), 321.4, 321.43, 321.45, 321.48, 321.85, 321.86, 321.88, 321.89, Code or Iowa, 1977. Iowa Department of Transportation Regs. 820-[07,D] 11.1(321),(1),(12), 820-[07,D] 11.51(1), Iowa Administrative Code, 1975. No forfeiture provisions are authorized for a vehicle seized under the altered VIN number statute, §321.84. An individual claiming return of a vehicle under §821.87 must demonstrate ownership properly identify it, and pay appropriate costs. Once an individual has complied with the requirements of §321.87, the custodians of the vehicle no longer have the responsibility of securing a new VIN number for the vehicle involved or holding it until one has been applied for. (Dundis to Kopecky, Linn County Attorney, 1-3-78) #78-1-1

PHYSICIANS AND SURGEONS

Midwifery. §§148.1 and 152.1, Code or Iowa, 1977. The practice of midwifery can be considered to be the practice of medicine and surgery. One who assists licensed physicians in the administration and treatment of pregnancies and deliveries could be considered to be within the practice of nursing. (Blumberg to Davitt, State Representative, 1-6-78) #78-1-5

SCHOOLS

Collective Bargaining Agreements. §§2.26, 56.1, Code of Iowa, 1977. Payroll deductions for employee representative organization membership cannot properly be used for political contributions distributed by the political action committee of the employee organization (Nolan to Branstad, State Representative, 1-10-78) #78-1-8

Teachers Contracts. §279.13, Code of Iowa, 1977. A local school board correctly uses a single written contract to set forth all duties, including extra-curricular duties, which are to be performed by a teacher and for which the teacher is to be compensated. (Nolan to Spear, State Representative, 1-6-78) #78-1-4

Regents; Trusts. §262.9, Chapter 28A, Chapter 68A, Code of Iowa, 1977. (1) Regents may not transfer state funds to non-profit foundations designated by the Regents to administer trusts without legislative authorization. (2) Where such foundations are designated by the Regents to accept and administer trusts for the benefit of Regent institutions the non-profit foundation becomes a public agency and is subject to open meetings and open records laws. (Nolan to Poncy and Dyrland, State Representatives, 1-4-78) #78-1-3

Reorganization. §275.3, Code of Iowa, 1977. A school district is not precluded by statute from reorganizing into two high school districts if the resulting districts meet the requirements of Chapter 275 and the voters approve such reorganization. (Nolan to Conlon, State Representative, 1-4-78) #78-1-2

STATE OFFICERS AND DEPARTMENTS

Iowa Public Employees Retirement System; Years of Service. §§97B.41, 97B.42 and 97B.53, Code of Iowa, 1958 and 1966. An individual in continuous public employment since 1958 whose earnings were below the IPERS minimum from January 1, 1958 to January 1, 1961 and from July 4, 1965 to January 1, 1968, and who has received a refund on October 22, 1965, was an "employee" at all times after January 1, 1961, and not terminated and could not properly request a refund of contributions paid into IPERS. IPERS could not grant a claim for refund submitted by one yet an "employee" under the 1966 Code provisions. He should be allowed to repay his refund together with appropriate interest compounded annually; and be credited with service from and after January 1, 1961. (Haesemeyer to Longnecker, Administrator, State Retirement System, 1-24-78) #78-1-15

Transportation of convicted persons to state institutions. §901.7, Code Supplement, 1977; §337.11(10) and (12), 337.12, Code of Iowa, 1977, Rule 24c(1) Criminal Procedure. The sheriff has the responsibility of transporting the convicted person to the proper state institution. The sheriff is entitled to charge and collect the statutory fee for same from the committing county. Upon receipt of the person at the institution, the state becomes responsible for such individual including the cost of incarceration. (Robinson to McCauley, Director of Division of Adult Corrections, 1-25-78) #78-1-16

Public Employment Relations Board. §20.19, Code of Iowa, 1977. The Public Employment Relations Act neither requires the parties to seek a mediator through the Public Employment Relations Board, nor does it authorize the PER Board to interfere with the independently-established impasse resolution procedure. (Condon to Anderson, State Representative, 1-16-78) #78-1-10

STATUTES CONSTRUED

Code 1977	Opinion
4.1(3)	78-1-6
4.1(3)	78-1-17
4.7	78-1-7
20.19	78-1-10
20.26	78-1-8
28A	78-1-3
47.5	78-1-13
56	78-1-7
56.1	78-1-8

68A	78-1-3
68B.2(7)	78-1-6
68B.5	78-1-6
97B.41	78-1-15
97B.42	78-1-15
97B.53	78-1-15
111A.6	78-1-11
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321.43	78-1-1
321.45	78-1-1
321.48	78-1-1
321.85	78-1-1
321.86	78-1-1
321.87	78-1-1
321.88	78-1-1
321.89	78-1-1
337.11(10)	78-1-16
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Art. I, §1	78-1-17
Art. I, §1	78-1-17

February 8, 1978

STATE OFFICERS AND DEPARTMENTS: Iowa Beer and Liquor Control Department — §§25A.2, 25A.4, 554.3104, Code of Iowa (1977): §1, Ch. 45,

Acts of the 67th General Assembly (1977); §1, Ch. 71, Acts of the 67th General Assembly (1977). (1) An employee of the Iowa Beer and Liquor Control Department is afforded liability protection by Chapter 25A of the Code when acting in the scope of employment. (2) The Iowa Beer and Liquor Control Department may accept checks for the sale of alcoholic liquor only from the holder of a retail liquor license. Such checks must be signed by the license holder. Cashier's checks cannot be accepted. (McNulty to Gallagher 2-8-78) #78-2-1

Rolland Gallagher, Director: You have requested the opinion of this office on two matters: (1) the liability protection afforded employees of the Iowa Beer and Liquor Control Department, and (2) whether state liquor stores can accept traveler's checks or cashier's checks from retail liquor license holders.

With regard to the first matter, the scope of liability protection afforded state employees by the State has been articulated in several recent opinions. Beamer to Richey, Office of the Attorney Genereal (O.A.G.) No. 76-12-14; Dent to Crane, O.A.G. No. 76-9-34; Beamer to Lynch, O.A.G. No. 76-8-10; Blumberg to Pawlewski, O.A.G. No. 76-7-24. Specifically, you have requested an opinion on the possible liability of a liquor store clerk who used force in restraining a customer who had attacked him after being notified that the store was out of a particular item.

Chapter 25A of the Code, the "State Tort Claims Act," provides liability protection for state employees. Section 25A.(3) of the Code states, in relevant part:

" '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."

Section 25A.2(5) of the Code defines "claim," in pertinent part as follows:

"b. Any claim against an employee of the State for money only, on account of damage to or loss of porperty or on account of personal injury or death, caused by the negligent or wrongful act or omission, except any act of malfeasance in office or willful and wanton conduct, of any employee of the state while acting within the scope of his office for employment."

Finally, section 1, Chapter 45, Acts of the 67th General Assembly (1977) adds the following section to Chapter 25A, thereby repealing §25A.21:

EMPLOYEES DEFENDED AND INDEMNIFIED. The state shall defend and, except in cases of malfeasance in office or willful and wanton conduct, shall indemnify and hold harmless any employee of the state against any claim as defined in section twenty-five A point two (25A.2), subsection five (5), paragraph b, of the Code, including claims arising under the Constitution, statutes, or rules of the United States or of any state."

It is evident from the above quoted sections of the Code that the state will defend, indemnify, and hold harmless employees who are sued for their acts or omissions while in the course of their employment. The employee's conduct in the factual situation you have posited certainly appears to incident to the service on account of which he was employed and thus would constitute an act within the course of employment. Accordingly, we are of the opinion that the store clerk would fall within the protection of Chapter 25A of the Code, as amended.

The legal standard to which the store clerk's conduct would be measured

under Chapter 25A is identical to the standard of conduct a private individual would be held under like circumstances. *See* §25A.4 of the Code (1977). A private individual can only use force to restrain an attack if such force is reasonable. *Sandman v. Hagan,* 261 Iowa 560, 570, 154 N.W.2d 113, 119 (1967). We do not offer any opinion as to the reasonableness of the state employee's conduct in this incident as such inquiry is purely factual in nature.

Section 123.13 of the Code (1977) is also relevant to the issue of employee liability protection as it specifically provides protection for employees of the Iowa Beer and Liquor Control Department. It provides:

"No council member or officer or employee of the [Iowa Beer and Liquor Control] [D]epartment shall be personally liable for damages sustained by any person due to the act of such member, officer, or employee performed in the reasonable discharge of his duties as enumerated in this chapter."

This section is consistent with the language of Chapter 25A as articulated above. The scope of employee protection, however, seems to be broader in Chapter 25A. Whereas section 123.13 provides that no employee of the department shall be personally liable for damages *performed in the reasonable discharge of his duties as enumerated in Chapter 123,* the most recent amendment to Chapter 25a, Chapter 45, section 1, Acts of the 67th General Assembly 1977, provides that the State shall indemnify and hold harmless, except in cases of malfeasance in office or willful and wanton conduct, any employee of the State *acting in the course of employment.* In other words, a Beer and Liquor Control Department employee need not be performing a duty enumerated in Chapter 123 to be protected under Chapter 25A of the Code; rather the employee need only be acting in the scope of employment. And to reiterate, the employee's conduct in this case certainly appears to be within the scope of employment and thus the state would have the obligation to defend, and except in cases of malfeasance in office or willful and wanton conduct, to indemnify.

In connection with your second question, i.e., whether state liquor stores can accept traveler's checks or cashier's checks from retail liquor licensee purchasers, reference is made to Chapter 71, Acts of the 67th General Assembly (1977) Section 1 of Chapter 71 provides as follows:

"Section 1. Section one hundred twenty-three point twenty-four (123.24), Code 1977, is amended by adding the following new unnumbered paragraph:

"Notwithstanding the preceding paragraph, a vendor may accept a check from, and signed by, the holder of a retail liquor control license as provided in section one hundred twenty-three point thirty (123.30), subsection three (3), Code 1977, in payment of alcoholic liquor purchased for resale. In the event a check is subsequently dishonored for good cause the director shall immediately suspend the licensee's liquor control license for a period of thirty days and shall cause notice thereof to be served upon the licensee by a peace officer. The provisions of the Iowa administrative procedure Act shall not apply in the case of a suspension under this section."

The scope of this section clearly applies only to holders of retail liquor control licenses; any other person must still pay cash for the purchase of alcoholic liquor as provided by the first paragraph of §123.24 of the Code (1977).

"Check" is defined in §554.3104 of the Code (1977). Both a traveler's check and cashier's check are within the scope of that definition. However, a holder of a retail liquor license can only purchase alcoholic liquor by check, as provided

by Chapter 71, §1, Acts of the 67th General Assembly, if the check is signed by the holder.

A traveler's check, offered in payment of alcoholic liquor by the holder of a retail liquor license, must be completed by the identifying signature of the license holder in order for the vendor to accept it. Accordingly, we are of the opinion that a properly completed traveler's check complies with the requirements of Chapter 71, §1, Acts of the 67th General Assembly (1977).

A cashier's check, on the other hand, usually bears the signature of an authorized officer of a bank only. Since the bank is the drawer (as well as the drawee) of the check, *see* §554.3104(1)(a) of the Code, a license holder would generally not sign such a check. Accordingly, we are of the opinion that a cashier's check, offered, but not signed by a retail liquor license holder in payment for alcoholic liquor, would not fall within the purview of Chapter 71, §1, Acts of the 67th General Assembly (1977).

February 8, 1978

STATE OFFICERS AND DEPARTMENTS: Merit Commission subpoenas. §§17A.13(1), 19A.17, 622.66, 622.67, 622.68, 1977 Code of Iowa. Subpoenas issued by the State Merit Commission are subject to a thirty mile limitation on their effective reach. (Haskins to Keating, Director, Iowa Merit Employment Department, 2-8-78) #78-2-2

W. L. Keating, Director, Merit Employment Department: You request our opinion as to whether, in essence, the mileage limitations on district court subpeonas in civil actions apply to subpoenas issued by the Iowa Merit Employment Commission (hereafter referred to as the "commission"). We believe that they do.

The commission is given the power under §19A.17, 1977 Code of Iowa, to issue supoenas for witnesses and books and papers. Section 19A.17 provides:

"The commission, each member of the commission, and the director shall have power to administer oaths, subpoena witnesses, and compel the production of books and papers pertinent to any investigation or hearing authorized by this chapter. Any person who shall fail to appear in response to a subpoena or produce any books or papers pertinent to any such investigation or hearing or who shall knowingly give false testimony therein shall be guilty of a misdemeanor."

However, §17A.13(1), 1977 Code of Iowa, part of more recently enacted Iowa Administrative Procedure Act, places a limitation on the enforceability of subpeonas issued by State agencies, including the commission. That section states:

"Agencies shall have all subpeona powers conferred upon them by their enabling acts or other statutes. In addition, prior to the commencement of a contested case by the notice referred to in section 17A.12, subsection 1, an agency having power to decide such cases shall have authority to subpeona books, papers, records and any other real evidence necessary for the agency to determine whether it should institute such a contested case proceeding. After the commencement of a contested case, each agency having power to decide contested cases shall have authority to administer oaths and to issue subpeonas in such cases. Discovery procedures applicable to civil actions shall be available

to all parties in contested cases before an agency. Evidence obtained in such discoveries may be used in the hearing before the agency if that evidence would otherwise be admissible in the agency hearing. Agency supoeonas shall be issued to a party on request. *On request, the court shall sustain the subpeona or similar process or demand to the extent that it is found to be in accordance with the law applicable to the issuance of subpoenas or discovery in civil actions.* In proceedings for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in cases of willful failure to comply." [Emphasis added]

As can be seen, an adminsitrative subpeona is sustainable only to the extent it is in conformance with the law applicable to the issuance of supboenas in civil actions. That law contains distance limitations on the effective reach of subpoenas. Section 662.66, 1977 Code of Iowa, states:

"Witnesses in civil cases cannot be compelled to attend the district or superior court out of the state where they are served, nor at a distance of more than one hundred miles from the place of their residence, or from that where they are served with a subpoena, unless within the same county."

Section 622.67, 1977 Code of Iowa, states:

"The court or judge, for good cause shown, may, upon deposit with the clerk of the court of sufficient money to pay the legal fees and mileage of a witness, order a subpoena to issue requiring the attendance of such witness from a greater distance within the state. Such subpoena shall show that it is issued under the provisions hereof."

Section 622.68, 1977 Code of Iowa, states:

"No other subpeona but that from the district or superior court can compel his attendance at a greater distance than thirty miles from his place of residence, or of service, if not in the same county."

The last quoted section would appear to place a limitation of thirty miles on the effective reach of an administrative subpoena since such a subpoena would not be issued by a "district or superior court." We therefore conclude that subpoenas of the commission are subject to a thirty mile limitation on their effective reach.

We note neither §19A.17 nor §17A.13(1) contains any provision for fees for witnesses or mileage expenses. Since, without a statute, there is no authority to tax costs in an administrative proceeding, *see Dail v. South Dakota Real Estate Commission,* 257 N.W.2d 709, 714 (S.D. 1977) a witness to a commission hearing could not be awarded fees or mileage expenses.

February 8, 1978

ADOPTIONS: Qualifications for Filing a Petition. §§600.1, 600.4(3)(c), 600.5(7), Code of Iowa, 1977. The petitioning spouse has the burden of showing unreasonable withholding by the other spouse, and the Court in determining what is unreasonable withholding will be guided by the principle of what is in the best interest and welfare of the person to be adopted. (Boecker to Rush, State Senator, 2-8-78) #78-2-3

The Honorable Bob Rush, State Senator: This is in response to your request for an Opinion of the Attorney General in which you ask the following question concerning Section 600.4(3)(c), Code of Iowa, 1977, with regard to qualifications for filing an adoption petition:

In determining what is an "unreasonable withholding" is the interest of the petitioning spouse to be controlling?

Section 600.4(3)(c), Code of Iowa, 1977, states in pertinent part:

Any person who may adopt may file an adoption petition under section 600.3. The following persons may adopt:

* * *

3. A husband or wife separately if the person to be adopted is not the other spouse and if the adopting spouse:

* * *

c. Is unable to petition with the other spouse because of the prolonged and unexplained absence, unavailability, or incapacity of the other spouse, or because of an unreasonable withholding of joinder by the other spouse, as determined by the court under section 600.5, subsection 7.

No decision concerning Chapter 600, Code of Iowa, 1977, can be made without first determining "the best interest" of the person to be adopted. Section 600.1, Code of Iowa, 1977 states:

This chapter shall be construed liberally. *The welfare of the person to be adopted shall be the paramount consideration in interpreting this division.* However, the interests of the adopting parents shall be given due consideration in this interpretation. [Empahsis added.]

"Unreasonable withholding" in the light of Section 600.1 is not to be looked at in terms of one spouse's interests over the others. Rather, looking at a given factual situation, the court determines what is in the best interest of the person to be adopted.

It is clear that the petitioner has the burden of going forward to establish the requisite facts to demonstrate to the court that an adoption should occur. Section 600.5(7), Code of Iowa, 1977; *In re Adoption of Ellis,* 260 Iowa 508, 149 N.W.2d 804 (1967).

Section 600.4(3)(c) of the Code refers to Section 600.5, subsection 7, which states that the contents of an adoption petition

...shall be signed and verified by the petitioner, shall be filed with the court designated in section 600.3, and shall state:

* * *

7. A designation of the particular provision in section 600.4 under which the petitioner is qualified to adopt and, if under section 600.4 subsection 3, paragraph "c," a request that the court approve the petitioner's qualification to adopt.

The long-standing principle of statutory construction is that in determining

the meaning of a statute all parts of the act are to be read together and given equal consideration. *Goergen v. State Tax Commission,* 165 N.W.2d 782 (Iowa 1969). Therefore, the conclusion to be drawn here is that the petitioner has the burden of showing that the other spouse is "unreasonably withholding" consent to the adoption, leaving the court to determine what is in the best interest and welfare of the person to be adopted.

February 8, 1978

COUNTIES: County Care Facility.§§332.7, 332.26 and 332.38, Code of Iowa, 1977. (1) Supervisors are required to observe the statutory restrictions on expenditures for county buildings including limitation on amounts authorized without vote of the people, as well as public hearings and public bidding requirements. (2) County is not liable for ultra vires acts of officers. (3) County indemnity fund is available to pay judgment against supervisors based on negligence. (4) Code does not provide for county to reimburse indeminfication fund for claims paid. (5) Care facilitiy can be considered a dental health or mental retardation project if facts so warrant. (Nolan to Pelton, State Representative, 2-8-78) #78-2-4

Honorable John Pelton, State Representative: You have requested an opinion to the Attorney General with respect to the following:

"The voters of Clinton County, by referendum, approved a project at the existing care facility which included construction of an addition thereto, as well as, remodeling work in the existing structures. The referendum vote authorized the project, and also authorized the County to issue 1.4 million dollars in county bonds. The original bid received from Vulcan Construction Company was in the amount of $1,617,000.00. Following negotiations, the County, its Architect and representatives of the construction company agreed to delete various items of work from the original bid. The result of these negotiations was the award of a contract to Vulcan Construction Company in the amount of $1,483,166.00 which was $83,166.00 in excess of sums to be financed through bonded indebtedness.

"During the course of construction, six change orders were proposed by the architect and approved, in writing, by vote of the Board of Supervisors and the contractor.

"After the Board approved the original contract for $1,483,166.00 the Board did not seek another referendum, nor did it hold a public hearing until after the work had been performed, nor did it seek public advertisement for bids.

"The total increase in costs occasioned by these change orders, over and above the original contract amount, is $277,425.93. The additional work called for by these change orders can be classified into the following four categories:

"(1) Work originally bid by Vulcan, but deleted from its original bid by the aforementioned negotiations, yet ultimately performed pursuant to change orders.

"(2) Additional remodeling to the existing Care Facility structures, not called for in the original architectural plans and specifications submitted for public bid.

"(3) Repairs to the existing structures unrelated to remodeling, but completed by change order without public bid.

"(4) Furnishings.

"While the exact dollar amounts for each category cannot be determined with certainty, our conferences with the County's Architect, Robert L. M. Johnson, and representatives of Vulcan Construction Company, would indicate the following assignments are realistic:

"(1) Work originally bid, deleted by negotiations, yet ultimately performed pursuant to change order - $127,181.93.

"(2) Additional remodeling not called for in the original plans submitted for bid - $110,458.00.

"(3) Repairs unrelated to remodeling, but completed by change order without bid - $35,766.00.

"(4) Furnishing - $4,954.00 and $1,500.00 for alterations ordered by the State Fire Marshall.

In summary, the voters approved a bonded indebtedness for the project totaling $1.4 million. By original contract, the county bound itself to pay an additional $83,166.00 By approving change orders, the board has committed itself to expend yet another $277,425.93 plus architectural fees.

"Of these monies, $1,565,831.00 has been paid to the contractor. The remainder has not.

"The County Board of Supervisors has provided me with copies of opinions offered by the Clinton County Attorney in this matter, as well as copies of change orders, schedule of bids, minutes of the August 18, 1975 Board meeting, and a summary of the project's costs and expenditures to date, which I have attached for your reference and consideration.

"Under the above stated facts, I submit to you the following questions for your determination and response:

"1. Did the Clinton County Board of Supervisors wrongfully spend public monies in excess of $1.4 million bonded indebtedness approved by referendum August 12, 1975 by approving both an original contract which was $83,166,000 in excess of said bonded indebtedness and subsequent work change orders equaling $277,425.00 plus additional architectural fees in violation of Section 23,345.1 and 332.7 of the Code of Iowa?

"2. Is Clinton County subject to and liable for the torts commited by its officers (members of the Board of Supervisors) in this case specifically in view of Section 613A.2, 613A.4 and 613A.8 of the Code of Iowa?

"3. If the members of the Board of Supervisors are found liable for negligence and judgment is rendered against them in District Court based upon the above stated facts, may they be indemnified by the County Indemnification Fund in the custody of the Treasurer of State under Section 332.36 of the Code of Iowa?

"4. Would Clinton County be obligated to reimburse the County Indemnification Fund for claims paid from said fund to cover the amount of judgment against its officers, if said county has sufficient funds available in its treasury for such reimbursements, to avoid unjust enrichment to said county?

"5. Can the Clinton County Care Facility remodeling project be considered, under these facts, a mental health or mental retardation project for the purposes of Section 345.1 of the Code of Iowa?

Expenditures of the kind contemplated in your questions are governed by the provisions of §345.1, Code of Iowa, 1977 as amended by Chapter 111, Acts of the 67th General Assembly, 1977:

"The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction or relocation and replacement of a court house, jail, county hospital, county care facility or other county building or facility, except as otherwise provided, and the probable cost would exceed $10,000, or the purchase of real estate for county purposes, exceeding $10,000 in value, until the proposition therefore shall have been first submitted to the qualified electors of the county, and voted for by a majority of all the persons voting for and against such proposition at a general or special election notice of the same being given as in other special elections. However, such proposition need not be submitted to the voters if any such erection, construction, remodeling, reconstruction, relocation and replacement or purchase of real estate may be accomplished from funds on hand or from federal revenue sharing funds or federal matching funds and without the levy of additional taxes and if the probable costs of the entire project will not exceed $100,000 in a county having a population of 25,000 or less, $150,000 in counties having a population more than 25,000 but not more than 50,000, $200,000 in counties having a population of more than 50,000 but not more than 100,000, $250,000 in counties having a population of more than 100,000 but no more than 200,000, and $500,000 in counties having a population of more than 200,000. If a county project should be determined to cost in excess of the dollar limitation for the population category of such county, the proposition must be submitted to the qualified electors of the county without regard to the source from which such funds may be derived. However a proposition need not be submitted to qualified electors to expend federal revenue-sharing funds for a mental health or mental retardation project, or when specific projects using federal funds other than federal revenue sharing funds, not requiring any matching funds are approved for a county, or when a relocation and replacement is made necessary by the acquisition of county property for a federal or state project, and the cost of the relocation does not exceed the amount of the award damages by the state or federal government. When the expenditure authorized in this section exceeds $50,000 and the proposition need not be submitted to the voters the board of supervisors shall hold a public hearing on the proposition. Notice of the hearing shall be published at least two weeks prior to the hearing, and the newspaper published in the county having a large circulation in the county. In determining whether the expenditure should be made, the board of supervisors shall give hope and consideration to testimony given during the hearing."

At the time in question, Clinton County had a population between 50,000 and 100,000 persons and thus could not spend more than $200,000 of money on hand without first obtaining voter approval. This authority to spend up to $200,000 may be invoked where proposed project costs are to be paid from funds on hand, federal revenue sharing funds or federal matching funds, without levy of additional taxes. Thus, in this instance of the Clinton County Care Facility, the county would be authorized to spend $200,000 over and above the amount authorized by the referendum without the necessity of further voter approval or a total of $1,600.00

However, in order to spend this additional $200,000, the statute would require that the county hold a public hearing thereon after proper notice. Otherwise, the most the county could spend in additional funds would be $50,000. Documentation which you have submitted to us does not indicate whether or not such a public hearing has been held with reference to any of the change orders. If such hearings have not been held the county could legally spend no

more than $50,000 in excess of 1.4 million. If they have been held the county could spend $200,000 in excess of the 1.4 million.

If we assume that proper hearings have been held and 1.6 million is the upper limit of the amount which could be spent we must also consider the fact that Chapters 23 and §332.7 of the Code of Iowa also require public advertisement for bids on any construction or repair of a building involving sums in excess of $5,000. This requirement is of course in addition to those relating to the necessity of public hearing under §345.1. In the case of the Clinton County Care Facility, it would appear that change orders in the amount of $127,181.93 which authorized remodeling and improvements were originally bid but deleted by negotiations. Since they were reinstated and were part of the original bid price, it would be our opinion that they comply with the bidding requirements of §332.7. However, change orders in the amount of $110,458 which were not part of the original bid project were approved without bid. Also, repairs unrelated to the bid project in the amount of $35,766 were authorized without compliance with the public bidding requirements.

In *Madrid Lumber Company v. Boone County,* 121 N.W.2d 523, 255 Iowa 380, 1963, the Iowa Supreme Court said:

"It is now well established the counties and municipal corporations, being creatures of the legislature, have such powers to contract and only such powers as the legislature grants them. When the legislature permits the exercise of power in a given case only in accordance with imposed restrictions, a contract entered into in violation thereof is not merely voidable but void. [citing cases]

* * *

"Appellee entered into an oral agreement contrary to the statutory requirements of an express written contract and the mandatory requirements of the statutes for filing plans and specifications with the county auditor, advertising thereafter and competitive bidding had not been met. Here the board acted illegally in defiance of several legislative restrictions.

* * *

"We need not decide whether the parties acted in good faith as claimed by appellee. It was bound at its peril to take cognizance of all statutory limitations upon the authority of the board and the county."

Under the foregoing since the governmental body failed to comply with statutory requirements it lacked the power to contract and any subsequent contractual attempt is ultra vires and void.

An earlier opinion of the Attorney General stated that the monetary limitations of Code Section 345.1 do not restrict Board of Supervisors in equipping and furnishing a building with what is necessary to fit it out for occupancy for the purpose for which it was erected. 1923-24 OAG 327. Thus, $4,954 in furnishings and equipment may be deducted from the amount which is deemed to be an unauthorized expenditure under §345.1.

Although not specifically asked by you in your request for an opinion, we would observe that we fully concur in the opinion given to the Clinton County Board of Supervisors by Clinton County Attorney Wylie Pillers in his letter of December 19, 1977:

"...neither the public notice of April 21, 1977, (allocation of $83,530.00 from revenue sharing to meet the contract price of $1,483,530.00) nor the public

notice of October 20, 1977 (allocation of $311,660.00 from revenue sharing to pay the balance of the Vulcan contract, including change orders) were published at least two weeks prior to the hearing. Furthermore, it was impossible for the hearings or the citizens attending to address the merits of contemplated construction and remodeling since the hearings were held after the proposed construction and remodeling had been or was nearly completed, rather than before the work was done.

"While there would appear to be no reason why a hearing to transfer revenue sharing funds (a Federal requirement) and a hearing to consider construction, remodeling or replacement of a county building pursuant to Chapter 345.1 (a state law requirement) could not be advertised and held simultaneously, this is not what was done in this matter. Moreover, even if such a combined hearing were planned, it must be held 'before the fact,' not 'after the fact.'

"The Iowa Supreme Court addressed a similar problem in the case of *King v. Mahaska County,* 15 Iowa 329 (1888), wherein it held that a second referendum by the public to approve an additional $50,000.00 expenditure to meet excess contract costs of the construction of a courthouse, contracted for by the Mahaska County Board of Supervisors, did not ratify the unauthorized acts of the parties in making the contracts. In that case, the Court said:

" 'If we were to construe the law as we are asked in this case, it would invite public officers and contractors to evade the positive requirements of the statutes by making contracts involving unlawful expenditures, and thus compel the people to increase appropriations made for such purposes.'

"Obviously, if the Iowa Supreme Court had held that the people themselves cannot ratify unauthorized expenditure contracts for in excess of those provided for by law, how could the law justify a board of supervisors ratifying their own unauthorized acts, after a perfunctory hearing."

II

The second question you have presented assumes that a tort has been committed by the board of supervisors and asks if Clinton County is subject to and liable for such tort. Thus far we have been dealing with expenditures all of which were made pursuant to contract or are possibly ultra vires acts for which the county would not be liable in tort.

III

While we do not see how an action in tort would lie under the facts given, if such judgment is rendered against the members of the board of supervisors on a theory of negligence liability, then the county indemnification fund provided for in §332.36 of the Code of Iowa would be available to pay amounts over and above the first five hundred dollars on each claim and the amount which is in excess of the limits of any insurance policy existing to indemnity such person against such judgment. (Section 332.41).

IV

There is presently no provision in the Iowa Code obligating a county to reimburse the country indemnification fund for claims paid them even though the county has sufficient funds available in its treasury for such reimbursement. The county indemnification fund is supported by a levy of one-half cent per thousand dollars assessed value to be collected by all counties with other taxes in the year following any year in which the balance in the fund on September 30 is less than $600,000. (Section 332.38).

V

The last question asks whether the Clinton County Care Facility Remodeling Project can be considered a mental health or mental retardation project for the purposes of the §345.1 of the Code of Iowa. The purpose of making such a designation would be to negate the possibility of violation of §345.1 requiring the vote of the electors on expenditures in excess of $1,600,000. If in fact federal revenue sharing funds have been expended on this project for the purpose of providing a mental health or retardation facility when the Clinton County Care Facility may be considered to be such a project. However, this does not remove the other impediments to legality under §345.1, namely, the mandatory requirement of notice and public hearing and the further requirements of advertisement for bids.

February 9, 1978

TAXATION: Homestead Tax Credit - §§425.11, 499A.14, Code of Iowa, 1977. Each apartment or room of a co-operation (multiple housing complex) organized under Chapter 499A, Code of Iowa, 1977, can qualify for a separate homestead tax credit and present Department or Revenue policy or allowing only one homestead tax credit for an entire co-operation is not in compliance with Iowa Law. (Kuehen to Rush, 2-9-78) #78-2-5

The Honorable Robert R. Rush, State Senator: We acknowledge receipt of your letter in which you have requested and opinion of the Attorney General as follows:

"In the mid-1950's the legislature enacted a Multiple Housing Act Chapter 499A. Section 499A.14 of this Act provides:

" 'Taxation. The real estate shall be taxed in the name of the co-operation, and each person owning an apartment or room shall pay his proportionate share of such tax, and each person owning an apartment as a residence and under the qualifications of the laws of the state of Iowa as such shall receive his proportionate homestead tax credit and each veteran of the military services of the United States identified as such under the laws of the State of Iowa or the United States shall receive as a credit his veterans tax benefit as prescribed by the laws of the state of Iowa. (C50, 54, 58, 62, 66, 71, 73, Section 499.14)'... *the Department of Revenue...now asserts that the entire cooperation is entitled to only one homestead credit which must be split amongst the various members.*

"Your opinion is respectfully requested as to whether the *individual members* of a housing cooperation existing under Chapter 499A, Code of Iowa, *are each entitled* to a homestead credit by fulfilling the requirements set out by law including maintaining a residence at said dwelling." (Emphasis added)

It is important to understand how the homestead tax credit law (Chapter 425, Code of Iowa, 1977) operates. This is described in *Ahreweiler v. Board,* 1939, 226 Iowa 229, 283 N.W. 889, where the Court stated at 226 Iowa 235:

"The tax credit is not a credit to the owner but to the homestead, although this results in benefit to the owner and cash refunds were allowed taxpayers who had paid such taxes prior to the allowance of the credit. That the credit is to the property, as distinguished from the owner, is evident from various provisions of the act. The credit (or refund) is given against the tax on the homestead and the taxpayer makes claim therefore as owner of the homestead."

The Iowa Supreme Court emphasized the importance of the legislative purpose of the homestead tax credit law in *Johnson v. Board of Supervisors,*

1946, 237 Iowa 1003, 24 N.W. 2d 449, as follows:

"We are warranted in giving some consideration to the purpose of the act (Homestead tax credit) as stated therein and as previously recognized by us. That purpose was to encourage and increase ownership and occupation of homesteads; the legislature realized the social and material benefits to the public at large from such ownership and occupation. Clearly plaintiffs are owners within the purpose of the act."

The legislature carried through with the spirit of encouraging and increasing ownership of homesteads in Chapter 499A, Code of Iowa, 1977, by including §§499A.14 and 499A.18 as part of the original Act in 1947 (See Chapter 250, Acts of 52nd General Assembly). Multiple housing facilities can provide the desired benefits to society with the added dimensions of an economy of space and resources. This Attorney General's opinion will attempt to explain why it would be absurd to think that the legislature would want to penalize those owning Chapter 499A rooms or apartments (multiple housing) by way of the homestead tax credit law.

Important in determining those who are entitled to the homestead tax credit under Chapter 425 is §425.11 which states:

"425.11 Definitions. For the purpose of this chapter and wherever used in this chapter:

"1. The word, 'homestead,' shall have the following meaning:

"a. The homestead must embrace the dwelling house in which the owner is living at the time of filing the application, except as herein provided, and said applicaiton must contain an affidavit of his intention to occupy said dwelling house, in good faith, as a home for six months or more in the year for which the credit is claimed.

* * *

"f. The words 'dwelling house' shall embrace any building occupied wholly or in part by the claimant as a home.

"2. The word, 'owner,' shall mean the person who holds the fee simple title to the homestead...."

The definition of a dwelling house in §425.11(1)(f) was drafted in a manner that would not exclude a Chapter 499A room or apartment. Indeed, that definition specifically includes any building occupied "*in part* by the claimant as his home." (italicizing added)

In 15A Am.Jur.2d, Condominiums and Co-operative Apartments, §4, there is a discussion of the multiple housing concept comparing co-opertive housing (Chapter 499A) with condominiums (Chapter 499B, Code of Iowa, 1977).

"§4.—Co-operative apartment.

"A 'co-operative apartment house,' frequently referred to in this connection as a 'co-operative' is a multiunit dwelling in which each resident has (1) an interest in the entity owning the building and (2) a lease entitling him to occupy a particular apartment within the building.

"In light of the definitions and history of condominiums and co-operative apartments, the basic differences between condominium and co-operative housing may be stated as follows: (1) in condominiums, individuals take title to their units, while in co-operatives, individuals have stock ownership in the co-operative and the right of occupancy of a specific unit; (2) in con-

dominiums, individuals vote on a proportionate basis, while in co-operatives, each individual has one vote regardless of the size of his unit; (3) in condominiums, individuals are taxed separately on their units, while in co-operatives, individuals pay their share of taxes on the project in their monthly carrying charges; (4) in condominiums, individuals are responsible only for mortgage indebtedness and taxes on their own property, while in co-operatives, each individual is dependent upon the solvency of the entire project. Accordingly, the unit owner in a condominium has an interest in real property which descends to his heirs as any other realty would; the sale of such property is not ordinarily subject to regulation under Blue Sky Laws. On the other hand, the tenant-stockholders in a co-operative association is the owner of shares of stock which pass as personalty to his personal representatives and which may be subject to securities regulation. *On the basis of this distinction between personalty and realty, it has also been suggested that the homestead exemption laws would apply to condominium units but not to co-operative apartments, since the latter are not interests in realty.* Furthermore, since the tenant-stockholder in a co-operative apartment is not an owner of real estate, in contrast to the condominium unit owner, he is not a necessary party to a suit for foreclosure on the apartment building." (italicizing added)

Although the above comments from American Jurisprudence would seem to indicate that co-operative housing would not entitle each apartment or room to a homestead tax credit, this may not be the situation under Chapter 499A, Code of Iowa. First, the Iowa Supreme Court emphasized the importance of the legislative purpose of the homestead tax credit law which was to encourage and increase ownership and occupation of homesteads because the legislature realized the social and material benefits to the public at large. *Johnson v. Board of Supervisors,* supra. Secondly, the Iowa legislature has indicated that the ownership of individual rooms or apartments is something that is closer akin to an interest in real property rather than personalty. Section 499A.11 states:

"499A.11 Certificate of ownership. The co-operative association shall have the right to purchase real estate for the purpose of erecting apartment houses or apartment buildings and the members shall be the owners thereof. *The interst of each individual member shall be evidenced by the issuance of a . . . deed to a particular apartment or room therein.* Such . . . *deed* shall be executed by the president of the co-operation and attested by its secretary in the name and in behalf of the co-operation." (italicizing added)

Black's Law Dictionary, Revised Fourth Edition, defines the word "deed" as follows:

"A *conveyance of realty* a writing signed by grantor, whereby *title to realty* is transferred from one to another." (italicizing added)

Furthermore, §499A.12 of the Multiple Housing Act and §425.11(2) of the homestead tax credit law state:

"499A.12 Title in trustees. The title to the real estate upon which the apartment or other buildings is constructed shall be conveyed to the *trustees or trustee who shall hold the said title for the use and benefit of the owners of such apartments or rooms.*

"425.11(2) The word 'owner' shall mean the person who holds the *fee simple title* to the homestead . . . ." (italicizing added)

Section 499A.12 would indicate that legal title of the rooms or apartments is with the trustees with equitable title with the owner of such rooms or apartments. In *Johnson v. Board of Supervisors,* supra, the Iowa Supreme Court

stated:

"The substance of the classic definition of 'title' is the means whereby the owner has the just possession of his property. Black's Law Dictionary, Third Ed., 1733; Bouvier's Law Dictionary (1934), Baldwin's Century Ed., 1179; Henderson v. Beatty, 124 Iowa 163, 167, 99 N.W. 716. But 'title' is frequently used to mean ownership. 41 Words and Phrases; Perm. Ed., 673, 674. See, also *Scofield v. Moore*, 31 Iowa 241, 245.

"[3] If, as frequently held, a 'fee simple' estate may be either legal or equitable and 'title' may be synonymous with ownership, then plaintiffs, under the admitted allegations of their petition, are the persons who hold 'the fee simple title to the homestead' under section 425.11(2)."

Furthermore, in 1962 O.A.G. 435, the Attorney General stated:

"In answer to this problem, we refer to *Johnson v. Board of Supervisors* of Jefferson County, 237 Iowa 1103. The Court there said that a fee simple can be either equitable or legal. We feel that 'A' in your question has an equitable fee simple and, therefore, is the owner of the property for purposes of the homestead credit."

Therefore, it is reasonable to conclude that *each* room or apartment is entitled to the benefits created by the homestead tax credit law because each owner of a room or apartment holds an equitable fee simple title to his or her room or apartment.

Furthermore, any ambiguity that may exist regarding giving *each* room or apartment a homestead tax credit was resolved by §499A.14 which states:

"499A.14 Taxation. *The real estate shall be taxed in the name of the co-operation,* and each person owning an apartment or room shall pay his proportionate share of such tax and each person owning an apartment as a residence and under the qualificaitons of the laws of the state of Iowa as such shall receive his *proportionate homestead tax credit*...." (italicizing added)

Prior to 1974, the homestead tax credit was equal to 25 mills per dollar of assessed (taxable) valuation up to a maximum amount of $2,500. Therefore, the maximum amount allowed per homestead was $62.50. However, during this period of time (prior to 1974), assessed (taxable) value was not equal to actual value because property was assessed at 27% of actual value. Therefore, the actual value of the $2,500 maximum was $9,260. In 1974, the legislature changed from 27% assessed (taxable) valuations to 100% assessed (taxable) valuations. In other words, assessed value, taxable value and actual value became synonymous in 1974. This resulted in each homestead being entitled to a homestead tax credit of $6.75 per thousand dollars of assessed value up to a maximum of $9,260 of assessed value. Therefore, the maximum amount allowed per homestead was still calculated to be $62.50. Although the percentage of taxable valuations was changed (from 27% to 100%) in 1974, the basic methodology for computing the homestead tax credit was the same from 1937 to 1974. For some history of the methodology used to compute the homestead tax credit, see Chapter 195, Acts of 47th General Assembly (1937) and Chapter 1231, Acts of 65th General Assembly (1974).

In 1976 the methodology to compute the homestead tax credit was changed by Chapter 1067, Acts of the 66th General Assembly. However, this change is not important for the purposes of determining what the legislature meant by the words "proportionate homestead tax credit" as used in §499A.14 because these words were part of the original act in 1947.

Black's Law Dictionary, Revised Fourth Edition, defines the word "proportionate" as follows:

"adjusted to something else according to certain rate of comparative relation."

One does not have to be a great mathematician to realize that, as per *Black's Law Dictionary* definition of the word "proportionate," something will have to be adjusted according to a certain rate of comparative relation. Section 499A.14 provides that "(t)he real estate shall be taxed in the name of the co-operation and each person owning an apartment or room shall pay his *proportionate* share of such tax..."(empahsis added) Thus, while there is one tax assessment made against the co-operation, each person owning an apartment or room is required to pay his "proportionate" share (depending upon the value of each apartment or room) of the total tax assessed against such co-operation. Section 499A.14 goes on to provide, "...and each person owning an apartment as a residence...shall receive his *proportionate* homestead tax credit..." (emphasis added) Therefore, since there is a single tax assessment against the co-operation and because each person owning an apartment or room therein may or may not be entitled to a homestead tax credit and those who are entitled may not all be entitled to the same amount of credit (depending upon the value of each individual apartment or room), the assessor must determine the total amount of homestead tax credit allowed against the assessment, which credit will offset a proportion of the total tax assessment against the co-operation.

It would be absurd to think that the legislature meant to give only one homestead tax credit for an entire multiple housing complex. It would not be unusual to anticipate a complex with 10 to 1000 units. Section 499A.14 states:

"...*each person owning*...a residence and under the *qualifications of the laws of the state of Iowa* as such shall receive his proportionate homestead tax credit..." (emphasis added)

If there were only one homestead tax credit intended for the entire complex, in order to qualify for a maximum credit of $62.50, each owner would have to comply with statutes that state:

"425.2 Qualifying for credit. 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 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. In case the owner of the homestead is in active service in the armed forces of this state or of the United States, or is sixty-five years of age or older, or is disabled, such statement and designation may be signed and delivered by any member of the owner's family...

"425.3 Verification by board. The county board of supervisors in each county shall forthwith examine all such claims, delivered to the assessors as herein provided, and shall either allow or disallow said claims, and in the event of disallowance notice thereof shall be sent by certified mail to claimant at his last known address.

"425.4 Certification to treasurer. All claims which have been allowed by the board of supervisors shall be certified on or before August 1, in each year, by the county auditor to the county treasurer, which certificates shall list the total amount of dollars, listed by taxing district in the county, due for homestead tax credits claimed and allowed. The county treasurer shall forthwith certify to the department of revenue the total amount of dollars, listed by taxing district in

the county, due for homestead tax credits claimed and allowed.

"425.7 Appeals permitted. (1) Any person whose claim is denied under the provisions of this chapter may appeal from the action of the board of supervisors to the district court of the county in which said claimed homestead is situated by giving written notice of such appeal to the county auditor of said county within twenty days from the date of mailing of notice of such action by the board of supervisors.

"425.10 Reversal of allowed claim. In the event any claim is allowed, and subsequently reversed on appeal, any credit made thereunder shall be void, and the amount of such credit shall be charged against the property in question, and the director of revenue, the county auditor, and the county treasurer are authorized and directed to correct their books and records accordingly. The amount of such erroneous credit, when collected, shall be returned by the county treasurer to the homestead credit fund to be reallocated the following year as provided herein.

"425.11 Definitions. For the purpose of this chapter and wherever used in this chapter:

1. The word, 'homestead,' shall have the following meaning:

a. The homestead must embrace the dwelling house in which the owner is living at the time of filing the application, except as herein provided, and said application must contain an affidavit of his intention to occupy said dwelling house, in good faith, as a home for six months or more in the year for which the credit is claimed.

"425.14 False affidavits. Any person making a false claim or affidavit for the purpose of securing a homestead tax credit, or for the purpose of aiding another to secure such homestead tax credit, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one hundred dollars, or by imprisonment in the county jail not more than thirty days, or by both such fine and imprisonment."

For purposes of determining the legislative intent, this opinion will use the post-1974 computational method of $6.75 per thousand dollars of assessed value up to a maximum of $9,260 of assessed value instead of the pre-1974 method, for purposes of ease and to avoid going through the process of converting 27% assessed value to actual value. Assume a multiple housing complex had 321 rooms or apartments ranging from $2,500 to $20,000 in value in 1955. The astronomical costs generated and labor involved (321 individuals will have to apply for the credit) in dividing the maximum $62.50 credit for the entire housing complex is mind boggling.

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."* (emphasis added)

Futhermore, since §449A.14 pertains, in part, to the homestead tax credit, it should be considered in pari materia and construed together with Chapter 425 for the purpose of reaching reasonable results. *Northern Natural Gas Company v. Forst,* 1973, Iowa 205 N.W.2d 692.

Construing Chapter 425 and §499A.14 together, it is obvious that the legislature intended to give *each* room or apartment a homestead tax credit rather than only one credit to an entire housing complex. The Iowa Supreme Court will not attribute to the legislature and intention to enact a law which would lead to absurd consequences. *Graham v. Worthington,* 1966, Iowa, 146 N.W.2d 626. The consequences of a single homestead tax credit for an entire multiple housing complex would be that each owner in a complex of 321 units and the county officials would have to comply with §§425.2, 425.3, 425.4, 425.7, 425.10, 425.11 and 425.14 in order to begin the mind boggling task of dividing a single maximum homestead tax credit of $62.50. The mind boggling task is made worse because each of the 321 units would probably not receive an equal share (19.47 cents) of the homestead tax credit of $62.50 because each of the units would not likely have the same value. These consequences are absurd and could not have been intended by the legislature.

Based upon the foregoing, it is the opinion of the Attorney General that each room or apartment can qualify for a separate homestead tax credit and that the present Department of Revenue policy of allowing only one homestead tax credit for an entire Chapter 499A multiple housing complex is not in compliance with Iowa law.

February 9, 1978

MENTAL HEALTH; COMMUNITY MENTAL HEALTH CENTERS; COUNTY BOARD OF SUPERVISORS. §§230A.2, 230A.3, 230A.12, 230A.14, 331.21, 332.3(5) and 444.12, Code of Iowa, 1977. The County Board of Supervisors must obtain personal information concerning persons served at a Community Mental Health Center, when the county is to pay for such services, in order to carry out the duty of the Board of Supervisors pursuant to §331.21, Code of Iowa, 1977. It is illegal for a county to enter into a contract which provides that the names of such persons shall not be disclosed to the County Board of Supervisors. To the extent such a contract provides that such names shall not be disclosed, such a contract may be void and unenforceable. The Community Mental Health Center is correct in refusing to disclose names and other information of persons who have not consented to the disclosure of such information. In the event a county enters into a contract with a Mental Health Center, the county should consider limiting payment for services at the Community Mental Health Center to those persons who consent to disclosure of name and other relevant information to the County Board of Supervisors. (O'Meara to Huffman, Pocahontas County Attorney and Thatcher, Webster County Attorney, 2-9-78) #78-2-6

Mr. H. Dale Huffman, Pocahontas County Attorney; Mr. William J. Thatcher, Webster County Attorney: This office is in receipt of a request for an official Attorney General's Opinion from Mr. H. Dale Huffman, Pocahontas County Attorney, which in essence raises the following questions:

1. Is a Mental Health Center justified in failing to disclose names of persons receiving services at the Mental Health Center, when the county is billed for such services?

2. Is the county entitled to the names of the persons served and billed to the county, before making payment on the claims submitted?

3. What is the effect of the language in the contract between the county and the Mental Health Center which provides that the Mental Health Center is not obligated to disclose such names?

Shortly after receiving the above inquiries from Mr. Huffman, this office received the following inquiry from Mr. William J. Thatcher, Webster County Attorney:

Is it legal for a County Board of Supervisors and a Mental Health Center to voluntarily enter into a contract with each other for the Center to provide service to residents of the county with the County Board of Supervisors agreeing to pay for the Center services with tax funds without receiving from the Center the names of the patients receiving services for which commitment is not required?

While these questions touch upon the same basic considerations, they do not appear to be identical. However, in the interest of providing a complete answer to the questions raised and realizing the extent to which these questions bear upon each other, I feel it is necessary to resolve these questions together. In order to most adequately respond to these inquires, I further feel it is necessary to first respond to Mr. Thatcher's inquiry regarding absolute legality of payment without receiving the names of patients, and then proceed to answer Mr. Huffman's inquiries.

The questions raised by both gentlemen identify the potential conflicts between Sections 444.12 and 331.21, Code of Iowa, 1977. In analyzing these sections of Iowa statute, reference is made to Section 4.7, Code of Iowa, 1977. This section provides in pertinent part:

If general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both....

Reference is also made to Section 4.4(3) and 4.4(5), The Code. These sections provide:

In enacting a statute, it is presumed that:

* * *

3. A just and reasonable result is intended.

* * *

5. Public interest is favored over any private interest.

The statutory reference is applied in light of the Attorney General's Opinion found in the 1976 Report of the Attorney General of Iowa at p. 501, 502. This Attorney General's Opinion calls for the balancing of an individuals right to privacy vis-a-vis the right of the public to know certain information.

The first question to be dealt with requests a determination of the legality of the County Board of Supervisors entering into a contract with the Mental Health Center to provide service to residents of the county (to be paid for by tax funds) without receiving from the Mental Health Center the names of the patients receiving such services for which commitment is not required.

Section 230A.12, Code of Iowa, 1977, empowers the county to enter into an agreement with the board of directors of a Community Mental Health Center, when such Community Mental Health Center has been established or continued in operation pursuant to Section 230A.3(2). [Section 230A.3(2) allows the establishment of a Mental Health Center by nonprofit corporation; as opposed to Section 230A.3(1) which allows the direct establishment of a Community Mental Health Center by the county or counties supporting it, with administration of such Center provided by an elected board of trustee.] Section 444.12(2)

also allows the counties to provide for the payment of the cost of services such as those provided pursuant to Section 230A.2, from the county mental health and institutions fund.

The more specific question involves a consideration of a comparison between Section 444.12(2) and 230A.14, and Section 331.21, all Code of Iowa, 1977. Section 331.21, The Code, provides in pertinent part:

All unliquidated claims against counties and all claims for fees or compensation...shall before being audited or paid, be so itemized as to clearly show the basis of any such claim...

Section 444.12(2) provides in pertinent part:

The board of supervisors may require any public or private facility as a condition of payment from county funds to furnish the board with a statement of the income, assets, and township or municipality and the county of legal residence of each person receiving services under this section, provided however, the facility shall not disclose to anyone without the permission of the person receiving services for which commitment is not required such person's name or street or route address.

The conflict arises between the county demanding receipt of the names of the persons treated at the Mental Health Center (wherein such treatment is to be paid for by the county) and Mental Health Center which refuses release of the names of such persons. The present contract between the Mental Health Center and the county apparently provides that the Mental Health Center shall not disclose the names of such persons treated at the Mental Health Center. Is it legal for the county to enter into such a contract?

Section 332.3(5), The Code, states that the Board of Supervisors shall have the power to examine, settle, and allow all claims against the county, unless otherwise provided by law. Section 331.21, referred to above, establishes the method by which such claims shall be submitted to the county. The Iowa Supreme Court in the case of *Escher v. Carroll County,* 146 Iowa 738, 742, 743; 125 N.W. 810 (1910), stated with reference to the board of supervisor's duty under this section of statutory law:

* * *

The board should be informed of the amount of the claim and the grounds on which it is made with sufficient clearness to enable it to investigate the facts and reach an intelligent conclusion.

[The *Escher* case no longer stands for such a proposition wherein it concerns tort claims. This interpretation does, however, appear to be of continuing validity with regard to contract claims submitted to the county. See *Dan Dugan Transport Company v. Worth County,* 243 N.W.2d 655, 658 (Iowa 1976).]

Section 331.21 states that the claim should be so itemized as to clearly show the *basis* of any such claim. Webster's New World Dictionary (Second College Edition, 1972) at p. 117, defines basis in pertinent part as, "chief supporting factor of anything." Section 331.21 calls for an itemization (that is statement with regard to individual service provided) of the cost of the claim. Section 444.12 indicates that the County Board of Supervisors has the power to request certain information with regard to "each person receiving services under this section."

Payment by the county for the services received by any individual is contingent upon a demonstration of need for such services and upon the person receiving the services being a "resident" of the county. With such contingencies precipitating payment of the claim, it is difficult to imagine any situtation under which the county could carry out its responsibility under Section 331.21, without receiving information with regard to each person served by the Mental Health Center, which information does not identify each individual personally. It would appear that the County Board of Supervisors may not be fulfilling its statutory duty without requiring such information. Therefore, it is concluded that it is not legal for the County Board of Supervisors to enter into a contract with a Mental Health Center which provides that the Mental Health Center shall not disclose the name of a noncommitted person who is served by the Community Mental Health Center, when the Center demands payment for such services from the county.

Such an interpretation would appear only to heighten the apparent conflict between the role of the County Board of Supervisors and the role of the Community Mental Health Center in providing services to members of the community. However, further examination of the appropriate roles of these entities pursuant to the questions raised by Mr. Huffman would appear to resolve this apparent conflict. Mr. Huffman first of all questioned whether or not the Mental Health Center is justified in failing to disclose names of persons receiving services at the Center, when the county is billed for such services.

Section 444.12, Code of Iowa, 1977, is explicit in stating in pertinent part:

* * *

...the facility shall not disclose to anyone without the permission of the person receiving services for which commitment is not required such persons name or street or route address.

This language is clear in expressing legislative intent that the Community Mental Health Center cannot disclose to the County Board of Supervisors the name and other pertinent information regarding the individual receiving services, without the permission of such person, unless such person is committed involuntarily to receive treatment.

To the extent that the Mental Health Center receives federal funding for alcohol treatment, reference to Volume 40, Number 127, Part IV of the 1975 Federal Register is pertinent. Under title of "Confidentiality of Alcohol and Drug Abuse Patient Records" [§2.37(a), at page 27813 of the above Federal Register citation], the Department of Health, Education and Welfare has stated:

Disclosure of patient information to third-party payers or funding sources may be made only with the written consent of the patient given in accordance with §2.31 and any such disclosure must be limited to that information which is reasonably necessary for the discharge of the legal or contractual obligations of the third-party payer of funding source.

[Patient information includes the name and address of the patient—§2.11(j). The county is a funding source under this regulation—§2.11(t).]

Therefore, it is concluded that the Mental Health Center is justified in failing to disclose such names of persons unless the person has specifically consented to such disclosure or unless the person is involuntarily committed to such treat-

ment. This, however, is not to say that the Mental Health Center is justified in providing by contract that it shall not provide such names under any circumstances. (This consideration will be further dealt with below.)

Mr. Huffman's second question concerns whether or not the county is entitled to the names of the persons served and billed to the county, before making payment on the claims submitted. The conclusion has been reached above, that it is a legal requirement that the county receive the names of persons for which the county is to pay. Therefore, it must be concluded that the County Board of Supervisors has the power to require submission of such names to the county prior to payment. Such a conclusion is consistent with Section 331.21, The Code, wherein it refers to the itemization of the basis for a claim, "before being audited or paid." Such an interpretation is also consistent with Section 444.12, wherein it states:

* * *

The board of supervisors may require any public or private facility as a condition of payment from county funds to furnish the board with a statement of income, assets, and township or municipality and the county of legal residence of each person receiving services under this section...

Section 4.1(36) states in pertinent part that, "the word 'may' confers a power."

Therefore, without reference to the specific contract existing between the county and the Community Mental Health Center, it is concluded that the County Board of Supervisors, as a matter of law, has the power to require the Community Mental Health Center to furnish the County Board of Supervisors with the names of the persons served by the Center when the services for such persons are billed to the county. Such submission of names to the county is correctly required prior to payment on the claims submitted.

The third question Mr. Huffman has raised concerns the effect of the language of the present contract between the county and the Mental Health Center which provides that the Center is not obligated to disclose the names of such persons. (It is noted that the contract existing at the present time has not been submitted with this request for an opinion. Therefore, it is not possible to make direct reference to the contract.)

It has been concluded above, that the county has a legal responsibility pursuant to Section 331.21, Code of Iowa, 1977, to require the submission of the names of persons served by the Community Mental Health Center, prior to the payment of such claims. It was also determined that it was not legal for the county to enter into a contract which specifically precluded such submission of names. The effect of the language in the present contract, to the extent that it precludes the County Board of Supervisors from carrying out a statutorily mandated procedure, may be summarized by reference to the Iowa Supreme Court's decision of *Voogd v. Joint Drainage District, Kossuth and Winnebago Counties,* 188 N.W.2d 387, 393 (Iowa 1971). At p. 393 of this decision, the Court stated:

Further, the fact the contractor involved will receive no compensation for his work even if he brought a court action against the appellees is not persuasive. In State ex rel *Iowa Employment Security Commission v. Des Moines County,* 260 Iowa 314, 149 N.W.2d 288, this Court indicated drainage districts are political subdivisions of the counties. Furthermore, contracts made by a county that are beyond its powers or are in contravention of expressed statute are void.

Thus, the party who enters into a contract with a county or a political subdivision of a county does so at the peril that the political subdivision or county involved has not complied with or acted within its statutory mandate from the legislature. Even courts of equity cannot assist this party. *Madrid Lumber Co. v. Boone County,* 255 Iowa 380, 121 N.W.2d 523; *Harrison County v. Ogden,* 133 Iowa 9, 110 N.W. 32.

This is not to state conclusively that the Mental Health Center would be entitled to no reimbursement of costs for those persons served on behalf of the county (although such argument is clearly available from the language of the Court in the above cited case). However, more appropriately, it may be considered that the specific provision of the contract stating that the Mental Health Center shall not disclose the names of persons served to the county may be void. The contract may then, in fact, be found to be subjected to the provisions of Section 331.21, The Code, requiring itemization of the claims to the county, if payment is to be made.

Such a conclusion would again appear to establish a conflict between the role of the Board of Supervisors and the role of the Community Mental Health Center in serving the members of the community. However, referring to section 4.7, above, it may be possible to resolve this apparent conflict.

It has been concluded above that an obligation is imposed upon the county to seek the name of each person for whom the county is to pay. At the same time, an obligation is imposed upon the Community Mental Health Center not to release the names and other pertinent information regarding person so served to anyone, unless the person so served consents to such disclosure (or is involuntarily committed).

The key to the resolution of this apparent impass could lie in the fact that the individual receiving services may consent to the disclosure of information, including name and other pertinent data about that individual, to the County Board of Supervisors from the county which is to pay for the services received. It is recommended that consideration be given to the inclusion of a statement in the contract between the county and the Community Mental Health Center which would provide that the county will pay for services to those individuals, only, who authorize disclosure of the name and other pertinent data relative to the individual to be served, to the county so that the county may verify the need for county payment, including the legal settlement ("residence") of such person.

Such a provision in the contract between the county and the Center would appear to be consistent with Section 444.12. Such a provision would also appear to be consistent with Section 230A.16, wherein it provides:

The Iowa Mental Health Authority with approval of the committee on mental hygiene and subject to the provisions of Chapter 17A, shall formulate and adopt and may from time to time revise standards for community mental health centers and comprehensive community mental health programs, with the overall objective of insuring that each center and each affiliate providing services under the contract with a center furnishes high quality mental health services *within a framework of an accountability to the community it serves.* (Empahsis added)

(Reference to Chapter 567 of the Iowa Administrative Code finds that no such standards are presently promulgated by the Mental Health Authority.)

The law would appear clear in stating that the county may, but need not, pay

for any specific services rendered to any given individual, or support any particular Community Mental Health Center. Section 444.12(2) begins with the statement that, "any portion which board of supervisors *may deem advisable* of the cost of..." (Emphasis supplied) Section 230A.14 begins in pertinent part, "the board of supervisors of any county... *may expend* money from the county mental health and institution fund..." (Emphasis supplied)

It is, therefore, concluded that the county may, but need not provide for the payment of such services. It is concluded that the county may, but need not support any particular Mental Health Center. In the event the county does provide by contract for the payment of such services to a specified Community Mental Health Center, the contract for the payment of such services should appropriately include provision for payment only for those persons who agree to disclosure of the name and other pertinent data regarding such persons to be served, to the Board of Supervisors so that the Board of Supervisors can carry out its statutory duty under Section 331.21, The Code.

It is further noted, that in the event the county still has quesions relative to the provision of services and billing for specific instances to the county, the county may possibly apply one of the following remedies for relief from such questions. The county may seek review and evaluation of the Community Mental Health Center pursuant to Section 230A.17, The Code, by contacting the Committee on Mental Hygiene or by contacting the Iowa Mental Health Authority. The county may apply to the State Director of the Division of Mental Health Resources of the Iowa Department of Social Services for an inspection of the Community Mental Health Center pursuant to the provisions of Sections 227.1 and 227.2(7), The Code. Finally the county may undertake its own audit of the Community Mental Health Center pursuant to the provisions of Section 232.3(31), Code of Iowa, 1977.

For purposes of clarification, a brief reference is made to two Opinions of the Attorney General raised by Mr. Huffman. Mr. Huffman has referred to "AGO 7/21/67" (1968 Report of the Attorney General of Iowa at page 226). This opinion is based upon §331.21, Code of Iowa, 1966; with no reference to §444.12, The Code. The language of §444.12 dealing with nondisclosure of names of patients was not introduced into The Code until 1972; having been adopted as Ch. 1108, Acts of the 64th G.A., Second Session. The continued effectiveness of the legal analysis presented in this 1967 OAG is questionable in light of the subsequent adoption of a statute which is to a certain extent contrary to, and not included in the analysis given.

Mr. Huffman has also referred to "AGO 7/1/75" (1976 Report of the Attorney General of Iowa at pages 160-162). This OAG deals with the public nature of the Books of Account required to be kept by the County Auditor under §125.33, Code of Iowa, 1975. It is felt that this 1975 OAG does not touch upon the specific issues considered in the present opinion.

However, this 1975 OAG highlights a matter which may be ripe for legislative consideration. This matter is the continuing availability to the public of such information (account of costs and index of names of persons receiving alcoholism treatment funded by the county) or any such collections of names and costs. (For a reference concerning another index, see 1976 Report of the Attorney General of Iowa at p. 503-504.)

Whereas there appears to be a compelling social policy in favor of the appropriate county officers having access to such information (to manage the busi-

ness of the county and provide some accountability from the service provided to the community paying for such service), it is questionable whether or not there is a continuing, legitimate social need for the public at large to have access to such information. Legislative attention to this concern might make the maintenance of such Books of Account less onerous to the members of the community served at public expense.

[Legislative attention to this concern might also assist in avoiding potential conflict with federal regulation in instances when federal funding is involved. See §2.37(b) of the 1975 Federal Register citation given above.]

February 9, 1978

MENTAL HEALTH; PRECOMMITMENT EXPENSES. §§68A.2, 229.24, 230.1 and 230.2 through 230.26, Code of Iowa, 1977. Precommitment expenses shall be paid from the County Mental Health Institutions fund, not from the court fund. Iowa law does not recognize a right to individual privacy with regard to indexing of expenses paid by a county for an individual's mental health services. To the extent a county adheres to the provisions of §§230.20 through 230.26, Code of Iowa, no invasion of privacy occurs. (O'Meara to Burk, Assistant Black Hawk County Attorney, 2-9-78) #78-2-7

Mr. Peter W. Burk, Assistant Black Hawk County Attorney: You have requested an opinion from the Attorney General with regard to the following two questions:

1. Are expenses incurred in precommitment matters chargeable to the court fund or the mental health institutions fund?

2. If the charges are to be made to the mental health and institutions fund, how is the anonymity and privacy of the patient protected?

In answering your first question, I will make reference to an Attorney General's Opinion of April 26, 1977, addressed to Mr. Eugene J. Kopecky, Linn County Attorney. (A copy of this Attorney General's Opinion is attached hereto for your reference.) Citing Section 230.1 and 230.23, Code of Iowa, 1977, this opinion concludes in essence that expenses with regard to physicians, attorneys and hospitalization which are incurred prior to commitment shall be paid from the mental health and institutions fund.

Section 230.23, The Code, states:

All expenses required to be paid by counties for the care, admission, commitment, and transportation of mentally ill patients in state hospitals shall be paid by the board of supervisors from the county mental health and institutions fund.

Therefore, it is concluded by this office that the expenses you described which are incurred prior to commitment shall be paid from the county mental health and institutions fund.

You have also requested direction relative to how the anonymity and privacy of the patient shall be protected in the event such expenses are paid from the mental health and institutions fund. In answering this inquiry I refer you to an Attorney General's Opinion found in the 1976 Report of the Attorney General of Iowa at p. 503, directed to Mr. Eugene J. Kopecky, Linn County Attorney, March 12, 1976, (a copy of which is attached hereto for your further reference).

That Attorney General's Opinion cited Chapter 139 Acts of the 66th G.A. 1st Session (now Section 229.24, Code of Iowa, 1977), Sections 230.25, 230.26 and

68A.2, all Code of Iowa, 1975. Relying upon the statutory authority given above, it was concluded in the Attorney General's Opinion 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."

It should be noted that "such record" referred to above deals only with the cost of commitment, care or treatment received. These records do not contain any medical or psychiatric information with regard to a named individual. Medical or psychiatric data is confidential under the Code of Iowa.

Therefore, this office concludes that with regard to the charges made upon the county mental health and institutions fund the Code of Iowa does not create the right of anonymity or privacy concerning expenses incurred or paid pursuant to Chapter 230 of the Code. The anonymity and privacy of the patient which is demanded by law shall be protected so long as the county adheres to the provision of Section 230.20 through 230.26, Code of Iowa, 1977, relative to the maintenance of an index of the names of the persons admitted or committed to a mental health institution from such county.

February 9, 1978

MENTAL HEALTH: Status of persons involuntarily hospitalized prior to January 1, 1976—Chapter 229, Code of Iowa, 1975; Chapter 229, Code of Iowa, 1977. Involuntary commitments to state mental institutions under Iowa law prior to January 1, 1976, are not void, but are voidable. No change of status of persons involutarily hospitalized prior to January 1, 1976, should occur unless and until further appropriate action is taken with regard to each of such persons. (O'Meara to Reiter, Marion County Attorney, 2-9-78) #78-2-8

Mr. Warren A. Reiter, Marion County Attorney: You have requested an opinion of the Attorney General with regard to three questions which are in essence stated as follows:

1. Are all commitments to state mental institutions under Iowa law prior to January 1, 1976, void?

2. In the event all such commitments are void, should all patients committed prior to January 1, 1976, be considered as voluntary admissions?

3. In the event all such commitments are now considered to be voluntary admissions, should the record of the mental health institution and the clerk of court be amended to show voluntary admission status, rather than involuntary commitment status?

These questions arise as a result of the case of *Stamus v. Leonhardt, et al.*, 414 F. Supp. 439 (S.D. Iowa 1976). In that case the federal judge ruled that Chapter 229 of the 1975 Iowa Code was unconstitutional, both on its face and as applied, with regard to nine particulars of constitutional deficiency cited in the conculsion of the court's opinion. The Court in the *Stamus* case entered the following conclusion:

It is the court's conclusion that Chapter 229 of the 1975 Code is unconstitutional in the following respects pertinent to this case, both on its face and as applied to plaintiffs:

1. In failing to provide for any type of notice or hearing as to the probable cause for detention of involuntary subjects pending a full commission hearing.

2. In failing to provide adequate notice to detained subjects prior to the full hearing before the commission.

3. In failing to provide for the presence of subjects for the duration of the commission hearing.

4. In failing to provide excluded subjects with the right to participate in their hearing.

5. In failing to advise subjects of their rights to representation of counsel at all significant stages of the proceedings, and in failing to provide that counsel be procured at such time that representation can be meaningful.

6. In failing to employ a standard of clear and convincing evidence at the full hearing.

7. In failing to require a showing of dangerousness as a prerequisite to involuntary admission and commitment.

8. In failing to employ a sufficiently precise standard upon which admission or commitment can be based.

9. In failing to require that less restrictive alternatives be considered prior to ordering full-time hospitalization.

Reference is also made to footnote number 1 at page 441 of the decision of the federal court. This footnote states:

The Iowa statutes which are challenged in this action, Chapters 228 and 229 of the Iowa Code, 1975, were repealed effective January 1, 1976, by Acts 1975 (66th G.A.) Ch. 139, §§31 and 82. The new Chapter 229, Hospitalization of Mentally Ill Persons, is not challenged in this action.

Having considered the above references to the *Stamus* case, I now turn to an examination of the questions you have raised. Your first question concerns whether or not all commitments to state mental health institutions under Iowa law prior to January 1, 1976, are void.

It is clear from the *Stamus* case that the federal court has declared Chapter 229, Code of Iowa, 1975, to be unconstitutional. At the same time it is noted that the *Stamus* case was not a class action. The decision is specifically restricted to the immediate case before the court, and only concerns Chapter 229, Code of Iowa, 1975. The federal court in the *Stamus* case has not declared all commitments to state mental health institutions prior to January 1, 1976, to be void. It is, therefore, necessary to further analyze the effect of this federal case in light of the questions you have raised.

Such an analysis begins with a determination of the nature of the Commission of Hospitalization provided for in Chapters 228 and 229, Code of Iowa, 1975. The issue to be resolved is whether the Commission of Hospitalization acted as a quasi-judicial body or a judicial body.

Although there is no case in Iowa law dealing specifically with the nature of the Commission of Hospitalization, the case of *Cedar Rapids Human Rights Commission v. Cedar Rapids Community School District,* in the County of Linn, 222 N.W.2d 391 (Iowa 1974) provides guidance in assessing the nature of this Commission. The *Cedar Rapids Human Rights Commission* case sought to determine whether that Commission was a court in the constitutional sense of the term "court," or administrative agency with quasi-judicial powers.

The Iowa Supreme Court determined that in order to constitute a court a commission must, in essence, be found to exhibit two primary characteristics. The commission must exercise the right to hear, determine and decide legal controversies. (With regard to the Commission of Hospitalization see Sections 229.2, 229.4, 229.6, 229.7, 229.8 and 229.10, Code of Iowa, 1975.) The commission must also exercise the ability to undertake ascertainment and application of a remedy. (See Sections 229.2, 229.9, 229.10 and 229.11, Code of Iowa, 1975.) These principle constituents of the nature of a court may be further demonstrated by items such as: The power to issue process (Section 229.3, Code of Iowa, 1975); practice by a plaintiff v. a defendant (Sections 229.1 and 229.5, Code of Iowa, 1975). The description of those items which constitute the nature of a court are found at pages 394 and 395 of the *Cedar Rapids Human Rights* case, supra. The statutory references given following each described constituent part of the nature of a court are references to the law on the commitment of mentally ill persons involving the exercise of power by the Commission of Hospitalization under the 1975 Code of Iowa.

At page 396 to 397 of the *Cedar Rapids Human Righs Commission* case, supra, the Iowa Supreme Court eventually distinguishes between a quasi-judicial (administrative) body and a judicial body (court) as follows:

In one case, there is a determination of a controversy by an impartial tribunal, while in the other instance, the regulatory agency or officer is in part an interested party and in part a trier of the respective contentions advanced by its counsel and the counsel for other parties represented at the hearing.

Application of this distinction to the function of the Commission of Hospitalization under Chapter 229, Code of Iowa, 1975, demonstrates the Commission of Hospitalization was a judicial body (court). Reference to the other descriptive elements of the nature of a court given above, also allows the conclusion that the Commission of Hospitalization was a judicial body (court).

The Iowa Supreme Court in the case of *County of Black Hawk v. Springer,* 58 Iowa 417, 418 (1882), in describing the Commission of Lunacy (Commission of Hospitalization) refers to the Commission as "a special tribunal." Black's Law Dictionary (Revised Fourth Edition, 1968) at page 1677 defines "tribunal" as:

The seat of a judge; the place where he administers justice. The whole body of judges who compose a jurisdiction; a judicial court; the jurisdiction which the judges exercise.

Considering all of the above, it is concluded that the Commission of Hospitalization described in Chapter 228, Code of Iowa, 1975, and exercising its powers under Chapter 229, The Code, 1975, performed a judicial function and was, in that sense, a court.

Having determined that the Commission of Hospitalization was a judicial body (court), it is possible to further determine the effect of the *Stamus* decision (declaring Chapter 229, Code of Iowa, 1975 unconstitutional) upon the individual and specific acts of the Commission of Hospitalization in ordering certain persons committed to state mental health institutions. In the case of *New York Life Insurance Company v. Breen,* 227 Iowa 738, 745; 289 N.W. 16 (Iowa 1939), the Iowa Supreme Court ruled as follows:

The question is whether or not a judgment or decree by a court of competent jurisdiction based on an unconstitutional statute, is void or merely voidable. It is the holding of some courts that such a decree is void from its inception, but

we believe the general holding is to the contrary—that the rule recognized in most of the jurisdictions is to the effect that a judgment or decree on the merits, based on an unconstitutional statute, is not void, but merely voidable, and remains effective until regularly set aside or reversed.

Therefore, it is concluded that, except for the relief granted specifically to the Stamuses by the federal court, the commitments of those persons involuntarily committed to state mental health institutions prior to January 1, 1976, are not void, but are voidable. For a specific commitment to be void, it would be necessary for the individual so committed to make further application to a court to declare such commitment void.

You have also requested direction concerning whether or not, in the event all such commitments are void, all patients committed prior to January 1, 1976, should be considered as voluntary. It is the opinion of this office that because such commitments are not void, but voidable, the present status of such commitments should be maintained until some further appropriate action is taken.

You have finally requested an opinion concerning whether or not, in the event all such commitments are not considered to be voluntary, the records of the mental health institution and the clerk of the committing court should be amended to show voluntary, rather than involuntary status. The considerations given above would appear to answer this question. The records of the mental health institution and the clerk of court should not be amended unless and until appropriate further action regarding the involuntary status of such persons is taken.

February 9, 1978

VACATION OF ROAD: §306.17, Code of Iowa, 1977, as amended by Senate File 307, Acts, 67th G.A., to apply prospectively and not to vacation ordinance entered prior to January 1, 1978, effective date. (Paff to McDonald, Cherokee County Attorney, 2-9-78) #78-2-10

Mr. James L. McDonald, Cherokee County Attorney: This letter is a written response to your request for an opinion with regard to the question whether the County Board of Supervisors has authority to rescind a prior Vacation Order and resume jurisdiction of a road pursuant to 1977 Code of Iowa, §306.17 as amended by Senate File 307, Acts of the 67th General Assembly, when the Vacation Order and further proceedings were prior to the amendment's effective date, January 1, 1978. The question is further complicated in that final damages were not determined until after the amendment's effective date.

Senate File 307, Acts of the General Assembly has a specific effective date of January 1, 1978. Section three of that act so provides. The only exceptions to prospective application of a legislative act is either when indicated by the act or when the act "relates to a remedy or procedure" rather than a "substantive right." *Schnebly v. St. Joseph Mercy Hospital of Dubuque, Iowa; Joyce v. Baker,* 166 N.W.2d 780, (1969).

The basic question you raise was answered, in this opinion, within the eminent domain area in the case of *Atherton v. State Conservation Commission,* 203 N.W.2d 620, (1973). In that case the Supreme Court held, "in ascertaining right of condemnee to recover costs following condemnor's abandonment of eminent domain, court was bound to construe statute as it existed prior to amendment which was enacted after proceedings were instituted." supra 621. It would appear that similar reasoning would apply to the Board's position in the

present circumstances. That is to say, the original Board proceedings including passing the vacation ordinance, filing appeal and court trial all occurred within the ambit of prior proceedings. The Board was proceeding "in the manner and form prescribed in Chapter 472 with reference to appeals from condemnation." §306.17, 1977 Code of Iowa. This reference is contained in the amended act also. The reasoning of the *Atherton* case (cited above) would indicate the amended act would not supercede the original act where prior proceedings have occurred. Therefore, it is this opinion that abandonment of condemnation would be governed by Chapter 472, 1977 Code of Iowa, specifically §472.34 and not 1977 Code of Iowa, §306.17 as amended by Senate File 307, Acts of the General Assembly.

February 13, 1978

TAXATION: Iowa Corporate Net Income Tax: Unrelated Business Income of Exempt Corporations. §422.34(2), Code of Iowa, 1977. Corporations which meet the exempt criteria contained in §422.34(2) are not taxed on their federally taxed unrelated business income. (Griger to Craft, State Senator, 2-13-78) #78-2-11

Hon. Rolf V. Craft, State Senator: You have requested an opinion of the Attorney General on the question of whether corporations organized for religious, charitable, scientific, or educational purposes are to pay Iowa corporation net income tax on unrelated business income subject to federal income tax imposed by §511 of the Internal Revenue Code (26 U.S.C. §511).

Section 422.34(2), Code of Iowa, 1977, exempts from the Iowa corporation net income tax the following:

"The following organizations and corporations shall be exempt from taxation under this division:

* * *

"2. Cemetery corporations, organizations and associations and corporations organized for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual."

Section 422.33, Code of Iowa, 1977, imposes the Iowa net income tax on corporations and the net income tax base is defined in §422.35, Code of Iowa, 1977, as federal taxable income properly computed under the Internal Revenue Code with certain adjustments not relevant to this opinion. Thus, in the event that a corporation within the ambit of §422.33 has federal taxable income, it generally has Iowa taxable income. Your question assumes that a corporation organized as described in §422.34(2) has federal taxable unrelated business income.

Section 422.34 is clear and unambiguous. By its terms, the statute exempts from tax the corporations organized for the purposes listed therein and as long as none of the corporate net earnings inure to the benefit of any private stockholder or individual, the tax exemption applies, whether the corporate net income constitutes federal taxable unrelated business income or not. Consequently, such corporations, as long as they fit the exemption criteria contained in §422.34(2), are not taxed on their federally taxed unrelated business income.

February 14, 1978

GAMBLING: Qualified Organization Raffles: Section 99B.7, Code of Iowa (1977); Sections 99B.3(1)(h), 99B.5(1)(g), 99B.15, Code of Iowa (1977); Section 99B.7(5), Code of Iowa (1975); 730 - 94.8(99B) I.A.C. A qualified organization licensed pursuant to Section 99B.7, Code of Iowa (1977), may not aggregate several items, units or parts to form the "prizes" awarded in "small raffles," even if the value of each aggregation does not exceed twenty-five dollars. A licensed qualified organization may not aggregate several items, units or parts to form the "prize" awarded in an annual "large" raffle, even if the value thereof does not exceed five thousand dollars. (Richards to Rush, State Senator, 2-14-78) #78-2-12

The Honorable Bob Rush, State Senator: You have requested an opinion of the Attorney General concerning the number and value of merchandise prizes that may be awarded by a qualified organization conducting raffles under Section 99B.7, Code of Iowa (1977). Specifically, you submit the following questions:

"1. Do the heretofore mentioned statutory provisions limit the number or cumulative value of merchandise prizes that may be awarded during a raffle, provided that each prize awarded is less than twenty-five dollars in value; and

"2. Do these provisions prohibit an organization from conducting a single raffle in which a prize having a value of less than five thousand dollars and other prizes each having a value of less than twenty-five dollars are awarded?"

Section 99B.7(1), Code of Iowa (1977), provides that a qualified organization may lawfully conduct games of skill, games of chance and raffles, if certain conditions are met. One such condition is specified in paragraph "d" of subsection one:

"Cash prizes shall not be awarded in games other than bingo. The actual retail value of any merchandise prizes shall not exceed twenty-five dollars and may not be repurchased. However, a raffle may be conducted not more than one time in a twelve month period at which a merchandise prize may be awarded of a value not greater than five thousand dollars as determined by purchase price paid by the organization or donor and for which the cost to a participant of a chance in a ticket to the raffle does not exceed five dollars."

This provision creates two types of raffles which may lawfully be conducted by a licensed qualified organization: the "small" raffle and "large" raffle. The "small" raffle is so designated in that "the cost to a participant...shall not exceed one dollar," Section 99B.7(1)(e), and "the actual retail value of any merchandise prizes shall not exceed twenty-five dollars," Section 99B.7(1)(d). The "small" raffle may be conducted at any time and as often as desired during a license period, and there is "no limit as to the number of winners or prizes, provided no one wins a prize with a value greater than twenty-five dollars." 730 - 94.8(99B)I.A.C. The "large" raffle is so designated in that the cost to a participant may not exceed five dollars and the value of the merchandise prize awarded may not be "greater than five thousand dollars as determined by purchase price paid by the organization or donor." The "large" raffle may be conducted only once during a twelve-month period. Section 99B.7(1)(d), Code of Iowa (1977). "In this raffle there can be only one winner." 730 - 94.8(99B)I.A.C.

Your first question deals with the "number or cumulative value" of "small" raffle merchandise prizes. I take this to mean whether several items, units or parts may be aggregated to form the "prize" awarded each winner, provided the value of the aggregation does not exceed twenty-five dollars.

Several sections of Chapter 99B, Code of Iowa (1977), specifically permit aggregation of more than one item, unit or part to form the awarded prize. *See,* Section 99B.3(1)(h) (amusement concessions), Section 99B.5(1)(g) (raffles conducted by a fair), Section 99B.7(1)(c) (bingo games conducted by qualified organizations), Code of Iowa (1977). If we could read Chapter 99B as a whole with each section considered, compared and construed *in para materia, Northern Natural Gas Co. v. Forst,* 205 N.W.2d 692, 695 (Iowa 1973), the logical result would be that a licensed qualified organization could aggregate several items, units or parts to form a "small" raffle prize. However, such construction is unavailable in light of the recent decision of *State ex rel Chwirka v. Audino,* et al,___ N.W.2d___, #59119 (Iowa, filed November 23, 1977). As noted by the Iowa Supreme Court in the *Audino* case, at pages 10 and 11 of its slip opinion, it is the apparent intent of the Legislature that each section of Chapter 99B stands on its own without overlap:

"Such legislative intent appears in the language contained in Section 99B.15, which provides:

" '99B.15 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...'

"Since the language refers to a section of the statute only, it demonstrates the intent to allow gambling in accordance with an individual section of that chapter and not to require that all sections thereof must be complied with in order for gambling to be lawful. This position is further strengthened by the explanation to the Senate bill which enacted chapter 99B:

" 'The intent is that gambling is unlawful except as specifically permitted in a given section of chapter 99B. The sections are not intended to overlap, so that each section contains the privilege and limitations applicable to a given set of circumstances.' Senate File 496, 66th G.A. (1975).

"The above language clearly fixes the legislative intent that each section should be read separately and would not limit each other."

Hence, Section 99B.7 must be interpreted on its face, without reference to other provisions of Chapter 99B.

As originally drafted and approved by the Senate, the section on lawful gambling by qualified organizations provided that, "the *aggregate* value of any prize in any single game or raffle shall not exceed twenty-five dollars." 1973 Iowa Senate Journal 326 (emphasis added). Whether by oversight or purpose, the House of Representatives' amended version which was approved by the Senate did not contain this aggregation of language: "No cash prizes shall be awarded in games of skill, games of chance, other than bingo, and raffles. *The actual retail value of any merchandise prizes shall not exceed twenty-five dollars and may not be repurchased."* Chapter 153, Section 7(5), Acts of the 65th General Assembly, 1973 Session; Section 99B.7(5), Code of Iowa (1975) (emphasis added). And this non-aggregation language was incorporated in toto into the 1975 rewrite of the gambling laws. Chapter 99, Section 9, Acts of the 66th General Assembly, 1975 Session; Section 99B.7(1)(d), Code of Iowa (1977), thus, although we are aware of the disparity and inconsistency since Section 99B.7(1)(d) does not provide for aggregation and must stand on its own, we are constrained to conclude that qualified organizations operating under Section 99B.7, Code of Iowa (1977), may *not* aggregate several items, units or parts to form the "prize" awarded the winner of a "small" raffle, even if the value thereof does not exceed twenty-five dollars.

Your second question deals with the number and value of "large" raffle merchandise prizes. I take this also to mean whether several items, units or parts may be aggregated to form the "prize" awarded the sole winner, provided the value of the aggregation does not exceed five thousand dollars. Just as with "small" raffles, Section 99B.7(1)(d), Code of Iowa (1977), is silent on aggregation in "large" raffles, and specifies that "*a* merchandise prize may be awarded." (emphasis added). Thus, in the "large" raffle, there can only be one prize which may *not* be composed of the aggregate of several items, units or parts, even if the value of the aggregation does not exceed five thousand dollars.

February 14, 1978

STATE OFFICERS AND DEPARTMENTS: Transportation Regulation Board, conflict of interest. §68B.7, Code of Iowa, 1977. Former lawyer member not barred as lawyer in salaried position from practice before where compensation not dependent upon agency action. (Paff to DeKoster, State Senator, 2-14-78) #78-2-13

The Honorable Lucas J. DeKoster, State Senator: You have requested an opinion as to whether an attorney, Mr. Richard Howe, may render services to clients that involve his former board. The matters in question would commence after the date of his resignation, but within the two-year prohibition of §68B.7, Code of Iowa, 1977. More specifically you ask whether a salaried law firm position would run afoul of the prohibition in §68B.7 "...wherein his compensation is to be dependent or contingent upon any action by such agency..."

In answering your inquiry, reference is made to 1972 OAG, Turner to Gallagher, 8/25/72, No. 72-8-10 where this conflict of interest issue was raised with regard to the Iowa Beer and Liquor Control Department in the context of §68B.7, Code of Iowa, 1971. The opinion set forth that, "It is not within the province of the attorney general to issue opinions finding individuals guilty of violations of criminal statutes and it would be improper for him to do so. Guilt is a matter for courts and juries to decide." That same opinion indicates that "§68B.7 is a criminal or penal statute."

Section 68B.7, Code of Iowa, 1977, contains the identical §68B.7 as found in the Code of Iowa, 1971. Also, §68B.9 places an enforcement burden upon the attorney general. Therefore, in view of the prohibition of comment in the earlier opinion and the possible enforcement of said provision a prior discussion of individual criminality would be improper.

However, the question you raise in the abstract "whether or not criminality within the meaning of §68B.7 is dependent upon one's compensation being dependent or contingent upon any action by such agency" is correct. The earlier opinion indicates "there is no violation if they are being paid on a straight salary basis not 'dependent or contingent upon' action by the agency." 1972 OAG, Turner to Gallagher, 8/25/72, No. 72-8-10. The legislature seems to prohibit contingent arrangements by the former employee or official in practice before the former agency. Also in view of the strict construction of penal statutes, *McReynolds v. Municipal Court of City of Ottumwa,* 207 N.W.2d 702, it would appear one drawing a salary would not have one's compensation "dependent or contingent upon" agency action. The prohibition of the §68B.7, Code of Iowa, 1977, would not prevent services of one former employee in matters commencing after the date of resignation assuming as you do in your request that one's compensation is not dependent upon agency action.

February 14, 1978

COUNTIES AND COUNTY OFFICERS: Employees Sick Leave. §91A.4, Code of Iowa, 1977. There is no express or implied statutory authority for paying county employees for unused sick leave upon retirement or termination of employment. (Nolan to Jones, Taylor County Attorney, 2-14-78) #78-2-14

Mr. Richard R. Jones, Taylor County Attorney: Your letter of January 27, 1978 discusses the questions raised in the county's annual audit for the year ending June 30, 1977 relating to payment for unused sick leave when county employees resign or retire.

This office has previously issued several opinions on this subject. A recent opinion to the assistant Black Hawk County Attorney on September 26, 1977 contains the following:

"In a 1949 opinion, 1950 O.A.G. 78, this office advised that sick leave and vacation provisions are benefits to the public employer rather than to the individual receiving them and that it is in the public interest to make provision for such sick-leave and vacation in order to maintain a productive staff. In 1964 O.A.G. 118 it was said that 'all elective county officers have the sole determination as to the vacation time, working hours, and sick leave to be granted to employees under their jurisdiction.' "

However, it has been a well established rule that sick leave is available for use as needed and is not a benefit which can be "cashed in" when not used.

* * *

"There is no expressed statutory authority for converting sick leave to cash and we find no implied power for the county to do so... Thus the payment of an unauthorized cash benefit would in our view be illegal."

The September opinion dealt with the question of whether a clerk continued to earn sick leave after being appointed a deputy in the same office. It is well established that vacation time can be converted to a cash benefit because the right to such paid vacation time is established as an earned benefit. The presumption with respect to sick leave, on the other hand, is that one is entitled to the benefits of sick leave only if the person is unable to work due to impaired health. It should also be noted that under this view while a person is on authorized sick leave that individual continues to earn regular salary or wages and continues to accrue vacation benefits in accordance with the applicable statute or personnel policy.

Your letter also made reference to the Chapter 91A of the 1977 Code of Iowa which is known as the Wage Payment Collection Law. You point out that under this chapter of the Code an employer may be government or governmental subdivision of the State and that the term wages includes "compensation owed by an employer for vacation, holiday, sick leave and severance payment in addition to labor or services rendered by an employee. Further you point out §91A.4 which provides for the payment by the employer of all wages earned when the employee's employment is suspended or terminated. Section 91A.4 also specifically states:

"If vacations are due an employee under an agreement with the employer or a policy of the employer establishing prorate of vacation accrued, the increment shall be in proportion to the fraction of the year which the employee was actually employed."

Since this section makes specific reference to vacations but not to sick leave, we employ the doctrine expressio unius est exclusio alterius to reach the conclusion that this section of the Code without more does not require a cash in payment for sick leave which was available to the employee during the time of the employment but which remained unused.

February 14, 1978

TOWNSHIP TRUSTEE: COMPENSATION: §359.46(1), Code of Iowa, 1977. Under a statute which provides that the township trustee shall receive $8 "for each day of service of eight hours" a township trustee is paid on the basis of $1.00 per hour. (Turner to Spear, State Representative, 2-14-78) #78-2-15

Honorable Clay Spear, State Representative: You have requested an opinion as follows:

"Apparently it is the practice to pay township trustees $8 a meeting regardless of the length of the meeting. In this connection, see the attached photocopy of an article in The Hawk Eye of February 8, 1978.

"In your opinion, how much should a township trustee be paid under Section 359.46(1) for a meeting lasting one hour and forty-five minutes?"

Section 359.46(1), Code of Iowa, 1977 provides:

"*Compensation of trustees.* Township trustees shall receive:

"(1) For each day of service of eight hours necessarily engaged in official business, to be paid out of the county treasury, eight dollars each."

Thus the answer is $1.75. See 1928 OAG 280 which holds that this particular section provides for hourly pay. It will be noted that when that opinion was written 50 years ago the maximum a trustee could receive for an eight hour day was $4.00 or 50 cents an hour. Since that time, the salary has skyrocketed all the way up to a dollar per hour.

February 15, 1978

STATE OFFICERS: COMMERCE COMMISSIONER: CAMPAIGNING. §§4.7, 474.8, 740.16 and 740.17, Code of Iowa, 1977. A commerce commissioner, being a state appointive officer, is expressly authorized by statute to be a candidate for political office and to campaign during his working hours. (Turner to Van Nostrand, Commerce Commission Chairman, 2-15-78) #78-2-16

Mr. Maurice Van Nostrand, Chairman Commerce Commission: You have requested an opinion of the attorney general as to whether you can lawfully be a candidate for the office of United States Senator, and campaign for said office, during your working hours as an Iowa Commerce Commissioner, a state office to which you were duly appointed by the Governor.

Section 474.8, Code of Iowa, 1977, provides as follows:

"*Office—time employed—expenses.* The commerce commission shall have an office at the seat of government and each member shall devote his whole time to the duties of the office, and the members and secretary and other employees shall receive their actual necessary traveling expenses while in the discharge of their official duties away from the general offices."

Sections 740.16 and 740.17 of said Code provide:

"*State employees not to participate.* It shall be unlawful for any state officer, any state appointive officer, or state employee to leave the place of his or her employment or the duties of his or her office for the purpose of soliciting votes or engaging in campaign work during the hours of employment of any such officer or employee."

"*Exception.* The provisions of Section 740.13 to 710.16, inclusive, shall not be construed as prohibiting any such officer or employee who is a candidate for political office to engage in campaign at any time or at any place for himself."

If strictly contrued, §474.8 would prohibit a commerce commissioner from eating, sleeping or performing other normal activities of daily living. A commissioner could not go home on weekends or holidays or take a vacation. Such construction would be absurd and in my opinion nothing more was intended than to require a commissioner to devote his whole time, *within reason,* to the duties of his office.

It is not necessary for us to determine in this opinion what is reasonable time away from the duties of one's office, or what other activities or employment, if any, may be permitted. §474.8 must be harmonized, if possible, with §§740.16 and 740.17. The latter, when considered with §474.8, are special statutes and control over the general duty requirement in the commerce commission statute.

Section 4.7 provides:

"*Conflicts between general and special statutes.* 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."

Thus, we conclude that §740.17 expressly authorizes you to be a candidate and to campaign for political office during your working hours and, if you are eligible to the office of United States Senator, your duties as Commerce Commissioner would not legally prevent your candidacy.

February 23, 1978

CIVIL RIGHTS: Act; Applicability to Religious Institutions. §§601A.6(1), 601A.6(2), Code of Iowa, 1977. A religious institution may use religion as an employment criteria only in relation to positions in which duties relate to the religious purpose of the institution. (Perry to Chiodo, State Representative, 2-23-78) #78-2-18

Representative Ned Chiodo, Iowa House of Representatives: This is in response to your letter, in which you ask the question: Based on 601A.6(1) and 601A.6(2), Code of Iowa, 1977, may a religious institution refuse to employ an individual if that person's religious beliefs or moral character is not in conformity with church philosophy?

These sections, which are contained in the Iowa Civil Rights Act of 1965, as amended, read, in relevant part, as follows:

601A.6(1): "It shall be an unfair or discriminatory practice for any: (a) person to refuse to hire, accept, register, classify or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation."

601A.6(2): "This section shall not apply to: (d) Any bona fide religious institutions or its educational facility, association, corporation or society with

respect to any qualifications for employment based on religion when such qualifications are related to a bona fide religious purpose."

Iowa Courts have not, to date, had occasion to interpret the religious discrimination prohibitions of the Iowa Civil Rights Act. A look at Federal law and Court decisions, however, provides background helpful in interpreting the Iowa Act.

Section 703(a)(1) of the Federal Civil Rights Act, 42 U.S.C.A. §2000(e)-2(a), outlaws discrimination in employment based on religion. Prior to 1972, when the Act was amended, an exception in Section 702, 42 U.S.C.A. §2000(e), provided:

"This subchapter shall not apply...to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association or society of its religous activities..."

In addition, another section, Section 703(e)(2), 42 U.S.C.A. §2000(e)-2(e)(2), also known as the Purcell Amendment, provided:

"...it shall not be an unlawful emloyment practice for a school, college, university, or other educational institution...to hire and employ employees of a particular religion if such school, college, university...is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society..."

It will be noted that there was a difference between the two types of exemptions from coverage specified in these sections. The difference between the two was correctly summarized by Vincent C. Allfred, 19 The Catholic Lawyer 307, (Autumn 1973) at page 311:

"The broad exemption for all religious corporations and societies in Section 702 was with reference only to their religious activities, while Section 703(e)(2) having reference only to religiously affiliated schools and colleges appears applicable to all employees, even if not engaged in religious activities."

In 1972, Congress amended the exemption of Section 702 to read:

"This title shall not apply to an employer with respect to a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C.A. §2000(e).

Thus amended, this exemption was not limited to *religious* activities, but rather exempted churches from the coverage of the Federal Civil Rights Act in every employment situation the church might undertake. The constitutionality of this 1972 amendment approach was severely questioned in a review of the amended section by the Court of Appeals, District of Columbia Circuit, in *King's Garden, Inc. v. F.C.C.,* 1974, (CA DC) 7 EPD par.9315, 498 F.2d 51; cert. denied, 1974, 8 EPD par. 9760, 419 U.S. At page 53 or 498 F.2d, Justice Skelley Wright, writing for the Court, condemned the statute as unconsitutional, but decided the case on other grounds. Chief Judge Bazelon, concurring in a separate opinion, would have decided the case by declaring the section unconstitutional.

In interpreting the Iowa Civil Rights Act's provisions as compared to past and present Federal law, it is noted, first, that 601A.6(2) could not be in-

terpreted to allow religious institutions to use religion as a criteria in *all* employment, for if that interpretation was to be made, the exception would be unconstitutional under the *King's Garden, Inc.* analysis. It is assumed that the Legislature did not intend to pass an unconstitutional law. For this reason, 601A.6(2) must be read as inapplicable to employment positions in which employees perform purely technical, administrative, business, or manual work, or work of any other type, which does not deal with the religion of the institution.

Secondly, it is noted that 601A.6(2) and pre-amendment §2000(e)-1 are similar, in that both exclude from coverage employment by religious institutions which is related to religious pursuits. A difference between the two is also evident. The Federal law exempted "employment of individuals...to perform work connected with the carrying on by such corporation, association, or society of its religious activities." This language seems to exempt all positions related to *activities of the institution* which are related to the institution's religious purpose. The Iowa exemption, however, exempts only individual positions, "when...qualifications are related to a bona fide religious purpose."

Thirdly, the Iowa Civil Rights Act contains no language of the type found in the aforementioned "Purcell Amendment," which amendment exempts all employment by religious affiliated schools. The Iowa Civil Rights Act does not go along the lines of exempting *all employees* working on church property or *all employees* of church schools. Rather, under the Iowa Civil Rights Act, the focus is always on whether a given job is related to a religious purpose.

With these points of law as background, it is possible to answer your question. Under the Iowa Civil Rights Act, a religious institution may *not* discriminate based on religion in the hiring of *all* of its employees. Rather, a religious institution in Iowa may use religion as an employment criteria only where qualifications for a position "are related to a bona fide religious purpose" of such religious institution. Thus, in filling positions which relate to the institution's religious purpose, a church may choose its employees on the basis of religion. Therefore, the religious discrimination provisions of 601A.6(1) never apply to employees holding church offices, conducting religious services or ceremonies, doing church oriented counseling, translating scriptures, or performing similar religion connected employment activities. Consistent with the Free Exercise Clause of the U.S. Constitution, 601A.6(2) precludes State governmental interference with ecclesiastical hierarchies, church administration and appointment of clergy. *King's Garden, Inc. v. The Federal Communications Commission,* 1974, 498 F.2d 51, 56. 601A.6(2) also protects the constitutional right of Free Exercise by guaranteeing religious groups the absolute right to choose on sectarian grounds those who will advocate, defend, or explain the group's beliefs or way of life, either to its own members or to the world at large.

On the other hand, 601A.6(2) does not serve to allow a religious institution to use religion as an employment criteria for positions involving work of a secular, as opposed to a religious, nature. Thus, it would appear to be illegal for a religious institution in Iowa to consider religion in hiring someone for a position of custodian or accountant. Similarly, it would not be legal for a religious institution to consider religion in employing someone to operate the church's physical plants, or to serve as an administrator of church run programs or businesses, unless the position in question involved duties related to the spiritual mission of the institution or its Free Exercise of religion.

In your question, you ask whether a religious institution may consider the "moral character" of an applicant for employment in deciding whether to hire that individual. The answer is that it is legal, under the Iowa Civil Rights Act, for a religious institution to consider the "moral character" of an individual in making employment decisions. In employment not related to a religious purpose, however, *religion* may not serve as an employment criteria. Therefore, when applying a criteria of "moral character" to employment not related to a religious purpose, the institution must apply standards of good moral character accepted by society in general, not a theological or doctrinal standard.

It is appropriate, in closing, to interject a word concerning the prohibitions of discrimination, besides religious discrimination, which are contained in 601A.6(1). 601A.6(2) specifies that when "related to a bona fide religious purpose," the provisions of 601A.6(1) shall not apply "with respect to *any qualifications for employment based on religion.*" This means that the provisions of 601A.6(1) relating to age, race, color, sex, national origin and disability, generally do apply to all employment by a religious institution. 601A.6(2) does not relieve a religious employer from its obligation not to discriminate, unless a religious doctrine or teaching requires disparate treatment of one of the protected classes. 601A.6(1)'s prohibitions of discrimination based on age, race, color, sex, national origin or disability are applicable to employment by religious institutions, even religion oriented employment, unless a religious reason justifies exclusion of persons of a particular age, race, sex, national origin or disability from the particular job.

February 23, 1978

TAXATION: Property Tax - Assessment. The value of real property constituting common areas of a Planned Unit Development, which common areas are deeded to a homeowner's association organized under Chapter 504A (Iowa Nonprofit Corporation Act), Code of Iowa, 1977, is to be assessed for property tax purposes in the name of the homeowner's association. (Kerwin to John H. King, Assistant Polk County Attorney, 2-23-78) #78-2-19

Mr. John H. King, Assistant Polk County Attorney: You have requested an opinion of the Attorney General as to whom the value of real property constituting common areas of a Planned Unit Development is to be assessed for property tax purposes where title to the common areas is held by a homeowner's association organized under Chapter 504A (Iowa Nonprofit Corporation Act), Code of Iowa, 1977.

The Planned Unit Development, or P.U.D., consists of various types of dwelling units, as well as "common areas" which the P.U.D., occupants have a right to use. Title to the real property constituting the common areas has been deeded to the homeowner's association organized under Chapter 504A, Code of Iowa, 1977.

It is clear that under the Code of Iowa, real property owned by a corporation is to be assessed in the name of that corporation. Section 441.26, Code of Iowa, 1977, provides that assessment rolls used by all property tax assessors in assessing real and personal property "shall be used in listing the property and showing the values affixed to such property of all persons, partnerships, *corporations*, or associations assessed..." (Emphasis supplied)

Section 428.1, Code of Iowa, 1977, states those required to list property for the purpose of propety tax assessments. That Section provides, in pertinent

part, as follows:

"*Listing - by whom.* Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed:

* * *

"5. The property of a body corporate, company, society or partnership, by its principal accountant, officer, agent, or partner, as the assessor may demand."

The procedure to be used for the valuation of real estate owned by a corporation is contained in §428.34, Code of Iowa, 1977, which provides as follows:

"*Real estate of corporations.* All real estate owned by corporations, returned in their statements as part of their assets for purposes of taxation, shall be valued therein for such assessment as other real estate, except as otherwise provided, and shall not be otherwise assessed."

Therefore, it is the opinion of this office that the value of real property constituting common areas of a Planned Unit Development, which common areas are deeded to a homeowner's association organized under Chapter 504A (Iowa Nonprofit Corporation Act), Code of Iowa, 1977, is to be assessed for property tax purposes in the name of the homeowner's association.

February 23, 1978

STATE OFFICERS AND DEPARTMENTS: Alcoholism; Drug Abuse: Ch. 74 §§2, 3, 4, 8, 14, 37, Acts of the 67th G.A.; §§125.2, 125.3, 125.7, 125.12, 125.27, 1977 Code of Iowa. The Act creating the department of substance abuse is silent as to whether local treatment programs for drug abusers and alcoholics must merge. But the department, and the commission on substance abuse, can, through the comprehensive substance abuse program, determine whether merger is required. (Haskins to Riedmann, Director, Department of Substance Abuse, 2-23-78) #78-2-20

Gary Riedmann, Director, Department of Substance Abuse: You ask our opinion as to whether Chapter 74, Acts of the 67th G.A., which creates a new department of substance abuse in place of the old division on alcoholism and the old drug abuse authority, requires that local treatment programs for drug abuse merge with those offering treatment only for alcoholics.

Chapter 74 amends Chapter 125, 1977 Code of Iowa, dealing with treatment of alcoholism, in several ways. As indicated, it creates a department of substance abuse, see Chapter 74, §4, Acts of the 67th G.A. (hereafter referred to as the "department") which is to develop a comprehensive substance abuse program. However, it does not indicate whether local treatment facilities offering treatment only for drug abusers must merge with those offering treatment only for alcoholics or whether these facilities can remain separate. The only thing which Chapter 74 makes clear is that the department is to oversee both drug and alcohol treatment programs. The definitional provisions of Chapter 74 are completely ambiguous with regard to the issue presented here. Chapter 74, §3, Acts of the 67th G.A., amends §125.2, 1977 Code of Iowa, to define the word "facility" as follows:

"2. 'Facility' means a hospital, institution, detoxification center, or installation providing care, maintenance and treatment for *substance abusers* and licensed by the director department under section 125.13." (Emphasis added)

The term "substance abuser" is defined in §125.2, 1977 Code of Iowa, as amended by Chapter 74, §2, Acts of the 67th G.A., as follows:

"5. 'Substance abuser' means a person who habitually lacks self-control as to the use of *chemical substances* or uses chemical substances to the extent that his or her health is substantially impaired or endangered or that his or her social or economic function is substantially disrupted." (Emphasis added)

"Chemical substance" is defined in the same section, as amended, as follows:

"3. 'Chemical substance' means alcohol, wine, spirits and beer as defined in chapter one hundred twenty-three (123) of the Code *and* drugs as defined in section two hundred three A point two (203A.2), subsection three (3) of the Code, which when used improperly could result in chemical dependency." (Emphasis added)

The effect of the word "and" in the last quoted section cannot be that a "substance abuser" is only a person who uses both alcohol *and* drugs. Rather, it seems clear that a "substance abuser" is one who uses either. But this does not resolve the larger question: is a "facility" under Chapter 74 a program which treats both alcoholics and drug abusers or one which treats either. Obviously, the definitional provisions could as easily be read to mean that a "facility" may treat either alcoholics or drug abusers as they could to mean that it must treat both types of persons. Hence, these provisions supply no answer to your question and other provisions of Chapter 74 must be looked to.

Chapter 74 requires the creation of a comprehensive substance abuse program. Chapter 74 §4, Acts of the 67th G.A., amends §125.3, 1977 Code of Iowa, to read as follows in relevant part:

"There is established the Iowa department of substance abuse which shall develop, implement and administer a comprehensive substance abuse program pursuant to sections 125.1 to 125.26. There is established within the department a commission on substance abuse to establish policies governing the performance of the department in the discharge of duties imposed on it by this chapter."

The duty of the commission with respect to the comprehensive substance abuse program is set forth in §125.7, 1977 Code of Iowa, as amended by Chapter 74, §8, Acts of the 67th G.A., as follows:

"The Commission shall:

* * *

"2. Approve the comprehensive substance abuse program, and the funding therefore [sic], developed by the department pursuant to sections 125.1 to 125.6."

More specifically, §125.12, 1977 Code of Iowa, as amended by Ch. 74, §14, Acts of the 67th G.A., provides:

"1. The commission shall establish a comprehensive and co-ordinated program for the treatment of substance abusers and intoxicated persons. Subject to the approval of the commission, the director shall divide the state into appropriate regions for the conduct of the program and establish standards for the development of the program on the regional level. In establishing the regions, consideration shall be given to city and county lines, population concentrations and existing substance abuse treatment services. In determining the regions, the director shall not be required to follow the regional map as prepared by the office for planning and programming."

The comprehensive program described above is broad enough to include the matter of merger of local alcoholism and drug abuse programs. Notably, funding of local treatment programs is to be in accordance with the comprehensive program. Section 125.27, 1977 Code of Iowa, as amended by Ch. 74, §37, Acts of the 67th G.A., states in relevant part:

"The director may, consistent with the comprehensive substance abuse program, enter into written agreement 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 a substance abuser."

In sum, the Act creating the department is silent as to whether local treatment programs for drug abusers and alcoholics must merge. But the department, and the commission, can, through the comprehensive substance abuse program, determine whether merger is required.

February 23, 1978

SCHOOLS: Bond Issue. Balance of $51,000 in school house fund may be used for addition of two classrooms to elementary-junior high school building if such additions were contemplated in building program voted on which authorized the bond sale from which these funds were obtained. (Nolan to Shirley, Dallas County Attorney, 2-23-78) #78-2-21

Mr. Alan Shirley, Dallas County Attorney: You have requested an Attorney General's opinion as to whether the voters of the Dallas Community School District in authorizing a bond issue in 1975 authorized the use of about $51,000 balance in the school fund for the addition of two elementary classrooms to the Elementary-Junior High School building at Grimes. The proposition submitted to the voters at the school bond election is as follows:

"Shall the Dallas Community School District in the counties of Dallas and Polk, State of Iowa, issue school bonds in the sum of not to exceed $550,000.00, for the purpose of providing funds to carry out the 1975 School Building Program, generally described as follows: build and furnish in Grimes, Iowa, a junior high school building addition, remodel and repair the present Grimes School building, including gymnasium, remodel and repair the present Dallas Center School building, and miscellaneous related improvements including the demolition of the old portion of the Grimes Junior High School Building and the Grimes Shop Building?"

It appears from the information available to us that the answer to the question you have submitted depends upon whether or not the addition of the two elementary classrooms at the Junior High School building was contemplated in the 1975 school building program. We have learned from conversation with the Superintendent of the Dallas Community School District that the elementary school and the junior high school are located in opposite wings of a single building. However, the fact that the junior high school is under the same roof with the elementary school does not justify additions to the elementary wing if such additions were not contemplated in the 1975 building program unless funds for such additions are available from a source other than the bond issue.

Further, the superintendent has indicated that the balance now existing in the school bond fund was derived from a transfer of general fund monies to the schoolhouse fund. Once monies are placed in the schoolhouse fund they must be used for authorized purposes and cannot be restored to the general fund unless so directed by the electors pursuant to §278.1(5) of the Code. However, such money may be used for the redemptions of schoolhouse bonds which by their terms are subject to redemption pursuant to §298.23 of the Code.

February 24, 1978

CORPORATIONS: Expiration of Charter, Sale of Assets. Chapters 491 and 496A, Code of Iowa, 1977. A corporation organized under Chapter 491 has a three month period either prior to or subsequent to the expiration date of its charter to file renewal articles of incorporation and continue to renew its existence under Chapter 491. It also had the additional option of adopting the provisions of Chapter 496A, by following the mandates of §496A.142. However, once a corporation of specified years' duration under Chapter 491 adopts Chapter 496A, the adoption action alone will not extend the duration and this corporation, in order to extend its duration, would have had to file an amendment changing its duration to perpetual. (Haesemeyer to Carr, State Senator, 2-24-78) #78-2-26

Honorable Robert M. Carr, State Senator: Reference is made to your letter of January 19, 1978, in which you request an opinion of the Attorney General and state:

"Pursuant to your powers as stated in Sec. 13.2(4) of the Iowa Code, I ask you to give your written opinion as to the following question of law.

"This inquiry regards the authority of an expired domestic corporation, which is subject to Chapter 496A of the Iowa Code, to continue doing business.

"The particular case in question involves a small utility company (telephone) whose corporate charter under *Chapter 491* of the Iowa Code expired. Eight days later the corporation filed the necessary form with the Secretary of State's office to become subject to the provisions of *Chapter 496A*. I do not question the legitimacy of that action because both chapters, 491 and 496A, provide a three month grace period after the expiration date in which the life of the corporation continues [491.25, third paragraph, and 496A.142(3)(e)(c)].

"Thereafter, the corporation failed to take any action to continue its life. They did not pay the required fee nor did they amend or restate their Articles of Incorporation. At the end of the three month grace period the corporation was allowed to expire. Now there are proceedings to sell the corporation and I am questioning the extent of action they may take.

"To what extent does *Section 102* ['Survival of rights and remedies after dissolution or expiration.'] authorize continuation of business transactions?

"Would the sale of the corporation and other actions necessary to sell it be considered 'other than in the regular course of business' and therefore subject to the provisions of *496a.76*?"

As you point out, the corporation in question previously existed under old Chapter 491 of the Code which is the business corporation law under which corporations were organized prior to the present Iowa Business Corporations Act, Chapter 496A, Code of Iowa, 1977. Most corporations which existed under the old act (Chapter 491) incorporated for a period of twenty years, since the corporation and renewal fees required by §491.11 were substantially greater for corporations of perpetual duration, than they were for those of a specific years' duration.

The corporation in question was one of those which had a twenty year corporate existence and this term expired July 31, 1977. Under the provisions of §491.25, the corporation had a three month period either prior to or subsequent to the expiration date to file renewal articles of incorporation and continue to renew its existence under Chapter 491. Since the advent of the Iowa Business Corporation Act, Chapter 496A, it had the additional option of adopting the

provisions of Chapter 496A by following the mandates of §496A.142 and this is what the corporation in question did in this instance.

However, once a corporation of a specified years' duration under Chapter 491 adopts Chapter 496A, the adoption action alone will not extend the duration and this corporation, in order to extend its duration, would have had to file an amendment changing its duration to perpetual or it could have filed restated articles of incorporation under §496A.61, which filing would have given it perpetual duration, unless they contained a provision limiting its duration to something less than perpetual. However, after adopting the corporation in question did neither of these things and consequently its corporate existence expired at midnight, October 31. 1977, and it is presently carried as an expired corporation on the records of the Corporations Division of the Office of the Secretary of State.

Despite all of the above, the corporation could have at that time and still can, revive itself by following the provisions set out in the last sentences of the first paragraph of §496A.102, which provides:

"* * * If the period of duration of a corporation has expired, it may, subject to the provisions of subsection 11 of section 496A.142, amend its articles of incorporation at any time within five years after the date of such expiration so as to extend its period of duration.

"* * *

Once it has done this, it can, if desired, confirm all actions during the period of expiration or it can backtrack and redo the business transaction from the start. Whether the corporation in question would wish to do this is of course a decision which they will have to make.

It is my understanding that the principals of the corporation, including the stockholders, not realizing it had expired, entered into some arrangement to actually sell the corporation as a going entity to another corporation, and in that regard you have asked to what extent 496A.102 (Survival of rights and remedies after dissolution or expiration) authorizes corporate continuance as to ordinary business transactions. Such §496A.102 provides:

"Survival of rights and remedies after dissolution or expiration. The dissolution of a corporation or the expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution or expiration, if action or other proceeding thereon is commenced within two years after the date of such dissolution or expiration. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporated name. The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim. If the period of duration of a corporation has expired, it may, subject to the provisions of subsection II of section 496A.142, amend its articles of incorporation at any time within five years after the date of such expiration so as to extend its period of duration.

"A corporation which has been dissolved or the period of duration of which has expired by limitation or otherwise, may nevertheless continue to act for the purpose of conveying title to its property, real and personal, and otherwise winding up its affairs."

In my opinion, this section does not authorize the continuance of ordinary business transactions at all. It is the statute which protects the rights third

parties hold against the corporation and the rights and remedies the corporation may hold against others at the time of its dissolution or expiration. It merely assures that these rights and remedies are not lost by reason of the dissolution or expiration if action is commenced thereon within the statutory period of two years. However, I am not saying that good faith de facto business transactions of expired corporations would not ultimately be considered valid on some legal basis. All that I am saying is that this section in particular does nothing for them one way or another.

You also ask whether a sale of the expired corporation itself, together with all other actions necessary to consumate the sale, would be considered a sale of the assets other than in the regular course of business. If such a sale took place during the period of corporate duration, it would fall within the purview of §496A.76, which provides:

"Sale or other disposition of assets other than in regular course of business. A sale, lease, exchange or other disposition of all or substantially all the property and assets, with or without the good will, of corporation, if not made in the usual and regular course of its business, may be made upon such terms and conditions and for such consideration which may consist in whole or in part of money or property, real or personal, including shares of any other corporation, domestic or foreign, as may be authorized in the following manner.

"* * *"

As to whether or not the same would be true of an expired corporation, I could not give a definite answer. However, I would think that such an expired corporation would probably be held to at least as restrictive a course of conduct as would a nonexpired corporation, thus following §496A.76 would be well advised.

February 27, 1978

ALCOHOLISM; LIENS; COUNTIES AND COUNTY OFFICERS: Ch. 73, §1, Acts of the 67th G.A.: §123B.10, 1973 Code of Iowa; Ch. 1104, §15, Acts of the 66th G.A. While Ch. 73, §1, Acts of the 67th G.A., effective January 1978, abolishes the lien created by §123B.10, 1973 Code of Iowa, for the cost of treatment of an alcoholic, it recognizes the validity of the lien if an action has been commenced on it prior to that date. (Haskins to Straub, Kossuth County Attorney, 2-27-78) #78-2-22

Mr. Joseph J. Straub, Kossuth County Attorney: You ask the opinion of our office as to whether Ch. 1104, Acts of the 66th G.A., dealing with liability for institutional care, abolished the lien for the cost of treatment of an alcoholic created by §123B.10, 1973 Code of Iowa.*

*The only provision in Ch. 1104 which abolishes liens is §15 thereof. Section 15 states:

"All liens created under section two hundred thirty point twenty-five (230.25), as that section appeared in the Code of 1975 and prior editions of the Code, are abolished effective January 1, 1977, except as otherwise provided by this Act. The board of supervisors of each county shall, as soon as practicable after July 1, 1976, review all liens resulting from the operation of said section two hundred thirty point twenty-five (230.25), Code 1975, and make a determination as to the ability of the person against whom the lien exists to pay the charges represented by the lien, and if they find that the person is able to pay those charges they shall direct the county attorney of that county to take immediate action to enforce the lien. If action is commenced under this section on any lien prior to the effective date of the abolition thereof, that lien shall not be abolished but shall continue until the action is completed.

Relevant here is Ch. 73, §1, Acts of the 67th G.A., which effectively answers your question. That section states:

"All liens created under section one hundred twenty-three B point ten (123B.10), as that section appeared in the Codes of 1973 and 1971, are abolished effective January 1, 1978, except as otherwise provided by this act. The board of supervisors of each county shall, as soon as practicable after July 1, 1977, review all liens resulting from the operation of said section one hundred twenty-three B point ten (123B.10) and make a determination as to the ability of the person against whom the lien exists to pay the charges represented by the lien, and if they find that the person is able to pay all or a part of those charges they shall direct the county attorney of that county to take immediate action to enforce the lien. If action is commenced under this section on any lien prior to the effective date of the abolition thereof, that lien shall not be abolished but shall continue until the action is completed. The board of supervisors shall release any such lien when the charge on which the lien is based is fully paid or is compromised and settled by the board in such a manner as its members deem to be in the best interest of the county, or when the estate affected by the lien has been probated and the proceeds allowable have been applied on the lien."

Clearly, Ch. 73, §1, Acts of the 67th G.A., while abolishing §123B.10 liens generally, does recognize their validity when an action has been commenced on them prior to January 1, 1978. Thus, by implication, the legislature has indicated that clearly this section does not purport to deal with liens created under §123B.10, 1973 Code of Iowa, but rather pertains only to liens created under §230.25, 1975 Code of Iowa, for assistance furnished to the mentally ill.

§123B.10 liens were valid and in existence prior to January 1, 1978, anything in Ch. 1104, Acts of the 66th G.A., to the contrary notwithstanding. Hence, while Ch. 73, §1, Acts of the 67th G.A., effective January 1, 1978, abolishes the lien created by §123B.10, 1973 Code of Iowa, for the cost of treatment of an alcoholic, it recognizes the validity of the lien if an action has been commenced on it prior to that date.

February 27, 1978

COUNTIES: Authority to Construct or Lease Facilities. §§332.3(12), (25), 444.12(2), Code of Iowa, 1977. A county may purchase or construct a building and lease it to a private nonprofit corporation that will use it as a sheltered workshop for the mentally retarded. (Robinson to Bice, IDSS, 2-27-78) #78-2-23

Mr. Donald Bice, Administrator: Recently you presented a question which we have restated as follows:

May a county purchase or construct a building to be used as an opportunity center or a sheltered workshop? It is understood that after the county acquires the facility it will lease it to a private nonprofit corporation which would actually run the sheltered workshop and that the county would provide 25% matching funds for the operation of the workshop.

Yes, in our opinion a county may purchase or construct a building that will be used as a sheltered workshop as outlined above.

Chapter 332, The Code, provides for the powers and duties of county supervisors. Section 332.3(12), The Code, provides in pertinent part:

12. To purchase or acquire title or possession *by lease or otherwise for the use of the county,* any real estate necessary *for county purpose;* . . . (Emphasis

added.)

The question then becomes, is the construction of a building that would be used as a sheltered workshop a county purpose? In our opinion, it is. See also §332.3(25), The Code, which provides:

25. To appropriate funds from the general fund to match any grant of the county under any state or federal program for the purpose of matching funds available to such county from federal programs including, but not limited to, a crime control, public health, disaster services, highway safety, juvenile delinquency, narcotics control and pollution.

We believe that it is significant that sheltered workshops for the mentally retarded qualify for federal funding and that the Department of Social Services has a purchase of service contract with the particular facility here involved. Also the county mental health and institutions fund under §444.12(2) may pay for a portion of these costs:

2. Any portion which the board of supervisors may deem advisable of the cost of psychiatric examination and treatment of person in need thereof or of professional evaluation, treatment, training, habilitation, and care of persons who are mentally retarded, autistic children or persons who are afflicted by any other developmental disability, at any suitable public or private facility providing inpatient or outpatient care in such county....

Thus, as we harmonize these statutes according to the rules of statutory construction in *Doe v. Ray,* 251 N.W.2d 496, 500-501 (Iowa 1977), we conclude that a county may purchase or construct a building and lease it to a private nonprofit corporation that will use it as a sheltered workshop. See also 1976 OAG 593 and 878.

February 28, 1978

MUNICIPALITIES: Policemen's and Firemen's Pensions. Section 411.6, Code of Iowa, 1977. A member must have attained age fifty-five and have served twenty-two years before a termination of employment is a service retirement entitling a member to the full range of options regarding a service retirement allowance. (Condon to Ridout, 2-28-78) #78-2-25

Mr. William B. Ridout, Emmet County Attorney: This letter is in response to your request for an opinion regarding retirement systems for policemen and firemen, Chapter 411, Code of Iowa, 1977. Reference is made to your letter of January 31, 1978, in which you stated the following fact situations:

"1. Facts: A member of an Iowa Fire or Police Retirement System leaves employment (no death or disability involved) of the City after having reached age 55, and after 15 years of service but before completing 22 years of service.

"Question: Since age 55 was attained before termination of employment, is this situation considered a retirement so that the employee has the same options as a service retirement (leaving his contribution in the system and receiving an annuity plus the pension, withdraw part of the contributions and receive a partial annuity plus the pension, or withdraw all of his contributions and still receive a pension)?

"Or does the lack of 22 years of service make this a termination prior to retirement, so that a withdrawal of contributions by the employee results in no retirement allowance?

"2. Facts: A member of an Iowa Fire or Police Retirement System leaves

employment (no death or disability involved) of the City after completing 15 years of service but before reaching age 55.

"Question: May the former member leave his contributions in the system until he has attained the age of 55, and then have the options of a service retirement (regarding withdrawal of contributions and receipt of a pension, as in question #1)?

"Or, does the termination of employment before age 55 make this a termination prior to retirement, so that a withdrawal of employee contributions at any age results in no retirement allowance (we were not positive from your March 28, 1977, opinion whether leaving the contributions in until age 55 would affect the situation)."

In fact situation one, the employee terminated his employment at age fifty-five before completing twenty-two years of service. Section 411.6(1)(a) provides:

"1. *Service retirement benefit.* Retirement of a member on a service retirement allowance shall be made by each board of trustee 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." (Emphasis added.)

The proviso states in the conjunctive that the member shall have reached the age of fifty-five and shall have served twenty-two years. The Iowa Supreme Court has held repeatedly that the words of statutes are to be given their "plain" and "ordinary" meanings. *State ex rel. Turner v. Drake,* 242 N.W.2d 707 (Iowa 1976); *State v. Hesford,* 242 N.W.2d 256 (Iowa 1976); *Kelly v. Brewer,* 239 N.W.2d 109 (Iowa 1976); *Hoyt v. Chicago, R.I. & P.R. Co.,* 206 N.W.2d 115 (Iowa 1973); *In re Millers' Estate,* 159 N.W.2d 441 (Iowa 1968).

Regarding the word "and," the Supreme Court stated in *Ness v. H. M. Iltis Lumber Company,* 1964, 256 Iowa 588, 128 N.W.2d 237, 239, as follows:

"It is a familiar rule of statutory construction, even of criminal statutes where a strict construction usually prevails, that the word 'and' is sometimes construed as a disjunctive, such as 'or' and 'or' is sometimes construed as 'and'."

The decisive factor in determining whether "and" is conjunctive or disjunctive is which contruction gives effect to the legislative intention. In *Skutt v. Dillavou,* 1944, 234 Iowa 610, 13 N.W.2d 322, the Supreme Court ruled that if necessary to arrive at legislative intent, the word "and" may be construed as "or."

In Section 411.6(1) the legislature evinces an intention to require that a fireman or policeman attain both fifty-five years of age and twenty-two years of service before the employee's termination is considered a retirement that entitles the employee to receive a service retirement allowance. The statute provides unequivocally that the member "shall have attained the age of fifty-five" and "shall have served twenty-two years or more in said department."

Furthermore, Section 411.6(1)(b), which establishes the mandatory retirement age at sixty-five, contains a proviso which allows a member of a department employed on July 4, 1965, to work past the mandatory retirement age

"until he has completed twenty-two years' service for service retirement." If the legislature intended that an employee would qualify for service retirement merely by attaining the age of fifty-five before retirement, the above proviso would be unnecessary to enable the employee to receive a service retirement allowance.

Therefore, the legislature intended that a member of the police or fire department would be eligible for the service retirement allowance only if he retired after attaining the age of fifty-five and serving twenty-two years in the department. The termination of employment by the employee described in the first fact situation of your letter is not a service retirement because it occured before the employee served twenty-two years in the department.

Since it is not a service retirement, the provisions of Section 411.6(1)(c) apply and the options of a service retirement are not available. An employee who terminates pursuant to Section 411.6(1)(c) may withdraw his accumulated contributions as allowed by Section 411.6(10) but in doing so he relinquishes the service retirement allowance.

In the second fact situation you posed, the former member completed fifteen years of service and left employment before attaining the age of fifty-five. Pursuant to Section 411.6(1)(a) a termination of employment is a service retirement only if the member has attained the age of fifty-five and has served twenty-two years. In this situation, the employee has terminated employment without meeting either requirement. The length of time the employee leaves his contributions in the system will not change his age or length of service at the time of his termination. The termination was not a service retirement so the options are not available to the former employee. Since he had served fifteen years when he terminated his employment, Section 411.6(1)(c) controls. The former employee may withdraw his contributions, or he may leave the contributions in the system and at age fifty-five begin collecting an allowance pursuant to Section 411.6(1)(c).

February 28, 1978

STATE OFFICERS AND DEPARTMENTS: Commission on the Aging—Employee status of volunteers—Chapter 25A, Code of Iowa, 1977. Volunteers performing services for the area agencies which receive Federal or State funds from the Commission on the Aging are not State employees for purposes of the Tort Claims Act. (Blumberg to Bowles, Executive Director, Commission on the Aging, 2-28-78) #78-2-24

Glenn R. Bowles, Executive Director: We have your opinion request regarding coverage of volunteers of funded Area Agencies under Chapter 25A of the Code. You ask whether these volunteers will be defended and indeminfied as state employees under the Tort Claims Act. In describing the relationship of the Commission on the Agency with the area agencies and grantees, you indicated:

"Funds flow from the Commission on Aging (hereafter called the State Agency) to the grantee. The area agency is generally a separate and distinct component of the grantee even though the area agency may be in the same office as the grantee. The area agency with the concurrence of its grantee makes grants to local service providers using the name of its grantee or provides the services themselves. (The grantee is a legal entity, the area agency is a component of the grantee.) The State Agency holds the grantee accountable for the funds granted to it. The grantee has authority over the area agency; however, in carrying out its authority the grantee must abide by the federal and state regulations regarding the use of Older American Act funds, and the use of state

funds granted to the State Agency for use by area agencies. Performance of area agencies regarding quality and quantity of programs is evaluated by the State Agency. The grantee may also be evaluating performance regarding quality and quantity of programs. However, the grantee's evaluation is separate from that of the State Agency. Most grantees do evaluate the area agency director on his/her performance. The area agency director in turn, generally evaluates those employees he/she supervises. Technical daily communication occurs between the State Agency and grantee. The grantee attempts to accommodate the regulations mandated by our office for the area agencies while at the same time providing direction to the area agency as a component of the Grantee."

In response to other questions from your office you indicated the following:

1. The grantee pays the salaries of its area agency personnel from your agency's grant.

2. The grantee determines who will be hired as an area agency director and that director may determine what personnel will be hired within the area agency. The grantee and the director determine the duties of the personnel and their salaries.

3. Volunteers are reimbursed by the grantee.

4. The area agency staff arranges for volunteer services and supervises them.

5. The grantee is legally responsible for the use and handling of all funds (state or federal). The grantee has oversight of responsibilities regarding the operation and management of the area agencies. The area agency has control of the day to day operations.

6. Pursuant to Volume 38 of the Federal Register, Number 196, October 11, 1973, §903.13, area agencies are public or nonprofit private agencies.

The leading case on this issue is *United States v. Orleans,* 1976, 425 U.S. 807, 96 S.Ct. 1971, 48 L.Ed.2d 390. The question there was whether a community action agency funded under the Economic Opportunity Act of 1964 was a federal agency for purposes of the Federal Tort Claims Act. Under the Act, a community action agency is a State or political subdivision or a public or private nonprofit agency or organization. The local agency in question was a nonprofit corporation. All funds of the agency were from the federal government. While on a recreational outing sponsored by the agency, the plaintiff was injured when the vehicle in which he was riding (owned and operated by a volunteer) collided with a truck. The government was sued because of the federal funds to the local agency.

In rejecting plaintiff's arguments, it was held (425 U.S. at 813-814):

"The Federal Tort Claims Act is a limited waiver of sovereign immunity making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment. The Tort Claims Act was never intended, and has not been construed by this Court, to reach employees or agents of all federally funded programs that confer benefits on people. The language of 28 USC §1346(b) [28 USCS §1346(b)] is unambigious, covering injuries 'caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment...' The Act defines Government employees to include officers and employee of 'any federal agency' but excludes 'any contractor with the United States.' 28 USC §2671 [28 USCS §2671]. Since the United States can be sued only to the extent that it has waived its immunity, due regard must be given to the exceptions, including the

independent contractor exception, to such waiver. A critical element in distinguishing an agency from a contractor is the power of the Federal Government 'to control the detailed physical performance of the contractor.'" *Logue v. United States,* 412 U.S. 521, 528, 37 L.Ed.2d 121, 93 S.Ct. 2215 (1973). [Citation omitted]

Based upon *Logue and Maryland v. United States,* 1965, 381 U.S. 41, 85 S.Ct. 1293, 14 L.Ed.2d 205, it was held that the test was not whether the local agency received federal funds and must comply with federal regulations, but whether the government supervised its day-to-day operations.

Holding that the local agency was a contractor and not an agency of the government, Mr. Chief Justice Burger stated (425 U.S. at 815-816):

"Billions of dollars of federal money are spent each year on projects performed by people and institutions which contract with the Government. These contractors act for and are paid by the United States. They are responsible to the United States for compliance with the specifications of a contract or grant, but they are largely free to select the means of its implementation. Perhaps part of the cost to the Government often includes the expense for public liability insurance, but that is a matter of either contract or choice. The respondents did not sue the community action agency itself. Similarly, by contract, the Government may fix specific and precise conditions to implement federal objectives. Although such regulations are aimed at assuring compliance with goals, the regulations do not convert the acts of entrepreneurs—or of state governmental bodies—into federal governmental acts...

"Federal funding reaches myriad areas of activity of local and state governments and activities in the private sector as well. It is inconceivable that Congress intended to have waiver of sovereign immunity follow congressional largesse and cover countless unidentifiable classes of 'beneficiaries.' The Federal Government in no sense controls 'the detailed physical performance' of all the programs and projects it finances by gifts, grants, contracts, or loans. *Logue v. United States,* 412 U.S. 528, 37 L.Ed.2d 121, 93 S.Ct. 2215. The underlying statue emphasizes that a community action agency is a local, not a federal, enterprise; thus agents and employees of local community action agency are not 'employee[s]' of the [Federal] government. 28 USC §2671 [28 USCS §2671]." [Citations omitted]

In further support of this, it was noted that the local agency was administered by local representatives and that the local agencies have complete control over operations of their own programs. The government merely supplied funds, advice and oversight only to assure that federal funds not be diverted for unauthorized purposes.

The facts in *Orleans* are similar to those you indicated. Since our Tort Claims Act is patterned after the federal Act, especially in the definition of employee, we can give consideration to the federal court interpretations of that Act in interpreting our own. *Hubbared v. State,* 163 N.W.2d 904 (Iowa 1969). If the area agencies are not state agencies within Chapter 25A, 1977 Code of Iowa, then their employees could not be State employees. As such, not only would the State not be held liable for the acts or omissions of those volunteers, but those volunteers could not be considered State employees for purposes of defense and indemnity.

Accordingly, we are of the opinion that volunteers providing services to area agencies which receive state or federal funds from the Commission on the Aging are not State employees for the purposes of the Tort Claims Act.

ADOPTIONS

Qualification for Filing a Petition. §§600.1, 600.4 (3) (c), 600.5 (7) Code of Iowa, 1977. The petitioning spouse has the burden and showing unreasonable withholding by the other spouse, and the Court in determining what is unreasonable withholding will be guided by the principle of what is in the best interest and welfare of the person to be adopted. (Boecker to Rush, State Senator, 2-8-78) #78-2-3

ALCOHOLISM

Liens; Counties and County Officers. Chapter 73, §1, Acts, 67th G.A.; §123B.10, 1973 Code of Iowa; Chapter 1104, §15, Acts, 66th G.A. While Chapter 73, §1, Acts, 67th G.A., effective January, 1978, abolishes the lien created by §123B.10, 1973 Code of Iowa, for the cost of treatment of an alcoholic, it recognizes the validity of the lien if an action has been commenced on it prior to that date. (Haskins to Straub, Kossuth County Attorney, 2-27-78) #78-2-22

CIVIL RIGHTS

Act; Applicability to Religious Institutions. §§601A.6(1), 601A.6(2), Code of Iowa, 1977. A religious insititution may use religion as an employment criteria only in relation to positions in which duties relate to the religious purpose of the institution. (Perry to Chiodo, State Representative 2-23-78) #78-2-18

CORPORATIONS

Expiration of Chapter, Sale of Assets. Chapters 491 and 496A, Code of Iowa, 1977. A corporation organized under Chapter 491 has a three month period either prior to or subsequent to the expiration date of its charter to file renewal articles of incorporation and continue to renew its existence under Chapter 491. It also had the additional option of adopting the provisions of Chapter 496A by following the mandates of §496A.142. However, once a corporation of a specified years' duration under Chapter 491 adopts Chapter 496A, the adoption action alone will not extend the duration and this corporation, in order to extend its duration, would have had to file an amendment changing its duration to perpetual. (Haesemeyer to Carr, State Senator, 2-24-78) #78-2-26

COUNTIES AND COUNTY OFFICERS

Authority to Construct or Lease Facilities. §§332.3(12), (25), 444.12 (2), Code of Iowa, 1977. A county may purchase or construct a building and lease it to a private nonprofit corporation that will use it as a sheltered workshop for the mentally retarded. (Robinson to Bice, IDSS, 2-27-78) #78-2-23

Employees Sick Leave §91A.4, Code of Iowa, 1977. There is no express or implied statutory authority for paying county employees for unused sick leave upon retirement or termination of employment. (Nolan to Jones, Taylor County Attorney, 2-14-78) #78-2-14

County Care Facility. §§332.7, 332.26 and 332.38, Code of Iowa, 1977. (1) Supervisors are required to observe the statutory restrictions on expenditures for county buildings including limitation on amounts authorized without vote of the people, as well as public hearings and public bidding requirements. (2) County is not liable for ultra vires acts of officers. (3) County indemnity fund is available to pay judgment against supervisors based on negligence.

(4) Code does not provide for county to reimburse indemnification fund for claims paid. (5) Care facility can be considered a mental health or mental retardation project if facts so warrant. (Nolan to Pelton, State Representative, 2-8-78) #78-2-4

GAMBLING

Qualified Organization Raffles. §99B.7, Code of Iowa, 1977; §§99B.3 (1) (h), 99B.5 (1) (g), 99B.15, Code of Iowa, 1977; §99B.7 (5), Code of Iowa, 1975; 730-94.8 (99B) I.A.C. A qualified organization licensed pursuant to §99B.7, may not aggregate several items, units or parts to form the "prizes" awarded in "small raffles," even if the value of each aggregation does not not exceed twenty-five dollars. A licensed qualified organization may not aggregate several items, units or parts to form the "prize" awarded in an annual "large" raffle, even if the value thereof does not exceed five thousand dollars. (Richards to Rush, State Senator, 2-14-78) #78-2-12

MENTAL HEALTH

Status of persons involuntarily hospitalized prior to January 1, 1976. Chapter 229, Code of Iowa, 1975; Chapter 229, Code of Iowa, 1977. Involuntary commitments to state mental health institutions under Iowa law prior to January 1, 1976, are not void, but are voidable. No change of status of persons involuntarily hospitalized prior to January 1, 1976, should occur unless and until further appropriate action is taken with regard to each of such persons. (O'Meara to Reiter, Marion County Attorney, 2-9-78) #78-2-8

Community Mental Health Centers; County Board of Supervisors. §§230A.2, 230A.3, 230A.12, 230A.14, 331.21, 332.3(5) and 444.12, Code of Iowa, 1977. The County Board of Supervisors must obtain personal information concerning persons served at a Community Mental Health Center, when the county is to pay for such services, in order to carry out the duty of the Board of Supervisors pursuant to §331.21. It is illegal for a county to enter into a contract which provides that the names of such persons shall not be disclosed to the County Board of Supervisors. To the extent such a contract provides that such names shall not be disclosed, such a contract may be void and unenforceable. The Community Mental Health Center is correct in refusing to disclose names and other information of persons who have not consented to the disclosure of such information. In the event a county enters into a contract with a Mental Health Center, the county should consider limiting payment for services at the Community Mental Health Center to those persons who consent to disclosure of name and other relevant information to the County Board of Supervisors. (O'Meara to Huffman, Pocahontas County Attorney and Thatcher, Webster County Attorney, 2-9-78) #78-2-6

MUNICIPALITIES

Policemen's and Firemen's Pensions. §411.6, Code of Iowa, 1977. A member must have attained age fifty-five and have served twenty-two years before a termination of employment is a service retirement entitling a member to the full range of options regarding a service retirement allowance. (Condon to Ridout, 2-28-78) #78-2-25

SCHOOLS

Bond Issue. Balance of $51,000 in schoolhouse fund may be used for addition of two classrooms to elementary-junior high school building if such additions were contemplated in building program voted on which authorized the bond

sale from which these funds were obtained. (Nolan to Shirley, Dallas County Attorney, 2-23-78) #78-2-21

STATE OFFICERS AND DEPARTMENTS

Iowa Beer and Liquor Control Department. §§25A.2, 25A.4, 554.3104, Code of Iowa, 1977; §1, Chapter 45, Acts, 67th G.A., 1977; §1, Chapter 71, Acts. 67th G.A., 1977. (1) An employee of the Iowa Beer and Liquor Control Department is afforded liability protection by Chapter 25A of the Code when acting in the scope of employment. (2) The Iowa Beer and Liquor Control Department may accept checks for the sale of alcoholic liquor only from the holder of a retail liquor license. Such checks must be signed by the license holder. Cashier's checks cannot be accepted. (McNulty to Gallagher, 2-8-78) #78-2-1

Transportation Regulation Board; Conflict of Interest. §68B.7, Code of Iowa, 1977. Former lawyer member not barred as lawyer in salaried position from practice before where compensation not dependent upon agency action. (Paff to DeKoster, State Senator, 2-14-78) #78-2-13

Commerce Commission; Campaigning. §§4.7, 474.8, 740.16 and 740.17, Code of Iowa, 1977. A commerce commissioner, being a state appointive officer, is expressly authorized by statute to be a candidate for political office and to campaign during his working hours. (Turner to Van Nostrand, Commerce Commission Chairman, 2-15-78) #78-2-16

Alcoholism; Drug Abuse. Chapter 74, §§2, 3, 4, 8, 14, 37, Acts, 67th G.A.; §§ 125.2, 125.3, 125.7, 125.12, 125.27, 1977 Code of Iowa. The Act creating the department of substance abuse is silent as to whether local treatment programs for drug abusers and alcoholics must merge. But the department, and the commission on substance abuse, can, through the comprehensive substance abuse program, determine whether merger is required. (Haskins to Riedmann, Director, Department of Substance Abuse, 2-23-78) #78-2-20

Commission on the Aging; Employee status of volunteers. Chapter 25A, Code of Iowa, 1977. Volunteers performing services for area agencies which receive federal or state funds from the Commission on the Aging are not state employees for purposes of the Tort Claims Act. (Blumberg to Bowles, Executive Director, Commission on the Aging, 2-28-78) #78-2-24

Merit Commission Subpoenas §§17A.13(1), 19A.17, 622.66, 622.67, 622.68, Code of Iowa, 1977. Subpoenas issued by the State Merit Commission are subject to a thirty-mile limitation on their effective reach. (Haskins to Keating, Director, Iowa Merit Employment Department, 2-8-78) #78-2-2

TAXATION

Iowa Corporate Net Income Tax; Unrelated Business Income of Exempt Corporations. §422.34(2), Code of Iowa, 1977. Corporations which meet the exempt criteria contained in §422.34(2) are not taxed on their federally taxed unrelated business income. (Griger to Craft, State Senator, 2-13-78) #78-2-11

Property Tax-Assessment. The value of real property constituting common areas of a Planned Unit Development, which common areas are deeded to a homeowner's association organized under Chapter 504A (Iowa Nonprofit Corporation Act), Code of Iowa, 1977, is to be assessed for property tax purposes in the name of the homeowner's association. (Kerwin and King, Assistant Polk County Attorney, 2-23-78) #78-2-19

Homestead Tax Credit. §§425.11, 499A.14, Code of Iowa, 1977. Each apartment or room of a cooperative (multiple housing complex) organized under Chapter 499A, can qualify for a separate homestead tax credit and present Department of Revenue policy of allowing only one homestead tax credit for an entire cooperation is not in compliance with Iowa law. (Kuehn to Rush, State Senator, 2-9-78) #78-2-5

VACATION OF ROAD

§306.17, Code of Iowa, 1977, as amended by Senate File 307, Acts, 67th G.A., to apply prospectively and not to vacation ordinance entered prior to January 1, 1978, effective date. (Paff to McDonald, Cherokee County Attorney, 2-9-78) #78-2-10

TOWNSHIP TRUSTEE

Compensation. §359.46(1), Code of Iowa, 1977. Under a statute which provides that the township trustee shall receive $8 "for each day of service of eight hours" a township trustee is paid on the basis of $1.00 per hour. (Turner to Spear, State Representative, 2-14-78) #78-2-15

STATUTES CONSTRUED

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66th GENERAL ASSEMBLY

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67th GENERAL ASSEMBLY

S.F. 307 78-2-10
Ch. 45, §1 78-2-1
Ch. 73, §1 78-2-22
Ch. 74 78-2-20

March 2, 1978

CRIMINAL LAW: MINIMUM SENTENCES: GOOD TIME AND HONOR TIME CALCULATIONS. Section 204.13, 246.38, 902.7, 902.8, and 906.5, Code of Iowa, 1977, as amended. Persons who are committed to the director of adult corrections and to whom the provisions of the minimum sentence requirements of the above sections apply are not eligible for parole until they have been confined for the minimum specified period of time but nevertheless are still eligible for good time and honor time benefit under

the reduction of sentence provisions of Section 246.48. The reduction of sentence provisions do not apply to shortening the minimum terms of confinement prescribed by Sections 204.13, 902.7, 902.8 and 905.6 of the Iowa Criminal Code. (Williams to McCauley, Director of Adult Corrections, 3-2-78) #78-3-1

Mr. Roland E. McCauley, Director, Division of Adult Corrections: Your letter of January 17, 1978, requests an opinion of the Attorney General with respect to the following:

The recently enacted Iowa Criminal Code contains within it several provisions which prescribe minimum sentences for persons committed to the custody of the Director of Adult Corrections under different circumstances. Those sections include the following:

Section 204.13—Mandatory Minimum Sentence (Drug manufacture and delivery)

Section 902.7—Minimum Sentences—Use of a firearm

Section 902.8—Minimum Sentence—Habitual offender

Section 906.5—Eligibility of prior forcible felon for parole

Each of the Code sections set out above prescribes a minimum period of confinement before one becomes eligible for parole. Each section refers specifically to parole eligibility and makes no mention of eligibility for release prior to the minimum time required for parole eligibility if such were to be earned under the good time and honor time statutes.

Because the minimum sentence sections set out above simply set the earliest possible date of eligibility for parole, these times would not be further reduced by application to them of the good and honor time statutes. Application of the common dictionary definition of a year constituting 365 days provides the appropriate manner in which one should calculate these minimum parole eligibility requirements.

It should also be noted that each of these minimum sentences affects only one's eligibility for parole and bears no formal relationship to eligibility for work release, furlough, minimum security placement or other administrative matters within the Division of Adult Corrections although the division may properly consider the fact that one is serving a mandatory minimum length sentence in determining one's eligibility for correctional programs.

You may also wish to note that the method of determining what individuals are subject to the mandatory minimums differs somewhat according to the wording of the various statutes. Section 902.7, relating to the minimum sentence for the use of a firearm and Section 902.8, relating to the minimum sentence for an habitual offender both require specific findings by the Court of commitment which will be reflected in the commitment papers received by the Director of Adult Corrections. The minimum sentence prescribed by Section 204.13 does not require a specific finding by the Court but may be properly applied to any person who is received under conviction of a violation of Section 204.401(1)(a) for a commitment of ten years and any individual received under commitment for a violation of Section 204.401(1)(b) and sentenced to a term not to exceed five years. Section 906.5 which affects the eligibility of a prior forcible felon for parole states in relevant portion as follows:

"If the person who is under consideration for parole is serving a sentence for conviction of a felony and has a criminal record of one or more prior convictions for a forcible felony or a crime of a similar gravity in this or any other state, parole shall be denied unless the defendant has served at least one half of the maximum term of his or her sentence."

This particular section requires the Parole Board to deny parole to individuals within the restricted category and the Parole Board itself is required to make the determination whether the individual has been convicted of the forcible felony.

You have also asked how the loss of good and honor time as a result of "disciplinary process" should be computed in the case of minimum sentences. In view of the fact that good and honor time do not serve to reduce the minimum time which one must serve prior to becoming eligible for parole, there is no relationship between good and honor time calculations and the minimum time which one must serve prior to becoming eligible for parole.

March 13, 1978

STATE OFFICERS AND DEPARTMENTS: Department of Transportation. §§17A.2(7) and 307.26(3), Code of Iowa, 1977. If an agency statement concerns only internal management of the agency and does not substantially affect the legal rights of or procedure available to the public or any segment thereof, the statement need not be enacted as an administrative rule under Chapter 17A. (Tangeman to Krause, State Representative, 3-13-78) #78-3-2

The Honorable Robert A. Krause, State Representative: In our several telephone conversations you have asked for an Attorney General's opinion, which as I understand it is "is it necessary for the Department of Transportation to enact administrative rules regarding procedures to be followed by the Department of Transportation with respect to railroad abandonments."

You referred to §307.26(3), Code of Iowa, 1977, which provides as follows:

"307.26 Railroad transportation division. The administrator of the railroad transportation division shall have the following duties and responsibilities:

* * *

"3. Advise and assist the director in developing programs in anticipation of railroad abandonment, including:

"a. Development and evaluation of programs which will encourage improvement of rail freight and the upgrading of rail lines in order to improve freight service.

"b. Development of alternative modes of transportation to areas and communities which lose rail service.

"c. Advise the director when it may appear in the best interest of the state to assume the role of advocate in railroad abandonments and railroad rate schedules."

The Director of the Railroad Division, in response to my inquiry, advised that the railroad abandonment referred to in the statute quoted above is Federal procedure before the Interstate Commerce Commission and that the communication with interested parties is a part of the Federal procedures, so that all interested parties are informed of the proceeding. The role played by the

Iowa Department of Transportation pursuant to the statute is considered to require only an internal policy and procedure to facilitate the advising of the Director of the DOT by the Director of the Railroad Division with regard to the items covered by the statute.

The Iowa Administrative Procedure Act at §17A.2(7) describes the term "rule" and includes descriptions of things that are excluded from the term "rule". One of the exclusions is in (a) of the said subsection (7) which states:

"(a) A statement concerning only the internal management of an agency and which does not substantially effect the legal rights of, or procedures available to, the public or any segment thereof."

Also it states another exclusion as follows:

"(c) An intergovernmental, interagency, or intra-agency 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."

It appears from the description of the procedure given by the Director of the Railroad Division that the matter involved in your inquiry comes within the exceptions of subparagraphs (a) and (c) and consequently, it does not appear that the enactment of Administrative Rules is necessary in the case about which you inquire.

March 16, 1978

COUNTIES: County Fair Societies. Chapter 174, Code of Iowa, 1977. A fair society which would ordinarily be entitled to receive state aid under §174.1 may be precluded from this assistance by the existence of another fair society in the same county which has been in existence for ten years. A society which does not qualify for state aid under §174.11 may be eligible to receive county aid under §174.13. (Nolan to Schwengels, State Senator, 3-16-78) #78-3-3

Honorable Forrest V. Schwengels, State Senator: This is written in reply to your two letters requesting opinions on questions relevant to the right of the Keokuk County Fair and the Keokuk County Exposition to receive State and County funds. Your first letter contained a statement submitted by the President of the Keokuk County Fair at What Cheer, Iowa, to the effect that the Keokuk County Fair was organized approximately eighty years ago as a nonprofit corporation and has acquired and owns in fee simple approximately 25 acres of real estate near the city of What Cheer, Iowa, with improved buildings which have been used in conducting an agricultural fair continuously through July of 1977. This fair has received the state and county aid up to and including 1975.

The Keokuk County Exposition was organized in 1976. At a meeting in the State Capitol on November 3, 1977, attended by representatives of the Keokuk County Exposition, the County Attorney and others, it was brought out that the Keokuk County Exposition Inc. has purchased and holds under warranty deed recorded May 16, 1977, subject to a purchase money mortgage such real estate as is required for the exposition to qualify as a "society" under §174.1 of the Code of Iowa. It was further brought out that 1976 county funds were distributed to both fair societies in September of 1977.

To determine whether or not both societies are entitled to receive either

State or county aid for 1977 and future years we look to the provisions of Chapter 174 of the 1977 Code of Iowa.

Section 174.9 of the Code provides:

"Each society shall be entitled to receive aid from the State if it files with the State Fairboard on or before November 1 of each year, a sworn statement which shall show:

"1. The actual amount paid by it in cash premiums at its fair for the current year, which statement must correspond with its published offer of premiums.

"2. That no part of said amount was paid for speed events or to secure gains or amusements.

"3. A full and accurate statement of the receipts and expenditures of the society for the current year and other statistical data relative to exhibits and attendance for the year.

"4. A copy of the published financial statement published as required by law, together with proof of such publication and/or certified statement showing an itemized list of premiums awarded, and such other information as the State Fairboard may require."

Under the statute set out above, any organization which qualifies as a "society" under §174.1 of the Code and complies with the requirements for a sworn statement filed on or before November 1 of each year pursuant to §174.9 is entitled to receive State aid. However, an anomalous situation arises due to the provision of §174.11 which provides that "in counties having more than one fair entitled to state aid...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." This language recognizes that more than one fair may be entitled to receive state aid, but provides for a prorated payment to societies which have been in existence ten years or more.

It has been urged that the language of §174.11 prohibits any payment of state aid to Keokuk County Exposition Inc. on the basis that it has not been in existence for ten years. We must agree with this view. Keokuk county clearly has two fairs, but according to the language of §174.11, state aid may only be paid to the one which has been in existence for ten years.

The ultimate object in construing a statute is to discover the real purpose and meaning of the act as a whole. *Cedar Memorial Park Cemetery Assn. v. Personnel Association Inc.,* Iowa, 1970, 178 N.W.2d 343. Statutes should be given sensible, practical, workable and logical construction. *Northern Natural Gas Co. v. Forst,* Iowa 1973, 205 N.W.2d 692. Where a general statute is in conflict with a specific statute, the latter ordinarily prevails whether enacted before or after the general statute *Ritter v. Dagel,* Iowa 1968, 156 N.W.2d 318. The special statute will be considered as an exception or qualification of the general. *State v. Halverson,* Iowa 1967, 155 N.W.2d 177.

With respect to county aid, Code §174.13 applies. This section of the Code provides:

"The board of supervisors of the county in which any such society is located may levy a tax of not to exceed six and three-fourths cents per thousand dollars of assessed value of the taxable property of the county, the funds realized therefrom to be known as the fair ground fund and to be used for the purpose of fitting up or purchasing fairgrounds for the society, or for the purpose

of aiding boys and girls 4-H clubwork and payment of agricultural and livestock premiums in connection with said fair, providing 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 approvements thereof of at least $8,000 in value."

Any society qualifying under §174.1 would also meet the requirements of §174.13 and accordingly it is left to the discretion of the board of supervisors as to whether the tax for the fairground fund is to be levied and, if levied, how it is to be distributed within the limitations expressed in §174.13.

Your second letter asks "if a nonprofit corporation receives and expends public funds is the general public entitled to vote on the directors of said corporation or may the corporation restrict the election of directors to the stockholders of said corporation?

The Articles of Incorporation of a nonprofit corporation control the voting rights of members of such corporation and generally contain provisions setting forth the eligibility qualifications for membership on the board of directors. The general public is not entitled to vote on any such matter unless specifically provided by statute.

March 16, 1978

STATE OFFICERS AND DEPARTMENTS: Arts Council; Copyright. PL 94. The mere grant of funds to an artist does not alone establish a copyright interest in the work produced. (Nolan to Olds, Executive Director, Iowa Arts Council, 3-16-78) #78-3-4

Mr. Jack E. Olds, Executive Director, Iowa Arts Council: You requested a written opinion regarding the copyright laws as they might relate to "newly-created works of art that are partially funded through the Iowa Arts Council." In your letter you stated that the Arts Council receives requests to help finance musical compositions, novels, paintings, sculpture, etc. and the council makes grants from funds received from the National Endowment for the Arts. Your letter further pointed out a recent grant of $1,000 to a composer and stated:

"We did not indicate [in the grant] that the copyright would belong to the State of Iowa because funds for the composer's fee and librettist's fee were partially paid with state (federal) funds. And I don't know if we have the automatic right to copyright such compositions, or if the right remains with the creators, or if we might hold a joint copyright. The Arts Council is not interested in owning the art or receiving any monetary renumeration from sales/rental of the compostion."

The State Board of Regents has authority in §262.9(10) of the 1977 Code of Iowa to take and hold such copyrights. The statutory language directs the Board of Regents:

"With consent of the inventor and in the discretion of the board, secure letters, patent or copyright on inventions of students, instructors, and officials, or take assignment of such letters, patent or copyright and may make all necessary expenditures in regard thereto. That the letters, patent or copyright on inventions when so secured shall be the property of the state, and the royalties and earnings thereon shall be credited to the funds of the institution in which such patent or copyright originated."

If the Arts Council deems such authority helpful to its purposes the appropriate legislation could be obtained. Without such ownership or a joint

participation in the actual creation of the work there is no basis for a copyright to issue to the Arts Council.

Under the provisions of §201(b) of the Copyright Act of 1976 (PL 94-553, 90 Stat. 2541, Title 17 U.S.C.A.) all copyright interests in a "work made for hire" vest in the employer. All works produced by an employee within the scope of employment are "works made for hire." In addition certain commissioned works can be considered works made for hire when there is an express agreement in writing signed by the parties that the work "shall be considered a work made for hire."

March 13, 1978

CRIMINAL LAW: Minimum Sentence for felon with prior forcible felony conviciton. Sections 246.38, 246.43, 801.5 and 906.5. Only persons convicted of crimes committed on or after January 1, 1978, are subject to the mandatory minimum sentence provisions of Section 906.5. Persons subject to the mandatory minimum provision of 906.5 are ineligible for parole until they have served one-half of the maximum term of their sentences. "Good" and "honor" time earned under §246.38 and §246.43 are not related to mandatory minimum sentences. (Williams to Olson, Executive Secretary, Iowa Board of Parole, 3-16-78) #78-3-5

Mr. Donald L. Olson, Executive Secretary, Iowa Board of Parole: You have requested an opinion of the Attorney General with respect to the following questions which relate to the eligibility of a prior forcible felon for parole:

1. Does the second paragraph of Section 906.5 apply to persons presently serving sentences regardless of when they were sentenced, or does it apply to only those sentences under the new code since January 1, 1978?

2. Does the second paragraph of Section 906.5 apply to persons charged prior to January 1, 1978, under the old code and sentenced after January 1, 1978?

3. What effect do good and honor time which might be granted under Sections 246.38 and 246.43 of the 1977 Code of Iowa have upon one's eligibility for parole under Section 906.5?

The answers to questions 1 and 2, relating to what individuals are to be held accountable for their past misdeeds in disqualifying them for parole eligibility under Section 906.5 is found in Section 801.5(3) of the 1977 Code of Iowa Supplement which states as follows:

"3. Provisions of this act governing the release or discharge of prisoners, probationers, and parolees shall apply to persons under sentence for offenses committed before the effective date of this act, *except that the minimum or maximum period of their detention or supervision shall in no case be increased....*"

It would seem clear that it is the intent of Section 801.5, the transitional section of the new Criminal Code, that the parole provisions of Section 906.5 not be applied to any person committing a crime prior to the effective date of the act, January 1, 1978. You should, therefore, apply the mandatory minimum sentence procedures contained in Section 906.5 only to those persons convicted of crimes committed on or after January 1, 1978.

In answer to question number 3, you should note that Section 906.5 provides that:

"Parole shall be denied unless the defendant has served at least one-half of the maximum term of his or her sentence."

This wording clearly makes it mandatory for the Board of Parole to deny parole to an inmate who has not served at least one-half of the maximum term of the sentence as prescribed by the Court. If the Legislature had intended that one be eligible for parole after serving one-half of the maximum sentence less good and honor time which could be earned, this provision would have been so worded. The section is not ambiguous and should be applied in such a manner as to require the service of one-half of the maximum term of one's sentence prior to becoming eligible for parole.

March 16, 1978

COUNTIES AND COUNTY OFFICERS: Extent of coverage of county indemnification fund. §§39.17, 111A.6, 137.20, 230A.12, 252.27, 332.36, 1977 Code of Iowa. A county attorney and his assistants and the employees of the county conservation board, the county board of health, the county care facility, and the county legal aid program are covered by the county indemnification fund for their errors or omissions. Medical malpractice coverage exists for employees of the county board of health and the county care facility. However, the employees of a community mental health center, even though funded in part by the county, are not covered. (Haskins to Hoth, Des Moines County Attorney, 3-16-78) #78-3-6

Mr. Steven S. Hoth, Des Moines County Attorney: You ask our opinion as to the extent of coverage provided by the county indemnification fund created in §332.36, 1977 Code of Iowa. That section states:

"There is created in the office of the treasurer of state a fund to be known as 'the county indemnification fund' to be used to indemnify and pay on behalf of *any elected county officer and any deputies, assistants or employees of the county*, all sums that such officers, deputies, assistants or employees are legally obligated to pay because of their errors or omissions in the performance of their official duties, except that the first five hundred dollars of each such claim shall not be paid from this fund." [Emphasis added].

As can be seen, the county indemnification fund indemnifies any elected county officer, and any deputy, assistant or employee of a county who is found liable because of an error or omission. We note that the fund does not provide indemnification to the county itself or to any county level body, as an entity, but only to the officers or employees of the county. With this distinction in mind, we then turn to your specific questions as the precise extent of coverage. You ask whether coverage would be provided in the following situations:

"1. Errors and omissions of the Des Moines County Legal Aide Attorney Funded in whole by Des Moines County.

2. Errors and omissions of the Des Moines County Care Facility also known as the County Home.

3. Errors and omissions of Southeast Iowa Mental Health which is funded in principal part by the Des Moines County Board of Supervisors.

4. Errors and omissions of the Des Moines County Conservation Board funded in whole by Des Moines County, Iowa.

5. Errors and omissions of the Des Moines County Attorney's Office.

6. Errors and omissions of the Des Moines County Board of Health.

7. Medical malpractice of the Des Moines County Care Facility.

8. Medical malpractice of the Southeast Iowa Mental Health.

9. Medical malpractice of the Des Moines County Board of Health."

With respect to the above, it is clear that indemnification would be provided to the Des Moines County Attorney and his assistants. The Des Moines County Attorney is an elected official, *see* §39.17, 1977 Code of Iowa, and his assistants would fall under the term "assistants" in §332.36.

Turning to the county conservation board, the county board of health, the county care facility, and the county legal aid program, the funding and other powers which the county board of supervisors has over them is sufficient to make their employees county employees for purposes of the county indemnification fund—*see e.g.* §111A.6, 1977 Code of Iowa (county conservation board); §137.20, 1977 Code of Iowa (county board of health); §253.1, 1977 Code of Iowa (county care facility); §252.27, 1977 Code of Iowa (county legal aid program). However, a community mental health center, even though funded in part by the county, *see* §230A.12, 1977 Code of Iowa, has characteristics of an independent body and is the equivalent of an independent contractor. Hence, its employees would not be covered by the county indemnification fund.

We note that medical malpractice would in nearly all instances be encompassed under the phrase "errors or omissions". Hence, medical malpractice of employees of the county care facility and the county board of health would be covered by the fund. It should be pointed out, however, that to the extent any medical or other personnel of these bodies are not employees but are independent contractors, coverage would not exist.

March 16, 1978

COUNTIES: Hospitals. Chapter 347A, §347.13, Code of Iowa, 1977. (1) The mandates of §347.13 do not apply as a limitation upon the powers and duties of trustees of a hospital organized and operating under Chapter 347A of the Code; (2) Such provisions may be adopted by the trustees pursuant to Chapter 347A and §347.24; (3) The optional powers of Chapter 347 may also be exercised by trustees under Chapter 347A. (Nolan to Straub, Kossuth County Attorney, 3-16-78) #78-3-7

Mr. Joseph J. Straub, Kossuth County Attorney: You have requested an opinion on the following questions:

"Kossuth County Hospital is organized under Chapter 347A of the Code of Iowa. Section 347.13 prescribes certain powers and duties which the Board of Hospital Trustees of a hospital organized under Chapter 347 must comply with. My question is, are all the mandates of Section 347.13 also applicable to a hospital organized under Chapter 347A?

"A second question is:

"If those powers and duties are not mandates for a 347A hospital, are they optional powers and duties which the Board of Trustees of a Chapter 347A hospital can perform?

"A third question is related to the second question:

"Assuming that your answer to the second question is yes, then are the optional powers and duties set forth in Section 347.14, 347.21, 347.26 and

347.28 also optional powers and duties which the Board of Trustees of a 347A hospital may perform?

It is the opinion of this office that your first question must be given a NO answer. The powers and duties of a board of hospital trustees under §347.13 of the Code of Iowa, 1977, are specific. There are no specific similar duties prescribed for hospital trustees under §347A.1 which merely provides:

"...the administration and management of any county hospital acquired, constructed, equipped, enlarged or improved under this chapter shall be vested in a board of hospital trustees consisting of five members appointed by the board of supervisors from among the resident citizens of the county with reference to their fitness for such office.... The board of hospital trustees may employ, fix the compensation and remove at pleasure, professional, technical, and other employees, skilled or unskilled, as it may deem necessary for the operation and maintenance of the hospital, and disbursement of funds in such operation and maintenance shall be made upon order and approval of the board of the hospital trustees. ... The board of trustees shall make all rules and regulations governing its meetings and the operation of the county hospital and shall fix rates, fees and charges for the services thereby furnished so that the revenues will be at all times sufficient in the aggregate to provide for the payment of the interest and principals of all revenue bonds that may be issued and outstanding under the provisions of this chapter, and for the payment of all operating and maintenance expenses of the hospital."

It should be noted that the provisions of §347A.4 of the Code specifically provide that Chapter 347A shall be regarded as an independent method of organizing, constructing and operating a town hospital. The language of this section provides:

"This chapter shall be construed as providing an alternative and independent method for the acquisition, construction, equipment, enlargement, improvement, operation and maintenance of a county hospital and for the issuance and sale of revenue bonds in connection therewith, and shall not be construed as an amendment of or subject to the provisions of any other law."

Accordingly, the mandates of §347.13 are not applicable as a limitation upon the powers and duties of hospital trustees under §347A.1 of the Code.

Your second question asks whether or not the mandates of §347.13 can be adopted as optional powers and duties of trustees under Chapter 347A. Section 347.24 provides:

"Hospitals organized under chapter 347 or chapter 347A may be operated as provided for in this chapter in any way not clearly inconsistent with the specific provisions of their chapters."

Accordingly, it is our view that the trustees of hospitals organized under Chapter 347A may exercise the powers of trustees as authorized under §347.13 with respect to the operation of the hospital established under 347A.

The answer to your third question is also an affirmative one. In our view the optional powers and duties of a trustee under Chapter 347 may also be the optional powers and duties of a hospital trustee under Chapter 347A.

March 16, 1978

SCHOOLS: School Parking Lots. Authority of city police to ticket cars on school parking lots depends on local ordinances. (Nolan to Spencer, State Representative, 3-16-78) #78-3-8

Honorable Don W. Spencer, State Representative: Recently you submitted the following question to this office for an opinion:

"1. Are school parking lots private or public?

"2. Is it possible for school officials to ask the police to ticket cars illegally parked and in restricted areas on the school grounds?"

We must assume that the school parking lots referred to in your letter are not under the jurisdiction of the State Board of Regents which has been given specific statutory authority under §§262.68 and 262.69 of the Iowa Code to regulate traffic on institutional grounds, or that they belong to some private school. Parking areas which are a part of a schoolhouse site are the property of a school corporation. Such parking lots are public property.

Under §279.8, Code of Iowa, the board of directors of a community school district "shall make rules... for the care of the schoolhouse, grounds, and property of the school corporation and aid in the enforcement of the same...." Use of the parking areas of the school in violation of such rules would, we believe, constitute such unauthorized use as would be sufficient to support a request by the local school board, or its delegated representative to seek assistance of local police authority in removing unauthorized cars from the school grounds.

Whether or not local police can ticket cars "illegally parked" depends upon the authority given to police to issue such tickets under local city ordinance.

March 16, 1978

SCHOOLS: Conference Board. §441.2, Code of Iowa, 1977. A community school board is entitled to representation on the County Conference Board even though all the school board members live in a city having its own conference board. (Nolan to Curnan, Dubuque County Attorney, 3-16-78) #78-3-9

Mr. Robert J. Curnan, Dubuque County Attorney: We have your letter of January 16, 1978, requesting an opinion on the following:

"Is the Dubuque Community School District (a high school district) entitled to one representative on the County Conference Board pursuant to Section 441.2 of the Iowa Code?"

According to your letter the Dubuque Community School District covers approximately 245 square miles. Although all of the members of the school board reside within the city limits of the City of Dubuque, over 90% of the geographic area of the school district lies outside of the limits of said city.

The Dubuque Community School District is represented on the city conference board and they desire representation, in addition, on the Dubuque County Conference Board. The Iowa Department of Revenue Property Tax Division in Bulletin No. 57 issued on May 7, 1975, interprets §441.2 of the Iowa Code to permit school districts to have representation on the conference board only "if a member of a district's board of directors lives in an area of the district assessed by the county assessors." On the other hand, your opinion to the superintendent of the Dubuque Community School District, dated November 28, 1977, takes the position that the board of directors of each high school district within the county is entitled to a representative on the county conference board. We concur with your view.

Prior to July 1, 1975, the county conference board consisted of the mayors of all the incorporated cities and towns in the counties whose property is assessed by the county assessor, members of the county board of education and members of the board of supervisors. Chapter 1172, Acts of the 65th General Assembly, 1974, abolished the county board of education and also changed the language in §441.2 to provide:

"In each county and each city having an assessor there shall be established a conference board. In counties the conference board shall consist of the mayors of all incorporated cities and towns in the county whose property is assessed by the county assessor, one representative from the board of directors of each high school district of the county, who is a resident of the county, said board of directors appointing said representative for a one-year term and notifying the clerk of the conference board as to their representative, and members of the board of supervisors...."

A number of school districts (including the Dubuque Community School District) contain land in more than one county. It is clear that no member of the Dubuque Community School Board residing in Dubuque would be eligible to represent that school board on the Jackson County Conference Board, and no member of the school board residing in Jackson County could represent the school district on the Dubuque County Conference Board. However, it is our opinion that a school board member residing in a city having its own conference board is not thereby precluded from representing the school district on the county conference board.

March 16, 1978

COUNTIES: Sheriff. There is no authority for the sheriff to provide answering service for private business or utility companies. (Nolan to Murphy, Clarke County Attorney, 3-16-78) #78-3-10

Mr. Richard J. Murphy, Clarke County Attorney: You requested an opinion on the question of whether it is proper for a local business firm and a utility company to contract with the Clarke County Sheriff to provide an answering service. According to your letter the telephones installed in the sheriff's office, at no expense to the county, are operated by the radio operator who is on duty twenty-four hours a day and the service apparently does not interfere with the office operation or the duties of the radio operator. You also said that the money received for the services is being placed in a county general fund. Code Chapter 28E does provide statutory authority for a county to enter into a contractual agreement with a private business organization for the mutual benefit of both when a joint exercise of governmental sevices is to be provided. From the situation as described in your letter we are unable to see the existence of a substantial benefit flowing to the county nor an exercise of a governmental purpose in the answering service provided for the utility and the local business firm. Accordingly, it is our view that the answering service cannot properly be provided by the Clarke County Sheriff's Office.

March 20, 1978

USURY: Business transactions. Chapters 535.2(1), 535.2(2), 535.4, and 537.1301(13) and (15). The maximum interest rate that can be charged to a business organized as a partnership or sole proprietorship is 9% per year on written contracts and 5% per year on other contracts. Said interest does not begin to accrue until six months after the date of the last item on an open acount. (Garrett to Chiodo & Smalley, State Representatives,

3-20-78) #78-3-11

Honorable Ned F. Chiodo, Honorable Douglas R. Smalley, State Representatives: You have asked for an Attorney General's Opinion answering the following question:

"What would be the highest allowable interest rate that can be charged to a business, organized as either a partnership or sole proprietorship, for goods or services purchased pursuant to open or closed-end accounts?"

The basic law in Iowa on interest rates is found in Chapter 535, 1977 Code of Iowa, The Iowa Usury Statute. There are a number of exceptions to this chapter for certain kinds of transactions. For example, Chapter 537, the Iowa Consumer Credit Code, generally covers goods or services purchased or a debt incurred primarily for a personal, family, household or agricultural purpose. [Section 537.1301(13) and (15).] However, the transaction you describe involves the purchase of goods or services for a business purpose and not for a personal, family, household or agricultural purpose. Therefore, the provisions of Chapter 537 would not apply.

There are several other exceptions to the usury law, but none of them cover the transaction you describe.

Under the provisions of §535.4 of the Iowa Code, it is provided that:

"No person shall, directly or indirectly, receive in money or in any other thing, or in any manner, any greater sum or value for the loan of money, or upon contract founded upon any *sale* or loan of real or *personal property*, than is in this chapter prescribed." (Emphasis Added)

Section 535.2(1) provides:

"Except as provided in subsection 2 hereof, the rate of interest shall be five cents on the hundred by the year in the following cases, unless the parties shall agree in writing for the payment of interest not exceeding nine cents on the hundred by the year:

"a. Money due by express contract.

* * *

"f. Money due on open acounts after six months from the date of the last item."

In other words if there is an express contract in writing, a partnership or sole proprietorship could not be charged over 9% per year in interest. On an open account, that same 9% rate would apply but not until six months after the date of the last item on the account. In cases where there is no written contract, then the rate would be 5% per year.

Though your question does not directly bear on corporations, it might be pointed out that under §535.2(2), any domestic or foreign corporation can be charged any rate of interest it agrees in writing to pay.

Finally, I would point out that the term, "business," as used in this opinion does not apply to transactions primarily for an agricultural purpose since such transactions are deemed consumer transactions under Chapter 537 of the Iowa Code, the Iowa Consumer Credit Code.

March 21, 1978

MENTAL HEALTH: COMMUNITY MENTAL HEALTH CENTERS: COUNTY BOARDS OF SUPERVISORS. §§230A.3 and 230A.13, Code of Iowa, 1977. The County Board of Supervisors may finance a Community Mental Health Center organized under §230A.3(2), Code of Iowa, 1977, through receipt and approval of the annual budget of the Community Mental Health Center pursuant to §230A.13, rather than requiring the submission of a claim to the county for each patient served on behalf of the county. Financing of a Community Mental Health Center by county approval of the Center's annual budget may be the preferred method of funding a Center organized under §230A.3(2). Community Mental Health Centers which are financed by County Boards of Supervisors pursuant to §230A.13, Code of Iowa, 1977, through the approval of the Center's annual budget, need not, but may, require the submission of the name or other personally identifiable information relative to patients served by the Center on behalf of the county. This lack of a requirement of submission of a name is in contradistinction to situations involving those Community Mental Health Centers which receive funding from the county through the submission of a claim to the county for each patient served on behalf of the county. (O'Meara to Burk, Assistant Black Hawk County Attorney, 3-21-78) #78-3-12

Mr. Peter W. Burk, Assistant Black Hawk County Attorney: You have requested an opinion from the Attorney General with regard to the following two questions:

1. Are Mental Health Centers organized as nonprofit corporations pursuant to §§230A.12 and 230A.13, Code of Iowa, 1977, required to submit claims for payment as specified in §§331.20 and 331.21 as required by 230A.9 and by your Opinion of February 9, 1978, or may they submit annual budgets as provided in §230A.13 subject only to the further permissive requirements of §444.12?

2. Assuming that the Community Mental Health Center may submit an annual budget as provided in §230A.134, may the county fund for care and treatment under the statutory scheme provided, without obtaining the name of the person or persons receiving benefit of said funds in the form of treatment?

In asking your questions you have referred to an Attorney General's Opinion of February 9, 1978, addressed to Mr. H. Dale Huffman, Pocahontas County Attorney, and Mr. William J. Thatcher, Webster County Attorney. The February 9, 1978, Opinion sought to answer the following questions:

1. Is a Mental Health Center justified in failing to disclose names of persons receiving services at the Mental Health Center, when the county is billed for such services?

2. Is the county entitled to the names of the persons served and billed to the county, before making payment on the claims submitted?

3. What is the effect of the language in the contract between the county and the Mental Health Center which provides that the Mental Health Center is not obligated to disclose such names?

4. Is it legal for a County Board of Supervisors and a Mental Health Center to voluntarily enter into a contract with each other for the Center to provide service to residents of the county with the County Board of Supervisors agreeing to pay for the Center services with tax funds without receiving from the Center the names of patients receiving services for which commitment is not

required?

In the context of payment on claims submitted to the counties, these questions were answered as follows: The County Board of Supervisors must obtain personal information concerning persons served at a Community Mental Health Center, when the county is to pay for such services, in order to carry out the duty of the Board of Supervisors pursuant to Section 331.21, Code of Iowa, 1977. It is illegal for a county to enter into a contract which provides that the names of such persons shall not be disclosed to the County Board of Supervisors. To the extent such a contract provides that such names shall not be disclosed, such a contract may be void and unenforceable. The Community Mental Health Center is correct in refusing to disclose names and other information of persons who have not consented to the disclosure of such information. In the event the county enters into a contract with a Mental Health Center, the county should consider limiting payments for services at the Community Mental Health Center to those persons who consent to disclosure of name and other relevant information to the County Board of Supervisors.

Following the submission of your question, contact was made with the Iowa Mental Health Authority to determine the present situation in Iowa regarding Community Mental Health Centers. The Mental Health Authority has informed this office that there are presently approximately 32 Community Mental Health Centers in Iowa. Of these 32 Centers, approximately one-half presently receive payment from the participating county through the submission of claims to that county. The remaining one-half of these Centers receive funding from the county pursuant to an annual budget, without the submission of claims per patient.

Considering the number of Community Mental Health Centers which are funded pursuant to an annual budget, and not pursuant to the submission of a claim for each patient, it is important to reemphasize that the February 9, 1978, Opinion of this office specifically addressed only those Community Mental Health Centers which are presently funded by the submission of a claim to the appropriate County Board of Supervisors for each patient served. Black Hawk County is one of those counties which participates in a Community Mental Health Center through funding pursuant to an annual budget. Therefore, the February 9, 1978, Attorney General's Opinion would not pertain to the funding of a Community Mental Health Center by Black Hawk County.

Section 230A.13, Code of Iowa, 1977, provides as follows:

The board of directors of each community mental health center which is organized as a nonprofit corporation shall prepare an annual budget for the center and, when satisfied with the budget, submit it to the auditor or auditors of the county or affiliated counties served by the center, at the time and in the manner prescribed by chapter 24. The budget shall be subject to review by and approval of the board of supervisors of the county which is served by the center or, in the case of a center serving affiliated counties, by the board of supervisors of each county, acting separately, to the extent the budget is to be financed by taxes levied by that county or by funds allocated to that county by the state which the county may by law use to help support the center.

Section 230A.13, speaks in terms of the budget being financed by a tax levied by the county or by funds allocated to the county by the state. Therefore, it is concluded that it is appropriate for the county to participate in the funding of a Community Mental Health Center by financing the budget of the

Community Mental Health Center, rather than paying for the services received by each patient served at the Center following the submission of a claim by the Center to the county. The answer to your first question is that Community Mental Health Centers organized as nonprofit corporations pursuant to §230A.3(2), Code of Iowa, 1977, are not required to submit claims for payment as specified in §§331.20 and 331.21, or as required by §230A.9, The Code. Centers organized pursuant to §230A.3(2), may submit annual budgets and receive funding upon the approval of such budget by the County Board of Supervisors.

Your second question asks whether or not a Community Mental Health Center financed pursuant to §230A.13, The Code, may be so financed without providing the name of the person or persons receiving services to the County Board of Supervisors in order to receive such financing. This question will be answered in light of the distinction between those counties providing payment pursuant to a claim submitted, and those counties participating in the financing of the budget of a Community Mental Health Center.

The determination in the February 9, 1978, Opinion of the Attorney General that the names and other personally identifying information of individuals served at the Community Mental Health Center must be submitted to the Board of Supervisors at their request prior to making payment on claims submitted was contingent upon the language in §331.21, Code of Iowa, 1977, dealing with claims against the county. In those counties participating in a Community Mental Health Center through the payment of claims, the arrangement between the Center and the county appears to provide that upon the provision of services to the individual by the Center, the Center is rightfully entitled to payment from the county for those services to the given individual. The county would appear to have provided by contract with the Center that once the service is delivered by the Center to the individual client, the Center has a just demand for payment against the county.

Webster's New World Dictionary, Second Edition (1968) at page 261, defines "claim" to mean, "a demand for something rightfully or allegedly due". The applicability of §331.21, The Code, to the funding of Community Mental Health Centers, is limited only to those instances in which the county funds the Community Mental Health Center through the payment of claims submitted to the county. In those instances in which the county funds the Center pursuant to §230A.13, The Code, through approval of a submitted budget, the county, in approving financing of the Center under the budget, is not approving payment on a demand for something rightfully or allegedly due.

The conclusion in the February 9, 1978, Opinion of the Attorney General regarding the necessity of the submission of names of persons served by the Center to the county prior to the making of payment, and regarding the illegality of a county entering into a contract with a Center which provides that the names of persons shall not be disclosed to the County Board of Supervisors, was expressly contingent upon the applicability of §331.21, Code of Iowa, 1977, to the role of the County Board of Supervisors in approving submitted claims. To the extent that the County Board of Supervisors approve financing of a Community Mental Health Center pursuant to a budget submitted by the Center, and without the requirement of the submission of claims by the Center, §331.21, The Code, is not applicable to financing of the Center. Therefore, it is concluded that in those instances in which the County Board of Supervisors finances the Community Mental Health Center directly to the

budget of the Center, it is not necessary for the County Board of Supervisors to require the submission of the names of individuals served by the Center prior to payment to the Center pursuant to the approved budget.

It is further necessary to note that §230A.13, The Code, indicates that the budget shall be subject to review and approval by the County Board of Supervisors in order to receive financing from the county. The supervisors of the county remain responsible under §230A.13 to assure that the portion of a Community Mental Health Center budget which comes from that county accurately reflects the intended participation of that county in the financing of the Community Mental Health Center. Whereas it is not mandatory that the County Board of Supervisors require the submission of names of individuals served on behalf of that county, the County Board of Supervisors maintains the power to require the submission of names of persons served pursuant to §444.12, The Code, wherein such section provides:

* * *

The board of supervisors may require any public or private facility as a condition of payment from county funds to furnish the board with a statement of the income, assets, and township or municipality and the county of legal residence of each person receiving services under this section...

To the extent the County Board of Supervisors reasonably believes at any point in the financing of the Community Mental Health Center that it must receive names of individuals served on behalf of that county, the County Board of Supervisors has the power to require such submission of names.

In the event the County Board of Supervisors which is participating in the financing of a Community Mental Health Center pursuant to §230A.13, The Code, reasonably determines that is necessary that the Center submit the names of persons served to the County Board of Supervisors, the Opinion of the Attorney General of February 9, 1978, is applicable to the extent that the Community Mental Center can only release the names of those persons who have consented to such release of their names and other personally identifiable information. To the extent the County Board of Supervisors determines that the submission of the names of persons served on behalf of that county is essential to the continued financing of the Community Mental Health Center, the failure of the patient to consent to the release of the patient's name and other personally identifiable information to the Board of Supervisors, and the subsequent inability of the Center to furnish such information to the Board of Supervisors, would appear to empower the Board of Supervisors to withhold further financing subject to the submission of that information which is required by the Board of Supervisors.

It may well be that in the event the County Board of Supervisors has questions relative to the provision of services to patients pursuant to that portion of the Community Mental Health Center's budget which is financed by the county, the county may apply one of the following remedies in order to obtain answers to such questions. The county may seek review and evaluation of the Community Mental Health Center pursuant to §230A.17, The Code, by contacting the committee on mental hygiene or by contacting the Iowa Mental Health Authority. The county may apply to the State Director of the Division of Mental Health Resources of the Iowa Department of Social Services for an inspection of the Community Mental Health Center pursuant to the provisions of §§227.1 and 227.2(7), The Code. The County Board of Supervisors

may also undertake its own audit of the Community Mental Health Center pursuant to the provisions of §232.3(31), Code of Iowa, 1977.

A final brief note is in order. Examination of the statutory scheme for the organization of Community Mental Health Centers in the State of Iowa, especially provided in §230A.3, and with further reference provided in that section to §§230A.4 to 230A.11, and §§230A.12 and 230A.13, may well indicate that the most appropriate method of funding a nonprofit Community Mental Health Center established pursuant to §230A.3(2) is through the method of financing the annual budget of the Community Mental Health Center pursuant to §230A.13, Code of Iowa, 1977, rather than providing for the funding of the nonprofit Center through the submission of claims pursuant to §230A.9.

March 21, 1978

STATE OFFICERS AND DEPARTMENTS: Foster Care Costs. §§4.7, 232.18, 232.22, 232.26, 232.33, 232.34, 232.51, 234.6(7)(b), 234.35, 234.36, 234.39, 242.7, 444.12(2), 444.12(5), Code of Iowa, 1977. The State is not responsible for paying the cost of care for a child who has been placed in the county juvenile home from foster care funds. The State, however, is responsible for paying the cost of foster care for child pursuant to §§234.35 and 234.36 where the court has ordered same under §§232.33, subsections 3 or 4, or 232.34, subsection 3 or 4. (Robinson to Sarcone, Special Counsel, Polk County Board of Supervisors, 3-21-78) #78-3-13

James Sarcone, Esq., Special Counsel, Board of Supervisors of Polk County: Reference is made to your memorandum concerning the problem of funding foster care and to memoranda from Quenten Emery, Director of the Polk County Office of the Department of Social Services, and from Ron Stehl and Ike Skinner of the central office staff of the Department of Social Services on the same subject.

Before attempting to address the issues raised in these memoranda, it is appropriate to restate them:

1. Is the State responsible for paying the cost of care for a child who has been placed in the county juvenile home?

2. Is the State responsible for paying the cost of foster care of a child if it does not have legal custody or if it has not been committed to the Commissioner of the Department of Social Services but otherwise qualifies under §§234.35 and 234.36, The Code?

In our opinion, the answer to the first question is negative while the answer to the second is affirmative.

I

As background to the first issue, we quote from Quenten Emery's memorandum of June 1, 1977, to Ike Skinner:

In January, 1974, the Polk County Board of Supervisors approved an Experimental Child Neglect and Abuse Prevention and Treatment Program. The program led to significant changes in the methods of operation of the Polk County Juvenile Home in addition to funding a large number of County positions to supplement State staff in the Foster Care and Child Protective Service Units. The program also enabled the Department, the Juvenile Court and the Juvenile Home to coordinate their efforts in providing emergency and temporary care to the children in this community.

During the same time period, July 1, 1974, the Department became directly responsible for foster care and foster care expenses because of changes in the Code of Iowa (cf. sections 234.35 and 234.36).

These Code changes enable the Department to become involved in emergency placements (cf. section 234.35, subsection 4) as this County already had. Subsequent amendments to the Employees' Manual (cf. VIII-6-30 & 52) adopted, in part, the emergency shelter care program already operational in Polk County.

The result of the County intitiated program, the concurrent legal changes and the Departmental program additions has been to cause the Juvenile Home to cease providing emergency shelter for children under five years of age and to close its nursery unit. This cooperative decision between the Department and the Juvenile Home has been a viable and satisfactory solution.

This division of labor or specialization has led to the Department's staff, as agents of the Commissioner, working in tandem with the staff of the Juvenile Home and Juvenile Court routine placing children in emergency care in either a foster home or in the Juvenile Home. Hence, the requirements of section 234.35, subsection 4 have been met routinely since 1974.

We recognize that the attempt to reorganize the function of the juvenile home was designed to avail itself of more state funding. In our opinion , however, what was done was not consistent with the legislative mandate as expressed in the statutes and the attempt was unsuccessful. In other words, we do not believe it was the intent of the legislature to fund the juvenile home with a tax levy and also foster care funds.

Before turning to the various Code provisions which are applicable to the problems you present, it is appropriate to consider the rules of statutory construction, as set forth in *Doe v. Ray*, 251 N.W.2d 496, 500-501 (Iowa 1977):

In interpreting these statutes we are guided by familiar principles of statutory construction. Of course, the polestar is legislative intent....Our goal is to ascertain that intent and, if possible, give it effect....Thus, intent is shown by construing the statute as a whole. In searching for legislative intent we consider the objects sought to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it....However, we must avoid legislating in our own right and placing upon statutory language a strained, impractical or absurd construction....

Finally, we note that in construing a statute we must be mindful of the state of the law when it was enacted and seek to harmonize it, if possible, with other statutes relating to the same subject....[Case citations omitted.]

Sections 234.35 and 234.36, The Code, provide for the payment of foster care expenses, to-wit:

234.35 When state to pay foster care costs. The department of social services shall be initially responsible for paying the cost of foster care for a child under any of the following circumstances:

1. When a court has committed the child to the commissioner of social services or his designee.

2. When a court has transferred legal custody of the child to the department of social services.

3. When the department has agreed to provide foster care services for the child on the basis of a signed placement agreement between the department and the child's parent or guardian.

4. When the child has been placed in emergency care for a period of not more than thirty days upon approval of the commissioner or his designee.

234.36 When county to pay foster care costs. Each county shall pay from the county mental health and institutions fund as provided by section 444.12, subsection 2, the cost of foster care for a child placed by a court as provided in section 232.33, subsection 3 or 4, or section 232.34, subsection 3 or 4. However, in any fiscal year for which the general assembly appropriates state funds to pay for foster care for children placed by courts under the statutes cited in this section, the county shall become responsible for these costs only when the funds so appropriated to the department for that fiscal year have been exhausted. The rate of payment by the county or the state, as the case may be, under this section shall be that fixed by the department of social services pursuant to section 234.38.

A child may be taken into immediate custody and detention under the provisions of §§232.7 [Child taken into custody], 232.10 [contempt], 232.15 [when immediate custody may be taken], 232.16 [parents or guardians notified], and 232.17 [court notified of detention of child], The Code. Section 232.18, provides:

232.18 Where child may be detained. A child may be detained as provided in section 232.17 in one of the following places:

1. A juvenile home.

2. A licensed facility for foster care in accordance with the laws relating to facilities for foster care.

3. A suitable place designated by the court.

4. A room entirely separate from adults in a jail, lockup, police station, or other adult detention facility as provided in section 232.19.

Note that the legislature distinguished between "a juvenile home" and a "licensed facility for foster care" in subparagraphs 1 and 2, above. Section 232.21 provides for the maintenance of a juvenile home and §232.22 states, in part, "Expenses for providing and maintaining a juvenile home shall be paid by the county...". Since §232.18(1) and (2) provide for immediate detention in either a juvenile home or a licensed facility for foster care, can §234.35(4) [state pays for emergancy care of not more than 30 days upon approval of commissioner or designee] be used as authority to require payment to a juvenile home if it is also a licensed foster care facility? We think not. We are required to harmonize these statutes if possible—"related statutes are to be read in pari materia". *Doe v. Ray*, supra, at 501. However, we are not required to read these statutes in a way that would result in doubling funding of the juvenile home. We do not believe that was the legislative intent. Section 232.22 provides for the funding of the juvenile home from a tax levy.

Section 232.26 provides:

232.36 Financial aid from state. Approved county or multicounty juvenile homes may be entitled to receive financial aid from the state in the amount and in such manner as determined by the state director. Aid paid by the state

shall not exceed fifty percent of the total cost of the establishment, improvements, operation, and maintenance of a juvenile home.

To the best of our understanding, this section has never been used. However, it still remains as an available option.

As I understand the situation in Polk County, there are two separate buildings making up the juvenile home. If the county decided not to fund one of these facilities from the tax levy, it may qualify for foster care funding [§234.35] or financial aid from the state [232.26].

Section 234.6(7)(b), while not defining foster care, seems to include "institutions". Nevertheless, §232.22 is more specific as it relates to juvenile homes and it controls over the more general provision. See §4.7, The Code, pertaining to interpreting conflicts between general and special statutes and *Doe v. Ray,* supra. Sections 444.12(5) and 444.12(2) (to a lesser extent) support our conclusion that the county should pay in instances where the juvenile home is supported from local property taxes.

Section 232.51 provides that the county will pay if no other provision is made by law. Polk County insists that §234.35(4) is that "other" provision. Again, we believe that §232.22 is closer to the situation as it pertains to juvenile home funding, and it controls. Section 232.51 is, however, another indication of legislative intent for the county to pay.

II

Consideration is now directed to the second question. Is the State responsible for paying the cost of foster care of a child if it does not have legal custody or if it has not been committed to the Commissioner of the Department of Social Services? Sections 232.33 and 232.34 provide in pertinent part:

232.33 Disposition of case of child in need of assistance—prohibited placement. If the court finds that the child is in need of assistance the court shall enter an order making any one or more of the following dispositions of the case:

* * *

3. Transfer legal custody of the child, subject to the continued jurisdiction of the court, to one of the following:

a. A child placing agency.

b. The county department of social welfare or the state department of social services.

c. A reputable individual of good moral character.

4. Commit the child to the commissioner of social services or his designee for placement.

* * *

232.34 Disposition of case of delinquency. If the court finds that the child is delinquent, the court shall enter an order making any one or more of the following dispositions of the case:

* * *

3. Subject to the continued jurisdiction of the court, transfer legal custody

of the child to one of the following:

a. A child placing agency.

b. A probation department.

c. A reputable individual of good moral character.

4. Commit the child to the commissioner of social services or his designee for placement.

* * *

Sections 234.35 and 234.36, supra, are not limited to situtaions where legal custody or commitment has been given to the Department of Social Services. The specific reference in §234.36 to §232.33, subsections 3 and 4, and §232.34, subsections 3 and 4, mean there are times when the Department would have neither custody nor commitment but still pay for foster care. Subsections 3a and 3c under both §§232.33 and 232.34 are the same. Custody could be placed with a child placing agency (defined in §238.2) or to a reputable individual. If foster care is provided under these categories, it qualifies by virtue of §234.36 and the State will pay until the appropriated funds are exhausted and then the county will pay. The limitation would be to foster family care units or group homes or institutions that have not been licensed by the Department of Social Services.

Early in both §§232.33 and 232.34, there is contained the phrase "the court shall enter an order making *any one or more* of the following dispositions of the case:". [Emphasis added.] This means the court is free to try one disposition and if that does not work out, to try another, if the court has retained jurisdiction. The court, by legislative design, is given flexibility to deal with the best interest of the child. The court cannot, in our opinion, apply two or more inconsistent provisions at the same time. For example, the court cannot place a child under §§232.33(5) or 232.33(6) and order the Department of Social Services to pay under the theory that child custody is also given the Department under §232.33(3)(b). The concept of flexibility does not include the power to order inconsistent provisions at the same time. The county pays under §§232.33(5) and (6) according to §§232.51, 232.52 and 444.12(5), The Code.

In *In Interest of Kelly,* 236 N.W.2d 50 (Iowa 1977), the Iowa Supreme Court held a juvenile court may transfer the custody of a child to the Department of Social Services subject to the continued jurisdiction of the court. The court, according to *Kelly*, supra, may not designate the placement after the transfer of custody or the commitment. The juvenile court, however, retains broad powers affecting foster care placements for which the State may nevertheless be required to pay under §234.36. Examples would be the transfer to a child placing agency under §232.33(a) or §232.34(a). The juvenile court has this power even though this may be contra to the case plan that the Department of Social Services has developed. Social Services may not dilute this power by refusing to pay in the first instance in accordance with the command of §234.36. The most vexing of all, to the Department of Social Services, is the power of the juvenile court to transfer custody of a child to a probation department under §232.34(3)(b) which placed the child in foster care for which the Department of Social Services must pay. This, however, is no different than the counties' obligation under §242.7, which provides:

242.7 Placing in families. All children committed to and received in the

training schools may be placed by the department under foster care arrangements, with any persons or in families of good standing and character where they will be properly cared for and educated. The cost of foster care provided under these arrangements shall be paid as provided in sections 234.35 and 234.36.

In other words, the counties would surely complain if they were required to pick up the cost of a foster care placement made after a commitment to the training school was made. Yet, they would be required to do so if the appropriation for §234.35 ran out as the cost of a §242.7 placement "shall be paid as provided in sections 234.35 and 234.36."

The argument is made that §234.36 was never funded by an appropriation. The appropriation language is very broad and in our opinion covers §234.36 as well as §234.35. See Ch. 37, §9, Acts 67th G.A., 1st Session, which provides:

Sec. 9. There is appropriated from the general fund of the state for the fiscal year beginning July 1, 1977, and ending June 30, 1978, to the department of social services, the following amounts, or so much thereof as may be necessary, to be used for the purposes designated:

* * *

6. For foster care ..... $ 7,800,000

* * *

Foster care was originally a cost borne by the county. It is essential to remember that the provisions of what are now §§234.35 ro 234.39, The Code, were passed as a measure to relieve the counties of this burden. We do not believe it was the intent of the legislature to transfer these funds to other uses or refuse to pay valid foster care vouchers, thus, enabling a reversion of large sums of appropriated funds.

The Department of Social Services argues that it cannot be accountable for funds it cannot control. The responsibility for foster care placements is dual—the juvenile courts and Social Services. We believe the legislature intended this dichotomy. Even though Social Services may not be "responsible" for all court placements, there is a lid on State spending. When appropriated funds are exhausted and the legislature refuses a supplemental appropriation, the cost reverts back to the counties under §§234.36 and 232.51. Under §234.36 the Department of Social Services may establish the rate of payment. Both the State and the counties benefit from foster care payments made by the Federal government pursuant to Title XX of the Social Security Act.

March 21, 1978

CONTRACTS; CLAIMS; GENERAL ASSEMBLY; RETROACTIVE APPLICATION. Article III, §31, Const. of Ia. H.F. 2329, 67th G.A., 2nd (1978), is prospective in its operation and no funds appropriated thereunder may be used to pay for services rendered prior to its becoming a law and which cannot be paid unless allowed by two-thirds of the members elected to each house of the general assembly. (Turner to Harbor, State Representative, 3-21-78) #78-3-14

The Honorable William H. Harbor, State Representative: You have requested an opinion of the Attorney General as to whether House File 2329 of the 67th General Assembly, 2nd Session, "An Act creating and making an

appropriation for the purpose of funding the acquisition, development, installation and use of a data processing interactive decision evaluation system encompassing state and local finance and budgeting procedures," would permit payment of any portion of a $387,000 contract with Coopers & Lybrand, a consulitng firm, for services heretofore rendered to the state, if the bill is not passed by two-thirds of the members elected to each house of the general assembly.

The contract in question was the subject of a previous opinion to State Comptroller Selden on September 8, 1976 (1976 OAG 749) in which I said at page 758 of 1976 OAG:

"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."

Article III, §31, Constitution of Iowa, provides:

"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).

Thus, it is my opinion that in order to pay any compensation or any money on any claim for services heretofore rendered under said Coopers & Lybrand contract, such compensation or claim must be allowed by two-thirds of the members elected to each house of the general assembly. Such payment for said services cannot be made under the guise of a new contract hereafter entered under authority of H.F. 2329, which attempts to incorporate them therein. This is true although no specific mention is made of Coopers & Lybrand or of said earlier contract. H.F. 2329 would allow only payments for services rendered after said bill becomes a law. And this is true even if H.F. 2329, in its present form, is in fact passed by two-thirds of the members elected to each house.

There is nothing in H.F. 2329 to indicate that it is intended to be retroactive in its operation. A "retroactive" or "retrospective" law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. *Walker State Bank v. Chipokas,* 228 N.W.2d 49 (1975 Iowa). Statutes have prospective application only unless a clearly contrary intent appears. *In re Marriage of Harless,* 251 N.W.2d 212, (1977 Iowa). Or, as held by the Iowa Supreme Court, quoting 82 C.J.S. *Statutes* §415 at 990-992 "Statutes are presumed to be only prospective in their operation, according to the authorities on the question, rather than retrospective or retroactive, unless the contrary clearly appears, or is very clearly, plainly and unequivocably expressed, or necessarily implied." *City of Monticello v. Adams,* 200 N.W.2d 523 (1972 Iowa). Certainly H.F. 2329 contains no clear, plain or unequivocably expressed, or necessarily implied language indicating that any portion of the $585,000 appropriated may be used retroactively for services already performed.

Thus you are correct in your "contention that the constitution is quite clear on this matter and does say that any service rendered prior to funds being

appropriated required a 2/3 vote."

March 27, 1978

COUNTIES: Official Newspapers. §§349.4, 618.3, Code of Iowa, 1977. Where the paid circulation of a newspaper is the same on the date of application for second class mailing rates in December 1975 as the paid circulation recognized by the postal services when the application was granted (May 1976), the newspaper meets the requirements of §618.3, Code 1977, and is eligible to be selected as an official county newspaper. (Nolan to Branco, Ida County Attorney, 3-27-78) #78-3-15

Mr. Richard F. Branco, Ida County Attorney: This letter is written in response to your request for an opinion with regard to the selection of the official newspapers in Ida County. The question which you presented requires an interpretation of §618.3, Code of Iowa, 1977. This Code Section provides:

"For the purpose of establishing and giving assured circulation to all notices and reports of proceedings required by statute to be published within the state, where newspapers are required to be used, newpapers of general circulation that have been established, published regularly and mailed through the post office of current entry for more than two years and which have had for more than two years a bona fide paid circulation recognized by the postal laws of the United States shall be designated for publication of notices and reports of proceedings as required by law."

Determination of this question actually appears to rest on two facts: (1). whether or not the newspaper has been mailed through the post office for more than two years and (2). whether its paid circulation entitles it to be recognized as a newpaper under the postal laws.

Current postal service criteria established for mailing at second class rates requires regular issuance of the periodical or newpaper with a statement therein showing at what regular intervals the issues appear. The publication must be issued from a known office of publication. The publications must be original and published for the purpose of disseminating information of a public character. A legitimate list of persons who have subscribed by paying a rate more than a nominal rate must be furnished. Publications designed for free circulation do not qualify for second class privileges nor do publications which are designed to circulate at nominal rates. The manual states:

"Nominal rate subscriptions include those which are sold:

"At a token subscription price that is so low that it cannot be considered a material consideration.

"At a reduction to the subscriber, under a premium offer or any other arrangement, of more than 50 percent of the amount charged at the basic annual rate for a subscription which entitles a subscriber to receive one copy of each issue published during the subscription. The value of a premium is considered to be its actual cost to the publisher, recognized retail value, or the represented value, which ever is the highest." Postal Service Manual, 1974.

In your request for an opinion you set out certain facts for consideration as follows:

"Ida County has a population of less than 15,000 and in accordance with Sec. 349.3, Code of Iowa, the Board of Supervisors is required to select two official county newspapers in January of 1978 for the year 1978. Three newspapers published in Ida County have filed written applications asking to be

selected as official county newspapers. A contest, therefore, exists in accordance with Sec. 349.4 of the Code. The Ida County Pioneer Record, published in Ida Grove, and the Holstein Advance, published in Holstein, have in past years been the official county newspaper.

"The Ida County Courier began publication of a newspaper with its first issue on November 1, 1975. It has been published weekly since that date and mailed through the post office to its subscribers. It made application to the U.S. Postal Service on December 23, 1975, for second class mailing privileges. On May 27, 1976, Authorization for Second Class Mail Privileges was granted by the U.S. Postal Service with an effective date of May 11, 1976. Since that date the newspaper has been mailed to subscribers at second class rates. From the time of its first issue until it was granted second class privileges it was mailed at the higher third class rates.

"After it was granted second class mail privileges it received from the U.S. Postal Service a refund of $4,209.08, being the difference in third class rates and second class rates for the period during which its application for second class authority was pending.

"The Holstein Advance and the Ida County Pioneer Record contest the qualifications of the Ida County Courier to be selected as an official county newspaper on the grounds that it does not meet the requirements of Sec. 618.3, Code of Iowa, in that the effective date of its second class mailing privilege was May 11, 1976, and that therefore it has not had for more than two years a bona fide paid circulation recognized by the postal service of the United States.

"The Ida County Courier claims to have met the requirements of Sec. 618.3 because of the refund of the difference between third class postal rates and second class postal rates for the period during which its application for second class rates was pending. Because of the refund the Courier actually paid second class rates from December 23, 1975.

"The question presented therefore, and upon which an Attorney General's opinion is requested, is as follows: Under the set of facts disclosed above, does the Ida County Courier qualify under Sec. 618.3 to be considered by the Board of Supervisors of Ida County, Iowa, as one of the official newspapers of the county for the year 1978?

"All three applicants have or will file the documents required by Sec. 349.5, Code of Iowa. In the event the Ida County Courier is deemed to be qualified for selection under Sec. 618.3, the Board of Supervisors will perform its duties under Ch. 349 of the Code and select two official newspapers from among the three applicants. In the event the Ida County Courier does not qualify under Sec. 618.3, then there will only be two qualified applicants for selection of the two official newspapers."

It is the opinion of this office, based upon the foregoing facts and applicable statutes that the Ida County Courier meets the requirements of §618.3, Code of Iowa. Since there has been no showing advanced that the paid circulation of the Ida County Courier was different on May 11, 1976, than the circulation reported to the postal authorities on December 23, 1975, we must conclude that "a bona fide paid curculation recognized by the postal laws" existed in December, 1975. The action of the postal authorities refunding the difference between second and third class mailing rates as of December, 1975, substantiates this view.

Accordingly, the Ida County Courier is eligible for selection as an official county newspaper.

March 29, 1978

STATE OFFICERS AND DEPARTMENTS: State Department of Health; Hospital Rate Review Programs; Antitrust Exemption. §§16, 17 and 18, Chapter 75, Acts 67th G.A., 1977 Session. Amendment #H 5568, H.F. 630, Acts of the 67th G.A., 1978 Session. State Health Department may contract for establishment of programs dealing with prospective rate review in hospitals if state takes an active part in such programs. "State action" exemption to antitrust laws applies. (Swanson to Middleton, Chief, Division of Health Facilities, 3-29-78) #78-3-16

Mr. Rick L. Middleton, Chief, Division of Health Facilities: We have received your opinion request regarding the establishment of pilot programs relating to prospective rate review of hospitals and other health care facilities in the State of Iowa. You ask whether the Iowa Department of Health may contract with the Iowa Hospital Association and third party payers, or the Iowa Health Care Facilities Association and third party payers, or the Iowa Association of Homes for the Aging and third party payers for the establishment of pilot programs dealing with prospective rate review in hospitals or health care facilities, or both.

This program would be instituted under the provisions of an amendment to House File 630, which would amend Chapter 75, Acts of the Sixty-Seventh General Assembly, 1977 Session, which provides as follows:

"*NEW SECTION.* CONTRACTS FOR ASSISTANCE WITH ANALYSES, STUDIES AND DATA. In furtherance of the department's responsibilities under sections sixteen (16), seventeen (17) and eighteen (18) of this chapter, the commissioner may contract with the Iowa hospital association and third party payers, the Iowa health care facilities association and third party payers, or the Iowa association of homes for the aging and third party payers for the establishment of pilot programs dealing with prospective rate review in hospitals or health care facilities, or both. No state or federal funds appropriated or available to the department shall be used for any such pilot program.

"Sec. 4. This Act, being deemed of immediate importance, shall take effect and be in force from and after its publication in The Waterloo Courier, a newspaper published in Waterloo, Iowa, and in the Tama News-Herald, a newspaper published in Tama, Iowa."

You ask whether this language is adequate to exempt the program from any problems associated with the antitrust laws.

We believe that in the absence of a "state action" exemption, such a program would clearly violate the antitrust laws. A combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing prices is illegal *per se* without regard to reasons advanced to justify them. *Morton Salt Co. v. U.S.*, 1956 Trade Cases, §68, 412, 235 F.2d 573. Even agreements to merely exchange future price information with resulting stabilized prices have been held violative of Section 1 of the Sherman Act. See *U.S. v. Container Corp.*, (U.S. Sup. Ct. 1969) 1969 Trade Cases, §72, 675, 393 U.S. 333, 89 S.Ct. 510.

The "state action" exemption first found judicial acceptance in *Parker v. Brown*, 317 U.S. 341 (1943). There, a unanimous Court held that commercial

activities mandated by a state or its instrumentalities are immune from Sherman Act liability. Since then, several other cases have dealt with different aspects of state regulation. These include *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975); *Cantor v. Detroit Edison Co.,*428 U.S. 579 (1976); *Gibson v. Berryhill,* 411 U.S. 564 (1973); and *Bates v. State Bar of Arizona,* 97 S. Ct. 2691 (1977). The Supreme Court has provided various standards in these opinions.

The *command* of the *state* as *sovereign* provides an antitrust exemption for those private activities which have been commanded. *Goldfarb, supra.* However, a state may not command private parties to violate antitrust laws. See *Schwegmann Bros. v. Calvert Corp.,* 341 U.S. 384 (1951).

A fact question is generated by what qualifies as the "state as sovereign." Clearly, the General Assembly, the Judiciary or the Executive exercising those functions given to them by the state Constitution are the "state as sovereign." But, "a state agency for some limited purposes," may not be the sovereign state for other purposes, either because it is acting beyond its necessary duty or because its decision makers have a private pecuniary interest in the outcome. *Goldfarb, supra.* And where a private group is "masquerading under the banner of state action" no antitrust exemption will be available for anyone. *New Mexico v. American Petrofina,* 501 F.2d 363, 370 (9th Cir. 1974).

State *delegation* of power to a private entity, i.e., a nonsovereign, does not itself provide anyone with an antitrust exemption when that power is used to restrain competition. Such delegation would raise many antitrust problems. See *Gibson v. Berryhill,* 411 U.S. 564 (1973).

Informal state encouragement of a private restraint does not provide an antitrust exemption. This principal was stated in *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940). "Virtual volunteers" may not be given the power to take "state action". 310 U.S. at 226-227.

Formal approval, however, of private conduct by the state as sovereign may be tantamount to a state command, giving rise to a "state action" exemption. But "a state does not give immunity to those who violate the antitrust laws by authorizing them to violate them, or by declaring that their action is lawful." *Parker, supra.* This is essentially a fact question depending on the role of the state in bringing about the restraint, its interest in it and the nature of its action, or, as the Court said in *Cantor, supra,* whether "the state's participation in a decision is so *dominant* that it would be unfair to hold a private party responsible for his conduct in implementing it." *Cantor, supra.* (Emphasis added).

Bates, supra, was the latest case in which questions relating to the scope of the exemption were presented to the Supreme Court. The Court immunized from antitrust attack rules and regulations, suggested or adopted by state bar associations and adopted and enforced by state supreme courts, that would be unlawful anticompetitive practices if promulgated by a trade association. The *Bates* Court deemed it significant that the state policy was so clearly and affirmatively expressed and that the state's participation was so active.

An agency's rubber-stamp approval of restrictive activities proposed and executed by private persons or companies does not relieve the private entities of responsibility for the consequences of their activities. Nor may an "interested" self-regulatory group assume that it has a mandate to command its members to engage in activities which profit the profession to the detriment of consumers, competitors, and the economy. *Goldfarb, supra.* See also, *Silver v. New York*

Stock Exchange, 373 U.S. 341 (1963).

Our economy is characterized by a mixture of private and public decision-making in which antitrust and direct regulatory service related *public interest* goals. This was made clear in *U.S. v. Philadelphia National Bank,* 374 U.S. 321, 372, (1963), where the Supreme Court emphasized that the fact that an industry, such as banking, was highly regulated "makes the play of competition not less important but more so." It has long been recognized that the basic goal of regulation and the basic goal of the antitrust laws are the same—"to achieve the most efficient allocation of resources possible." *Northern Natural Gas Co. v. F.P.C.,* 399 F.2d 953, 959 (D.C. Cir. 1968).

Cantor, supra, and earlier cases indicate that the courts are going to be concerned about the application of antitrust principles to regulated sectors of the economy—which can be unpalatable to those regulated because antitrust-mandated markets do interfere with private interest arrangements often fostered under the cover of regulation. *Cantor, supra,* makes it clear that courts will look behind the phrase "state action" to see whether the sovereign state is really there or whether private interests are there attempting to cloak themselves in the state's sovereignty.

We turn now to the applicability of this body of law to the proposed contractual relationship of the Health Department to the entities set out in your letter. Chapter 75, Acts of the 67th General Assembly, 1977 Session, provides that the department shall undertake analysis and studies relating to hospital and health care facility costs with the objective of providing a basis for *determining whether regulation* of hospital and health care facility rates and charges by the State of Iowa *is necessary* to protect the health or welfare of the people of the state.

The department was directed to *study* feasibility of such regulation and to submit, within two years, to the General Assembly a report based on the information gathered, compiled, and analyzed for the purpose of assisting the *General Assembly to determine* whether regulation of hospital rates by the state is warranted. See Sections 16, 17 and 18, Chapter 75, Acts of the 67th General Assembly, 1977 Session.

The amendment to House File 630 goes further and grants authority to the Department of Health to enter into contracts for the *purpose* of regulating and setting hospital rates or budgets. The problem here is to determine whether this amendment provides a "state action" exemption to the antitrust laws. In *Goldfarb, supra,* the Court found that further inquiry was unnecesary because it was far from certain that the state, through its Supreme Court rules, *required* the anti-competitive activities. The Court spoke in terms of *compelling* action by the state acting as sovereign. The amendment to House File 630 certainly does not *compel* or *require* that the Health Department contract for the purpose of establishing pilot rate review programs.

Our reading of *Parker, Goldfarb, Cantor* and *Bates,* however, leads us to believe that they stand for the proposition that if the sovereign *authorizes* the anti-competitive conduct *and takes part* in it, then the conduct is exempt from antitrust coverage. Justice Steven, in *Cantor, supra,* recognized that regulation rarely takes the form of a pure state command and is more likely to be "a blend of private and public decision-making."

The House File 630 amendment is similar to Section 146.60 of the Wisconsin statutes. That section provides that "the [Health] department may enter into a

contract with the Wisconsin hospital association and associated hospital services for the purpose of setting hospital rates prospectively." It is informative to note that pursuant to the Business Review Procedure (28 C.F.R. 50.6) of the United States Department of Justice (Antitrust Division), John H. Shenefield, Acting Assistant Attorney General of the Antitrust Division, by letter dated July 5, 1977, declared that the Division does not intend to institute enforcement proceedings against the Wisconsin program. He stated in his letter as follows:

"...this Chapter [224] created Section 146.60 of the Wisconsin Statutes and authorized the Department of Health and Social Services to enter into a contract with Wisconsin Blue Cross and the Wisconsin Hospital Association (WHA) for the purpose of setting hospital rates prospectively. Under the Program, a Rate Review Committee composed of representatives appointed by the Governor, the WHA, and Blue Cross will review proposals by individual hospitals for increases in rates. An Appeals Board may hear appeals by hospitals whose proposals have been rejected. Also, a Standards Development Committee will develop standards for determining the reasonableness of proposed rate increases.

"The Antitrust Division has no present intention to institute enforcement proceedings against the Program. However, the Division remains completely free to bring whatever action or proceeding it subsequently comes to beleive is required by the public interest."

Section 553.6(4), The Code, provides an exemption to the Iowa Competition Law. Exempt are "activities or arrangements expressly approved or regulated by any regulatory body or officer acting under authority of this state or of the United States."

If the Department of Health were to act pursuant to the House File 630 amendment in contracting for the purpose of establishing a program dealing with prospective rate review in hospitals or health care facilities, the above exemption would apply. The activities would then be "expressly approved or regulated" by a regulatory body, and the "body" would be "acting under authority of the state." Section 553.6(4), The Code. This would then render the Iowa Competition Law inapplicable to any anti-competitive aspects of the contractual arrangement dealing with regulation of rates.

Under our interpretation of "state action" exemption cases cited above, such activity would also be immune from applicability of the Sherman Act, if participation by the state in such program is active. As stated above, such involvement by the state presents a question of fact which could only be determined by an examination of any program proposed by the department. Any such program may also be submitted to the United States Department of Justice (Antitrust Division) for a business review under 28 C.F.R. 50.6.

March 30, 1978

SCHOOLS: School Corporation Real Estate With Student Erected Structures: §§297.22, 427.1(2), 427.13, 441.46, Code of Iowa, 1977. A school corporation's real estate upon which a structure has been erected by students as part of a regular course of study meets the tax exempt criteria contained in §427.1(2), provided that the real estate is in a tax exempt status on the levy date of the taxable fiscal year. Assuming that the tax exempt status is attained and thereafter the real estate is sold to a nonexempt individual or entity, the property taxes will be prorated on the basis of the status of the property during the assessment year. (Griger to Benton, State Superintendent of Public Instruction, 3-30-78) #78-3-17

Robert D. Benton, State Superintendent of Public Instruction: You have requested the opinion of the Attorney General as follows:

"Section 297.22, Code of 1977, in the last two paragraphs makes provision for the board of directors of school corporations to sell, lease, or dispose of real estate upon which a structure has been erected by students as part of a regular course of study and purchase sites for the erection of additional structures.

"My question is whether sites so purchased and facilities erected on such sites, done as part of the regular education program of the school corporation, are exempt from property tax as other property of school corporations provided by Section 427.1(2), The Code 1977."

The relevant provisions of §297.22 state:

"The board of directors of any school corporation may, subject to sections 297.23 and 297.24, sell, lease, or dispose of real estate upon which a structure has been erected by students as part of a regular course of study, and may purchase sites for the erection of additional structures."

Section 427.1(2), in relevant part, exempts from property tax:

"The property of a...school corporation..., when devoted to public use and not held for pecuniary profit...."

Clearly, a school corporation's real estate upon which students erect a structure as part of a regular course of study and which is thereafter sold with the net proceeds inuring to the benefit of the school corporation is within the exemption criteria set forth in §427.1(2). But, given this premise, additional statutory provisions must be examined to determine the applicability of this tax exemption.

Section 441.46, Code of Iowa, 1977, provides in relevant part:

"The assessment date of January 1 is the first date of an assessment year period which constitutes a calendar year commencing January 1 and ending December 31. All property tax statutes providing for tax exemptions or credits and requiring, as a prerequisite thereto, that a claim be filed, shall be construed to require such claims to be filed during the assessment year. In the event that no claim is required to be filed to procure an exemption or credit, the status of the property as exempt or taxable on the levy date of the fiscal year which commences during the assessment year determines its eligibility for exemption or credit. Any statute requiring proration of property taxes for any purpose shall be for the assessment year, unless otherwise stated, and such proration shall be based on the status of the property during the assessment year."

No claim is required to be filed to procure a property tax exemption pursuant to §427.1(2). Therefore, whether such property is tax exempt depends upon its ownership and use by the school corporation on the levy date of the taxable fiscal year. The levy date occurs in March. See §444.9, Code of Iowa, 1977. The taxable fiscal year begins July 1 and ends June 30. Section 441.46, Code of Iowa, 1977. Hence, the levy date for the taxable fiscal year beginning July 1, 1977, and ending June 30, 1978, is in March, 1978, and, if upon such levy date the real estate is owned and used by the school corporation in accordance with §427.1(2), the tax exemption is established for taxes payable in the following fiscal year (July 1, 1978 through June 30, 1979).

But, there is yet another facet to resolving the question posed and this concerns proration of property taxes. Section 427.13, last paragraph, provides:

"Previously tax exempt property under section 427.1, subsections 2 to 9 and

subsections 11 and 12, placed on the tax assessment rolls will be prorated monthly from the time of the transfer or beneficial possession."

Section 441.46 generally requires proration of property taxes on the basis of the status of the property during the assessment (calendar) year. Therefore, if the school corporation owned and used the real estate on the levy date in 1978 and on April 1, 1978, the real estate was sold to a private individual, the property taxes levied in March of 1979 against the 1978 assessment would be 3/4 of the computed amount since the property was in a taxable status for nine months during the calendar year 1978.

It is the opinion of this office that a school corporation's real estate upon which a structure has been erected by students as part of a regular course of study meets the tax exempt criteria contained in §427.1(2), provided that the real estate is in a tax exempt status on the levy date of the taxable fiscal year. Assuming that tax exempt status is attained and thereafter the real estate is sold to a nonexempt individual or entity, the property taxes will be prorated on the basis of the status of the property during the assessment year.

March 31, 1978

MUNICIPALITIES: Cable T.V. Franchises — Section 364.2(4), Code of Iowa, 1977. A city need not grant a franchise for cable T.V. even though the voters approved same at an election. Where more than one company has received a majority vote at separate elections the city may grant a franchise to only one. If a company is named on the ballot, and receives a majority of the votes, a city may not grant the franchise to another company. (Blumberg to Schroeder, State Representative, 3-31-78) #78-3-18

The Honorable Laverne W. Schroeder, State Representative: We have your opinion request of March 28, 1978, regarding a Cable T.V. franchise. You stated in your letter:

"The City of Council Bluffs is preparing for an election concerning a franchise for cable T.V. I would like an opinion as to whether or not the city would be required to issue a franchise to two or more cable T.V. companies if the voters elect more than one company.

"Also, if a company receives a majority of the votes, is the city council required or mandated to issue a franchise to said company or could the city council still issue a franchise to another company to whom it felt presented a better proposal to such city."

Section 364.2(4), 1977 Code, provides:

"a. A city may grant to any person a franchise to erect, maintain, and operate plants and systems for electric light and power, heating, telephone, telegraph, cable television, district telegraph and alarm, motor bus, trolley bus, street railway or other public transit, waterworks, or gasworks, within the city for a term of not more than twenty-five years. The franchise may be granted, amended, extended, or renewed only by an ordinance, but no exclusive franchise shall be granted, amended, extended, or renewed.

"b. No such ordinance shall become effective unless approved at an election. The proposal may be submitted by the council on its own motion to the voters at any city election. Upon receipt of a valid petition as defined in section 362.4 requesting that a proposal be submitted to the voters, the council shall submit the proposal at the next regular city election or at a special election called for that purpose prior to the next regular city election. If a majority of those voting approves the proposal the city may proceed as proposed.

"c. Notice of the election shall be given by publication as prescribed in section 49.53 in a newspaper of general circulation in the city.

"d. The person asking for the granting, amending, extension, or renewal of a franchise shall pay the costs incurred in holding the election, including the costs of the notice. A franchise shall not be finally effective until an acceptance in writing has been filed with the council and payment of the costs has been made.

"e. The franchise ordinance may regulate the conditions required and the manner of use of the streets and public grounds of the city, and it may, for the purpose of providing electrical, gas, heating, or water service, confer the power to appropriate and condemn private property upon the person franchised."

There can be no doubt that prior to granting a franchise for cable T.V. a municipality must conduct an election on the question. However, this section does not speak to the granting of the franchise after the election. We assume from your questions that the companies desirous of getting the franchise are named on the ballot.

The city could present the question of separate companies in two forms. One ballot could name the various companies with the voters choosing the one they want, assuming they want a franchise granted. Or, the city could hold separate elections for each company. In the first instance, assuming the voters favor a franchise, there would be only one winner. In the second, however, the voters could favorably vote for more than one. This can occur because only a bare majority of those voting is necessary. *Interstate P. Co. v. Forest City,* 225 Iowa 490, 281 N.W. 207; *Abbot v. Iowa City,* 224 Iowa 698, 277 N.W. 437; 1911-12 O.A.G. 578.

An affirmative vote authorizes the council to act but does not require it to act. *Baird v. City of Webster City,* 256 Iowa 1097, 1114, 130 N.W.2d 432; *Iowa Public Service Co. v. Tourgee,* 208 Iowa 36, 222 N.W. 882. Section 364.2(4)(b) further points this out when it provides that if a majority of the voters approves the franchise proposal "the city *may* proceed as proposed." [Emphasis added]. The word "may" is emphasized because it is not a word normally used to indicate a mandatory function.

What this means is that even though the voters approve a franchise, the city need not grant a franchise. Thus, in answer to your first question, if the voters approve different franchises the city has discretion on the granting of the franchises. It may grant to both, grant to none or grant to only one.

While still assuming that the company will be named on the ballot, we respond to your second question. Generally, where a statute requires an election on the granting of franchises to companies the ratification by the voters is a condition precedent to the right of such companies to be granted the franchise. 64 C.J.S., *Municipal Corporations* §1730 (1950). Thus, it can be said that although where the voters specifically approve one company, the city need not grant a franchise, where it does grant a franchise it must be to the company named on the ballot. Otherwise, the election would constitute a useless act.

Accordingly, we are of the opinion that a city need not grant a franchise for Cable T.V. even though the voters approve it; and, where more than one company receives a majority vote in separate elections the city can decide which company, if any, to grant the franchise. If a company is named on the ballot and receives a majority of the vote, the city may not grant the franchise to another company not named on any ballot.

March, 1978

CONTRACTS

Claims; General Assembly; Retroactive Application. Article III, §31, Constitution of Iowa; H.F. 2329, 67th G.A., 2nd (1978), is prospective in its operation and no funds appropriated thereunder may be used to pay for services rendered prior to its becoming a law and which cannot be paid unless allowed by two-thirds of the members elected to each house of the general assembly. (Turner to Harbor, State Representative, 3-21-78) #78-3-14

COUNTIES AND COUNTY OFFICERS

Sheriff. There is no authority for the sheriff to provide answering service for private business or utility companies. (Nolan to Murphy, Clarke County Attorney, 3-16-78) #78-3-10

Hospitals. Chapter 347A, §347.13, Code of Iowa, 1977. (1) the mandates of §347.13 do not apply as a limitation upon the powers and duties of trustees of a hospital organized and operating under Chapter 347A of the Code; (2) such provisions may be adopted by the trustees pursuant to Chapter 347A and §347.24; (3) the optional powers of Chapter 347 may also be exercised by trustees under Chapter 347A. (Nolan to Straub, Kossuth County Attorney, 3-16-78) #78-3-7

Conference Board. §441.2, Code of Iowa, 1977. A community school board is entitled to representation on the County Conference Board even though all the school board members live in a city having its own conference board. (Nolan to Curnan, Dubuque County Attorney, 3-16-78) #78-3-9

County Fair Societies. Chapter 174, Code of Iowa, 1977. A fair society which would ordinarily be entitled to receive state aid under §174.1 may be precluded from this assistance by the existence of another fair society in the same county which has been in existence for ten years. A society which does not qualify for state aid under §174.11 may be eligible to receive county aid under §174.13. (Nolan to Schwengels, State Senator, 3-16-78) #78-3-3

Extent of Coverage of County Indemnification Fund. §§39.17, 111A.6, 137.20, 230A.12, 252.27, 332.36, Code of Iowa, 1977. A county attorney and his assistants and the employees of the county conservation board, the county board of health, the county care facility, and the county legal aid program are covered by the county indeminification fund for their errors or omissions. Medical malpractice coverage exists for employees of the county board of health and the county care facility. However, the employees of a community mental health center, even though funded in part by the county, are not covered. (Haskins to Hoth, Des Moines County Attorney, 3-16-78) #78-3-6

Official Newspapers. §§349.4, 618.3, Code of Iowa, 1977. Where the paid circulation of a newspaper is the same on the date of application for second class mailing rates in December 1975 as the paid circulation recognized by the postal services when the application was granted. (May 1976), the newspaper meets the requirements of §618.3, and is eligible to be selected as an official county newspaper. (Nolan to Branco, Ida County Attorney, 3-27-78) #78-3-15

CRIMINAL LAW

Minimum Sentences; Good Time and Honor Time Calculations. §§204.13, 246.38, 902.7, 902.8, 906.5, Code of Iowa, 1977, as amended. Persons who are committed to the director of adult corrections and to whom the provisions of

the minimum sentence requirements of the above sections apply are not eligible for parole until they have been confined for the minimum specified period of time but nevertheless are still eligible for good time and honor time benefit under the reduction of sentence provisions of §246.38. The reduction of sentence provisions do not apply to shortening the minimum terms of confinement prescribed by §§204.13, 902.7, 902.8 and 905.6 of the Iowa Criminal Code. (Williams to McCauley, Directory of Adult Corrections, 3-2-78) #78-3-1

Minimum Sentence for Felon with Prior Forcible Felony Conviction. §§246.38, 246.43, 801.5 and 906.5, The Code, 1977. Only persons convicted of crimes committed on or after January 1, 1978, are subject to the mandatory minimum sentence provisions of §906.5. Persons subject to the mandatory minimum provision of §906.5 are ineligible for parole until they have served one-half of the maximum term of their sentences. "Good" and "honor" time earned under §246.38 and §246.43 are not related to mandatory minimum sentences. (Williams to Olson, Exec. Secy., Iowa Board of Parole, 3-16-78) #78-3-5

MENTAL HEALTH

Community Mental Health Centers; County Boards of Supervisors. §230A.3 and 230A.13, Code of Iowa, 1977 The county board of supervisors may finance a community mental health center organized under §230A.3(2), through receipt and approval of the annual budget of the community mental health center pursuant to §230A.13, rather than requiring the submission of a claim to the county for each patient served on behalf of the county. Financing of a community mental health center by county approval of the center's annual budget may be the preferred method of funding a center organized under §230A.3(2). Community mental health centers which are financed by county boards of supervisors pursuant to §230A.13, through the approval of the center's annual budget, need not, but may, require the submission of the name or other personally identifiable information relative to patients served by the center on behalf of the county. This lack of a requirement of submission of a name is in contradistinction to situations involving those community mental health centers which receive funding from the county through the submission of a claim to the county for each patient served on behalf of the county. (O'Meara to Burk, Assistant Black Hawk County Attorney, 3-21-78) #78-3-12

MUNICIPAITIES

Cable T.V. Franchises. §364.2(4), Code of Iowa, 1977. A city need not grant a franchise for cable T.V. even though the voters approved same at an election. Where more than one company has received a majority vote at separate elections the city may grant a franchise to only one. If a company is named on the ballot, and receives a majority of the votes, a city may not grant the franchise to another company. (Blumberg to Schroeder, State Representative, 3-31-78) #78-3-18

SCHOOLS

School Parking Lots. Authority of city police to ticket cars on school parking lots depends on local ordinance. (Nolan to Spencer, State Representative, 3-16-78) #78-3-8

STATE OFFICERS AND DEPARTMENTS

Arts Council; Copyright. PL 94. The mere grant of funds to an artist does not alone establish a copyright interest in the work produced. (Nolan to Olds, Executive Director, Iowa Arts Council, 3-16-78) #78-3-4

Department of Transportation. §§17A.2(7) and 307.26(3), Code of Iowa, 1977. If an agency statement concerns only internal management of the agency and does not substantially affect the legal rights of or procedure available to the public or any segment thereof, the statement need not be enacted as an administrative rule under Chapter 17A. (Tangeman to Krause, State Representative, 3-13-78) #78-3-2

State Department of Health; Hospital Rate Review Programs; Anti-Trust Exemption. §§16, 17 and 18, Chapter 75, Acts of the 67th G.A., 1977 Session. Amendment #H 5568, H.F. 630, Acts of the 67th G.A., 1978 Session. State Health Department may contract for establishment of programs dealing with prospective rate review in hospitals if state takes an active part in such programs. "State action" exemption to antitrust law applies. (Swanson to Middleton, Chief, Division of Health Facilities, 3-29-78) #78-3-16

Foster Care Cost. §§4.7, 232.18, 232.22, 232.26, 232.33, 232.34, 232.51, 234.6(7)(b), 234.35, 234.36, 234.39, 242.7, 444.12(2), 444.12(5), Code of Iowa, 1977. The State is not responsible for paying the cost of care for a child who has been placed in the county juvenile home from foster care funds. The State, however, is responsible for paying the cost of foster care for a child pursuant to §§234.35 and 234.36 where the court has ordered same under §§232.33, subsections 3 or 4, or 232.34, subsections 3 or 4. (Robinson to Sarcone, Special Counsel, Polk County Board of Supervisors, 3-31-78) #78-3-13

TAXATION

School Corporation Real Estate With Student Erected Structures. §§297.22, 427.1(2), 427.13, 441.46, Code of Iowa, 1977. A school corporation's real estate upon which a structure has been erected by students as part of a regular course of study meets the tax exempt criteria contained in §427.1(2), provided that the real estate is in a tax exempt status on the levy date of the taxable fiscal year. Assuming that the tax exempt status is attained and thereafter the real estate is sold to a nonexempt individual or entity, the property taxes will be prorated on the basis of the status of the property during the assessment year. (Griger to Benton, State Superintendent of Public Instruction, 3-30-78) #78-3-17

USURY

Business Tranactions. Chapters 535.2(1), 535.2(2), 535.4 and 537.1301(13) and (15). The maximum interest rate that can be charged to a business organized as a partnership or sole proprietership is 9% per year on written contracts and 5% per year on other contracts. Said interest does not begin to accrue until six months after the date of the last item on an open account. (Garrett to Chiodo & Smalley, State Representatives, 3-20-78) #78-3-11

STATUTES CONSTRUED

Code, 1977	Opinion
4.7	78-3-13
17A.2(7)	78-3-2
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111A.6	78-3-6
137.20	78-3-6
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204.13	78-3-1
230A.3	78-3-12
230A.3(2)	78-3-12

230A.12	78-3-6
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441.2	78-3-9
441.46	78-3-17
444.12(2)	78-3-13
444.12(5)	78-3-13
535.2(1)	78-3-11
535.2(2)	78-3-11
535.4	78-3-11
537.1301(13)	78-3-11
537.1301(15)	78-3-11
618.3	78-3-15
801.5	78-3-5
902.7	78-3-1
902.8	78-3-1
906.5	78-3-1
906.5	78-3-5

67th GENERAL ASSEMBLY

H.F. 630	78-3-16
H.F. 2329 (2nd)	78-3-14

CONSTITUTION OF IOWA

Art. III, §31	78-3-14
Ch. 75, §§16, 17, 18	78-3-16

April 3, 1978

JUDGES: BOARDS OF DIRECTORS OF DISTRICT DEPARTMENTS

OF CORRECTIONAL SERVICES: ELIGIBILITY - Art. III, §1, Art. IV, §1, Art. V, §18, Iowa Constitution; Ch. 154, §§2, 3, 4, 67th G.A. (1977); §6(G), Code of Judicial Conduct. Judges of the District Court are constitutionally ineligible to the office of member of the Board of Directors of the Judicial District Department of Correctional Services. (Hayward to McCauley, Director of Adult Corrections, IDSS, 4-3-78) #78-4-1

Mr. Roland McCauley, Director: You have asked this office whether a District Court Judge can serve as a member of the Board of Directors of the Judicial District Department of Correctional Services established by the General Assembly in Chapter 154, Section 3, 67th G.A. (1977). It appears that such service is in conflict with the Constitution of the State of Iowa. Art. III, §1; Art. IV, §1; and Art. V, §§1 and 18.

Your letter specifically inquired about the effect of Art. V, §18, on this question. That section reads, 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."

Art. III, §1 of the Constitution of the State of Iowa is also applicable. It reads:

"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."

The Iowa Supreme Court ruled that Art. V, §18, of the Iowa Constitution violated the equal protection clause of the Fourteenth Amendment to the United States Constitution insofar as it served to bar District Court judges from immediate appointment to the Iowa Court of Appeals. *Redmond v. Carter,* 1977, 247 N.W.2d 268. The Court based its decision on the fact that there was no reasonable basis for disqualifying District Court judges as a class from serving on the Court of Appeals. However, the Court did not state that Art. V, §18, of the Iowa Constitution would be unconstitutional in all other applications.

The *Redmond* case was based on the lack of a reasonable basis for discriminating against District Court judges in that particular context. The Court noted that the position of appellate judge and district judge were both Judicial positions. Therefore, there was no separation of power problem. The Court also noted that the nonpartisan nature of the offices created no threat of trafficking in public office.

The office of member of the Board of Directors of the Judicial District Department of Correctional Services is an Executive position. The Board is responsible for the administration of the Community Corrections Program in the district. Service by a District Court judge on that Board would provide a classic violation of the doctrine of separation of powers.

District Court judges serving on such boards would be also facing a potential conflict of interest. It is quite possible that claims could be filed in their courts regarding the administration of Correctional Services in their district. Such claims could be filed by the State, county, or persons employed by or participating in its programs. This problem is noted in §6(G) of the Code of Judicial Conduct which states:

"A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy or matters other than the improvement of the law, the legal system, or the administration of justice." Vol. II, Iowa Code, 1977, p. 3674.

For the foregoing reasons, there is a reasonable basis for making judges ineligible for service on the Board of Directors of Judicial District Correctional services. Therefore, there is no discrimination violating the Fourteenth Amendment equal protection clause as was found in the *Redmond* case. Art. V., §18, of the Iowa Constitution is applicable to membership on such boards as "an office of the state". The Iowa Supreme Court has set forth five criteria which have been applied to the term "public office" in a variety of contexts including corruption of a public official, *State v. Spaulding,* 1897, 102 Iowa 639, 72 N.W. 288; workers' compensation, *Hutton v. State,* 1944, 235 Iowa 52, 16 N.W.2d 18; corruption of a public official, *State v. Taylor,* 1967, 260 Iowa 634, 144 N.W.2d 289; malicious prosecution, *Vander Linden v. Crews,* 1973, 205 N.W.2d 686. The criteria are:

"(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." *Vander Linden v. Crews,* 205 N.W.2d at 688.

These boards are expressly established by the Legislature in Chapter 154, §2, 67th G.A. The boards are delegated a portion of the sovereign power of the government. Such power has been broadly defined as acting "on behalf of the public". *State v. Taylor,* 1967, 260 Iowa at 640. See also 81 1A C.J.S. *States* §16 (1977). The duties and powers of the boards are specifically set forth in Chapter 154, §4, 67th G.A. The boards act independently, without the control of a superior power other than the law. The Iowa Department of Social Services may set standards, but the boards have complete latitude within those standards in the selection of facilities, acceptance of gifts, raising funds in the private sector and the expenditure of funds. The District Department is under the direction of the board, Chapter 154, §2, 67th G.A. It is not necessary that all duties of a position be independent, as long as those which are independent are substantial. *Hutton v. State,* 1944, 235 Iowa at 57. Finally the position is one with permanence and continuity. The Legislature gives no indication thay they intended to create anything other than an ongoing program.

This office is of the opinion that service by a District Court judge on the Board of Directors of the Judicial District Department of Correctional Services is barred as a violation of the doctrine of separation of powers by Art. III, §1, of the Iowa Constitution. Furthermore, Art. V, §18, of the Iowa Constitution makes judges ineligible for service on said Board of Directors.

April 3, 1978

COUNTIES: Employees. Except as limited by a collective bargaining agreement under Chapter 20, Code of Iowa, 1977, each county officer has sole determination of vacation, sick leave and working hours of employees under his jurisdiction. (Nolan to Schlue, Benton County Attorney, 4-3-78) #78-4-2

Mr. Larry D. Schlue: This is written in response to your request for an

opinion on the following question:

"Can the Board of Supervisors prescribe uniform work policies for all county employees or does each elected official have the right to prescribe work policies for his or her own office employees. Work policies would include vacation time, sick leave, and other policies related to the working time of the employees in the office of an elected official."

Except in so far as the proposed uniform work policies may be a part of a collective bargaining agreement between the board of supervisors and an employee organization entered into and pursuant to Chapter 20, Code of Iowa, 1977, each county officer has sole determination of vacation time, working hours and sick leave of employees under his jurisdiction. 1964 O.A.G. 118.

April 3, 1978

AUDITOR: Industrial Loans. §536A.8, Code, 1977. The maximum amount of a loan made by an industrial loan licensee is to be determined by the location of the office where there is no breakdown of the capital, surplus or undivided profits for each of the licenses issued for places of business of a corporation holding more than one license and meeting only the minimum requirements of §536A.8 for the aggregate of the licenses issued. (Nolan to Wilson, Supervisor, Industrial Loan Division, 4-3-78) #78-4-3

Mr. K. R. Wilson, Supervisor, Industrial Loan Division: You have requested an opinion on the following situation:

"Section 8 of the Industrial Loan Law sets out the minimum capital stock and surplus requirements for each corporation.

"Section 25 sets the maximum loan to any one borrower as 20% of capital, surplus and undivided profits.

"I request your opinion as to the maximum loan any one office of a multiple licensee corporation can make.

"Example: Corporation "A" has 30 licenses. The capital is the minimum required as aggregate of the 30 licenses.

Capital	$1,075,000
Surplus	2,947,159
Retained Income	(56,275)
Total	$3,965,884
	x 20%
	$ 793,176

"From this example, can each of the 30 licensees make a maximum loan of $793,176?

"If the opinion is no, then what would be the maximum loan that any one of the licensees would be allowed to make?"

Your letter also indicated that the example is typical of the chain corporations where there is no breakdown of the capital, surplus or undivided profits for each of the thirty licensees.

It is the opinion of this office that the maximum loan which can be made in the situation given would be dependent upon the location of the office from which the loan was made. The language of §536A.8 requires paid in capital stock of $25,000 when the corporation transacts business in a city having less

than 25,000 population and paid in capital stock of $50,000 in other offices in addition to the required surplus of 10 percent of the capital stock. Thus, it is not possible to merely divide the total capital surplus and undivided profits by 30 to establish the maximum loan which can be made to a borrower. This amount can be determined, however, according to the proportionate share of the corporation's total capital surplus and undivided profits which are credited under the licensing procedure to the particular place of business where the loan is to be made.

April 4, 1978

COUNTIES AND COUNTY OFFICERS: Business Licenses. §§332.23, 332.24, 332.25, 137.6, Code of Iowa, 1977. Grocery stores located in unincorporated area of county are required to be licensed by the county under §332.25. Local health board fees for inspection are not necessarily included in the county license fee. (Nolan to Burk, Asst. Black Hawk County Attorney, 4-4-78) #78-4-4

Mr. Peter W. Burk, Assistant Black Hawk County Attorney: We have received your letter requesting an interpretation of the county business license statute in the 1977 Code of Iowa. Your letter states:

"A question has arisen in Black Hawk County, Iowa, as to whether grocery stores in the unincorporated areas of the county are required to have a business license as provided in Chapter 332.23 and 332.24.

"We note that under the general definition of 'foodstuffs' groceries are normally included. We also note that in §332.23 the legislature separated foodstuffs from prepared food or drink—thus leading us to the conclusion that the legislature intended prepared food restaurants to be distinguished from other types of establishments where foodstuffs are available (such as grocery stores).

"The matter is of some importance because of the provision in §332.25 that requires all businesses covered to obtain a license.

"As a collateral question: the Black Hawk County Board of Health is considering an increase in its inspection fees in the unincorporated areas of the county. Assuming that the local board otherwise complied with the requirements of §137.6, do the provisions of §§332.23 and 332.24 limit the amount that can be charged to $10?

"We would appreciate your opinion as to these matters."

We agree with your conclusions that grocery stores are indeed included within the provision of §332.23 which provides in pertinent part:

"For the purpose of promoting the health, safety, recreation, and general welfare of the people of the county, the county board of supervisors shall have the power to regulate and license outside the limits of an incorporated city any...business establishment open to the public and located on or accessible to a road or highway outside the limits of an incorporated city where...foodstuffs, prepared food or drink is furnished to the general public for hire, sale or profit."

The application and fee prescribed by the Board of Supervisors for the license to operate such business is provided for in §332.24 of the Code which states:

"No person shall engage in the business activities specified in section 332.23 without first obtaining a license from the county board of supervisors. Upon application being made as herein provided and upon the payment of a fee

prescribed by the county board of supervisors, not to exceed ten dollars per license, the board shall issue a license to the applicant for a period of not less than six months nor more than one year...."

We agree with your conclusion that the definition of foodstuffs includes groceries. Webster's Seventh New Collegiate Dictionary defines foodstuff:

"A substance with food value."

It should be noted also that grocery stores are included in the definition of "food establishments" under §170.2 of the Code. In an opinion of April 17, 1970 (1970 O.A.G. 579) this office advised that both the county and the State Secretary of Agriculture have specifically delegated power under the Iowa Code to license food establishments. Such coexisting powers are not inconsistent with each other but are independently exercised and enforced according to the appropriate statutory provisions. Accordingly, a grocery store is required to obtain two licenses (one county and one state) and is subject to inspection and such other rules and regulations as may be promulgated in connection with the licenses.

The collateral question which you presented must be answered with reference to the requirements of the county license. If the county license provisions state that a part of the license fee will be used to cover the cost of local health inspection then it is our view that the statutory limitation of ten dollars would preclude the local health board from raising its inspection fees for businesses licensed by the counties. If the county license fee does not include an inspection by the local board of health then that board may fix and collect fees pursuant to §§137.6 and 137.7 of the Code.

April 4, 1978

STATE OFFICERS AND DEPARTMENTS: Arts Council; Grants. Chapter 304A, Code of Iowa, 1977. A grant or contract to provide art supplies does not necessitate that the State take title to the completed work unless a matching federal grant requires it. If it can be shown that the granting of fellowships will stimulate or encourage public interest and participation in the arts there may be a basis for such an award by the Arts Council. (Nolan to Olds, Executive Director, Iowa Arts Council, 4-4-78) #78-4-5

Mr. Jack Olds, Executive Director: This letter is written in response to your request for an opinion on the following two questions in regard to aid to individual artists as submitted by the Iowa Arts Council:

"1. If a grant or contract is awarded for Art Supplies to be used in the creating of Art Works, does the title to the Art Works retain with the Arts Council or State of Iowa?

"2. Does the Iowa Arts Council have the authority to award fellowships (funds are awarded to artists to better themselves) where a specific service is not completed. All the other Arts Council grant/contracts require that a project or service is to be performed or completed. I can find no other example, within State Government, of fellowships being made by State Agencies.

The authority of the State Arts Council is set out in Chapter 304A of the 1977 Code of Iowa. Under §304A.5 one of the duties of the director is to "stimulate and encourage throughout the State a study and presentation of the performing and fine arts and public interests and participation therein." For this purpose the director is authorized under §304A.6(5) to accept any federal funds granted, by Act of Congress or by Executive Order, for all or any purpose of this

Chapter, and receive and "disburse as the official agency of the State any funds made available by the National Foundation on the Arts."

Appropriations made to the Arts Council are for support and maintenance of the central office to match federal fund grants. A grant made by the Arts Council need not require that the State exercise any rights of ownership of the completed work if the federal matching program does not specify otherwise. This does not mean however, that the State cannot acquire such works either by agreement with the artist or by purchase.

We find no specific authority for the Iowa Arts Council to award fellowships to individual artists. However, if it can be shown that such self-improvement study will stimulate and encourage public interests and participation in the fine arts or that the grant is made for purposes which are consistent with the purpose of extending the council's Arts and Older Americans Program to county care facilities as provided for in Chapter 4, Acts of the 67th General Assembly, 1977 Session, then there may be basis for awarding such fellowships.

April 11, 1978

ALCOHOLISM; COUNTIES AND COUNTY OFFICERS: §§125.2, 125.17, 1977 Code of Iowa; Chapter 74, §§3, 27, Acts of the 67th G.A. A peace officer has no obligation to take to a facility for treatment a person who is intoxicated by a chemical substance but who is not in need of help. (Haskins to Correll, Black Hawk County Attorney, 4-11-78) #78-4-6

David H. Correll, Black Hawk County Attorney: Your question relates to the duty of peace officers to take persons intoxicated or incapacitated by alcohol or drugs to treatment facilities. It arises from the language of §125.17, 1977 Code of Iowa, as amended by Chapter 74, §27, Acts of the 67th G.A., which states:

"1. An intoxicated person may come voluntarily to a facility for emergency treatment. A person who appears to be intoxicated or incapacitated by a chemical substance in a public place *and in need of help* shall be taken to a facility by a peace officer. If the person refuses the proffered help, the person may be arrested and charged with intoxication." [Emphasis added].

Your question boils down to whether every person who is intoxicated or incapacitated by alcohol or drugs in a public place is, *ipso facto,* "in need of help" so that he or she must be taken to a facility for treatment.

The terms "intoxicated person" and "incapacitated by a chemical substance" contained in §125.17 are defined by §125.2, 1977 Code of Iowa, as amended by Chapter 74, §3, Acts of the 67th G.A., as follows:

8. "Incapacitated by a chemical substance" means that a person, as a result of the use of a chemical substance, is unconscious or has his or her judgment otherwise so impaired that he or she is incapable of realizing and making a rational decision with respect to the need for treatment.

10. "Intoxicated person" means a person whose mental or physical functioning is substantially impaired as a result of the use of a chemical substance."

We believe that the above definitions are too ambiguous to be useful here.

Obviously, the words "in need of help" in §125.17 must be given independent content, for otherwise they would be superfluous. Giving them independent content means that they must refer to something over and above mere intoxication. This accords with everyday experience. A person can be intoxicated,

and yet not be "in need of help", either in the sense of requiring long term treatment or immediate physical assistance. Unless it is assumed — which it cannot — that intoxication *per se* indicates a problem requiring long term treatment or a need for immediate physical assistance, it cannot be said that merely because a person is intoxicated, as that concept is ordinarily understood, he or she is in need of help. Thus, we conclude that a peace officer has no duty to take to a facility for treatment a person who is intoxicated but who is not in need of help.

Of course, if an intoxicated person is not in need of help he or she may be arrested for public intoxication if he or she is in public. Only if the person is in need of help must he or she be offered the prospect of going to a facility before being arrested for public intoxication. *See* §125.17, *supra.*

April 12, 1978

MUNICIPALITIES: Publication of Council Minutes. §§372.13(6); 618.8 and 618.11, Code of Iowa, 1977. The municipality can direct the type size and form of the required publication. However, claims should be listed in tabulation form so as to be easily readable. The monthly salaries of each employee need not be published with the council minutes if the gross yearly salaries are otherwise published. (Blumberg to Sween, Hardin County Attorney, 4-12-78) #78-4-7

Jim R. Sween, Hardin County Attorney: We have your opinion request of December 3, 1977, regarding the publication of city council proceedings. You specifically ask:

1. Can a municipality legally request that claims be published in a straight-line or paragraph form rather than tabular form? The straight-line form is less expensive; the tabular form probably easier to read. The City Attorney has rendered the opinion that the straight-line form is permissible under the Iowa Code, based principally on *Spencer Publishing Co. v. City of Spencer,* 92 N.W.2d 633, and an Attorney General's Opinion issued November 4, 1971.

2. How much detail is required to satisfy the requirement in Section 372.13(6) of the Code that a list of all claims allowed must be published? The City feels it is sufficient to list the claimant, the general nature of the purchase, unless obvious, and the amount. For example:

N.W. Bell Telephone	$ 20.00
Jones Hardware, supplies	$ 10.00
Smith Gas Station, fire truck repair	$ 30.00
Brown Const. Co., street repairs	$1,000.00

The editor of the newspaper feels that examples are legally insufficient; the first example because no explanation is given for the claim, and the others because the explanation is too general.

3. Does the publisher have any control over the type size used by the paper in printing council proceedings? The City claims it can request the least expensive type size available at the newspaper. The editor claims the right to choose the type size so long as it is between 5 point type and 10 point type.

4. Is it necessary to list, on a monthly basis, the amount of salary paid each City employee? The City claims it can simply list the amount of total salaries paid out of each fund, provided that gross salaries for each employee are published at least annually. Salaries for new employees, or salaries which are

adjusted would appear in the council minutes. The editor insists that each employee's gross wages must be listed individually each time checks are approved by the council, with the exception of those salaries set by Ordinance.

Section 372.13(6) provides in pertinent part:

"Within fifteen days following a regular or special meeting of the council, the clerk shall cause the minutes of the proceedings of the council, including the total expenditure from each city fund, to be published in a newspaper of general circulation in the city. The publication shall include a list of all claims allowed and a summary of all receipts and shall show the gross amount of the claim. Matters discussed in closed session pursuant to section 28A.3 shall not be published until entered on the public minutes.

In an earlier opinion, 1972 O.A.G. 284, when faced with a similar question to your questions two and four, and a similar wording of the statute, we held:

Clearly, the statute requires showing not only of the total expenditures from each municipal fund, but a statement summarizing all receipts and a list of all claims and disbursements. This means the clerk should set up a list of every claim allowed under each municipal fund, showing to whom the claim was allowed, what it was for, in what amount and the total of claims from each fund. If a claim is allowed in less than the gross amount, the gross amount of the claim as well as the part allowed must be shown.

Since the statute does not specifically indicate what is sufficient listing of the claims, and our prior opinion did not specify anything other than a statement of what the claim was for, we cannot state precisely the amount of detail necessary. However, the examples you list appear to be sufficient. If the payee's name suggests the purpose of the payment, as in the case of the telephone company, the purpose need not be stated.

We do not believe that a municipality must publish each month the salary paid to each employee when the annual salary and changes are otherwise published. A municipality must, however, each month indicate the total amount of expenditure from each fund, which would include the total amount of the salaries. And of course, amounts paid to occasional, casual, temporary employees and others who do not receive an annual salary would have to be listed.

In *Spencer Publishing Co. v. City of Spencer,* 1958, 250 Iowa 47, 92 N.W.2d 633, the Court spoke to the issue of listing the claims in straight line as opposed to tabular form. However, it did not reach a decision on the issue. We believe that the information should be easily readable and listed in tabular form to achieve that end.

Section 618.11, 1977 Code of Iowa, provides:

"The compensation, when not otherwise fixed, for the publication in a newspaper of any notice, order, citation, or other publication required or allowed by law, shall not exceed twenty-four cents for one insertion, and sixteen cents for each subsequent insertion, for each line of eight-point type two inches in length, or the equivalent thereof. In case of controversy or doubt regarding measurements, style, manner or form, said controversy shall be referred to the executive council, and its decision shall be final."

This section sets forth the maximum that can be charged for publication based upon a two inch line of eight-point type. It does not specify the size of type or column that must be used. A similar question to yours was decided in *Brown & Co. v. Lucas County,* 1895, 94 Iowa 70, 62 N.W. 694. There, the maximum

was based on a square of ten lines of brevier type or its equivalent. The court held (94 Iowa at 73-74, 62 N.W. at 695):

"We think the legislative intent was, not to fix a compensation for filling a certain space with printing, of whatever kind, but to fix a compensation for a particular space of a particular kind of printing, and make it the standard by which other kinds of printing could be measured and compensated.... With the square in brevier type as a basis, if a different form of work is desired, by which the same space will cost less, then less is to be paid for it. If it costs more for the same space, then more is to be paid. The payment is to be made, at all times, on the basis of the fixed compensation for the specified space and form of printing.

Our office has previously interpreted this case, and held (1917-1918 O.A.G. 556, 557:

We believe it was the intention of the legislature to fix the compensation for a particular space of a particular kind of printing and make it the standard by which other kind of printing could be measured and compensated. That is to say, first, if the kind of printing matter is the same as the standard but the amount of such matter is more or less (that is to say, the type is larger or smaller) then the compensation would be more or less as the same compares with the said standard.

Second, if the kind of printing matter is different, for instance, tabulated instead of straight matter, then the compensation shall be increased if the cost of the work is more, or decreased if such cost is less, at all times using the cost of performing the standard as a basis of determination.

With the ten lines in brevier type as a basis, if a different form of work is desired by which the same space will cost less, then less is to be paid for it. If it costs more for the same space, then more is to be paid. If the same form of work is desired but the size of the type is less, then more is to be paid for it, but if the same form of work is desired and the size of the type is larger, then less is to be paid for it.

The payment is to be made at all times on the basis of the said standard for the specified space and form of printing. See *Chas. D. Brown Co. v. Lucas County*,94 Iowa 70.

Thus, whatever size or style of type or form is used, the charge is to be computed in relation to the charge for a two inch line of eight-point type.

Accordingly, we are of the opinion that:

1. Claims should be published in tabular form so as to be easily readable.

2. The examples you cited in your second question should suffice for an explanation of the claim.

3. The municipality can direct the type size and form of the publication, and it shall be printed as such unless the size and form used is illegible.

4. It is not necessary to list each employee's salary each month if the gross yearly salary is otherwise published.

We should indicate that, pursuant to §618.8, if the publication is refused, after tender of copy and payment, another newspaper at or nearest the county seat can be used.

April 17, 1978

WEAPONS: PERMIT TO PURCHASE PISTOLS OR REVOLVERS: Sections 724.16, 724.17, 724.18, 724.19 and 724.20, Supplement to the Code 1977. A person does *not* need to obtain a permit to purchase for each separate pistol or revolver purchased. The law requires a person to obtain but a single permit to purchase which is valid for a period of one year after the date of application and allows the permit holder to purchase as many pistols or revolvers as desired. It is not necessary to include a description of a pistol or revolver on the face of a permit to purchase such weapons. (Cook to Erhardt, Wapello County Attorney, 4-17-78) #78-4-8

Samuel O. Erhardt, Wapello County Attorney: You have requested an opinion of the attorney general concerning Iowa's new weapon law, Chapter 724 of the Supplement to the Code 1977. Specifically, you pose the following questions for our consideration:

"Whether [§724.19] means that a separate permit has to be issued each time a dealer wants to purchase a pistol or revolver?...[C]an the Sheriff issue a permit authorizing a dealer to purchase more than one gun at a time without describing the gun, and if so is there a limitation on the number of permits which a Sheriff could issue to any one dealer at any time."

To answer your questions, it is necessary to examine those sections of Chapter 724 which pertain to the permit to purchase pistols or revolvers. Sections 724.16 through 724.20 do not specifically address the questions you raise. In construing these statutes, we may look to the legislative history and the object sought to be obtained by the Legislature in determining legislative intent. §4.6, Iowa Code (1977).

Chapter 724 of the Supplement appeared in bill form, as Division XXIV, Senate File 85 (criminal code revision). As originally drafted and adopted by the Senate, Division XXIV contained no provisions relating to a permit to purchase pistols or revolvers. During debate on the Senate version of the criminal code, an amendment (H-5842) was introduced and adopted by the House of Representatives which clearly would have required a separate permit for each purchase of a pistol or revolver. 1976 House Journal 1254-1255. The House amendment was subsequently rejected by the Senate. 1976 Senate Journal 1754. Thereafter, both Houses adopted the language proposed by the Second Joint Conference Committee on the Criminal Code Revision which appears as §§724.16 through 724.20 of the Supplement.

As finally adopted, §724.16 (Permit to Purchase Required), §724.17 (Application for Permits to Purchase), §724.18 (Mailing of Application for Permit to Purchase) and §724.19 (Issuance of Permit to Purchase) consistently refer to a "permit to purchase pistols or revolvers." Thus, all of these sections contemplate a single permit to purchase more than one pistol or revolver since the word "permit" is used in its singular form while the words "pistols or revolvers" are used in their plural form. Thereafter §724.20 establishes the period of time a permit to purchase is valid after its issuance. This section provides:

"*The permit* shall be valid throughout the State and shall be valid three days after the date of application and *shall be invalid one year after the date of application.*" (Emphasis added)

The apparent purpose of the permit to purchase provisions is to incorporate into the weapon laws a three-day period during which a person cannot purchase

a handgun. The thinking is that this waiting period, commonly referred to as a "cooling-off" period, will prevent a person in a fit of rage or anger from immediately purchasing a handgun to inflict injury or death upon a victum. The person, under the law, would first have to make application to the sheriff for a permit to purchase and then wait three days from the date of application before the handgun purchase could be made. By rejecting the House amendment which would have required a permit for each handgun purchase and adopting §724.20 which makes a permit to purchase valid for "one year after the date of application", we discern a legislative intent to impose the three-day waiting period for the first pistol or revolver purchased but not subsequent purchases made during the period in which the permit remains valid.

Thus, after reading all of the above sections together and reviewing the legislative history and purpose of these provisions it appears that the Legislature did *not* intend to require a person to obtain a permit for each separate pistol or revolver purchased. Rather, it is our opinion, that all that is contemplated and required by the law is for a person to obtain a *single* permit to purchase pistols or revolvers which is valid for a period of one year after the date of application. A single permit authorizes the permit holder to purchase as many pistols or revolvers as desired during the period the permit is valid.

You raise one further question by implication in your letter to us. You indicate that it may be necessary to include a description of a particular weapon on the face of a permit to purchase.

While a description of a pistol or revolver is required to be included in a "report and record of sale" of such weapons under §724.15, such a description is not required by the provisions pertaining to a permit to purchase pistols or revolvers. Pursuant to §724.19, the only information required to appear on the face of a permit to purchase is the permit holder's name, social security number, and residence and the effective date of the permit.

April 17, 1978

MUNICIPALITIES: Franchise Elections; Cable Television. §§47.6, 364.2, 364.6, Code of Iowa. A city council is not required to submit all cable television franchise proposals timely received by it at the same election although it is free and encouraged to do so. In any event, any proposal received by a council must be submitted to a vote of the people within a reasonable time. Additional proposals may not be added to an already scheduled election without notification to the county commissioner of elections as required by §47.6 although substantial compliance with the time requirements of that section is sufficient. (Haesemeyer to Schroeder, State Representative, 4-17-78) #78-4-9

Honorable Laverne W. Schroeder, State Representative: Reference is made to your letter of April 13, 1978, in which you request an opinion of the Attorney General and state:

"The City of Council Bluffs has adopted a resolution calling for a special election on May 16, 1978, for the purpose of submitting to the voters a proposal as to whether a certain applicant shall be granted a non-exclusive cable TV franchise as authorized by Section 364.2, Code of Iowa.

"If a petition complying with Iowa Code Section 362.4 is filed requesting the submission to the voters of a proposal as to whether another applicant shall be granted such a similar non-exclusive franchise, would the city council be required to put that issue to the voters at the May 16 special election to give the

voters a choice between the two?

"After notifying the county election commissioner of a special election by a governing body for special election for one purpose, may any additional such proposals be added without additional notification?

"Please be advised that I have received a recent opinion dated March 31, 1978, by Larry Blumberg, concerning city franchises."

Section 364.2(4), Code of Iowa, 1977, provides:

"4. a. A city may grant to any person a franchise to erect, maintain, and operate plants and systems for electric light and power, heating, telephone, telegraph, cable television, district telegraph and alarm, motor bus, trolley bus, street railway or other public transit, waterworks or gasworks, within the city for a term of not more than twenty-five years. The franchise may be granted, amended, extended, or renewed only by an ordinance, but no exclusive franchise shall be granted, amended, extended or renewed.

"b. No such ordinance shall become effective unless approved at an election. The proposal may be submitted by the council on its own motion to the voters at any city election. Upon receipt of a valid petition as defined in section 362.4 requesting that a proposal be submitted to the voters, the council shall submit the proposal at the next regular city election or at a special election called for that purpose prior to the next regular city election. If a majority of those voting approves the proposal the city may proceed as proposed.

"c. Notice of the election shall be given by publication as prescribed in section 49.53 in a newspaper of general circulation in the city.

"d. The person asking for the granting, amending, extention, or renewal of a franchise shall pay the costs incurred in holding the election, including the costs of the notice. A franchise shall not be finally effective until an acceptance in writing has been filed with the council and payment of the costs has been made."

The notice requirements of §49.53 referred to in §364.2(4)(c) are as follows:

"Publication of ballot and notice. The commissioner shall not less than four, nor more than twenty days prior to the day of each election, except those for which different publication requirements are prescribed by law, publish notice of the election.

Consideration must also be given §47.6, which provides:

"Dates for special elections.

"1. The governing body of any political subdivision which has authorized a special election to which section 39.2 is applicable, shall by written notice inform the commissioner who will be responsible for conducting the election of the proposed date of the special election. If the proposed date of the special election coincides with the date of a regularly scheduled election, the notice shall be given no later than five o'clock p.m. on the last day on which nomination papers may be filed for the regularly scheduled election. Otherwise, the notice shall be given at least thirty days in advance of the date of the proposed special election. Upon receiving the notice, the commissioner shall promptly give written approval of the proposed date unless it appears that the special election, if held on that date, would conflict with a regular election or with another special election previously scheduled for that date.

"2. For the purpose of this section, a conflict between two elections exists only when one of the elections would require use of precinct boundaries which differs from those to be used for the other election, or when some but not all of

the qualified electors of any precinct would be entitled to vote in the other election. Nothing in this subsection shall deny a commissioner descretionary authority to approve holding a special election on the same date as another election, even though the two elections may be defined as being in conflict, if the commissioner concludes that to do so will cause no undue difficulties."

The March 31, 1978 opinion of the Attorney General to which you refer involved two questions. The first was whether or not a city would be required to issue its franchise to two or more cable TV companies if the voters approved more than one company. The second question was whether or not a city council would be required to issue a franchise to a company which had received voter approval or could it issue a franchise to another company which had also received voter approval. The opinion concluded that if the voters approved different proposals the city has discretion in the granting and withholding of franchises. It could grant to both, grant to none, or grant to only one. Thus, the opinion did not directly reach either of the questions you now present.

It is apparent under §364.2(4)(b) that a proposal to grant a cable television franchise may be submitted to the voters either by the council on its own motion or upon a valid petition requesting such submission. Upon the happening of either of these events, the requirement of the statute is that the council "shall submit the proposals at the next regular city election or at a special election called for *that purpose* prior to the next regular city election." Do the words "that purpose" refer to any special election already called for the purpose of approval of any cable television franchise or do they refer to a special election called only for the purpose of considering the particular cable television franchise proposal in question? In other words, in the situation you describe where a special election has already been called for the purpose of considering one cable television franchise grant is a city council obliged to submit any other timely cable television franchise proposals at the same election or may it schedule separate special elections for each such proposal or even wait until the next regular city election for one or more of them. In this connection, it is worth noting that the next regularly scheduled city election will not occur until November, 1979. Section 376.1.

In our opinion, the city council is not required to submit all proposals submitted to it at the same election although it is free to do so provided the various proposals are submitted in time to be included in the same special election. Certainly, it would be much more convenient for the voters if they had to go to the polls only once to vote on cable television franchises and it would also reduce the costs incurred by the persons seeking such franchises if the proposals were all submitted at a single special election. Moreover, the argument that the people would be confused if they had to consider more than one proposal at the same time is untenable. As stated in *Lame v. Kramer,* 259 Iowa 675, 145 N.W.2d 597, 602 (1966):

"Defendant contends under his sixth and seventh propositions the trial court should not have required him to call a special election on granting a gas franchise to private utility when the town was in the process of estabilishing its own gas distribution system pursuant to a vote of the electorate; that causing a notice of election on the question of purchasing gas from Northern and a notice on the question of granting a franchise to Iowa Power and Light to be published in the same issue of the same paper would confuse the voters; the fact plaintiffs waited until after they knew the council planned to hold an election on the contract before presenting their petition for a franchise election, justifies an inference the presentation of the franchise petition was not a good faith effort to

ascertain the desire of the people on the question of the sale of natural gas.

"Defendant's argument in support of these assignments is without merit. Elections were required on both questions by statute. We believe the voters are certainly able to distinguish an election granting a franchise from one for the purchase of gas by a municipally-owned plant. The question of plaintiffs' good faith is not involved."

The words "that purpose" in §364.2(4)(b) refer to the submission of a proposal to the voters and each such proposal in turn refers to the granting of a cable television franchise to a specific person or company. Thus, "a special election called for that purpose" refers to a special election called for the purpose of submitting a specified company's request for a franchise to the people and not to a special election called for the purpose of submitting some other company's franchise proposal to the electorate or to a special election called for the purpose of generally gaining voter approval of the granting of a cable television franchise to someone. If the statute had used the words "*any* special election", instead of "a special election" it would be reasonable to conclude that a city council would have a duty to submit company B's proposal at a special election called for the purpose of approving company A's proposal. But that is not what the statute says.

However, it is our opinion that a city council would have to submit any franchise proposal to the voters within a reasonable time after it has been sumbitted to them. For example, in the situation you present, it would not be reasonable for the city council to submit on its own motion company A's proposal on May 16, 1978, and then require all other applicants to wait until the regular city election in November of 1979. As stated in 29 C.J.S., p. 173, *Elections*, §77:

"Time is an essential element of the valid election. The time for holding an election must be fixed in advance either by law or by the officer or officers empowered by law to designate the time, and when no special length of time is required, it must be reasonable time.

"* * *

"In general, unless controlled by constitutional provision, the legislature may fix the time for holding of an election, or, as in the case of special elections, it may provide for some designated official or agency to fix it. Such official or agency may be given a discretion in fixing the date of election, but the discretion must be exercised reasonably."

While it is always difficult to determine what is a reasonable or unreasonable length of time under different circumstances, some guidance as to the short time standards applied by the Iowa Supreme Court in a §364.2(4)(b) case can be found in *Iowa Public Service Co. v. Tourgee*, 208 Iowa 36, 222 N.W. 882 (1929). There, the Court held that a mayor's delay of five days in calling a special election on a petition for an election franchise was so unreasonable under the circumstances as to justify a writ of mandamus compelling the calling of the special election.

Thus, while as we have noted, the city council is under no statutory mandate to hold more than the one election scheduled for May 16, 1978, on that date it is entirely free and encouraged to do so. Holding all elections on proposed cable television franchises on the same day would serve the convenience of the voters, reduce costs, afford the widest choice to the electorate and enhance competition among the applicants.

Turning to your second question, it is our opinion that additional proposals may not be added to an already scheduled election without compliance with the notification requirements of §47.6. Nevertheless, we do not think strict compliance with the 30-day requirement of §47.6 is demanded so long as there is substantial compliance and the commissioner of elections has sufficient time to include the additional ballot proposals. Section 364.6 provides:

'Procedure. A city shall *substantially* comply with a procedure established by a state law for exercising a city power. If a procedure is not established by state law, a city may determine its own procedure for exercising the power." (Emphasis added)

Moreover, §47.6(2) specifically confers discretion on the commissioner to hold more than one election on the same day.

April 18, 1978

CRIMINAL LAW: Minimum term for felon with prior forcible felony conviction. Section 906.5. A judge is not required to advise an individual of the potential effects of §906.5 upon him at the time of taking a guilty plea to a felony. A conviction of any crime containing all of the elements of a forcible felony under the new Iowa Criminal Code would constitute a prior conviction for the purpose of triggering the effects of §906.5. (Williams to Olson, Executive Secretary, Iowa Board of Parole, 4-18-78) #78-4-10

Mr. Donald L. Olson, Executive Secretary, The Board of Parole: You have requested an opinion of the Attorney General with respect to the following questions which relate to the determination by the Board of Parole whether an individual has a prior forceful felony conviction which would make him ineligible for parole for a certain period of time as prescribed in §906.5 of the Iowa Corrections Code:

"1. To insure fundamental fairness at time of sentencing, should the defendant be advised by the court of the minimum sentences prescribed in the above numbered sections of the new criminal code?

2. What specific prior convictions establish the mandatory minimum of one half of the maximum sentence mentioned in Section 906.5 of the new criminal code?

3. Will the latest B.C.I. and/or F.B.I. rap sheet be sufficient proof of the previous conviction of a forcible felony to determine if the minimum sentences mentioned in Section 906.5 of the new criminal code apply?"

In answer to your first question, it does not appear that the court is required under present Iowa law to make mention of the potential effect of §906.5 upon a new conviction to an individual who is entering a plea of guilty. The Iowa Supreme Court has considered an analogous type of situation involving suspended and deferred sentences, ruling that the court did not have to advise an individual that because of prior offenses he would be ineligible for a deferred or suspended sentence. *State v. Woolsey,* 240 N.W.2d 651 (Iowa 1976). It might also be noted that federal cases indicate that procedures such as dictated by §906.5 are constitutional. *Oyler v. Boles,* 368 U.S. 448, 452; *Spencer v. Texas,* 385 U.S. 656; *Wessling v. Bennett,* 410 F.2d 205.

Your second question asks what specific prior convictions trigger the mandatory minimum sentence provision of §906.5. In answering this question one must refer to three different categories of potential offenses which I shall outline for you:

A. Crimes listed in the Iowa Criminal Code which became effective January 1, 1978.

707.2 Murder in the 1st Degree
707.3 Murder in the 2nd Degree
707.4 Voluntary Manslaughter (Felonious Assault)
707.7 Feticide
707.11 Murder of Fetus Aborted Alive

A. Crimes

708.3 Assault While Participating in a Felony
708.4 Willful Injury
708.5 Administration of Harmful Substances
708.6 Terrorism
709.2 Sexual Abuse in the 1st Degree
709.3 Sexual Abuse in the 2nd Degree
709.4 Sexual Abuse in the 3rd Degree
710.2 Kidnapping in the 1st Degree
710.3 Kidnapping in the 2nd Degree
710.4 Kidnapping in the 3rd Degree
711.2 Robbery in the 1st Degree
711.3 Robbery in the 2nd Degree
712.2 Arson in the 1st Degree
713.2 Burglary in the 1st Degree

B. Code sections contained in the 1977 Code of Iowa.

690.2 First-Degree Murder
690.3 Second-Degree Murder
690.6 Assault With Intent to Murder
690.7 Assault While Masked
690.9 Poisoning Food or Drink with Intent to Kill
692.1 Killing in Duel
693.3 Mayhem
694.4 Assault While Masked
694.5 Assault With Intent to Commit a Felony
694.7 Assault With Intent to Commit Certain Crimes
697.1 Death Caused by High Explosives
697.2 Injury to Person
697.4 Damage by High Explosives
698.1 Rape
698.4 Assault With Intent to Commit Rape
706.1 Kidnapping
706.3 Kidnapping for Ransom
707.1 Arson of Dwelling House
708.4 Burglary by Means of Explosives
711.2 Robbery With Aggravation
711.3 Robbery Without Aggravation
711.4 Train Robbery
714.2 Injuring or Terrorizing Inhabitants of Dwelling

With respect to the following sections contained in the 1977 Code of Iowa, the conviction may or may not constitute a conviction "for a crime of similar gravity" to a forcible felony depending upon the specific factual circumstances. In these cases you will have to examine records of the court of conviction to

determine the factual basis of the allegations:

B. 690.10 Manslaughter - If the conviction was for voluntary manslaughter, it would constitute a prior conviction; if for involuntary manslaughter it would not.

704.1 Incest - If the record shows the victum was a child under age of 14, such violation would constitute a prior conviction.

708.2 Burglary with Aggravation - If the record shows the defendant was armed or assaulted someone during the perpetration of the crime, it would constitute a prior conviction.

Each of the sections of the 1977 Code included above is regarded as being a "crime of equivalent gravity" to forcible felony because it contains all elements of one of the forcible felony crimes listed in paragraph A.

C. Convictions from other jurisdictions.
With respect to the determination of whether a conviction from another jurisdiction is a "crime of similar gravity" the Board should:

1. Secure a copy of the relevant Code section of the foreign furisdiction.
2. Compare the foreign section with the equivalent forcible felony as contained in the Iowa Criminal Code.
   a. If the foreign conviction is for an offence containing all of the elements of the equivalent Iowa forcible felony, then it should be regarded as a prior conviction.
   b. If the foreign section constitutes a crime which could be committed in several ways, and some but not all of them are included in category (a) above, the Board should seek to determine if records of the court of conviction show that the individual committed the violation in such a manner as to fall within the scope of that portion of the law constituting the equivalent of a forcible felony.

In your third question yor are in essence asking what evidence is adequate proof of a prior conviction. I will outline for you the elements of which the Board must be satisfied along with examples of sufficient evidence of each:

1. That the prior crime is a forcible felony or a crime of similar gravity.
   a. Certified copy of the judgment entry or mittımus; and
   b. Analysis as suggested in the answer to question number 2; or
   c. Admission by the inmate.
2. That there was a conviction in the matter.
   a. Certified copy of the judgment entry or mittimus; or
   b. Admission by the inmate.
3. That the inmate is the same person as the individual involved in the prior conviction.
   a. Comparison of fingerprint records; or
   b. Personal identification; or
   c. Admission by the inmate.
4. That the inmate was not denied his right of counsel in the prior action.

a. Admission by the inmate; or

b. Excerpts from the transcripts; or

c. Testimony of Affidavit(s) of persons having knowledge of the prior conviction such as the judge, clerk of court, prosecutor or defense counsel.

Further insight into the methods of proving previous convictions is found in 39 IA.L.REV. 153 (1953) - *Methods of Proving Previous Convictions Under the Iowa OMVI and Habitual Criminal Statutes.* The basic outline of matters of which the Board must be satisfied is derived from §813.2 of the Rules of Criminal Procedure, Rule 18(9), and the authority for use of judicial records is derived from §§622.52, 622.53 and 622.59 of the 1977 Code of Iowa.

We hope that this opinion will be of assistance to the Board of Parole in undertaking its new administrative responsibility under §906.5.

April 18, 1978

WELFARE: Work as a condition of granting relief. §§252.27, 252.42, 1977 Code of Iowa. There are two code sections dealing with work requirements for general relief recipients. Work projects that comply with Section 252.42, The Code, are not limited to the "streets and highways" requirement of Section 252.27, The Code. (Cosson to Wickey, Assistant Woodbury County Attorney, 4-18-78) #78-4-11

Mr. Gene A. Wickey, Assistant County Attorney: You have asked for an opinion of the Attorney General as to what techniques may be used by the Woodbury County Board of Supervisors to require recipients of General Relief to "work off" funds they receive from the county under Chapter 252, Code of Iowa.

There are two sections of the law authorizing the county to require general relief recipients to "work off" the funds they receive: Section 252.27 and 252.42, The Code. Section 252.27 requires the labor be performed on the streets or highways at the prevailing local rate per hour. Section 252.42 does not require the work to be performed only on the streets or highways. The only requirements of 252.42 are that the project be undertaken jointly with a city, town, or the United States government, and 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". A Chapter 28E contract between the County Board of Supervisors and a city would be one way to satisfy the "joint project" requirement.

A similar question was asked recently by Jeffrey Myers, Assistant Woodbury County Attorney. In O.A.G. #78-12-8, I advised him that washing patrol cars did not constitute work on the streets or highways and that Section252.27 could not be used as authority for such a project. I also advised him that the Woodbury County Board of Supervisors could implement other parts of their proposal which could be accomplished through a joint county-city project.

The authority under Section 252.42 to engage in joint county-city or county-United States projects is in addition to the authority to require general relief recipients to labor on the streets and highways under 252.27. See 1968 O.A.G. 299 and 1976 O.A.G. 880 at 881 where the following appears: "The restrictions of 252.27... would not apply to work projects under 252.42". That is, in a joint

project, the work may be performed somewhere besides the streets or highways.

I hope this resolves any questions left unanswered by my opinion of December 10, 1976.

April 18, 1978

COUNTIES AND COUNTY OFFICERS: Revenue Sharing Funds. Title 31, U.S.C., §1221, et seq. Federal revenue sharing monies available to a county may generally be spent for any purpose for which the general fund of the county may be spent. (Nolan to Welden, State Representative, 4-18-78) #78-4-12

Honorable Richard W. Welden, State Representative: On March 8, 1978 you wrote to this office requesting an opinion on the following situation:

"The town of Galt, Iowa, in Wright County, needs to install some insulation and put a new roof on their combination community building and fire station. The cost of this project is estimated to be about $2500, which is pretty much beyond the capability of this small town.

"The County Board of Supervisors appears to be willing to allocate this money from county revenue sharing funds. However, the county attorney has raised a question as to whether it is legal for the board to make these funds available to a municipality. The town has been receiving three or four hundred dollars a year, but recent changes have reduced that to a token amount.

"Under what conditions might it be possible for the county to advance all or part of this money to a municipality?"

The federal revenue sharing monies that are made available to a county as a local unit of government under Title 31 U.S. Code §§1221 *et seq.* may generally be spent for any purpose for which the general fund of the county may be spent. Information given to this office, indicates that the building is not being currently used for community purposes other than the storage of the fire truck. It appears that the building would be of questionable value even for the location of county projects, such as a senior citizen center. [§332.3(26)].

Accordingly it is our view that the county attorney is correct in questioning the legality of an allocation of county revenue sharing money to the Town of Galt for the renovation of its community building and fire station.

April 18, 1978

MUNICIPALITIES: Plumbing License Fees—§§135.11(7) and 135.15, Code of Iowa, 1977. Cities which license plumbers shall submit a portion of the license fees to the State pursuant to §135.15 of the Code. (Blumberg to Pawlewski, Commissioner of Public Health, 4-18-78) #78-4-13

Mr. Norman L. Pawlewski, Commissioner of Public Health: We have your opinion request of April 5, 1978, regarding the licensing of plumbers and the license fees. Under your facts, one city does not use the State Plumbing Code and, therefore, contends that it need not send any of the license fees to the State. You ask whether a city must pay the fees to the State even if it does not use the State Plumbing Code.

Section 135.11(7), 1977 Code of Iowa, provides that the Department of Health shall establish, publish and enforce a plumbing code governing the installation of plumbing in cities. Pursuant to 1919-1920 O.A.G. 727, under a similar section, our office held that such a plumbing code *shall* be applicable in

cities, although cities could adopt additional regulations not inconsistent therewith. We see no indication in the present statute to reach a different result.

Section 135.15 provides that cities which license plumbers *shall* pay to the State one dollar for each license issued and twenty-five cents for each license renewal. Section 4.1(36) of the Code provides that the word "shall" imposes a duty. Thus, any city which licenses plumbers shall forward a portion of the fees to the State. This section makes no distinction between cities which may apply the State Code and those cities which don't.

Accordingly, we are of the opinion that cities which license plumbers shall submit a portion of the license fees to the State.

April 18, 1978

CIVIL PROCEDURE: FILING FEES: INDIGENTS: Filing fees and other court costs in state proceedings of a civil nature must be paid by incarcerated persons and other indigents unless such fees have been waived by the courts in a dissolution proceeding or, if in other civil actions, such fees are waived by the court in the interest of justice. (Piazza to Poppen, Wright County Attorney, 4-18-78) #78-4-14

Mr. Lee E. Poppen, Wright County Attorney: You have requested an opinion of the Attorney General with regard to whether an inmate of one of Iowa's correctional facilities is entitled to file civil actions without payment of filing fees, fees to sheriff for service of notice and other costs which are normally incurred by a plaintiff initiating a civil action. This opinion will discuss the entitlement to file civil suits without the payment of fees both in federal court and in the Iowa district courts.

Pursuant to 28 U.S.C. §1915:

"PROCEEDINGS IN FORMA PAUPERIS. Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs of security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state that nature of the action, defense, or appeal and affiant's belief that he is entitled to redress."

Clearly then, federal law does give any person unable to afford filing fees and other costs of a civil action the right to proceed in forma pauperis without payment of such fees or the posting of any security. However, it should be noted that the grant of relief to proceed in forma pauperis is a matter which is within the sound discretion of the trial court. As to the ability of an individual to proceed in a civil action in state courts without the requisite payment of filing fees and other costs incurred, the seminal decision in this regard is *Boddie v. Connecticut*, 401 U.S. 371, 28 L.Ed 2d. 113, 91 S. Ct. 780 (1970). That case dealt with the right of indigent persons to have filing fees waived in a divorce proceeding. The Supreme Court held that to deny access to the courts of indigent persons in a dissolution of marriage proceeding was a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. In so ruling, the Court held that marriage and the legal relationship of individuals within the marriage relationship, constitutes a fundamental interest of the parties involved. The Court further held that this fundamental interest required that certain due process protections accrue. One of the due process requirements which accrues, the Court held, was the right of access

to the judicial system whether or not the individual affected could afford to pay filing fees and other court costs. This decision was cited by the Iowa Supreme Court in the case of *Hightower v. Peterson*, 235 N.W.2d 313 (1975). Under the rulings of *Boddie and Hightower*, there is no question but that a person who makes a requisite showing of indingecy is entitled to have filing fees and other court costs waived in a dissolution of marriage proceeding.

The question remains whether indigent persons have a right under the due process clause to waive costs of filing in other civil actions. In the *Hightower* case, the Iowa Supreme Court noted that waiver of fees and cost for indigents is accomplished through the inherent power of the trial court to waive such fees in the interests of justice. The court cited a case decided by the Court of Appeals in Washington, *Bowman v. Waldt*, 513 P.2d 559 (1973). The court held in that case that the inherent power of courts to act in the interest of justice would permit a judge to waive filing fees in any civil action based upon a showing of indigency. It should be noted however, that the Iowa Supreme Court has not directly reached such a result.

Similarily, I will call the reader's attention to the case of *Ortwein v. Schwab*, 410 U.S. 656, 35 L.Ed.2d 572, 93 S.Ct. 1172 (1973). In that case the United States Supreme Court refused to allow an indigent recipient of state welfare or old age assistance benefits, whose public assistance was reduced after an evidentiary administrative hearing, to waive a filing fee for appellate court review of such administrative decision. In reaching such a result, the United States Supreme Court cited the case of *United States v. Kras,* 409 U.S. 434, 34 L.Ed.2d 626, 93 S.Ct. 631 (1973) where the court upheld statutorily imposed bankruptcy filing fees against a Constitutional challenge based upon *Boddie.* The court there noted the special nature of the marital relationship and its concomitant associational interest and held that no such fundamental interest is involved in bankruptcy and other civil actions.

In general then, the principal holds true that due process does not require the courts to waive filing fees in civil actions for indigents unless a fundamental interest of the particular indigent is involved. Marriage, as pointed out in *Boddie*, constitutes such a fundamental interest.

So, in any civil action except for a dissolution of marriage, the question of whether filing fees and other costs may be waived for indigent individuals is a matter to be decided by the court, upon application of the indigent, after considering his indigency and the interest of justice.

As a final note, it should be kept in mind that arguments have been propounded that to deny access to the courts for individuals with low economic means could constitute a denial of equal protection of the laws which are guaranteed pursuant to the Fourteenth Amendment to the Constitution of the United States. In vigorous dissenting opinions in the *Boddie* case, Justices Brennan and Douglass expressed the view that to deny such access by virtue of the imposition of filing fees was to invidiously discriminate against a class of individuals based upon their wealth, or rather their lack of wealth.

This equal protection analysis, however, has never been approved by the full court.

April 18, 1978

MUNICIPALITIES: Police and Fire Chiefs' Civil Service Status — §§372.15, 400.13 and 400.14, Code of Iowa, 1977. Police or fire chiefs appointed

under a Code section granting them full civil service rights as chief do not have vested interests in that civil service status when the statute is later amended to do away with the chiefs' civil service status. A chief appointed by a mayor may be removed by any person holding the position of mayor. (Blumberg to Holden, State Senator, 4-18-78) #78-4-15

Honorable Edgar H. Holden, State Senator: We have your opinion request of January 18, 1978. In it you stated:

"Section 365.13, Code of Iowa 1973, provides that a fire chief 'shall be apointed from the chief's civil service eligible list and shall hold full civil service rights....'

"Section 400.13, Code of Iowa 1977, provides that a fire chief 'shall be appointed from the chief's civil service eligible lists', but does not appear he would hold full civil service rights.

"There could be and probably are cases where a fire chief was appointed under the earlier provision who is serving under a new mayor elected subsequent to the enactment of Chapter 1189 of the 66th General Assembly. Since such a mayor could be one who was not the original appointing mayor and might wish to replace the fire chief, the following question is submitted for your answer.

" 'Can a fire chief who was appointed under the provisions of Section 365.13, Code of Iowa 1973, be removed by a mayor who was not the appointing mayor and was elected in 1977?' "

Section 400.13, Code of Iowa, 1977, provides in pertinent 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 had 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. *A chief of a police department or fire department shall maintain his civil service rights as determined by section 400.12.*" (Emphasis added)

Section 400.14, provides:

"A police officer under civil service may be appointed chief of police and a fireman under civil service may be appointed chief of the fire department without losing his civil service status, and shall retain, while holding the office of chief, the same civil service rights he may have had immediately previous to his appointment as chief, *but nothing herein shall be deemed to extend to such individual any civil service right upon which he may retain the position of chief.* (Emphasis added)

In *Dennis v. Bennet*, 1966, 258 Iowa 664, 140 N.W.2d 123, the Court discussed §§365.13 and 365.14, 1962 Code.[1] At that time, §365.13 read, in pertinent part:

"The chief of the fire department shall be appointed from the chiefs' civil

[1]Chapter 365 was the civil service chapter until the 1975 Code, when it was placed in Chapter 400.

service eligible list *and shall hold full civil service rights as chief,* and the chief of the police department shall be appointed from the active members of the department who hold civil service seniority rights as partolmen...Any such chief of police having ten or more years service, shall be entitled to civil service rights as partolman for the period of such service as chief with continuing seniority determined as provided in section 365.12. (Emphasis added)

Section 365.14, provided:

"A police officer under civil service may be appointed chief of police without losing his civil service status, and shall retain, while holding the office of chief, the same civil service rights he may have had immediately previous to his appointment as chief, *but nothing herein shall be deemed to extend to such individual any civil service right upon which he may retain the position of chief.* (Emphasis added)

The Court held (258 Iowa at 668):

"Referring now to Code sections 365.6, subsection 2(a), 365.13 and 365.14, we find the chief of the fire department must be appointed from the chiefs' civil service list and once appointed holds full civil service rights as such.

"On the other hand, the law specifically provides the chief of police appointed holds full civil service rights as such.

"On the other hand, the law specifically provides the chief of police must be appointed from the active members of the department and holds no civil service status in that office. In fact, he, as chief, retains only those civil service rights which were held prior to appointment at head of the department."

Comparing the statutes referred to in the above decision with §§400.13 and 400.14, it becomes apparent that the statutory changes equalized the chiefs of fire and police. They do not hold civil service rights as chiefs, but only those under §400.12 and previously held.

Section 400.13 also provides, in the last paragraph, who has the power to appoint the chiefs. Under the Commission plan, it is the superintendent of public safety. Under the City Manager plan, it is the city manager. In all other forms, it is the mayor. Section 372.15 provides, unless otherwise provided by state or city law, that an appointed person can only be removed by the officer or body making the appointment. We do not believe the legislature intended this section to mean that only the specific person who made the appointment can remove the individual. If that were the case, it would be difficult to remove appointees since the composition of elected city officers and bodies constantly changes. Rather, we read this section to mean that if a mayor appoints only a mayor may remove the appointee. Likewise, if a council appoints, only a council may so remove.

This brings us to the final issue of your question. That is, if a fire chief is appointed under a statute that provides for civil service status as chief, may he be removed under §372.15 at a later time when the statute no longer provides for such civil service status. In other words, does the civil service status of a fire chief vest regardless of subsequent statutory changes.

The issue of vesting under civil service laws has raised its head many times over the years. There appears to be a split of authority over whether any rights do vest under civil service. Those courts which have held that there is a vested interest in a civil service position did so on the basis that a civil service employee cannot be discharged without following the applicable statutes and rules on

the discharge of civil service employees. *See, Valenzuela v. Board of Civil Service Com'rs.*, 1974, 115 Cal. Rptr. 103, 40 C.A. 3rd 557; *Deason v. DeKalb County Merit System Council,* 1964, 110 Ga. App. 244, 138 S.E.2d 183; *Black v. Sutton,* 1945, 301 Ky. 247, 191 S.W.2d 407.

The majority of cases hold that a public employee has no vested right to his or her position. In *State, ex rel. Anderson v. Barlow*, 1940, 235 Wis. 169, 292 N.W. 290, the tax commission, of which plaintiff was an employee, was abolished by statue and a new agency was created. Plaintiff alleged that because she was appointed to a position cognizable in the statutes, that she could not be removed from her position even though the statutes were changed. The Court held (292 N.W. at 296):

"It is contended...that the petitioner having once acquired definite civil service status, this status must be regarded in the nature of a property right of which the owner thereof is not to be lightly deprived at the whim or caprice of a subsequent legislature or of a department head. Rights under the civil service law are conferred by act of the legislature. What the legislature may give it may take away.... In this country there is no vested or contract right to an office. *Butler v. Pennsylvania,* 10 How. 402, 13 L.Ed. 472."

Similarly, in *State, ex rel. Kane v. Stassen,* 1940, 208 Minn. 523, 294 N.W. 647, petitioner was appointed at a time when a veterans' preference act governed his employment. He was discharged and shortly thereafter a new civil service law became effective, repealing the veterans' preference law. It was held that the petitioner did not have a vested right in his employment.[2]

In *Reed v. Trovatten*, 1941, 209 Minn. 348, 296 N.W. 535, as in the previously cited case, a new civil service act became effective, replacing a previous one. Petitioner contested that his civil service status under the old statute was still applicable. The Court held otherwise, stating that a public officer has no vested right to continuance in his or her position. "The legislature may abolish and modify any civil service or preference right which it has granted as well as the remedies for enforcement of the same." 296 N.W. at 537. See also, *Slezak v. Ausdigian,* 1961, 260 Minn. 303, 110 N.W.2d 1; *State v. Oehler*, 1944, 218 Minn. 290, 16 N.W.2d 765; *Halek v. City of St. Paul*, 1949, 227 Minn. 477, 35 N.W.2d 705: *Starkweather v. Blair,* 1955, 245 Minn. 371, 71 N.W.2d 869; *Head v. Special School District No. 1*, 1971, 288 Minn. 496, 182 N.W.2d 887; and, *State, ex rel. Dolan v. Civil Service Bar of St. Paul,* 1972, 293 Minn. 477, 197 N.W.2d 711.

In *Dolan*, the petitioner took an examination for sergeant on the police force. At the time of examination, the law provided for an absolute preference in promotion for a veteran. Within a few days of the examination, an amendment to the civil service laws became effective which gave the employee the opportunity to use a five point credit instead of a veterans' preference. When informed of this, petitioner took the credit, was moved up on the eligible list, and took the sergeant's position. Thereafter, he applied for a lieutenant's position. Because he had already used the five point credit earlier, he was precluded by statute from using it again. Thus, because others could use it,

[2]However, because there was a question as to the legality of his discharge, the Court held there existed a right to contest it. This was especially so in light of the fact that if petitioner had not been discharged he would have been given permanent status in the civil service.

he was passed by them on the eligible list and did not get the appointment. Petitioner claimed that since he obtained civil service status at a time when the statutes only provided a straight veterans' preference, he had acquired a vested right under those statutes to that veterans' preference. The Court disagreed and affirmed the lower court's decision against the petitioner.

For other cases which hold that no vested right to public employment exists, and that what the legislature creates it may alter or abolish, see, *Ex Parte Bracken,* 1955, 263 Ala. 402, 82 So.2d 629; *Levin v. Civil Service Comm. of Cook County,* 1972, 52 Ill. 2d 516, 288 N.E.2d 97; *Gaunt v. Payes* 1965, 57 Ill. App. 2d 331, 205 N.E.2d 766; *Jordan v. Metropolitan San. Dist. of Greater Chicago,* 1959, 15 Ill. 2d 369, 155 N.E.2d 297; *Gervais v. New Orleans,* 1955, 116 La. 782, 77 So. 2d 393; *DeStefano v. Civil Service Comm. of State of N.J.,* 1943, 130 N.J.L. 267, 32 A.2d 284; *Egan v. Livati,* 1942, 287 N.Y. 464, 40 N.E.2d 635; and, *Personnel Division of Executive Dept. v. St. Clair,* 1972, 10 Or.App. 106, 498 P.2d 809. We have also reached a similar result with reference to vesting of pensions under Chapter 410 of the Code. See, 1972 O.A.G. 618.

Accordingly, we are of the opinion that a fire chief appointed under a statutory provision granting civil service status as chief does not have a vested interest in that civil service status when the provision is later amended to do away with the chiefs' civil service status. Thus, a fire chief appointed by a mayor can later be removed by a mayor, pursuant to §372.15.

April 24, 1978

CONTRACTS; CONSTITUTIONAL LAW; STATE OFFICERS AND DEPARTMENTS: Art. I, §10, United States Constitution; Art. I, §21, Iowa Constitution; Fourteenth Amendment, United States Constitution; Art. I, §9, Iowa Constitution. Wallace Building Partitions. Acts 1977, (67 G.A.) ch. 87; acts 1977, (67 G.A.) ch. 34. The legislature may not pass laws impairing the obligations of earlier existing contracts; depriving contracting parties of vested contract rights without due process of law; or pass retrospective legislation divesting parties of valid pre-existing contracts rights. (Salmons to Thompson, State Representative, District 66, 4-24-78) #78-4-16

Honorable Patricia L. Thompson, State Representative, District 66: I am in receipt of your April 11, 1978, request for an opinion of this office regarding an apparent conflict between a contract entered into by Pigott, Inc. and the State of Iowa and legislation enacted subsequent to such contract.

You have provided a copy of the contract, a three page document, which became effective on August 18, 1976, the date of execution by the Vice President of Pigott, Inc. In important detail the contract specifies in its first unnumbered paragraph the duration of the agreement and the substance of the bargain:

"This contract entered into between the State of Iowa, Department of General Services and the Pigott Supply Company for Herman Miller brand partitions and components on the basis shown herein, shall be subject to renewal annually up to a maximum of five years with the right of cancellation by written notice thirty (30) days prior to the anniversary date of the contract by either party with just and legal cause."

Clause I of the contract, with respect to the partitions identified in the preceding paragraph, then provides:

"The contractor agrees to deliver all material to the State Office Building designated on the purchasing document and to completely install all partitions and components in the following buildings as outlined below:

Henry A. Wallace Building for a period of six months after the initial moving date.

Herbert Hoover Building until six months after the initial moving in date."

The price paid by the State for the partitions so provided by the contractor, Pigott, Inc., is to be determined in accordance with Clause IV. That Clause specifies the State is to receive a 53 percent discount over the catalog price of June 1, 1976, for such partitions.

Notably, it is also agreed in Clause VII that Pigott, Inc., will also sell such partitions to "any State agency or political sub-division within the State of Iowa" on the same discount-price basis. Thus, it is clear at the outset that while performance under Clause I deals with the supply of all partitions required to furnish the Wallace and Hoover Buildings, the duration of this agreement (first unnumbered paragraph) and its extension to other State agencies and political subdivisions of the State (Clause VII) doubt that this agreement is broader than and has a life longer than that associated with delivery of partitions to the Wallace and Hoover Buildings.

Additionally, you state in your request that delivery of the first shipment of partitions with components for the Wallace Building was scheduled for September, 1977, with final shipment of this $700,000.00 order to be in November, 1977. The Wallace Building is now in operation and shipment and receipt of partitions under this contract have been completed.

The legislation you have cited which is in apparent conflict with the Pigott-State contract is in two different Acts. House File 57 [Acts 1977, (67 G.A.) Ch. 87] effective July 1, 1978, [Acts 1977, (67 G.A.) Ch. 87, §12] is an Act to revise statutes governing the Iowa State Industries. Section 8(1) of House File 57 provides:

"No product appearing in the price lists prepared pursuant to section seven (7) of this Act shall be purchased by any department or agency of the state government from any other source, except:

a. When the purchase is made under emergency circumstances, which shall be explained in writing by the public body or official who made or authorized the purchase if the state director so requests; or

b. When Iowa State Industries is unable to furnish needed articles, comparable in both quality and price to those available from alternative sources, within a reasonable length of time...."

The second legislative enactment, House File 584 [Acts 1977, (67 G.A.) Ch. 34] was approved by the Governor July 5, 1977, and became effective August 15, 1977. Iowa Code Section 3.7. This House File, an Act making appropriations to the department of general services, allocates $500,000.00 "[f]or furniture and moving expense for agencies to be located in the Wallace Building..." Chapter 34, Section 1(2). Provided further in said section is the following statement:

"It is the intent of the general assembly that to the extent possible, furniture, furniture components, and office dividers to be utilized in the Wallace Building be purchased from state industries if the bid received from Iowa State Industries

does not exceed bids from other suppliers for equivalent furnishings."

Given the pre-existing, valid and partially performed Pigott, Inc., contract of August 18, 1976, and the later effective statutes designed to require State purchases of partitions the subject of the Pigott, Inc. contract, you ask the following four questions of law, with apparent concern that these statutes now require the purchase of partitions for the Hoover Building from Iowa State Industries, pursuant to statute, and not from Pigott, Inc. by the contract:

"1. Do House File 57, Section 8 and House File 584, Section 3 [Section 1(2)] violate Article I, Section 10 of the United States Constitution or Article I, Section 21 of the Iowa Constitution by impairing the vested rights represented by this earlier executed contract?

"2. Do House File 57, Section 8 and House File 584, Section 3 [Section 1(2)] violate the due process provisions of either the Fourteenth Amendment to the United States Constitution or Article I, Section 9 of the Iowa Constitution by taking from these parties valuable rights which have been created by this contract?

"3. Do House File 57, Section 8 and House File 584, Section 3 [Section 1(2)] operate unconstitutionally in retrospective manner to divest pre-existing rights acquired by these parties under this contract?

"4. Does mere passage into law of House File 57, Section 8 and House File 584, Section 3 [Section 1(2)] void the contract such that Pigott, Inc., may treat this contract as a nullity and disregard its provisions with impunity from the sanctions of civil recourse?"

For purposes of this opinion it is assumed that Iowa State Industries is and was able to provide for State purchase the partitions and components, the subject of the Pigott, Inc., contract. It will be further assumed that the partitions purchased under the Pigott, Inc., contract were purchased in other than the "emergency circumstances" to which House File 57, Section 8(1)(a) refers and the partitions so purchased were "comparable in both quality and price" to those which could have been obtained from Iowa State Industries. House File 57, Section 8(1)(b).

Since the questions you ask are founded upon constitutional considerations, it is necessary to consider constructional aids employed by the courts when questions such as these are presented.

In *Appleby v. Farmers State Bank,* 244 Iowa 288, 56 N.W.2d 917 (1953) the Court was confronted with similar problems on the same constitutional footing. It was there said:

"There are many rules cited by the authorities for determining whether statutes are to be given retroactive effect or are prospective only. We think the first that must be considered is the familiar one which holds a statute must be so construed that it will be constitutional rather than unconstitutional; that is, if there are two possible and reasonable interpretations which may be made from the language of the enactment, that one must be chosen which will give it constitutional effect, and that one discarded which will require a holding that it is unconstitutional....

"So, if a statute admits of a construction that is retroactive, in which case it would adversely affect vested rights or impair the obligation of contract, while a construction that it is prospective only and not of subject to those constitutional objections is also reasonably possible, the latter should be adopted."

Id, at Iowa 291-2, N.W.2d at 919. See also, *Moorman Mfg. Co. v. Bair,* 254

N.W.2d 737, 743 (Iowa 1977) (and cases cited therein); Iowa Code Sections 4.4, 4.5.

It is clear as well both House File 57 and House File 584 must be read as *in pari materia* since both pertain to the same legislative object.

I

Do House File 57, Section 8 and House File 584, Section 3 [Section 2(1)] violate Article I, Section 10 of the United States Constitution or Article I, Section 21 of the Iowa Constitution by impairing the vested rights represented by this earlier executed contract?

Article I, Section 10 of the United States Constitution states in pertinent part:

"No State shall...pass any Bill of Attainder, expost facto law, or law impairing the Obligation of Contracts..."

The Iowa Constitution's Contract Clause counterpart is that Article I, Section 21 declaring:

"No Bill of Attainder, expost facto law, or law impairing the obligation of contracts, shall ever be passed."

Because your first question is premised on analogous constitutional guarantees of the federal and state constitutions, "a separate discussion of the two constitutional provisions is not necessary under the general principle that similar constitutional guarantees are usually deemed to be identical in scope, import and purpose." *Moorman Mfg. Co. v. Bair, supra,* at 745. *Des Moines Joint Stock Land Bank v. Nordholm,* 217 Iowa 1319, 252 N.W. 701 (1934).

Within the past year, the United States Supreme Court has decided the first major Contract Clause case to reach the court since 1965. In *United States Trust Co. v. New Jersey,* ___U.S.___, 52 L.Ed.2d 92 (1977) the court held unconstitutional a statute which retroactively repealed an earlier statute which had guaranteed to certain municipal bond holders revenues of the New York-New Jersey Port Authority to secure such bonds. In overturning the retroactively repealing statute on contract clause grounds the court considered the history of its decisions and observed:

"...that the State 'has the "sovereign right...to protect the ...general welfare of the people" ' and 'we must respect the "wide discretion on the part of the legislature in determining what is and what is not necessary" '."

United States Trust Co. v. New Jersey, supra, at 105. See, *Des Moines Joint Stock Land Bank v. Nordholm, supra.* Even so, the court recognized " 'the power of a state to modify or affect the obligation of contract is not without limit...' " *United States Trust Co. v. New Jersey, supra,* at 106. See, *First Trust Joint Stock Land Bank v. Smith,* 219 Iowa 658, 660-1, 259 N.W. 192, 193 (1935):

"With all the power of the legislature, it will hardly be claimed under the constitution of the state, that it has the power by a legislative enactment to divest a lien or right in property already acquired before the passage of the act undertaking to divest the lien."

It was established quite early that the Contract Clause limits the power of the states to *modify* their own contracts as well as to regulate those between private parties. *United States Trust Co. v. New Jersey, supra,* at 106; *Frost v. State of Iowa,* 172 N.W.2d 575, 583 (Iowa 1970). It may be that "emergency may furnish the occasion for the exercise of [police] power", *Home Building*

& Loan Assn. v. Blaisdell, 290 U.S. 398, 426 (1934).

"(y)et private contracts are not subject to unlimited modification under the police power...a State could not 'adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them...' Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."

United States Trust Co. v. New Jersey, supra, at 109-110. See, 16 C.J.S. Constitutional Law Section 285; 16 Am.Jur2d *Constitutional Law* Section 441.

In the present instance Pigott, Inc. and the State of Iowa became legally bound to the performances specified in the contract of August 18, 1976. The contract has been partially executed by the completion of installation of partitions in the Wallace Building. But as the 'intent' statement of House File 584, Section 1(2) declares when read *in pari materia* with House File 57, Section 8, these later passed statutory enactments are designed by the legislature to require partitions be purchased from Iowa State Industries for installation in the Wallace Building. Ever aware that the legislature is empowered to pass legislation of this type for the purposes identified in the Preamble to House File 57 — although here not done so under 'emergency circumstances' — these enactments go further than mere *modification* of the Pigott, Inc., — State contract or some remedy or procedure specified therein. *United States Trust Co. v. New Jersey, supra,* at 108, fn. 17. The aim of these laws is not to *adjust the rights and responsibilities of these contracting parties; the goal is, rather, to have the law supercede and supplant the contract with respect to Wallace Building partitions.*

Despite all attendant presumtions of constitutionality in favor of statutes, the express intent of these laws is to scrap this partially executed contract in its entirety where Wallace Building components are concerned. A case more clearly violating Article I, Section 10 of the United States Constitution and Article I, Section 21 of the Iowa Constitution is hardly conceivable. See *Fletcher v. Peck,* s Cranch 87 (1810); *Dartmouth College v. Woodward,* 4 Wheat. 518 (1819). This legislation is therefore unconstitutional as applied. *Moorman Mfg. Co. v. Bair, supra,* at 755 (McCormick, J. concurring).

II

Do House File 57, Section 8 and House File 584, Section 3 [Section 1(2)] violate the due process provisions of either the Fourteenth Amendment to the United States Constitution or Article I, §9 of the Iowa Constitution by taking from these parties valuable rights which have been created by this contract?

The Due Process clauses of the United States Constitution and Iowa Constitution shall be considered together as both have been deemed by the Iowa Supreme Court to be identical in scope, import and purpose. *Davenport Water Co. v. Iowa State Commerce Comm'n,* 190 N.W.2d 583, 593 (Iowa 1971).

As was noted above, the legislature was well within its powers in passing House Files 57 and 584 for the purposes identified in the Preamble of House File 57. But even though the police powers would seem sufficient to sustain a frontal assault on the constitutionality of this legislation, the legislation cannot be constitutional when applied to deprive contracting parties to the rights and incidents of their agreement.

"Contract rights are a form of property and as such may be taken for a public

purpose provided that just compensation is paid." *United States Trust Co. v. New Jersey, supra,* at 108, fn. 16. See 16A C.J.S. *Constitutional Law* Sections 599, 610, 645; 16 Am.Jur.2d *Constitutional Law* Sections 373, 416.

Here, of course, the subject legislation outright strips these contracting parties of the obligations they have attempted to secure by agreement. The legislation is clear in its diction of the ends it seeks to foster providing for neither notice and opportunity for hearing prior to the property's destruction or taking [*Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950)], nor for the 'just compensation' required to be paid the parties for the confiscation of their rights. *Constitutors to the Pennsylvania Hospital v. City of Philadelphia,* 245 U.S. 20 (1917); *Lynch v. United States,* 292 U.S. 571 (1934); *Taylor v. Drainages District No. 56,* 167 Iowa 42, 148 N.W. 1040 (1914) *aff'd,* 244 U.S. 644. As applied to that element of the contract requiring partitions be supplied to the Wallace Building by Pigott, Inc., these statutes fail to provide for due process of law and are therefore unconstitutional.

III

Do House File 57, Section 8 and House File 584, Section 3 [Section 1(2)] operate unconstitutionally in a retrospective manner to divest pre-existing rights acquired by these parties under this contract?

"A retroactive (or retrospective) law is one which 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.' "

Walker State Bank v. Chipokas, 228 N.W.2d 49, 51 (Iowa 1975); 16 Am.Jur.2d *Constitutional Law* Section 413.

To this point, it has been shown that House Files 57 and 584 operate to impair the earlier existing obligations of the Pigott, Inc., State of Iowa contract in an unconstitutional manner and to violate the due process of law protections by destroying a property right with no prior hearing and no payment of just compensation. These principles of law tend to "blend together" when consideration of the 'retrospective application of statutes' is added to the mix. 16 Am.Jur.2d *Constitutional Law* Section 420.

"The Due Process Clause of the Fourteenth Amendment generally does not prohibit retrospective civil legislation, unless the consequences are particularly 'harsh and oppressive.' " *United States Trust Co. v. New Jersey, supra,* at 106, fn. 13. Retrospective application of a statute does not render it unconstitutional per se [*Presbytery of Southeast Iowa v. Harris*, 226 N.W.2d 232, 237 (Iowa 1975)] and there is no Iowa constitutional provision forbidding the enactment of retrospective laws. *Ross v. Supervisors,* 128 Iowa 427, 104 N.W. 506 (1905). It is said, however, that retrospective legislation must be carefully scrutinized if its constitutionality is questioned (16 Am.Jur.2d *Constitutional Law* Section 414) because it may be unconstitutional as 'repugnant' to the Fourteenth Amendment's Due Process Clause while not offending Contract Clause constitutional guarantees. 16 Am.Jur.2d *Constitutional Law* Section 416. The retrospective legislation prohibited by the Fourteenth Amendment is that which divests any vested interest. 16 Am.Jur.2d *Constitutional Law* Section 416; *First Trust Joint Stock Land Bank v. Smith, supra.*

In 16 Am.Jur.2d *Constitutional Law* Section 426, at 767, it is stated:

"Under the restraint which the Fourteenth Amendment to the Federal

Constitution imposes upon retrospective legislation, as well as under the restraints imposed thereon by the state constitutional provisions expressly prohibiting the enactment of retrospective laws, a state cannot by a mere act of the legislature take property from one man and vest it in another directly; nor can such property, by the retrospective operation of laws, be indirectly transferred from one to another. Hence, a statute is unconstitutional which in effect, either by legislative fiat or by direct or indirect operation, takes the property of one man and gives it to another. Pursuant to this general principle, retroactive declaratory statutes will not be allowed to affect vested rights, and an act of the legislature declaring the interpretation to be placed upon a previous statute will not be allowed to affect transactions or rights of action which accrued prior to the enactment of such statute."

See also 16A C.J.S. *Constitutional Law* Section 417.

Again, while all presumptions are viewed with an eye to sustaining the statutes in question, the legislature has expressly stated its intent that funds allocated for Wallace Building furniture and partitions be spent with Iowa State Industries—this while the earlier Pigott, Inc., state contract was negotiated for supply of all such partitions and components required by the Wallace Building.

In every sense House Files 57 and 584 seek to divest valuable rights created long before the statutes were authored. Strict adherence to the dictates of House File 57, Section 8 together with House File 584, Section 2(1) could not lead to other than a retrospective divestment of vested contract rights under the Pigott, Inc. instrument. Either the contract or the statutes must prevail as to the partitions of the Wallace Building. It is the contract which must predominate; for otherwise the statutes seize the rights of the contract in a manner totally inconsistent with the law.

IV

You finally ask:

Does mere passage into law of House File 57, Section 8 and House File 584, Section 3 [Section 1(2)] void the contract such that Pigott, Inc. may treat this contract as a nullity and disregard its provisions with impunity from the sanctions or civil recourse?

As has been pointed out, it is the view of the undersigned that House Files 57 and 584 operate to impair the obligations of the Pigott, Inc. contract to condemn the contract property without due process of law and to retrospectively divest fully matured pre-existing rights with respect only to that portion of the contract dealing with the purchase and delivery of partitions to the Wallace Building. That is, a court would likely not find these statutes unconstitutional on their face, but only as applied to the Wallace Building provision. *Moorman Mfg. Co. v. Bair, supra,* at 755 (McCormick, J. concurring).

The effect of finding House Files 57 and 584 unconstitutional in the manner just described, leaves the statutes void and ineffectual as to the Wallace Building provision in the contract, but certainly does not render the contract void. See generally, 16 Am.Jur.2d *Constitutional Law* Section 194.

Because it appears the statutes would be interpreted as unconstitutional in the ways specified in reference to your first three questions, it is the opinion of this writer that the Pigott, Inc., State of Iowa contract of August 18, 1976, must be honored.

I hope the foregoing addresses adequately answer the questions you have presented.

April 26, 1978

STATE OFFICERS AND DEPARTMENTS: Cost of Treatment for Substance Abuser: §125.28, Code of Iowa, 1977, as amended by Ch. 74, 38, Acts 67th G.A. The approval of the board of supervisors is required for the cost to the county of treatment of a substance abuser in a MHI where the cost exceeds $500.00 within one year. (Robinson to Preisser, Acting Commissioner, IDSS, 4-26-78) #78-4-17

Mr. Victor Preisser, Acting Commissioner: You recently requested an opinion of the Attorney General on the following question:

Is the approval of the board of supervisors required for the state to obtain reimbursement from the county if the costs of care or treatment of an alcoholic patient in a state mental health institution exceeds $500.00 for a single admission or for multiple admissions within one year?

In our opinion, the approval of the board of supervisors is required for the cost to the county of treatment of a substance abuser in a state mental health institute which exceeds $500.00 within a year for a single admission and also where the cost exceeds $500.00 for multiple admissions of a patient within one year. Section 125.28, Code of Iowa, 1977, as amended by Ch. 74, §38, Acts of the 67th G.A., provides:

1. Except as provided in section 125.26, each county shall pay for the remaining twenty-five percent of the cost of the care, maintenance, and treatment under this chapter of residents of that county 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 residence once each month twenty-five percent of the unpaid cost of the care, maintenance, and treatment of a *substance abuser.* Such county shall pay the cost so certified to the facility from its county mental health and institutions 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 by any one *substance abuser,* except that such approval is not required for the cost of treatment provided to *a substance abuser* who is committed pursuant to section 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 *substance abusers* who are residents of that county for each month. The board of supervisors may demand an itemization of such billings at any time or may audit the same.

Section 4.1(35), Code of Iowa, 1977, provides:

4.1 Rules. 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:

* * *

35. The word "year" means twelve consecutive months.

Thus, a straightforward interpretation of §125.28 means that the approval

of the board of supervisors is required before payment can be made by a county when the costs exceed a total of $500.00 in any twelve-month period. Whether this occurs as a result of a single admission or multiple admissions is not really significant. The controlling factor is the accumulation of the cost of treatment within a year's length of time.

April 26, 1978

MUNICIPALITIES: Municipal Takeover of Private Water System—§471.4(6), Code of Iowa, 1977. A municipality, through its power of eminent domain, may take over a private water system upon payment of just compensation. (Blumberg to Curnan, Dubuque County Attorney, 4-26-78) #78-4-18

Mr. Robert J. Curnan, Dubuque County Attorney: We have received your opinion request concerning the rights and powers of the City of Asbury, Iowa, regarding private water corporations. You ask whether the city, pursuant to any of its powers, could condemn or otherwise take possession and ownership of such corporations which operate within the city upon the happening of certain events. These events are as follows:

1. Present operating private water systems do not have certified operators as required by the Safe Water Act, effective June, 1977.

2. Said private water systems have failed to pay property and franchise taxes on their system's lines and well.

3. Said private water systems have failed to either request approval or failed to be granted approval to put their water lines within city street right of way property.

4. That said private water systems fail to meet safe drinking water criteria.

5. That said private water systems fail to get authorization and approval to set rates from the Iowa State Commerce Commission.

A response to your question can best be found by asking whether such conduct by the city would be a valid exercise of its police powers or a taking of property within the meaning of the 14th Amendment to the United States Constitution and Article I, §18, Constitution of Iowa. The "police power" allows a city to control and regulate the use of private property for the public good and no compensation need be made; the "taking" of private property for a public use is accomplished pursuant to the power of eminent domain and compensation must be given. *Hinricks v. Iowa State Highway Commission,* 260 Iowa 1115, 152 N.W.2d 248 (1967).

As a general test, a "taking" occurs where the effects of the government's actions deprive the owner of all or most of his interest in the property, and this can occur without the destruction of the property or the passage of legal title to the government. *United States v. General Motors Corp.,* 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945). A deprivation, amounting to the taking of a property owner's interest, has been found to occur where a governmental body takes possession and operates a private business. *United States v. Pewee Coal Co.,* 341 U.S. 114, 71 S.Ct. 670, 95 L.Ed. 809 (1951); See also, *United States v. United Mine Workers,* 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947); 26 Am.Jur.2d, *Eminent Domain,* §161. Accordingly, if the City of Asbury were to take possession of private water systems, it must act, if at all, pursuant to its powers of eminent domain.

A city's power of eminent domain is derived from §471.4(6) Code of Iowa, which reads:

"The right to take private property for public use is hereby conferred:

* * *

6. *Cities.* Upon all cities for public purposes which are reasonable and necessary as an incident to the powers and duties conferred upon cities."

The United States Supreme Court in *Long Island Water Supply Co., v. Brooklyn,* 166 U.S. 685, 689, 17 S.Ct. 718, 41 L.Ed. 1165 (1897) held that a private water corporation could be condemned by a city:

"That the supply of water to a city as a public purpose cannot be doubted, and hence the condemnation of a water supply system must be recognized as within the unquestioned limits of the powers of eminent domain. It matters not to whom the water supply system belongs, individual or corporation, or what franchises are connected with it—all may be taken for public use upon payment of just compensation."

Accordingly, we are of the opinion that if the City of Asbury were to take possession of and operate a private water system there would be a "taking" of property within the 14th Amendment to the United States Constitution and Article I, §18, Constitution of Iowa. Since the operation of a water system is devoted to a public purpose, the city can take control of a private water system pursuant to the city's power of eminent domain and Chapter 472, Code of Iowa, which details the procedure to be followed in condemning private property for public use. The fact that there may be "events" which result in a city taking over a private water system does not necessarily control the city's power to exercise its eminent domain.

April 26, 1978

MONEY: INTEREST. USURY. LOANS. DWELLINGS. IOWA CONSUMER CREDIT CODE: §§535.2, 535.4, 537.1301(20)(a)(1), 537.1301(15) and 682.46, Code of Iowa, 1977. While ordinarily a loan secured by an interest in land is excluded from the definition of "consumer loan" in the Iowa Consumer Credit Code, a loan not exceeding $35,000 secured by a first lien on a dwelling of the debtor given to finance the acquisition of that dwelling, is a consumer loan under the provisions of §537.1301(20)(a)(1) and, in addition to a finance charge of 9%, "points" can be lawfully charged to either the buyer or seller, or both. A "point" is a fee or charge equal to one percent (1%) of the principal amount of the loan and no limit is imposed on the number of points which may be charged. Otherwise, §535.4 remains in force and, where the real estate is not the dwelling of the debtor, or the loan exceeds $35,000, the lender may not receive, directly or indirectly, in money, points, or any other thing, from anyone, any sum greater than 9% per annum. Provided that FHA and VA loans are exempted from the usury limitation by §682.46. (Turner to Chiodo and Small, State Representatives, 4-26-78) #78-4-19

Honorable Ned F. Chiodo, Honorable Arthur A. Small, Jr., State Representatives: You have requested an opinion of the Attorney General as to whether it is legal for an Iowa lender to charge points to the seller on conventional real estate mortgages not insured by FHA or VA, where those mortgages carry an interest rate of 9%. Mortgages insured by FHA or VA are exempt from the 9% usury limitation of Chapter 535, Code of Iowa, 1977, under the provisions of §682.46 of said code.

A "point" is "a fee or charge equal to one percent (1%) of the principal amount of the loan which is collected by the lender at the time the loan is made." *B. F. Saul Co. v. West End Park North, Inc.*, 1968 Md., 246 A.2d 591, p. 595. Similarly, a charge of two points would be a one time payment equal to 2% of the amount financed.

The general Iowa usury law is found in Chapter 535. Section 535.2(1) provides:

"Except as provided in subsection two hereof, the rate of interest shall be five cents on the hundred by the year in the following cases, unless the parties shall agree in writing for the payment of interest not exceeding nine cents on the hundred by the year:

* * *

"c Money loaned."

§535.2(2) has to do with corporations and provides that a corporation may contract in writing to pay any interest rate and cannot then claim usury as a defense. This subsection is not relevant to your question.

The general interest rate ceiling set forth in the Iowa usury law then is 9% per year, but only if there is a written agreement between the parties. If not in writing, the rate is 5% per annum. §535.2.

If this was the only law with a bearing on your question, it would seem that the charging of points on a 9% loan, even to the seller, is but a subterfuge to avoid the usury law. An extra charge paid by the seller tends to cause the seller to increase his price sufficiently to include the extra charge he has to pay. Thus, the borrower would in reality pay not only the 9% but the extra charge being assessed.

But Chapter 537, Code of Iowa, 1977, commonly referred to as the Iowa Consumer Credit Code, hereinafter referred to as the ICCC, appears to allow a major exception to the Iowa usury law and permits a greater charge for different transactions including "consumer loans."

The ICCC allows the charging of a "finance charge" on "consumer loans".

Section 537.1301(20)(a)(1) provides as follows:

"Except as otherwise provided in subsection 'b', 'finance charge' means the sum of all charges payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, including any of the following types of charges which are applicable:

"(1) Interest or any amount payable under a point, discount or other system of charges, however denominated, *except that, with respect to a consumer loan secured by a first lien on a dwelling of the debtor given to finance the acquistion of that dwelling, points,* consisting of a charge paid in cash at the time of commitment or closing of a loan tranaction. . . shall not be part of the finance charge for the purpose of determining maximum charges pursuant to section 537.2401 and chapters 524, 534, *and 535*. . ." (Emphasis added)

In other words, points are included as part of the finance charge for determining maximum charges *except* with respect to a consumer loan secured by a first lien on a dwelling of the debtor given to finance the acquisition of that dwelling. The charging of points under those conditions is permissible even if

that causes the finance charge to exceed 9%. It will be noted that there is no distinction made between charging points to a buyer or to a seller. Such charge may be imposed on either or both without limit.

This might seem to dispose of the matter were it not for a definitional problem which appears in the ICCC. The problem arises because of the definition of a "consumer loan" found in §537.1301(15). That section provides:

"a. Except as provided in paragraph 'b' of this section a 'consumer loan' is a loan in which all of the following are applicable:

"1. The person is regularly engaged in the business of making loans.

"2. The debtor is a person other than an organization.

"3. The debt is incurred primarily for a personal, family, household or agricultural purpose.

"4. Either the debt is payable in installments or a finance charge is made.

"5. *Either the amount financed does not exceed $35,000* or the debt is not incurred primarily for an agricultural purpose and is secured by an interest in land. (Emphasis added).

"b. *A 'consumer loan' does not include:*

"(2) A loan secured by an interest in land if the security interest is bonafide and not for the purpose of circumvention or evasion of this chapter and the finance charge does not exceed *twelve percent per year* calculated according to the actuarial method on the assumption that the debt will be paid according to the agreed terms and will not be paid before the end of the agreed term." (Emphasis added)

At first blush it appears from the words of §537.1301(15) that a loan not exceeding $35,000, for the purchase of a dwelling secured by a security interest in the dwelling, and with a finance charge not in excess of 12%, would nevertheless not be a consumer loan because it is secured by an interest in *land* and excluded from the definition by (15)(b)(2).

The maximum finance charge permissible on a consumer loan is set forth in §537.240(1). The relevant provisions of that section state that:

"...a lender may contract for and receive a finance charge not exceeding the maximum charge permitted by the laws of this state or of the United States for similar lenders, and, in addition, *with respect to a consumer loan not secured by a first lien on a dwelling of the debtor* given to finders, and, in addition, *with respect to a consumer loan not secured by a first lien on a dwelling of the debtor* given to finance the acquisition of that dwelling, a supervised financial organization may contract for and receive a finance charge, calculated according to actuarial method, not exceeding *fifteen percent* per year on the unpaid balance on the amount financed." (Emphasis added)

In other words, a lender may contract for a finance charge permitted by any other provision of state or federal law for similar lenders; and, except for a loan secured by a first lien on a dwelling of the debtor, given to finance the acquisition of that dwelling, a supervised financial organization may contract for a finance charge not exceeding 15%. Obviously, a supervised lender cannot charge a finance charge of 15% on a consumer loan that is secured by a first lien on a dwelling of the debtor given to finance the acquisition of that dwelling. It should be pointed out that a "supervised financial organization" includes a bank, credit union or savings and loan association as provided in §537.1301(42).

The end result of these provisions is that home loans are basically left under §535 of the Code and are limited to a 9% interest rate. However, we still must return to §537.1301(20)(a)(1) having to do with points. If the term "consumer loan" is construed so as not to include a loan on the dwelling of the debtor because of the provisions of §537.1301(15), then the provision regarding points is rendered completely meaningless because there would never be a situation in which points could be charged even though that section clearly provides that they are permissible under certain conditions.

Section 537.1301 contains most of the definitions found in the ICCC. Its opening sentence is, "As used in this act, *unless otherwise required by the context:...*" and then follows a list of terms and their definitions. Thus, although ambiguous, it seems that the ICCC contemplates that in some of its sections a different definition may be required for a particular term by the context of that section than the definition found in §537.1301.

The context in which the words "consumer loan" are used in §537.1301(20)(a)(1) requires a different definition of those words than is found in §537.1301(15). As the Iowa Supreme Court has said:

"It is a settled rule of statutory construction that in determining the meaning of a statute, all provisions thereof and the act of which it is a part must be considered. (Citations)."

"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. (Citations)"

Goergen v. State Tax Commission, 1969 Iowa, 165 N.W.2d 782, 785.

Similarly, the Supreme Court has stated:

"We are obliged, if possible, to give effect to each section - indeed each word - of a legislative act."

Mallory v. Paraise, 1969 Iowa, 173 N.W.2d 264, 267.

To give meaning to the "points" provision of §537.1301(20)(a)(1), it is necessary to give a broader definition to the words "consumer loan" than is given in §537.1301(15), so that a loan on the dwelling of the debtor will not be excluded as a loan secured by an interest in land. I believe, therefore, that for the purposes of §537.1301(20)(a)(1), such a loan should be construed to be a "consumer loan" if it would be a consumer loan but for the provisions of §537.1301(15)(b)(2). This means that a loan on the dwelling of the debtor, for his personal use, would be a consumer loan and points could be assessed in connection with that loan if the loan does not exceed $35,000. This gives meaning to the section regarding points and yet creates as little inconsistency as possible with the section defining "consumer loans." If the loan is on other real estate, not used or to be used as the dwelling of the debtor himself, or if it is in excess of $35,000, no points may be charged if such, added to the interest or finance charge, will exceed 9% per annum. §535.4 remains in full force and effect where the real estate is not the dwelling of the debtor, or where the loan exceeds $35,000, and "No person shall, directly or indirectly, *receive* in money or any other thing, or in any other manner, any greater sum or value for the loan of money, or upon contract founded upon any *sale of real* or personal *property,* than" 9% per annum. (§§535.4 and 535.2)

The answer to your question then is that in addition to a finance charge of 9%

as permitted in §535.2, points without limit can be charged to either the buyer or seller, or both, on a loan which meets the five requirements for a "consumer loan" set out in §537.1301(15)(a) if the loan is secured by a first lien on a dwelling of the debtor given to finance the acquisition of that dwelling. To qualify for points, the loan can't exceed $35,000.

The attorney general has repeatedly recommended to the General Assembly, in the three annual reports which §537.6104(5) has required him to make as administrator of the ICCC, that the General Assembly correct this ambiguity in the definition of "consumer loan." The most recent of these reports was filed on February 8, 1978. Therein it was again suggested *inter alia:*

"There are several ways to correct this problem. The simplest and most direct would be to eliminate the reference to 'points' altogether and not allow the charging of points. However, if the General Assembly concludes that points should be allowed, then this could be accomplished by eliminating the word 'consumer' in §537.1301(20)(a)(1). Also, perhaps a limit should be imposed on the number of points, there now being no limit."

Since it now appears that it may recently have become common practice to charge points on real estate loans without regard to the limitation set forth in Chs. 535 and 537, perhaps any corrective act to legalize the transactions should be made retrospective. Meanwhile, it should be recalled that usurious interest once paid cannot be recovered. *State ex rel. Turner v. Younker Bros.,* 1973 Iowa, 210 N.W.2d 550, 567.

April 26, 1978

MUNICIPALITIES: Administrative Assistants to the City Manager or Administrator. §§372.4, 372.8 and 400.6, Code of Iowa, 1977. Department heads and directors who, by ordinance, are appointed by a city manager or administrator do not become administrative assistants within §400.6 of the Code. (Blumberg to Ashcraft, State Senator, 4-26-78) #78-4-20

The Honorable Forrest F. Ashcraft, State Senator: We have your opinion request of February 2, 1978. You stated:

The City of Davenport by ordinance effective March 15, 1977, created the office of City Administrator. This ordinance by Section 2.02-5 abolished the existing committees system under which the City was operated and directed that the responsibility for such an operation be centered on the City Administrator to whom all department activities were to be reported. Section 2.02-7 of the city's ordinance provides:

"The City Administrator, * * * shall assume responsibility for all duties and functions of the following officers and departments of the city, and shall provide for those duties to be carried out by the City Administrator, a department head or director or a designated executive assistant:

1. Director of Construction and Engineering.
2. Director of Public Services.
3. Director of Community Development.
4. Chief Building Inspector.
5. Director of Public Transportation.
6. Director of Personnel.

7. Director of Finance and Budget.

8. Director of Purchasing, Building and Grounds.

All administrative assistants, department heads or directors shall be directly responsible to, and shall report to, the City Administrator. Said administrative assistants, department heads or directors shall be appointed by the City Administrator with the advice and consent of the majority of the council. Any administrative assistants, department head or director so appointed and not covered by Civil Service, can be dismissed at any time by the following procedure: * * *

Section 2.02-8 of this ordinance provides, "The City Administrator may, with council approval, appoint such executive assistants or department heads or directors as are deemed necessary to conduct, supervise and administer any and all of said offices including the consolidation of one or more compatible offices or departments."

In response to an inquiry by the City Administrator of the City of Davenport, the Legal Department of that city on November 23, 1977, issued an opinion that the office of the City Administrator was of such close similarity with the office of the City Manager as identified in Section 400.6 of the Iowa Code as to draw his administrative assistants within the same exemptions as was provided to the City Manager, his administrative assistants under the state code provision; that because of the fact that he had the power of appointment of each of such office, and was also responsible for the performance of all their duties that each of such identified positions, numbered above, were in effect administrative assistants to the City Administrator and were likewise exempt from the provisions of Chapter 400 of the Iowa Code.

You, therefore, ask whether the City Administrator, his assistants and those he appoints, listed one (1) through eight (8) in the ordinance, are outside the coverage of Chapter 400 of the Code.

Section 400.6, 1977 Code, provides in pertinent part:

"1. The provisions of this chapter shall apply to all appointive officers and employees, including former deputy clerks of the municipal court who became deputies of the district court clerks, in cities under any form of government having a population of more than fifteen thousand except:

a. City clerk, deputy city clerk, city solicitor, assistant solicitor, assessor, treasurer, auditor, civil engineer, health physician, chief of police, assistant chief of police in departments numbering more than two hundred fifty members, market master, *city manager and administrative assistants to the manager.*

b. Laborers whose occupation requires no special skill or fitness.

c. Election officials.

d. Secretary to the mayor or to any commissioner.

e. Commissioners of any kind.

f. Casual employees." [Emphasis added]

There is no mention of a city administrator in that section, but rather a city manager. Section 372.8 prescribes the duties of a city manager, in a council-manager-at-large or ward form of government. They are:

"When a city adopts a council-manager-at-large or council-manager-ward form of government:

1. The city manager is the chief administrative officer of the city.

2. The city manager shall:

a. Supervise enforcement and execution of the city laws.

b. Attend all meetings of the council.

c. Recommend to the council any measures necessary or expedient for the good government and welfare of the city.

d. Supervise the official conduct of all officers of the city whom he has appointed, and take active control of the police, fire, and engineering departments of the city.

e. Supervise the performance of all contracts for work to be done for the city, make all purchases of material and supplies, and see that such material and supplies are received, and are of the quality and character called for by the contract.

f. Supervise the construction, improvement, repair, maintenance, and management of all city property, capital improvements, and undertakings of the city, including the making and preservation of all surveys, maps, plans, drawings, specifications, and estimates for capital improvements, except property, improvements, and undertakings managed by a utility board of trustees.

g. Cooperate with any administrative agency or utility board of trustees.

h. Be responsible for the cleaning, sprinkling, and lighting of streets, alleys, and public places, and the collection and disposal of waste.

i. Provide for and cause records to be kept of the issuance and revocation of licenses and permits authorized by city law.

j. Keep the council fully advised of the financial and other conditions of the city, and of its future needs.

k. Prepare and submit to the council annually the required budgets.

l. Conduct the business affairs of the city and cause accurate records to be kept by modern and efficient accounting methods.

m. Make to the council not later than the tenth day of each month an itemized financial report in writing, showing the receipts and disbursements for the preceding month. Copies of financial reports must be available at the clerk's office for public distribution.

n. Appoint a treasurer subject to the approval of the council.

o. Perform other duties at the council's direction.

3. The city manager may:

a. Appoint administrative assistants, with the approval of the council.

b. Employ, reclassify, or discharge all employees and fix their compensation, subject to civil service provisions and Chapter 70, except the city clerk, deputy city clerk, and city attorneys.

c. Make all appointments not otherwise provided for.

d. Suspend or discharge summarily any officer, appointee, or employee that he has power to appoint or employ, subject to civil service provisions and Chapter 70.

e. Summarily and without notice investigate the affairs and conduct of any department, agency, officer, or employee under his supervision, and compel the production of evidence and attendance of witnesses.

f. Administer oaths."

In a mayor-council form the duties of a manager are set forth by the council. See §372.4. The duties outlined above comport, at least in part, with those of your city administrator. Although we cannot be sure that the city intended its city administrator to be, in fact, a city manager, we will so assume for purposes of this opinion.

With the above assumption in mind, it thus becomes apparent that a city administrator (manager) would be exempt for Chapter 400, along with the administrative assistants. The issue is whether all the people he or she appoints are administrative assistants. If those officers and departments listed in §2.02-7 of the ordinance were appointed by the mayor or council, there would be no doubt that they would fall within Chapter 400. The mere fact that an ordinance gives a city administrator or manager the power to appoint them does not, nor could not, change their status to fall outside of Chapter 400. In addition, the wording of the ordinance itself shows a distinction between administrative assistants and department heads or directors. A mere decision by a city administrator or manager cannot change the applicability of Chapter 400. We are not saying that the ordinance in question makes the department heads and directors administrative assistants, nor are we saying that the ordinance is invalid.[1] We are saying, however, that the ordinance should not be interpreted as granting administrative assistant status to department heads or directors who would otherwise fall within the civil services laws.

April 28, 1978

MONEY: INTEREST: USURY: LOANS: DWELLINGS: IOWA CONSUMER CREDIT CODE: §§535.2, 535.4, 537.1301(20)(a)(1), 537.1301(15) and 682.46, Code of Iowa, 1977. While ordinarily a loan secured by an interest in land is excluded from the definition of "consumer loan" in the Iowa Consumer Credit Code, a loan secured by a first lien on a dwelling of the debtor given to finance the acquisition of that dwelling, is a consumer loan under the provisions of §537.1301(20)(a)(1) and, in addition to a finance charge of 9% "points" can be lawfully charged to either the buyer or seller, or both. A "point" is a fee or charge equal to one percent (1%) of the principal amount of the loan and no limit is imposed on the number of points which may be charged. Otherwise, §535.4 remains in force and, where the real estate is not the dwelling of the debtor, the lender may not receive, directly or indirectly, in money, points or any other thing, from anyone, any sum greater than 9% per annum. Provided that FHA and VA loans are exempted from the usuary limitation by §682.46 (Turner to Chiodo and Small, State Representatives, 4-28-78) #78-4-21

Honorable Ned F. Chiodo, Honorable Arthur A. Small, Jr., State Representatives: As I noted in my opinion of April 26, 1978, a "consumer loan" is defined in §537.1301(15), Code of Iowa, 1977, as follows:

[1]For purposes of this opinion we need not decide whether a city can have an administrator rather than a manager.

"15. *Consumer loan.*

"a. Except as provided in paragraph 'b', a 'consumer loan' is a loan in which all of the following are applicable:

"(1) The person is regularly engaged in the business of making loans.

"(2) The debtor is a person other than an organization.

"(3) The debt is incurred primarily for a personal, family, household or agricultural purpose.

"(4) Either the debt is payable in installments or a finance charge is made.

"(5) Either the amount financed does not exceed thirty-five thousand dollars, or the debt is not incurred primarily for an agricultural purpose and is secured by an interest in land.

"b. A '*consumer loan*' does not include:

"(1) A sale or lease in which the seller or lessor allows the buyer or lessee to purchase or lease pursuant to a seller credit card.

"(2) A loan secured by an interest in land if the security interest is bona fide and not for the purpose of circumvention or evasion of this chapter and the finance charge does not exceed twelve percent per year calculated according to the actuarial method on the assumption that the debt will be paid according to the agreed terms and will not be paid before the end of the agreed term."

There are five elements of a consumer loan, the last two of which contain alternatives. The fifth requirement is not a model of clarity because both alternatives are stated in the negative. It appeared to me, in my opinion of April 26, and I concluded, that in order to be a consumer loan the amount financed could not exceed $35,000. But reading subsection 5 more carefully it will be seen:

"(5) *Either* the amount financed does *not* exceed thirty-five thousand dollars, *or* the debt is *not* incurred primarily for an agricultural purpose and is secured by an interest in land."

Therefore, a loan in excess of $35,000 may nevertheless be a consumer loan under the second negative alternative of the fifth requirement if "the debt is *not* incurred primarily for an agricultural purpose and is secured by an interest in land." This alternative can include a loan in excess of $35,000 given to finance the acquisition of a dwelling.

Accordingly, my opinion of April 26, 1978, is modified to say that points can lawfully be charged, without limit, to either the buyer or seller, or both, on a consumer loan secured by a first lien on the dwelling of the debtor given to finance the acquisition of that dwelling. §537.1301(20)(a)(1). *The $35,000 limitation does not apply.* But no points can be charged on a loan to a non-corporate builder who does not intend to make the building his own personal dwelling. Nor can points be charged on a loan for the purpose of acquiring rental property.

I regret the boner.

April, 1978

ALCOHOLISM

Counties and County Officers. §§125.2, 125.17, Code, 1977; Chapter 74, §§3, 27, Acts, 67th G.A., 1978 Session. A peace officer has no obligation to take to

a facility for treatment a person who is intoxicated by chemical substance but who is not in need of help. (Haskins to Correll, Black Hawk County Attorney, 4-11-78) #78-4-6

AUDITOR

Industrial Loans. §536A.8, Code 1977. The maximum amount of a loan made by an industrial loan licensee is to be determined by the location of the office where there is no breakdown of the capital surplus or undivided profits for each of the licenses issued for places of business of a corporation holding more than one license and meeting only the minimum requirements of §536A.8 for the aggregate of the licenses issued. (Nolan to Wilson, Supervisor, Industrial Loan Division, Auditor of State, 4-3-78) #78-4-3

CIVIL PROCEDURE

Filing Fees; Indigents. Filing fees and other court costs in state proceedings of a civil nature must be paid by incarcerated persons and other indigents unless such fees have been waived by the court in a dissolution proceeding or, if in other civil actions, such fees are waived by the court in the interest of justice. (Piazza to Poppen, Wright County Attorney, 4-18-78) #78-4-14

CONTRACTS

Constitutional Law; State Officers and Departments. Art. I, §10, United States Constitution; Art. I, §21, Iowa Constitution; Fourteenth Amendment, United States Constitution; Art. I, §9, Iowa Constitution, Wallace Building Partitions. Chapter 87, Acts, 67th G.A., 1977; Chapter 34, 67th G.A., 1977. The legislature may not pass laws impairing the obligations of earlier existing contracts; depriving contracting parties of vested contract rights without the due process of law; or pass retrospective legislation divesting parties of valid pre-existing contract rights. (Salmons to Thompson, State Representative, 4-24-78) #78-4-16

COUNTIES AND COUNTY OFFICERS

Revenue Sharing Funds. Title 31, U.S.C., §1221, et seq. Federal revenue sharing monies available to a county may generally be spent for any purpose for which the general fund of the county may be spent. (Nolan to Welden, State Representative, 4-18-78) #78-4-12

Business Licenses. §§332.23, 332.24, 332.25, Code, 1977. Grocery stores located in unincorporated area of county are required to be licensed by the county under §332.25. Local health board fees for inspection are not necessarily included in the county license fee. (Nolan to Burk, Asst. Black Hawk County Attorney, 4-4-78) #78-4-4

Employees. Except as limited by a collective bargaining agreement under Chapter 20, Code, 1977, each county officer has sole determination of vacation, sick leave and working hours of employees under his jurisdiction. (Nolan to Schlue, Benton County Attorney, 4-3-78) #78-4-2

CRIMINAL LAW

Minimum term for felon with prior forcible felony conviction. §906.5, Code, 1977. A judge is not required to advise an individual of the potential effects of §906.5 upon him at the time of taking a guilty plea to a felony. A conviction of any crime containing all of the elements of a forcible felony under the new Iowa Criminal Code would constitute a prior conviction for the purpose of triggering the effects of §906.5. (Williams to Olson, Executive Secretary, Iowa Board of Parole, 4-18-78) #78-4-10

JUDGES

Boards of Directors of District Departments of Correctional Services; Eligibility. Art. III, §1; Art. IV, §1; Art. V, §18, Iowa Constitution; Chapter 154, §§2.3, 4, 67th G.A., 1977; §6(G), Code of Judicial Conduct. Judges of the District Court are constitutionally ineligible to the office of member of the Board of Directors of the Judicial District Department of Correctional Services. (Hayward to McCauley, Director of Adult Corrections, Department of Social Services, 4-3-78) #78-4-1

MONEY

Interest; Usury; Loans; Dwellings; Iowa Consumer Credit Code. §§535.2, 535.4, 537.1301(20)(a)(1), 537.1301(15) and 682.46, Code, 1977. While ordinarily a loan secured by an interest in land is excluded from the definition of "consumer loan" in the Iowa Consumer Credit Code, a loan not exceeding $35,000 secured by a first lien on a dwelling of the debtor given to finance the acquisition of that dwelling, is a consumer loan under the provisions of §537.1301(20)(a)(1) and, in addition to a finance charge of 9%, "points" can be lawfully charged to either the buyer or seller, or both. A "point" is a fee or charge equal to one percent (1%) of the principal amount of the loan and no limit is imposed on the number of points which may be charged. Otherwise, §535.4 remains in force and, where the real estate is not the dwelling of the debtor, or the loan exceeds $35,000, the lender may not receive, directly or indirectly, in money, points or any other thing, from anyone, any sum greater than 9% per annum. Provided that FHA and VA loans are exempted from the usury limitation by §682.46. (Turner to Chiodo and Small, State Representatives, 4-26-78) #78-4-19

Interest; Usury; Loans; Dwellings; Iowa Consumer Credit Code. §§535.2, 535.4, 537.1301(20)(a)(1), 537.1301(15) and 682.46, Code, 1977. While ordinarily a loan secured by an interest in land is excluded from the definition of "consumer loan" in the Iowa Consumer Credit Code, a loan secured by a first lien on a dwelling of the debtor given to finance the acquisition of that dwelling, is a consumer loan under the provisions of §537.1301(20)(a)(1) and, in addition to a finance charge of 9%, "points" can be lawfully charged to either the buyer or seller, or both. A "point" is a fee or charge equal to one percent (1%) of the principal amount of the loan and no limit is imposed on the number of points which may be charged. Otherwise, §535.4 remains in force and, where the real estate is not the dwelling of the debtor, the lender may not receive, directly or indirectly, in money, points or any other thing, from anyone, any sum greater than 9% per annum. Provided that FHA and VA loans are exempted from the usury limitation by §682.46. (Turner to Chiodo and Small, State Representatives, 4-28-78) #78-4-21

MUNICIPALITIES

Administrative Assistants to the City Manager or Administrator. §§372.4, 372.8 and 400.6, Code, 1977. Department heads and directors who, by ordinance, are appointed by a city manager or administrator do not become administrative assistants within §400.6 of the Code. (Blumberg to Ashcraft, State Senator, 4-26-78) #78-4-20

Municipal takeover of private water system. §471.4(6), Code, 1977. A municipality, through its power of eminent domain, may take over a private water system upon payment of just compensation. (Blumberg to Curnan, Dubuque County Attorney, 4-26-78) #78-4-18

Police and Fire Chiefs' Civil Service Status. §§372.15, 400.13 and 400.14, Code, 1977. Police or fire chiefs appointed under a Code section granting them full civil service rights as chief do not have vested interests in that civil service status when the statute is later amended to do away with the chief's civil service status. A chief appointed by a mayor may be removed by any person holding the position of mayor. (Blumberg to Holden, State Senator, 4-18-78) #78-4-15

Plumbing License Fees. §§135.11(7) and 135.15, Code, 1977. Cities which license plumbers shall submit a portion of the license fees to the State pursuant to §135.15 of the Code. (Blumberg to Pawlewski, Commissioner of Public Health, 4-18-78) #78-4-13

Franchise Elections; Cable Television. §§47.6, 364.2, 364.6, Code, 1977. A city council is not required to submit all cable television franchise proposals timely received by it at the same election although it is free and encouraged to do so. In any event, any proposal received by a council must be submitted to a vote of the people within a reasonable time. Additional proposals may not be added to an already scheduled election without notification to the county commissioner of elections as required by §47.6 although substantial compliance with the time requirements of that section is sufficient. (Haesemeyer to Schroeder, State Representative, 4-17-78) #78-4-9

Publication of Council Minutes. §§372.13(6); 618.8 and 618.11, Code, 1977. The municipality can direct the type size and form of the required publication. However, claims should be listed in tabulation form so as to be easily readable. The monthly salaries of each employee need not be published with the council minutes if the gross yearly salaries are otherwise published. (Blumberg to Sween, Hardin County Attorney, 4-12-78) #78-4-7

STATE OFFICERS AND DEPARTMENTS

Cost of treatment for substance abuser. §125.28, Code, 1978, as amended by Chapter 74, §38, Acts, 67th G.A. The approval of the board of supervisors is required for the cost to the county of treatment of a substance abuser in a MHI where the cost exceeds $500.00 within one year. (Robinson to Preisser, Acting Commissioner, IDSS, 4-26-78) #78-4-17

Arts Council; Grants. Chapter 304A, Code, 1977. A grant or contract to provide art supplies does not necessitate that the state take title to the completed work unless a matching federal grant requires it. If it can be shown that the granting of fellowships will stimulate or encourage public interest and participation in the arts there may be a basis for such an award by the Arts Council. (Nolan to Olds, Executive Director, Iowa Arts Council, 4-4-78) #78-4-5

WEAPONS

Permit to Purchase Pistols or Revolvers. §§724.16, 724.17, 724.18, 724.19 and 724.20, Code, 1977. A person does *not* need to obtain a permit to purchase for each separate pistol or revolver purchased. The law requires a person to obtain but a single permit to purchase which is valid for a period of one year after the date of application and allows the permit holder to purchase as many pistols or revolvers as desired. It is not necessary to include a description of a pistol or revolver on the face of a permit to purchase such weapons. (Cook to Erhardt, Wapello County Attorney, 4-17-78) #78-4-8

WELFARE

Work as condition of granting relief. §§252.27, 252.42, Code, 1977. There are two code sections dealing with work requirements for general relief

recipients. Work projects that comply with §252.42 are not limited to the "streets and highways" requirement of §252.27. (Cosson to Wickey, Asst. Woodbury County Attorney, 4-18-78) #78-4-11

STATUTES CONSTRUED

Code, 1977	Opinion
20	78-4-2
47.6	78-4-9
125.2	78-4-6
125.17	78-4-6
125.28	78-4-17
135.11(7)	78-4-13
135.15	78-4-13
137.6	78-4-4
252.27	78-4-11
252.42	78-4-11
304A	78-4-5
332.23	78-4-4
332.24	78-4-4
332.25	78-4-4
364.2	78-4-9
364.6	78-4-9
372.4	78-4-20
372.8	78-4-20
372.13(6)	78-4-7
372.15	78-4-15
400.6	78-4-20
400.13	78-4-15
400.14	78-4-15
471.4(6)	78-4-18
535.2	78-4-21
535.2	78-4-19
535.4	78-4-19
535.4	78-4-21
536A.8	78-4-3
537.1301(15)	78-4-21
537.1301(15)	78-4-19
537.1301(20)(a)(1)	78-4-19
537.1301(20)(a)(1)	78-4-21
618.8	78-4-7
618.11	78-4-7
682.46	78-4-21
682.46	78-4-19
724.16	78-4-8
724.17	78-4-8
724.18	78-4-8
724.19	78-4-8
724.20	78-4-8
906.5	78-4-10

CONSTITUTION OF IOWA

Art. I, §9	78-4-16

Art. I, §10	78-4-16
Art. I, §21	78-4-16
Art. III, §1	78-4-1
Art. IV, §1	78-4-1
Art. V, §18	78-4-1

67th GENERAL ASSEMBLY

Ch. 34	78-4-16
Ch. 74, §§3, 27	78-4-6
Ch. 74, §38	78-4-17
Ch. 87	78-4-16
Ch. 154, §§2, 3, 4	78-4-1

May 1, 1978

AIRPORTS: MUNICIPALITIES: CITIES. 5th and 14th Amendments, Const. of U.S.; §§330.17, 330.21 and 613A.8, Code of Iowa, 1977. The Airport Commission is an independent or autonomous commission and has power to defend, save harmless, and indemnify its officers, employees, and agents against tort and contract claims. §330.17 prescribes elections as the only means of creating or abolishing an Airport Commission. No airport property can be transferred or sold by the city council without approval of the Airport Commission. If an Airport Commission is abolished, its contractual agreements legally made are binding upon the city. (Turner to Lightsey, DOT Aeronautics Director, 5-1-78) #78-5-1

Mr. James L. Lightsey, Director, Aeronautics Division: You have requested an opinion of the attorney general as to the following four questions:

"First, does a City have the duty to defend, save harmless, and indemnify members of an Airport Commission (established under the provisions of Chapter 330) or the officers, employees or agents of the Airport Commission?

"Second, can an Airport Commission be abolished in a manner other than by a petition filed by the electors and an election held as provided in Chapter 330.17?

"Third, can all or any part of the municipal airport property be transferred or sold for other than airport purposes by the City Council without the approval of the Airport Commission?

"Fourth, if an Airport Commission is abolished pursuant to Chapter 330.17, are the contractual agreements made by the Commission binding on the city (or county or township) owning the airport?"

I

The answer to your first question is that the Airport Commission is an "independent or autonomous board or commission of a municipality having authority to disperse funds for a particular municipal function without approval of the governing body" and has power to "defend, save harmless, and indemnify its officers, employees and agents against...tort claims or demands." §613A.8, Code of Iowa, 1977. The governing body of a municipality is so defined as to include a city. §613A.1. To the extent that the Airport Commission might have insufficient funds or other resources with which to defend itself, the governing body of the city, that is the council, would have that duty under §613A.8.

It is to be noted that while §613A.8 pertains to tort claims and demands, a suit on a contract executed by Airport Commission members would undoubtedly be brought against the city and the commission, rather than against the Airport Commission members in their individual capacities and, in any case, it is my opinion that either the commission or governing body should defend a suit on a contract made and executed by the Airport Commission, even when brought against the members in their individual capacities, and has a duty to indemnify and save them harmless.

II

§330.17 prescribes the *only* means of creating or abolishing an Airport Commission—by a majority of the voters of the city. *Expressio unius est exclusio alterius.*

III

In my opinion, no airport authority, real or personal, can be transferred or sold for other than airport purposes by the city council without approval of the Airport Commission. §330.21 provides that the Airport Commission has all the power granted to cities "except powers to sell the airport." Thus, the Airport Commission could not sell the airport without action by the city council. But on the other hand, creation of an Airport Commission gives the commission "management and control" of the airport until it is "abolished sixty days from and after the date of" the election to abolish it, at which time "the power to maintain and operate such airport shall revert to" the city. §330.17. "All funds derived from taxation or otherwise for airport purposes shall be under the full and absolute control of the commission...and shall be dispersed 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." §330.21. These board delegations of power make the Airport Commission independent and autonomous and there is no way in which the city council can subvert the commission's power without the consent of the commission. See *1968 OAG 816, 1976 OAG 541, OAG 2-4-77*, Blumberg to Griffee, and *OAG 7-14-77,* Blumberg to Redmond.

IV

If an Airport Commission is abolished under §330.17, its contractual agreements legally made by the commission would be binding upon the city (or county or townships) owning the airport. If the commission is abolished, the city would take over the liabilities as well as the assets of the commission. We have said that an Airport Commission has the power to lease airport land under its control not needed for a public purpose. *OAG 2-4-77,* Blumberg to Griffee. Obviously, a lessee or other person holding benefits properly awarded by contract with the commission could not be deprived thereof without due process and just compensation. Amendments 5 and 14, Constitution of the United States.

May 3, 1978

WEAPONS: PERMITS: FIREARM TRAINING: Sections 724.9, 724.11 and 724.14, Supplement to the Code 1977; §§4.6 and 695.13, Iowa Code, (1977). The words "renewal permits" in §724.11, Supplement to the Code, 1977, mean a permit renewing an initial permit issued on or after January 1, 1978. Section 724.9, Supplement to the Code, 1977, requires individuals

who held concealed weapon permits issued prior to January 1, 1978, other than certified peace officers, to obtain a certificate of completion from a prescribed firearm safety training program as a prerequisite to obtaining either a professional or nonprofessional permit to carry weapons. (Cook to Baker, State Representative, 5-3-78) #78-5-2

The Honorable Keith Baker, State Representative; You have requested an opinion of the attorney general on the question whether an individual who held a concealed weapon permit issued prior to January 1, 1978 (under the former weapon law) is required to complete a firearm training program as a prerequisite to obtaining a weapon permit under the new weapon law?

Chapter 724 of the Supplement of the Code, 1977, (hereinafter Supplement), effective January 1, 1978, contains the provisions of the new criminal code pretaining to weapons. In your letter to us, you refer to §724.9 of the Supplement which deals with the firearm training program. In relevant parts, this section provides:

"A training program to qualify persons in the safe use of firearms shall be provided by issuing officer of permits, as provided in section 724.11.... Certificates of completion...shall be issued to each person who successfully completes the program. *No person shall be issued either a professional or nonprofessional permit unless he or she has received a certificate of completion* or is a certified peace officer. No peace officer or correctional officer, except a certified peace officer, shall go armed with a pistol or revolver unless he or she has received a certificate of completion...." (Emphasis added)

You also refer to language in §724.11 of the Supplement and ask whether it can be read to "grandfather in" individuals who held concealed weapon permits issued under the old law, so that such persons would not be required to complete a firearm safety training program to obtain a permit under the new law. In parts relevant to your question, §724.11 provides:

"ISSUANCE OF PERMIT TO CARRY WEAPONS....the issuance of the permit shall be by and at the discretion of the sheriff or commissioner, who shall, before issuing the permit, determine that the requirements of sections 724.6 through 724.10, inclusive, have been satisfied. However, *the training program requirements in section 724.9 may be waived for renewal permits.*" (Emphasis added)

The words "renewal permits" in §724.11 obviously were intended to mean a permit renewing an initial permit issued pursuant to the new weapon law on or after January 1, 1978. It is not clear that these words were also meant to include permits issued prior to enactment of the new law. In other words, it is not clear that the term "renewal permits" were intended to "grandfather in" individuals who held concealed weapon permits issued under the old law.[1] In view of the apparent ambiguity in the statute, we may look to the former weapon law and consider the object sought to be obtained to determine the intended legislative meaning of these terms. §4.6, Iowa Code (1977). Additionally, where an ambiguity exists in statutes of a remedial nature, we must construe the words of the statutes liberally in favor of the remedial purpose sought by the Legislature for the public welfare and benefit and against the

[1]The language of §724.11 should be compared with those sections in the 1977 Iowa Code which clearly represent "grandfather" clauses. See, e.g. §§117.53, 118.8, 118A.21, 147.154, 148A.5, 149.2 Iowa Code (1977).

evil. *State ex rel. Turner v. Koscot Interplanetary, Inc. et al*, Iowa, 1971, 191 N.W.2d 624; *Bankers Life & Cas. Co. v. Alexander*, 1950, 242 Iowa 364, 45 N.W.2d 258; 3 *Sutherland Statutory Construction* p. 29 §60.01 (4th ed. 1974); 82 C.J.S. *Statutes* pp. 897-898 §384: 73 Am.Jur.2d *Statutes* pp.443-444 §§278-281.

The former weapon laws, Chapter 695, Iowa Code (1977), were repealed *in toto* and replaced by Chapter 724 of the Supplement. Under the former weapon laws, a safety training program was not required to be taken by an applicant for a concealed weapon permit. We perceive §724.9 of the new law as remediai in nature, intended to correct the old law by incorporating a requirement to ensure that persons permitted to carry weapons in Iowa after January 1, 1978 are knowledgeable in the safe use of such weapons.

Section 724.9 only excepts "certified peace officers" from the new training requirement.[2] There is no indication in the words of §724.9 that a holder of a concealed weapon permit issued under the former law is not required to satisfy the training requirements. Rather, §724.9 apparently requires all individuals, other than certified peace officers, to take the training and obtain a certificate of completion before getting a permit to carry weapons. Moreover, we note that under §724.9, peace officers (other than "certified peace officers") and correctional officers are prohibited from going armed with a pistol or revolver unless they have completed the training course. Thus, they are apparently required under §724.9 to take the training even though they may have held a weapon permit issued under the former law.

There were no provisions in the former weapon laws pertaining to the "renewal" of a concealed weapon permit. Under §695.13, Iowa Code (1977), concealed weapon permits expired annually on December 31 of the year in which a permit was issued. We note that pursuant to §724.14 of the new law, a permit issued "prior to January 1, 1978 shall remain in effect until its normal expiration date." Thus, by statute, the Legislature has indicated an intent to withdraw those rights or privileges derived by a concealed weapon permit issued under the former law as December 31, 1977 and make applicable the provisions of the new weapon law (including the training requirement of §724.9) as of the laws effective date, January 1, 1978.

From the foregoing, we conclude that the words "renewal permits" in §724.11 mean a permit renewing an initial permit issued on or after January 1, 1978. Section 724.9 requires individuals who held concealed weapon permits issued prior to January 1, 1978, other than certified peace officers, to obtain a certificate of completion from a prescribed firearm safety training program as a prerequisite to obtaining either a professional or nonprofessional permit to carry weapons. Such a construction seems to best accomplish the object and purpose of §724.9 for the public benefit and welfare by prohibiting the carrying of weapons by persons who may not have received training in the safe handling of weapons prior to receiving a concealed weapon permit under the former law.

May 5, 1978

HIGHWAYS: PRIMARY ROAD FUNDS: CONSTITUTIONAL LAW.

[2]The apparent reason for exempting "certified peace officers" from the training requirements is that such officers receive extensive firearm-safety training in their peace officer training courses. See, Rule 2.300(7), Rules of the Department of Public Safety, I.A.C.

Art. VII, §8, Const. of Iowa; §312.2, Code of Iowa, 1977; H.F. 491, 67th G.A.2d. A proposed statutory amendment to authorize expenditure of road use tax funds "for the lease or other use of land intended for the planning or maintenance of wind erosion control barriers designed to reduce wind erosion interfering with the maintenance of highways in the state or the safe operation of vehicles thereon" is an unconstitutional attempt to evade Art. VII, §8, the 18th or 1942 anti-diversion amendment to the Constitution of Iowa. (Turner to Drake and Van Gilst, 5-5-78) #78-5-3

The Honorable Richard F. Drake, The Honorable Bass Van Gilst: You have requested an opinion of the attorney general as follows:

"On April 25, 1978, the Senate debated and passed House file 491, relating, in part, to the allocation of moneys in the road use tax fund. The following subsections were added to section 312.2, Code 1977 by passage of the bill, 2 May, 1978, by the House of Representatives:

" 'Sec. 7. Section three hundred twelve point two (312.2), Code 1977, is amended to read as follows:

" '312.2 ALLOCATIONS FROM FUND. The treasurer of the state shall, on the first day of each month, credit all road use tax funds which have *been received by the treasurer,* to the primary road fund, the secondary road fund of the counties, the farm-to-market road fund, and the street construction fund of cities in the following manner and amounts:

" '9. *The treasurer of state, before making the allotments provided for in this section, shall credit annually to the Iowa Department of Soil Conservation five hundred thousand (500,000) dollars from the road use tax funds. The Department of Soil Conservation, in cooperation with the Department of Transportation and the Iowa Conservation Commission shall expend such funds, for the lease or other use of land intended for the planting or maintenance of wind erosion control barriers designed to reduce wind erosion interfering with the maintenance of highways in the state or the safe operation of vehicles thereon.'*

"(Senate amendment to House File 491, H-6416 Sec. 7) Subsection 9 was not deleted by the House. This new subsection appears to be in conflict with Article VII Section 8 of the Iowa Constitution which reads as follows:

" 'Sec. 8. 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.'

"I respectfully request a formal opinion as to whether the aforementioned amendment to Section 312.2 authorizes an unconstitutional use of funds to be used exclusively for public highways.

"Section 9 of the bill amends Section 312.2 by, among other things, adding a new subsection nine (9) which would transfer $500,000 annually from the road use tax fund to the Iowa Department of Soil Conservation for wind erosion control purposes. Since there is no provision for the Iowa Department of Transportation to direct and supervise the expenditure of said $500,000 fund, to be sure it is expended only on highway purposes, there is a question as to whether the use of road use tax fund monies as allowed in this Section would be in conflict with the provision of Article 7 Section 8 of the Iowa Constitution as amended by the 18th Amendment in 1942.

"There is a further question of whether the use of road use tax fund monies as allowed in this Section would be in conflict with said Article 7 Section 8

of the Constitution of the State of Iowa, which provides that such monies 'shall be used exclusively for the construction, maintenance and supervision of public highways' within the State of Iowa.

"Given the importance and timeliness of this question, I would appreciate your opinion at the earliest possible time."

In my opinion, the proposed amendment (Section 9 aforesaid) to §312.2, Code of Iowa, 1977, authorizing expenditure of road use tax funds "for the lease or other use of land intended for planting or maintenance of wind erosion control barriers designed to reduce wind erosion interfering with the maintenance of highways in the state or the safe operation of vehicles thereon" is an unconstitutional attempt to evade Article VII, §8, Constitution of Iowa, sometimes called the 18th Amendment or the 1942 anti-diversion amendment.

The land for which the funds are authorized to be expended is, under the statute, not located on the right-of-way and is clearly not a part of the highway. In *1972 OAG 362* it was my opinion that the 1942 anti-diversion amendment prevented use of primary road funds for purchasing billboards, signs and junk yards outside the right-of-way on land adjacent to public highways, because they were "clearly not a part of the highway." In that 1972 opinion I distinguished my opinion in *1968 OAG 494* in which I had found that the primary road fund could be used for safety rest areas because the safety rest areas *were* part of the public highways. Therein I noted that our Supreme Court has construed our anti-diversion amendment more narrowly than the almost identical anti-diversion provision of the North Dakota constitution, citing *Edge v. Brice*, 253 Iowa 710, 113 N.W.2d 755 (1962), *Slapnicka v. City of Cedar Rapids,* 258 Iowa 382, 139 N.W.2d 179 (1965) and *Frost v. State,* 172 N.W.2d 575 (1969 Iowa). Cf. *OAG 1-14-77,* Haesemeyer to Welden.

Moreover, while I must ordinarily accept the factual determinations of the General Assembly, I cannot help but notice that the users who support our highways would be surprised to learn that the wind erodes them to the extent of "interfering with the maintenance of highways in the state or the safe operation of vehicles thereon."

In any case, I predict that our court would find this expenditure of the road use tax funds for leasing or using land outside, and perhaps not even adjacent to, our highways, an improper diversion of money consitutionally earmarked to "be used exclusively for the construction, maintenance and supervision of the public highways..." *Frost v. State, supra.*

May 9, 1978

MUNICIPALITIES: Population for wards. §§4.1(25), 26.6 and 372.13(7), Code of Iowa, 1977. In determining the proper division of a city into wards the city council should use the latest preceding certified federal census. (Nolan to Glenn, State Senator, 5-9-78) #78-5-4

Honorable Gene W. Glenn, State Senator: This is written in response to your letter of April 12, 1978, requesting an Attorney General's opinion on the following:

"If a city ordinance, pursuant to Section 372.13(7) of the 1977 Code of Iowa, as amended, divides itself into wards based upon population, may said division be based upon the 1970 United States census figures or is the Council required to obtain a new census. The first election under said ward system would not be until November of 1979."

Code §372.13(7), referred to above provides:

"By ordinance, the city council may divide the city into wards based upon population, change the boundaries of wards, eliminate wards or create new wards."

Thus, §26.6, Code of Iowa, 1977 applies. This section provides:

"Whenever the population of any...city is referred to in any law of this state, it shall be determined by the last preceding certified federal census unless otherwise provided. Whenever a special federal census is taken by any city, the mayor and council shall certify the census as soon as possible to the secretary of state and to the treasurer of state as otherwise herein provided.... If there be a difference between the original certified record of the secretary of state and the published census the former shall prevail."

A similar provision appears in §4.1(25) of the Code:

"Population. The word 'population' where used in this Code or any statue means the population shown by the last preceding certified federal census, unless otherwise specifically provided."

Accordingly, it is the view of this office that if the 1970 Federal Census is indeed the "latest preceding certified federal census" that is what the council is required to use. A city may have one special federal census taken each decade pursuant to §312.3(2) for purposes of apportionment of the road tax fund and if such a census has been taken and certified to the Secretary of State as provided in the statute then that census will be used by the council in establishing wards for the city.

May 9, 1978

COUNTIES AND COUNTY OFFICERS. Sheriff. §332.35, Code of Iowa, 1977. In the absence of a contract with the sheriff for the use of his personal car in the performance of his duties, the county is required to provide at least one automobile for sheriff's office use. (Nolan to Rolfe, Union County Attorney, 5-9-78) #78-5-5

Mr. Robert A. Rolfe, County Attorney: This will acknowledge receipt of your letter requesting an opinion on the following:

"Section 332.35 of the 1977 Code of Iowa has language which would appear to make mandatory the purchase of automobiles for the Sheriff's Department of a county. If no contract is made or more specifically, if the Sheriff and the Board are unable to agree as to an equitable amount for the use of a private automobile, does the Board of Supervisors have a mandatory duty at that point to purchase an automobile or automobiles for the use of the Sheriff and his deputies.

"If the Board of Supervisors refuses to purchase an automobile and offers merely a token amount for the Sheriff's private vehicle, does the Sheriff have any remedy other than to sue the Board of Supervisors."

Under §332.35 of the Code of Iowa, 1977 the county is required to provide county owned automobiles for the sheriff's department if the Board of Supervisors fails to reach an agreement with the sheriff for the use of private vehicles. §332.35 provides:

"Sheriffs and deputies shall not use private automobiles in the performance of their duties of office unless such use is pursuant to a contract made between the board of supervisors and the sheriff or deputy, as the case may be, as set

forth in section 332.3, subsection 18. If no such contract is made regarding use of private vehicles, the board of supervisors must provide as many county-owned automobiles as the board determines are needed for the sheriff and deputies to perform their duties of office."

It is the view of this office that the language of the statute set out above mandates that the supervisors act either to enter an appropriate contract with the sheriff for the use of his personal car or provide at least one county owned automobile for the sheriff's office use. There does not appear to be any authority expressed or implied for the sheriff to file a claim against the county for mileage in the absence of a contract with the board of supervisors. Nor do we see any authority for the sheriff to bind the county on the purchase of one or more automobiles to be used by the sheriff's office.

May 9, 1978

COUNTIES AND COUNTY OFFICERS: Uniform Support of Dependent's Law. Chapter 252A, Code of Iowa, 1977. An award of alimony is enforceable under the Iowa Uniform Support of Dependents' Law. (Grubisich to Filseth, Assistant Scott County Attorney, 5-9-78) #78-5-6

Mr. Henry C. Filseth: We have received your letter of March 9, 1978, requesting an opinion concerning the following question:

Can alimony be collected in a proceeding brought pursuant to the Uniform Reciprocal Enforcement of Support Act (URESA), Chapter 252A, the Code?

The facts involved in the case at hand are that the original decree was entered in Scott County, Iowa, which decree ordered the husband to pay to the wife the sum of $250.00 per month as alimony. The wife subsequently moved to the State of Wisconsin while the husband remained in Scott County. The alimony was not paid as ordered and a Uniform Support action was commenced in Wisconsin and forwarded to Iowa for enforcement.

The above presents a question which has not heretofore been directly addressed by the Iowa Courts. In such a situation it is helpful to look to decisions from other jurisdictions interpreting the same or a similar statute. The various URESA statutes of the 50 states, being uniform in nature, are all substantially similar to each other. The general rule is that alimony is enforceable under the URESA statutes if it was ordered in the original divorce decree, but cannot be otherwise obtained.

Historicaly, the difficulty with interstate enforcement of support orders stems from the fact that such orders are not "final" orders or judgments and are thus not entitled to full faith and credit under the U.S. Constitution. *Sistare v. Sistare,* 218 U.S. 1 (1910). The states have traditionally, however, as a matter of comity, enforced foreign support orders in light of the important public policy considerations involved in support of dependents. The Iowa statute has attempted to deal with the finality problem by including in the URESA Statute section 252A.8 which states as follows:

This chapter shall be construed to furnish an additional or alternative civil remedy and shall in no way affect or impair any other remedy, civil or criminal, provided in any other statute and available to the Petitioner in relation to the same subject matter.

In this way, an action brought under the Iowa URESA statute is considered to be a separate and distinct proceeding with any order entered therein being a

new order which does not modify, change or impair any other support order in effect at the time. Such an order would not necessarily supersede a pre-existing support order, however, as monies paid pursuant to the URESA order would be applied to the original support order.

In interpreting a statute such as Chapter 252A, the legislative intent must be sought in light of the wrong to be remedied and the purpose to be accomplished, with the ultimate goal being to give the statute a reasonable construction which will accomplish rather than defeat its purpose.

Greenstreet v. Clark, 239 N.W.2d 143 (Iowa 1976).

The purpose of the Iowa URESA statute is succinctly stated in section 252A.1 wherein it is stated:

The purpose of this Uniform Chapter is to secure support in civil proceedings for dependent spouses, children and poor relatives, from persons legally responsible for their support.

Thus, the purpose of the URESA statute is to provide a uniform, simplified and convenient method whereby a dependent can obtain needed monetary support from one obligated to provide such support. As such, it is a remedial statute and, in light of its humanitarian nature, is entitled to be accorded a liberal interpretation, and every effort should be made to render in operable and effective *Greenstreet v. Clark,* supra.

Implicit in the URESA statute is the term "dependent". Section 252A.2(4) defines the term "dependent" as follows:

"Dependent" shall mean and include a spouse, child, mother, father, grandparent or grandchild who is in need of and entitled to support from a person who is declared to be legally liable for such support by the laws of the state or states wherein the petitioner and the respondent reside."

Said term thus refers to a person who is entitled to monetary support from another person who has legal duty to provide such support. Therefore, to determine whether or not alimony is enforceable under the Iowa URESA statute, we must first determine whether or not a duty to support an ex-wife exist in Iowa.

The Iowa Court stated in *Engleson v. Mallea,* 180 N.W.2d 127 (Iowa 1970), that:

The duty of support under the provisions of the URESA law are those imposable by Iowa law generally.

In *Keefe v. Keefe,* 143 N.W.2d 335 (Iowa 1966), the Court stated that a husband is bound both in law and equity for the support and maintenance of his wife. The question then becomes what happens to this duty of support when the parties are divorced. The Court addressed this issue in *Knipfer v. Knipfer,* 144 N.W.2d 140 (Iowa 1966), wherein it was stated that:

The common law obligation of a husband to support his wife is not removed by her obtaining a divorce***.

The Court further states in *In Re the Marriage of Murray,* 213 N.W.2d 657 (Iowa 1973), as follows:

A divorced husband's inability to maintain his former wife in her usual mode of living did not negate his duty to contribute, so far as reasonably possible, to her support and maintenance; the wife's needs were to be balanced against his

ability to pay.

And finally, the Court actually defines the term alimony as follows:

alimony is an allowance to the wife from the husband for her support in a divorce action, in lieu of the legal obligation of the husband to support her. *Knipfer v. Knipfer,* supra.

Thus, it appears from the above that a divorce does not necessarily terminate the husband's legal duty to support his wife, and the wife would, therefore, be a dependent as contemplated by Chapter 252A and is entitled to enforce her award of alimony pursuant to said statute.

This decision is supported by similar decisions in numerous other states. The Wisconsin Court has stated as follows:

Upon termination of the marriage, the husband has a continuing obligation to support his wife in the manner to which she has become accustomed. See *Radandt v. Radandt,* 140 N.W.2d 293, 30 Wisc. 2d 108 (Wisc. 1966); *Tonjes v. Tonjes,* 128 N.W.2d 446, 24 Wisc. 2d, 120 (Wisc. 1964); *Borchers v. Borchers,* 36 N.W.2d 79, 254 Wisc. 302 (Wisc. 1949).

From the above, it is obvious that Iowa and Wisconsin law is essentially the same on this issue, and alimony is enforceable in both states pursuant to the respective URESA statutes.

A possible exception to the above conclusion, and a possible defense which could be raised to a URESA petition for support by a respondent thereto, involves the question as to whether the alimony as originally ordered was actually ordered for the support of a dependent former spouse, or whether it was ordered by way of a property settlement in the divorce. Generally, a property settlement is defined as a wife's just and equitable share of property which the parties accumulated during the course of their marriage. The question then becomes whether or not the alimony was substituted for the wife's share of said property. This question must be approached on a case by case basis as it is raised, taking into account all relevant factors and considerations. It does not alter our opinion that alimony is enforceable under Iowa's URESA Statute, Chapter 252A, and it is the Respondent's responsibility to raise this question.

Conclusion

A husband has both a statutory and common law duty to support his wife, which duty is not extinguished by the mere fact of a divorce. Therefore, the former wife is a dependent as contemplated by the Iowa URESA statute, Chapter 252A, and is entitled to enforce her rights to support under said law. To provide otherwise would deprive a wife in one jurisdiction the right to pursue one legally obligated to her in another jurisdiction, and the evil which the award of alimony payments sought to prevent occurs, and the wife becomes a ward of the state. See 54 Iowa Law Review 597 (1969).

May 22, 1978

PHARMACY: Iowa Drug and Cosmetic Act; Labeling Requirements. §203A.10, subsection 12, Code of Iowa, 1977. Labeling requirements of §203A.10(12) apply to doctors. (McGrane to Johnson, Executive Secretary, Iowa Board of Pharmacy Examiners, 5-22-78) #78-5-7

Mr. Norman Johnson, Executive Secretary, Iowa Board of Pharmacy Examiners: You have requested an opinion on the following question:

"Does 203A.10(12.b) apply to drugs dispensed by a physician, dentist, or veterinarian? Are drugs dispensed by a physician, dentist, or veterinarian misbranded if the conditions set out under 203A.10(12.b) are not met?"

Chapter 203A, Code of Iowa, 1977 is the Iowa Drug and Cosmetic Act. Section 203A.10 provides that a drug or device shall be misbranded unless its packaging and labeling meet certain criteria. Section 203A.10, subsection 12 provides an exemption, to-wit:

"12. A drug sold on a written prescription signed by a doctor, dentist or veterinarian (except a drug sold in the course of the conduct of a business of selling drugs pursuant to diagnosis by mail) shall be exempt from the requirements of this section if:

"a. Such doctor, dentist or veterinarian is licensed by law to administer such drugs, and

"b. Such drug bears a label containing the name and place of business of the seller, the serial number and date of such prescription, and the name of the doctor, dentist or veterinarian."

Section 203A.10 is phrased in general terms and applies to all persons unless exempted. Some states have exempted doctors from the general application, (see Ohio statute 3714.01(b)(2), but Iowa has not. The only exemption in Iowa is Section 203A.10, subsection 12, which applies to doctors, dentists, veterinarians and pharmacists. It is appropriate to apply this to a doctor who does his own dispensing since "it has always been the rule that a physician who does his own dispensing is also acting in the capacity of a pharmacist." *DeFreese v. United States,* 270 F.2d 730, 734, n. 7, (2nd Cir. 1959).

It is therefore the opinion of this office that in order to be exempt from the labeling requirements of Section 203A.10 a doctor, dentist, or veterinarian who does his own dispensing must comply with the labeling requirements of Section 203A.10 subsection 12. Drugs dispensed by a doctor without substantial compliance with the condition in Section 203A.10(12)(b) would be misbranded.

May 18, 1978

COUNTIES AND COUNTY OFFICERS: Supervisors, County Engineer; Approval of Plats. §§306.21 and 309.18, Code of Iowa, 1977. The board of supervisors cannot compel the county engineer to approve a subdivision plat. The authority relative to such approval conferred upon him by §306.21 is discretionary. (Haesemeyer to Richter, Pottawattamie County Attorney, 5-18-78) #78-5-8

Mr. David E. Richter, Pottawattamie County Attorney: Reference is made to your request for an opinion of the Attorney General with respect to the following:

"Section 306.21, 1977 Code of Iowa states, relative to approval of plats, in part'. . . by the board of supervisors and the county engineer before the subdivision is laid out and platted,. . .'.

"Section 309.18, 1977 Code of Iowa states, relative to engineers in counties that, '. . . shall, in the performance of their duties, work under the directions of said board and. . .'.

"If the board has approved a plat under 306.21, does the engineer also have to approve it or can the board 'direct' him to approve same with the same force as if he had approved it?"

Sections 306.21 and 309.18, Code of Iowa, 1977, provide respectively:

§306.21

"Plans, plats and field notes filed. All road plans, plats and field notes and true and accurate diagrams of water, sewage and electric lines for rural subdivisions shall be filed with and recorded by the county auditor and approved by the board of supervisors and the county engineer before the subdivision is laid out and platted, and if any proposed rural subdivision is within one mile of the corporate limits of any city such road plans shall also be approved by the city engineer or council of the adjoining municipality. Such plans shall be clearly designated as 'completed', 'partially completed' or 'proposed' with a statement of the portion completed and the expected date of full completion. In the event such road plans are not approved as herein provided such roads shall not become the part of any road system as defined in this chapter."

§309.18

"Compensation. The board shall fix the compensation of said engineer or engineers, and pay the same, together with all engineering costs, from the general county fund, or from the secondary road construction fund or from the secondary road maintenance fund, or from any or all of said funds.

"Said engineers shall, in the performance of their duties, work under the directions of said board and shall give bonds for the faithful performance of their duties in a sum not less than two thousand nor more than five thousand dollars, to be approved by the board."

In our opinion, the latter section does not override the discretion and authority of the county engineer relative to the approval of plats conferred upon him by §306.21 and permit the board of supervisors to compel the county engineer to approve a plat against his will and professional judgment. Section 309.18 is a general statute relative to the right of the board of supervisors to direct the county attorney in the performance of his duties in a comprehensive and general way whereas §306.21 is a special statute dealing with the county engineer's part in the approval of plats under that section. As stated in §4.7:

"Conflicts between general and special statutes. 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 provisions."

Beyond this, if it were competent for the board of supervisors to compel the county engineer's approval under §306.21 the practical effect of such conclusion would be to render the statutory requirement of the county engineer's approval to superfluous and meaningless. It is axiomatic that statutes should not be construed so as to render any part thereof as superfulous. While it is perhaps idle to speculate as to the reasons the legislature saw fit to require the approval both of the board of supervisors and the county engineer, it could well be that the framers of §306.21 recognized that the popularly elected supervisors needed the independent professional input and judgment of an engineer in matters of this kind.

While we cannot conclude that the supervisors may compel the county engineer to approve a plat against his judgment, this is not to say, of course, that a court of law in a proper case would not do so if it could be shown that the county engineer's refusal to approve was arbitrary and capricious or motivated by improper considerations.

Elections: Ballot Vacancies; county convention reconvened; quorum and certificate. §§43.78(1), 43.88 and 43.95, Code of Iowa, 1977. There is no requirement that a certification made to the county auditor to fill a vacancy under §43.78 must contain a statement that a quorum of delegates was present at the county convention which filled the vacancy. If there is a majority of the whole number of delegates elected to the convention or if one or more delegates representing a majority of the precincts are thus assembled, the convention would be lawful. If no objections are filed to the certificate to fill a vacancy on the general election ballot, and it is later learned that a quorum was not present at the county convention, such election would not be void or voidable because of the lack of a quorum at the county convention nominating the candidate but would at most be irregular. (Haesemeyer to Smith, O'Brien County Attorney, 5-9-78) #78-5-9

May, 1978

COUNTIES AND COUNTY OFFICERS

Supervisors, County Engineer; Approval of Plats. §§306.21 and 309.18, Code of Iowa, 1977. The board of supervisors cannot compel the county engineer to approve a subdivision plat. The authority relative to such approval conferred upon him by §306.21 is discretionary. (Haesemeyer to Richter, Pottawattamie County Attorney, 5-18-78) #78-5-8

Uniform Support of Dependents' Law. Ch. 252A, Code of Iowa, 1977. An award of alimony is enforceable under the Iowa Uniform Support of Dependents' Law. (Grubisich to Filseth, Asst. Scott County Attorney, 5-9-78) #78-5-6

Sheriff. §332.35, Code of Iowa, 1977. In the absence of a contract with the sheriff for the use of his personal car in the performance of his duties, the county is required to provide at least one automobile for sheriff's office use. (Nolan to Rolfe, Union County Attorney, 5-9-78) #78-5-5

HIGHWAYS

Primary Road Funds; Constitutional Law. Art. VII, §8, Const. of Iowa; §312.2, Code of Iowa, 1977; HF 491, 67th G.A., 2nd. A proposed statutory amendment to authorize expenditure of road use tax funds "for the lease or other use of land intended for the planning or maintenance of wind erosion control barriers designed to reduce wind erosion interfering with the maintenance of highways in the state or the safe operation of vehicles thereon" is an unconstitutional attempt to evade Art. VII, §8, the 18th or 1942 anti-diversion amendment to the Constitution of Iowa. (Turner to Drake and Van Gilst, State Senators, 5-5-78) #78-5-3

MUNICIPALITIES

Airports. 5th and 14th Amendments, Const. of the United States; §§330.17, 330.21, 613A.8, Code of Iowa, 1977. The Airport Commission is an independent or autonomous commission and has power to defend, save harmless and indemnify its officers, employees and agents against tort and contract claims. §330.17 prescribes elections as the only means of creating or abolishing an Airport Commission. No airport property can be transferred or sold by the city council without approval of the Airport Commission. If an Airport Commission is abolished, its contractual agreements legally made are binding upon the city. (Turner to Lightsey, DOT Aeronautics Director, 5-1-78) #78-5-1

Population for Wards. §§4.1(25), 26.6 and 372.13(7), Code of Iowa, 1977. In

determining the proper division of a city into wards the city council should use the latest preceding certified federal census. (Nolan to Glenn, State Senator, 5-9-78) #78-5-4

PHARMACY

Iowa Drug and Cosmetic Act; Labeling requirements. §203.10, subsection 12, Code of Iowa, 1977. Labeling requirements of §203A.10(12) apply to doctors. (McGrane to Johnson, Executive Secretary, Iowa Board of Pharmacy Examiners, 5-22-78) #78-5-7

WEAPONS

Permits; Firearm Training. §§724.9, 724.11, 724.14, Supplement to the Code, 1977; §§4.6 and 695.13, Code of Iowa, 1977. The words "renewal permits" in §724.11, mean a permit renewing an initial permit issued on or after January 1, 1978. §724.9 requires individuals who held concealed weapon permits issued prior to January 1, 1978, other than certified peace officers, to obtain a certificate of completion from a prescribed firearm safety training program as a prerequisit to obtaining either a professional or nonprofessional permit to carry weapons. (Cook to Baker, State Representative, 5-3-78) #78-5-2

STATUTES CONSTRUED

Code, 1977	Opinion
4.1(25)	78-5-4
4.6	78-5-2
26.6	78-5-4
203A.10, §12	78-5-7
252A	78-5-6
306.21	78-5-8
309.18	78-5-8
312.2	78-5-3
330.17	78-5-1
330.21	78-5-1
332.35	78-5-5
372.13(7)	78-5-4
613A.8	78-5-1
695.13	78-5-2
724.9	78-5-2
724.11	78-5-2
724.14	78-5-2
67th GENERAL ASSEMBLY	
House File 491	78-5-3
CONSTITUTION OF IOWA	
Article VII, §8	78-5-3

June 1, 1978

STATE OFFICERS AND DEPARTMENTS: Child Abuse Statute and Federal Regulations: §235A.3(1)(a) and (b) Code of Iowa; 45 C.F.R. §1340.3-3(d)(2)(i). The Iowa statutes comply with the Federal regulations as there is no substantial difference between the reporting requirements under Iowa law that one who "believes" shall report instances of child abuse and the

one who "suspects" provision of the Federal Regulation. (Robinson to Preisser, Acting Director of Social Services, 6-1-78) #78-6-1

Mr. Victor Preisser, Acting Commissioner, Iowa Department of Social Services: You recently brought to my attention §235A.3(1)(a) of the Code of Iowa, 1977, as amended by H.F. 2404 of the 67th G.A. (1978 session) which provides:

1. The following classes of persons shall make a report, as provided in section 235A.4, of cases of child abuse:

a. Every health practitioner who examines, attends, or treats a child and who reasonably *believes* the child has been abused....

b. Every social worker under the jurisdiction of the department of social services, any social worker employed by a public or private agency or institution, public or private health care facility as defined in section 135C.1, certified psychologist, certified school employee, employee of a licensed day care facility, member of the staff of a mental health center, or peace officer, who, in the course of employment, examines, attends, counsels or treats a child and reasonably *believes a child has suffered abuse*...(Emphasis added).

The question you ask is whether or not the Iowa statute complies with 45 C.F.R. §1340.3-3(d)(2)(i) which provides:

(2)(i) *The State must provide for the reporting of known or suspected instances of child abuse and neglect.* This requirement shall be deemed satisfied if a State requires specified persons by law, and has a law or administrative procedure which requires, allows, or encourages all other citizens, to report known or suspected instances of child abuse and neglect to one or more properly constituted authorities with the power and responsibility to perform an investigation and take necessary ameliorative and protective steps as required in paragraph (3). (Emphasis provided).

In answering the question as to whether or not the above quoted Iowa statute complies with the federal regulation you directed our attention to the language which states "the reporting of known or suspected instances of child abuse" of the regulation and asked whether it is consistent with the "who reasonably believes" standard used in the Iowa statute. In our opinion the Iowa statute complies with the federal regulation.

We have found no Iowa authority directly on point. An opinion by the Nebraska attorney general has been brought to our attention. We agree with the reasoning of this opinion which we quote in part as follows:

The fifth subject of consideration deals with the standard of evidence required before reporting is mandated under section 28-1502, R.R.S. 1943. That statute creates the standard which requires reporting when any "person has reasonable cause to believe" that abuse is going on. The question is whether that standard is equivalent to "suspect" as used in the federal regulations, 45 C.F.R. Subpart C 1340.3-(d)(2)(e). On June 25, 1975 Curt T. Schneider, Attorney General of the State of Kansas in Opinion No. 75-265, addressed the subject of comparison of the two requirements of reporting child abuse or neglect.

"In my opinion, the reporting requirement under Kansas law, appertaining to those 'having reason to believe' instances of child abuse or neglect have occurred, is tantamount and equivalent to a requirement for the reporting of 'suspected' such instances. In the ordinary course of human affairs, one who has reason to believe a particular fact thereby suspects that fact to be correct,

and the two requirements are, in my judgment legally identical."

We feel that language of the Nebraska statute is equivalent to that of the Kansas statute and that the same reasoning would apply. It is, therefore our opinion that the question is semantical and there would be no practical difference in any way in the conduct of persons reporting cases of abuse, or neglect, whether the standard of care in the statute was reasonable cause or suspicion. (Harper to Ehrlich, 8-17-77).

We note that some courts have drawn a distinction between "suspected instances" which does not constitute reasonable grounds for probable cause necessary to justify an investigative stop by a police officer as opposed to the "specific and articulable cause to believe" standard which is used to justify a stop and search by a police officer. See *U.S. v. Wright,* 425 F. Supp. 253 (D.C. Iowa 1977); *State v. Billings,* 242 N.W.2d 726 (Iowa 1976); and *State v. Farrell,* 242 N.W.2d 327 (Iowa 1976). In the criminal law, a motion to suppress is often made of evidence obtained in such an arrest. This involves the fourth amendment right pertaining to search and seizure. The two Iowa cases were decided on the same day. In *State v. Farrell, supra,* the court states "...there may be an investigatory stop based on reasonable grounds to *suspect* 'criminal activity is afoot.' " [242 N.W.2d at 329]. (Emphasis added). Thus Iowa seems to have merged the previous distinction between "belief" and "suspected."

It is important to note that the above distinctions were made in the criminal law and do not apply to our statutory construction problem in the civil context of construing the Iowa statute vis-a-vis the federal regulation. If there is a distinction (which we have concluded there is not) we draw some comfort from the fact that Iowa's language comes closer to meeting constitutional muster.

Again, in conclusion, the Iowa child abuse statute complies with the pertinent federal regulations.

June 6, 1978

COUNTIES AND COUNTY OFFICERS: County Road Bridges; Board of Supervisors. §306.10, et. seq., Code of Iowa, 1977. County Board of Supervisors has the power to establish, alter or vacate roads. Therefore, the county board of supervisors may vacate a portion of the road under their jurisdiction a section of which consists of a bridge which has washed out. (Paff to Daggett, State Representative, 6-6-78) #78-6-2

The Honorable Horace Daggett, State Representative: In response to your request for a formal opinion concerning a county obligation to replace a bridge on a county road, please be advised as follows:

Generally there is no question that highway authorities have the power to establish, alter or vacate roads within their jurisdiction and control pursuant to Section 306.10 et. seq. of the Code of Iowa, 1977. Therefore, the county has no obligation to replace a bridge on a county road. Such road could be closed in lieu of maintaining the bridge or reconstructing one that has washed out. Highways may be altered, vacated or closed at any time and no person, including adjacent property owners, have a "vested right" to *keep highways open.* See *Hinnechs v. Iowa State Highway Commission,* 260 Iowa 1115, 152 N.W.2d 248 (1967).

Additionally, to comment; whether a failure to replace a bridge which has been washed out amounts to a de facto closing giving rise to a claim of "just

compensation" is a separate question. A consideration paramount in this case would be the bar represented by the Statute of Limitations Section 614.1(4) of the Code of Iowa, 1977, which places a five-year limitation on claims arising out of injury to property. A second consideration would be whether the farmer in this particular situation bought the property some 31 years ago prior to the bridge washout thus establishing that the farmer bought the property with knowledge of this particular situation.

June 13, 1978

ENVIRONMENTAL PROTECTION: Septic Tanks; County Board of Health Requiring Professional Engineer to Conduct Percolation Test. Sections 136.3(7), 137.6(2), 137.7, 114.2, 114.16, 1977 Code of Iowa; Rule 470-12.1(1), Rule 470-12.7, Iowa Administrative Code; Rule adopted by Clayton County Board of Health requiring registered professional engineer to conduct percolation tests before issuance of a permit to install a septic tank is within Board's authority and such tests are the practice of engineering. (Davis to Halvorson, State Representative, 6-13-78) #78-6-3

The Honorable Roger A. Halvorson: You have requested the opinion of this office concerning the validity of a rule established by the Clayton County Board of Health which became effective April 20, 1977. You state:

"The rule established by this Board is in conjunction with preapplication for establishment of septic tank and drain field installations after this date; mandating the taking of a 'Percolation Test' by a licensed engineer; and the filing of the results of this test prior to actual construction of such sewer system. Clayton County officials inform me the cost of having a 'licensed engineer' to perform the test will cost the applicant an additional $200.00. This would appear to be an attempt to conform to Chapter 114.16 of the Code of Iowa, again according to the County officials."

Your question is whether the Clayton County Board may or must require a licensed professional engineer to conduct percolation tests. You indicate that the County Board has stated it must require the test to be conducted by a professional engineer under section 114.16, 1977 Code of Iowa.

I

Pursuant to Section 136.3(7), 1977 Code of Iowa, the State Board of Health has established rules concerning sewage disposal. They are found in Ch. 12, I.A.C., 7/28/75, Health (470). Rule 470-12.1(1)(133) states:

"Permit required. No individual private sewage disposal system shall be installed or reconstructed until an application for a permit has been submitted and a permit has been issued by the local board of health - such installation to be in accordance with these rules."

Rule 470-12.7(135) concerns subsurface tile systems and percolation rates. Section 12.7(1)b states:

"Percolation tests. Percolation tests are required before any lateral field is installed. A minimum of three test holes distributed evenly over the proposed lateral field are required. The lineal feet of lateral field required shall be as specified in Table III."

Further, Rule 12.7(2), entitled "Percolation Rates," subsections (a) and (b) state:

"a. Percolation chart. Table III, percolation chart, specifies lineal feet of

lateral trenches required in accordance with the results of the standard percolation tests.

"b. Unsuitable absorption. In the event the percolation rate exceeds 60 minutes per inch of water absorption, the soil conditions are unsuitable for the use of an absorption field to serve the individual sewage treatment system. Plans for an alternative method of secondary treatment shall be submitted to the administrative authority for their approval prior to construction."

Subrule (c) of 12.7(2) is entitled Table III, *Percolation Chart.* It sets forth the minimum number of lineal feet of absorption trench required for various percolation rates—as the absorption rate of the soil increases, the minimum required number of absorption trench feet also increases.

Chapter 137, 1977 Code of Iowa, concerns local boards of health as "a county, city or district board of health." Section 137.6 sets forth the powers of local boards. The section states in pertinent part:

"Local boards shall have the following powers:

* * *

"2. Make and enforce such reasonable rules and regulations not inconsistent with law or with rules of the state board as may be necessary for the protection and improvement of public health."

Section 137.7, entitled "Additional powers of local boards," authorizes local boards of health to "issue licenses and permits and charge reasonable fees therefor in relation to the collection or disposal of solid waste and the construction or operation of private water supplies or sewage disposal facilities."

Under Section 137.7 and also under Rule 470-12.1(1)(135) above, a county board of health must issue a permit prior to the construction or operation of a sewage disposal system. Further, under Section 137.6 set forth above, a local board of health may promulgate reasonable regulations not inconsistent with existing law or regulations of the state health board. Here, the state regulations on percolation testing fail to designate the party by whom testing must be conducted.

However, other sections of the laws of Iowa require that all percolation tests come under the practice of professional engineering and must be conducted by a professional engineer under Chapter 114, 1977 Code of Iowa, entitled "Professional Engineers and Land Surveyors." Section 114.2 provides the following definition of professional engineering:

"The practice of 'professional engineering' within the meaning and intent of this chapter includes any professional service, such as consultation, investigation, evaluation, planning, designing, or responsible supervision of construction in connection with structures, building, equipment, processes, works, or projects, wherein the public welfare, or the safeguarding of life, health or property is or may be concerned or involved, when such professional services require the application of professional principles and data."

The design and construction of a private sewage disposal system is certainly "any professional service" where the public health and welfare is involved and the application of engineering principles is required. Our question is whether one small step in the construction process, that of testing soil porosity, comes under the definition of professional engineering.

The leading case concerning the Iowa statute's definition of professional

engineering is *Food Managment, Inc. v. Blue Ribbon Beef Pack, Inc.,* 413 F.2d 716 (1969). There, the Eighth Circuit Court of Appeals concluded:

"Thus under Iowa law, the mere gathering of data constitutes a part of the practice of architecture of professional engineering." 413 F.2d 716 at 723.

Applied to the present issue, the above statement supports the conclusion that percolation testing, which constitutes the gathering of data, is a part of the practice of professional engineering, particularly since Rule 470-12.7(2)(a) refers to "the standard percolation tests" which must be a reference to such an "application of professional principles and data" as is referred to in §114.2. The word "standard" as used in Rule 470-12.7(2)(a) can only refer to a professionally accepted engineering procedure. The *entire* construction process, including gathering soil porosity data, constitutes professional engineering.

Since the percolation testing constitutes the practice of professional engineering, the test results are thus engineering documents. The definition of "engineering documents" appears in §114.2:

"The term 'engineering documents' as used in this chapter includes all plans, specifications, drawings, and reports, if the preparation thereof constitutes or requires the practice of professional engineering."

As engineering documents, percolation test results come under the provisions of §114.16. That section states in pertinent part:

"114.16 Seal - certificate of responsibility - reproductions.

* * *

"All engineering documents and land surveying documents shall be dated and shall contain the following: (1) The signature of the registrant in responsible charge; (2) a certificate that the work was done by such registrant or under his direct personal supervision; and (3) the Iowa registration number or legible seal of such registrant.

* * *

"No agency of this state and no subdivision or municipal corporation of this state, nor any officer thereof, shall file or record or approve any engineering document or land surveying document which does not comply with this section.

"No registrant shall place his signature or seal on any engineering document or land surveying document unless he was in responsible charge of the work, except that he may do so if he contributed to the work and the registrant in responsible charge has signed and certified the work. . . ."

Pursuant to this section, it is the opinion of this office that County Board of Health shall not file for record or approve any percolation test results which do not comply with §114.16.

What reasons, other than the clear mandate of the law, should require this result? Even without Chapter 114, it is a reasonable and valid exercise of the Board of Health's power to protect and improve the public health to require a licensed professional engineer to conduct percolation testing.

The sections set forth above from Chapter 137 vest broad discretionary powers in local boards of health. *Warner v. Stebbins,* 111 Iowa 86, 88, 82 N.W. 457, (1900), rendered an interpretation of §2568, 1897 Code of Iowa, from which the present §137.6 is derived. In that decision the Iowa Supreme Court stated:

"The power given to local boards by this statute is broad. It is in the nature of legislative power delegated to the officers of a municipality for the preservation and promotion of the public health, and, while its use as an instrument of oppression by the local authorities will not be permitted, acts done thereunder, in good faith and for the purpose of promoting the general health...will be upheld by the courts."

In determining the validity of the acts of boards of health, a liberal construction is justified, in view of the public good to be accomplished. *Walker v. Sears,* 245 Iowa 262, 61 N.W.2d 729 (1953). A regulation which is reasonably calculated to preserve the public health is valid, and will be upheld unless it clearly appears unreasonable. *Dobbins v. Los Angeles,* 195 U.S. 223 (1904); *California Reduction Co. v. Sanitary Reduction Works,* 199 U.S. 306 (1905); *State ex rel. Cedar Rapids v. Holcomb,* 68 Iowa 107, 26 N.W. 33 (1885), partially overruled on other grounds in *Dotson v. City of Ames,* 251 Iowa 472, 101 N.W.2d 711 (1960).

In the present case, even without considering Chapter 114, the regulation concerning percolation tests made by the Clayton County Board of Health is clearly reasonable. In fact, requiring an accurate percolation test to be conducted by an independent professional engineer prior to the construction of a sewage disposal system appears to bear a very reasonable relation to the protection of public health. The subsurface tile trenches of a private sewage disposal system cannot be designed to function properly without first conducting soil absorption rate testing. The percolation rate, as measured in minutes per inch of water absorbed, determines the number of lineal feet of absorption trench required. See I.A.C., Ch. 12.7(2)(c).

Thus, an accurate determination of soil transmissibility is critical to the proper design and construction of a sewage disposal system. Were a private party allowed to conduct percolation testing on his own, an obvious potential conflict of interest exists. The percolation rate determines whether soil conditions are suitable for an absorption system and, if so, the minimum number of lineal feet of subsurface lateral trenches required. Clearly, percolation test results have a direct bearing on the total cost of a private sewage disposal system.

Soil percolation testing has resulted in litigation in several states where a health board and a private party have disagreed over percolation test results. Although no cases have confronted the specific issue of whether a professional engineer may be required to conduct the testing, many demonstrate clearly the potential conflict of interest between the parties. See *Dinneen v. Health Division, Department of Human Resources,* Cr. App., 529 P.2d 932 (1974); *Glen Avenue Realty Corporation v. Director of Public Health of Wilmington,* 358 Mass. 443, 265 N.E. 2d 376 (1970).

Thus, even without consideration of Chapter 114, this office would find that the Clayton County Board of Health acted within its power to protect the public health by enacting a regulation requiring a competent, disinterested professional engineer to conduct percolation testing. Such a regulation would reasonably be expected to enhance the accuracy of the tests by discouraging fraud, and help prevent the health hazards which result from the construction of inadequate private sewage disposal systems.

As previously stated, considering the cited sections of Chapter 114 in conjunction with the cited sections of Chapter 136 and the rules promulgated

thereunder, the determination of the Clayton County Board of Health to consider openly those percolation tests done by licensed professional engineers is correct and the adoption of a rule stating this interpretation, while by some disfavored because it recites the law, is approved as within the discretion granted the board to inform the public.

June 14, 1978

MUNICIPALITIES: Special Elections to Fill Vacancies; §§39.8, 47.6, 372.13(2), 376.1 and 376.6, Code of Iowa, 1977. Upon receipt of a valid petition pursuant to §372.13(2), a city council shall call a special election at the earliest practicable time. A primary or runoff election for a special election to fill a vacancy is not permitted. The winner of such a special election shall take office as soon as it is possible to qualify therefor. (Blumberg to Richter, Pottawattamie County Attorney, 6-14-78) #78-6-4

Mr. David E. Richter, Pottawattamie County Attorney: We have your opinion request of May 24, 1978, regarding a special election to fill a city council vacancy. A council member, whose term expires December 31, 1979, was elected mayor and qualified for that office on January 2, 1978. That same day, the remaining council members filled the newly created council vacancy. In May, 1978, a petition, allegedly containing the sufficient number of signatures, was filed with the city council requesting a special election to fill the vacancy for the remaining balance of the term. Based upon these facts, you ask the following questions:

1. Is it necessary for the council to take formal action (vote) to fix a date for the election?

2. If more than two persons file the requisite nomination papers, must a primary be held?

3. If the incumbent is defeated, on what date would the person elected actually take office?

Section 372.13(2) of the Code provides:

"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 69.12. Otherwise, a special election to fill the office shall be called at the earliest practicable time after the petition is presented to the council."

This section mandates that if the petition be valid, a special election shall be held. It is further mandated that the special election, if not requested to be held with a general election, be called at the earliest practicable time. These provisions are mandatory. A city council may not refuse to call a special election if the petition is valid, nor may it, under the guise of a voting procedure, such as a tie vote, fail to set the date. Pursuant to §47.6 of the Code, the governing body of a political subdivision shall give written notice to the commissioner who is to conduct the election of the proposed date of the special election.

There is nothing in the Code which specifically mandates a vote to select an election date. If a vote is taken, it need only be made in the form of a motion. Whether or not a vote need be taken is not relevant since the election must be called at the earliest practicable time. Generally, when a valid petition is presented to the authority to call an election, it is mandatory for that authority to order an election. 26 Am.Jur.2d *Elections* §188 (1966). We recommend, however, that when the council selects a date, it do so by motion so that it will become a matter of record.

Your second question regarding a primary is answered in the negative. Section 376.6 mandates either a primary election or a runoff (as determined by the city) for more than double the number of candidates for the number of positions to be filled in a regular city election. There is no mention in the Code regarding primaries or runoffs for special elections. Our office has held on previous occasions that a municipality may only hold such elections as prescribed by the Legislature. *See,* 1972 OAG 263, 520. Since no primary or runoff elections for special elections to fill vacancies are mentioned in the Code,[1] such a primary or runoff is not permitted. Therefore, regardless of the number of candidates on the ballot for this special election, the one receiving the most votes is the winner. *See,* 1976 OAG 320, 322.

Finally, you ask on what date the winner shall take office. Section 372.13(2) talks about a special election for the *remaining balance* of the term. Read along with §39.8 of the Code, made applicable to cities by §376.1, which provides that an officer chosen to fill a vacancy shall commence the term as soon as such person has qualified. Therefore, we can glean a legislative intent that the newly elected officer shall take office as soon as it is possible to qualify therefor.

In summary, we are of the opinion that upon the receipt of a valid petition pursuant to §372.13(2), a city council shall call a special election at the earliest practicable time. A primary or runoff election for a special election to fill a city council vacancy is not permitted. The winner of the special election shall take office as soon as it is possible to qualify therefor.

June 15, 1978

MUNICIPALITIES: City Councilman and Member of Plan and Zoning Commission; Incompatibility of Offices. §§372.9(13) and 414.6, Code of Iowa, 1977. The offices of city councilman and member of city plan and zoning commission are incompatible. (Haesemeyer to Hoffman, State Representative, 6-15-78) #78-6-5

Honorable Betty Hoffman, State Representative: This is written in response to your request for an opinion on the legality of one person serving both on the city council and the Plan and Zoning Commission.

Two sections of the 1977 Code of Iowa are pertinent to this inquiry:

Section 372.9(13):

"A councilman, during the term for which he is elected, is not eligible for appointment to any city office if the office has been created or the compensation increased during the term for which he is elected...."

[1]See also §376.1 which provides that a city shall hold regular, special, primary, or runoff elections as provided by state law.

Section 414.6:

"In order to avail itself of the powers conferred by this chapter, the council shall appoint a commission, to be known as the zoning commission, to recommend the boundaries of the various original districts, and appropriate regulations and restrictions to be enforced therein. Where a city planning commission already exists, it may be appointed as the zoning commission. Such commission shall, with due diligence, prepare a preliminary report and hold public hearings thereon before submitting its final report; and such council shall not hold its public hearings or take action until it has received the final report of such commission. After the adoption of such regulations, restrictions, and boundaries of districts, the zoning commission may, from time to time, recommend to the council amendments, supplements, changes or modifications."

In an opinion issued by this office on May 13, 1957, 1958 OAG 39, it was stated that the prohibition against the member of the city council being appointed during his elective term to an office created by the council during the same term is general and absolute. A council member could not serve on a commission created by that council. However, where a commission member takes office of councilman there is no vacancy created on the commission because of incompatibility of offices.

The sole power of the city Plan and Zoning Commission is to make recommendations to the city council. The city council is the governing body of the city and has the ultimate power as to the disposition of such recommendations. The city Plan and Zoning Commission, like the county zoning commission authorized under §358A.8, Code of Iowa, 1977, acts more or less as a committee of the governing body having authority only to suggest plans, regulations and to hold public hearings thereon with no power to enact or enforce such plans or regulations.

The zoning board of adjustment is a different body, which pursuant to §414.7 of the Iowa Code has authority to adjust and modify regulations enacted by the city council as they are applied to aggrieved property owners. This kind of power is an administrative and quasi judicial power. *City of Des Moines v. Lohner*, 1969, 168 N.W.2d 779. It is well settled that persons cannot serve on a legislative body and on the administrative or quasi judicial body which applies the legislation to a specific situation without contravening the separation of powers doctrine. *Depue v. City of Clinton*, 1968, 1609 N.W.2d 860.

Despite the fact that the duties and powers of the zoning board of adjustment and the plan and zoning commission are different, it is nevertheless our opinion that the offices of city councilman and member of a city plan and zoning commission are incompatible.

The leading case on incompatibility of offices is *State ex rel. Crawford v. Anderson*, 1912, 155 Iowa 271, 273, 136 N.W. 128. It was stated therein:

"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. Catell, 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.' "

See also, *State ex rel. LeBuhn v. White,* 1965, 257 Iowa 606, 133 N.W.2d 903.

While the city plan and zoning commission's function is only to make recommendations to the city council, the latter body has the ultimate decision making power and is in that sense sitting in revisory capacity over the decisions of the city plan and zoning commission. Moreover, from considerations of public policy it is apparent that the two positions would be incompatible. It is difficult to conceive that a city councilman would bring to bear the objectivity which he should in considering recommendations of the city plan and zoning commission which he had a part in making. If, as a member of the city plan and zoning commission, he had voted in favor of a particular recommended course of action, it is unlikely that as a city councilman he would reverse himself and vote against the recommendation. By the same token, if as a member of the city plan and zoning commission, he voted in the minority against a specific recommendation, the probability that as a city councilman he would vote in favor thereof would be remote. In other words, and in either event, he would necessarily have prejudged the issue. Accordingly, it is our opinion that the two offices are incompatible.

June 16, 1978

COUNTIES AND COUNTY OFFICERS: Plats. §306.21, Code of Iowa, 1977. A final plat of a rural subdivision which bears the approval of the board of supervisors and meets the requirements of county zoning ordinance and other applicable statute may be recorded even though the county engineer does not approve of such plat. (Nolan to Richter, Pottawattamie County Attorney, 6-16-78) #78-6-6

Mr. David E. Richter, Pottawattamie County Attorney: On May 18, 1978, an attorney general's opinion was issued in answer to your request concerning the authority of the board of supervisors to direct the county engineer to approve a plat of a subdivision under §306.21 of the Iowa Code. When this opinion was issued, a related question which you has submitted by separate letter was not covered. This letter is written to answer the additional question which you presented in your letter of April 13, 1978, as follows:

"If the board of supervisors does not have the power to direct the county engineer to give his approval, does it have the authority to direct that the plat of the subdivision be recorded without that approval?"

The question now under consideration may be answered affirmatively. One of the purposes of §306.21 of the Code is to provide for the dedication of roads to the public road system. This section of the Code expressly provides:

"...in the event such road plans are not approved as herein provided such roads shall not become a part of any road system as defined in this chapter."

Where the supervisors approve a rural subdivision plat such approval will have the effect of granting to the county any land dedicated therein for county

purpose with the exception of the roadways marked thereon. Without the approval of the county engineer the platted roads are private roadways. The county should not undertake any expense for the construction and maintenance of such roads.

With respect to the recording of such a plat, we have previously advised an opinion dated October 29, 1969, 1970 OAG 311:

"All subdivision platting in this state must be done in compliance with the provisions of Chapter 409 of the Code. There is no other guideline. Particularly, the plat must be accompanied by:

"A complete abstract of title and a title opinion from an attorney at law that the fee title is in the proprietor and the platted land is free from encumbrance (other than that secured by bond) and a certified statement from the treasurer of the county where the land lies that it is free from taxes and from the clerk of the District Court that it is free from all judgments, attachments or liens, and from the county recorder that the title and fee is in the proprietor and it is free from encumbrances. (§409.4). If the requirements of the statute are met, the recorder must record the plat. This is separate and distinct from the road plan.

"It is the auditor's duty to receive and file the notes pertaining to roads and easements to be located outside the cities and to present them to the board of supervisors for their approval, then to record the action taken.

"The board of supervisors may approve a plat and all the same time disapprove roads in the plan. 1964 OAG 66. In such case the roads in a rural subdivision must be maintained as private roads, as the platting in and of itself, does not effect a dedication of such road to the secondary road system, without the approval of the county engineer and the board of supervisors as it formally did.

We have noted the opinion of the attorney general dated September 18, 1961, 1962 OAG 146 which states:

"...I am of the opinion that the recorder has the power and duty of refusing to accept a plat of a rural subdivision with its road plans, plats and field notes unless such plat and its road plans, plats and field notes bear the approval of the board of supervisors and the county engineer, as well as the approval of the city engineer or the city council of the adjoining municipality. This power and duty of the recorder of accepting or refusing plats for recording, including plats of subdivisions within a mile of any city or town, is vested in him by §409.14, as amended by chapters 219 and 220, Acts of 59th G.A...."

This opinion is generally regarded as affecting all rural subdivisions. However, close examination of §409.14 of the Iowa Code, on which it is based, clearly indicates that the limitations imposed by this section apply only to plats purporting to subdivide a tract of land within cities having an applicable ordinance relating to such subdivision and those of population of 25,000 or over and proposed subdivisions within two miles of the limits of such cities. We also note that Pottawattamie County has enacted a county zoning ordinance prescribing the requirements for the platting of subdivisions, resubdivisions or dedications in unincorporated areas. This requirements appears in §79 of the Pottawattamie County Zoning Ordinance. There appears to be no express requirement of approval of a plat by the county engineer in the language of the county zoning ordinance. The ordinance does provide:

"No plat of any subdivision or unit development authorized by this section shall be filed with or recorded by the county auditor unless approved in the

manner herein prescribed,

and

"The board may find, upon proper showing by the owner and with the advice of the county engineer, that good reason exists to consider the final plat and approve the same before required improvements are completed."

Accordingly it is our view that a final plat which bears the approval of the board of supervisors and which meets the requirements of the county zoning ordinance and all other applicable statutes, may be recorded even though such plat does not bear the approval of the county engineer.

June 29, 1978

STATE OFFICERS AND DEPARTMENTS: Board of Nursing; Open License Discipline Hearings. §§17A.2(2), 17A.12(7), and 17A.23, Code of Iowa, 1977. §6.1, Ch. 95, 67th G.A. (1977). Licensee discipline hearings pursuant to Chapter 95, 67th G.A. (1977), shall be open if they are contested cases. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 6-29-78) #78-6-7

Lynne M. Illes, Executive Director, Iowa Board of Nursing: We have your opinion request of June 2, 1978, regarding hearings for licensee discipline. You ask whether the meetings shall be open or closed at the licensee's discretion.

Section 6.1, Ch. 95, Acts of the 67th G.A. (1977), provides in pertinent part:

"Notwithstanding Chapter [28A] of the Code a disciplinary hearing shall be open to the public at the discretion of the licensee." Section 17A.12(7) of the Code provides in part that "[o]ral proceedings [contested case hearings] shall be open to the public..." The problem is that these two statutes are in conflict.

There can be no doubt that a licensee discipline hearing is a contested case under Chapter 17A. See, §17A.2(2) which defines "contested case." Section 17A.23 provides:

"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. If any other statute* now in existence or *hereafter enacted diminishes any right conferred upon a person by this chapter or diminishes any requirement imposed upon an agency by this chapter, this chapter shall take precedence unless the other statute expressly provides that it shall take precedence over all or some specified portion of this named chapter.*

"The Iowa Administrative Procedure Act shall be construed broadly to effectuate its purposes. This chapter shall also be construed to apply to all agencies not expressly exempted by this chapter or by another statute specifically referring to this chapter by name; and except as to proceedings in process on July 1, 1975, this chapter shall be construed to apply to all covered agency proceedings and all agency action not expressly exempted by this chapter or by another statute specifically referring to this chapter by name." [Emphasis added].

The emphasized portions clearly indicate legislative intent. Unless some other statute expressly provides otherwise, referring specifically to Chapter

17A, the requirements imposed by Chapter 17A shall be in addition to those of every other statute in existence when Chapter 17A became effective or every other statute enacted thereafter. If any such statute diminishes any requirement of Chapter 17A, then Chapter 17A shall take precedence unless the other statute expressly provides it shall take precedence.

If §6.1 of Chapter 95, 67th G.A. (1977), which allows closed hearings, is to take precedence over §17A.12(7), which mandates open hearings, then §6.1 would have to expressly refer to chapter 17A by name. That not being the case, it is the legislative intent that §17A.12(7) control.

Accordingly, we are of the opinion that all hearings for licensee discipline under Chapter 95, 67th G.A. (1977), must be open as long as they are contested cases within Chapter 17A of the Code.

June, 1978

COUNTIES AND COUNTY OFFICERS

Plats. §306.21, Code of Iowa, 1977. A final plat of a rural subdivision which bears the approval of the board of supervisors and meets the requirements of county zoning ordinance and other applicable statute may be recorded even though the county engineer does not approve of such plat. (Nolan to Richter, Pottawattamie County Attorney, 6-16-78) #78-6-6

County road bridges; Board of Supervisors. §306.10, et seq., Code of Iowa, 1977. County Board of Supervisors has the power to establish, alter or vacate roads. Therefore, the county board of supervisors may vacate a portion of the road under their jurisdiction a section of which consists of a bridge which has washed out. (Paff to Daggett, State Representative, 6-6-78) #78-6-2

ENVIRONMENTAL PROTECTION

Septic Tanks-County Board of Health requiring professional engineer to conduct percolation test. §§136.3(7), 137.6(2), 137.7, 114.2, 114.16, Code of Iowa, 1977; Rule 470-12.1(1), Rule 470-12.7, Iowa Administrative Code. Rule adopted by Clayton County Board of Health requiring registered professional engineer to conduct percolation tests before issuance of a permit to install a septic tank is within Board's authority and such tests are the practice of engineering. (Davis to Halvorson, State Representative, 6-13-78) #78-6-3

MUNICIPALITIES

Special elections to fill vacancies. §§39.8, 47.6, 372.13(2), 376.1, 376.6, Code of Iowa, 1977. Upon receipt of a valid petition pursuant to §372.13(2), a city council shall call a special election at the earliest practicable time. A primary or runoff election for a special election to fill a vacancy is not permitted. The winner of such a special election shall take office as soon as it is possible to qualify therefor. (Blumberg to Richter, Pottawattamie County Attorney, 6-14-78) #78-6-4

City Councilman and member of plan and zoning commission; Incompatibility of Offices. §§372.9(13) and 414.6, Code of Iowa, 1977. The offices of city councilman and member of city plan and zoning commission are incompatible. (Haesemeyer to Hoffmann, State Representative, 6-15-78) #78-6-5

STATE OFFICERS AND DEPARTMENTS

Board of Nursing-Open licensee discipline hearings. §§17A.2(2), 17A.12(7) and 17A.23, Code of Iowa, 1977. Ch. 95, §6.1, 67th G.A. (1977). Licensee

discipline hearings pursuant to Chapter 95 shall be open if they are contested cases. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 6-29-78) #78-6-7

Child abuse statute and federal regulations. §235A.3(1)(a) and (b), Code of Iowa, 1977. 45 C.F.R. §1340.3-3(d)(2)(i). The Iowa statutes comply with the Federal regulations as there is no substantial difference between the reporting requirements under Iowa law that one who "believes" shall report instances of child abuse and the one who "suspects" provision of the Federal regulation. (Robinson to Preisser, Acting Director, Department of Social Services, 6-1-78) #78-6-1

STATUTES CONSTURED

Code, 1977	Opinion
17A.2(2)	78-6-7
17A.12(7)	78-6-7
17A.23	78-6-7
39.8	78-6-4
47.6	78-6-4
114.2	78-6-3
114.16	78-6-3
136.3(7)	78-6-3
137.6(2)	78-6-3
137.7	78-6-3
235A.3(1)(a)(b)	78-6-1
306.10	78-6-2
306.21	78-6-6
372.9(13)	78-6-5
372.13(2)	78-6-4
376.1	78-6-4
376.6	78-6-4
414.6	78-6-5

67th GENERAL ASSEMBLY

Chapter 95, §6.1	78-6-7

July 3, 1978

ENVIRONMENTAL PROTECTION: County Conservation Boards — §111A.6, §111A.7, §336.1, §336.2(6) §610 Appendix, Iowa Code of Professional Responsibility, Cannon 5. A county conservation board may expend board funds for legal service provided by an attorney other than the county attorney and may store equipment outside the county. (Davis to Van Gilst, Senator, Forty Sixth District, 7-3-78) #78-7-1

Hon. Bass Van Gilst, State Senator: We have received your letter requesting an Attorney General's Opinion in regard to the expenditure of funds and equipment use by the local county conservation board. Specifically you ask (1) whether the board may legally hire an attorney other than the county attorney to assist them in legal matters and (2) whether the board may legally store equipment outside of the county.

The county conservation boards operate under the provisions of Chapter

111A of the Code of Iowa, 1977. You indicate that the present situation involves a former employee of the board seeking unemployment compensation. §111A.6 directs the board to deposit all general funds in an account and use such for "payment of expenses incurred in carrying out the activities of the board." Representation at an unemployment compensation hearing would constitute a valid expense in carrying out board activities.

The question then becomes whether the county attorney should have provided the legal assistance rather than the board employing outside help. §336.2(6), Code of Iowa, 1977, commands the county attorney to "commence, prosecute, and defend all actions and proceedings in which any county officer in his official capacity, or the county, is interested, or a party". The duty imposed by this section is qualified by §111A.7 which directs the state conservation commission, county engineer, county agricultural agent and *other county officials* to render such assistance "as shall not interfere with their regular employment." This section contemplates situations when assistance by the county attorney would not be possible, making it encumbant upon the board to seek other legal assistance. Thus, the board may legally employ legal counsel other than the county attorney. It would seem in the interest of the public and efficient use of public monies for the board to inquire whether county attorney assistance was possible, but it is not mandatory that he provide the services.

You stated in a telephone conversation concerning the opinion that there was a question of possible conflict of interest because the county attorney and the former employee were friends. §366.1 states that the county attorney must be an attorney admitted to practice in this state. He therefore operates under the guidelines and mandates of §610 App., Iowa Code of Professional Responsibility for Lawyers, which expresses in general terms the standards of professional conduct expected of lawyers. Ethical Code, Canon 5-1 states:

"The professional judgment of the lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

Canon 5-2 holds in relevant part:

"A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client."

Disciplinary Rule 5-101A commands:

"Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or *personal interests*."

The personal friendship you mention between the county attorney and the former employee *could* provide the grounds under §111A.7 to disqualify the

county attorney and provide the board reason to employ other assistance. The facts presented are not sufficient to show whether such disclosure was made to the board by the county attorney in this case.

The second problem involved the question of whether the board could store equipment outside the county. Under §111A.7, the board "may join with any other county board or county boards to carry out the provisions of this chapter" and "may do any and all things necessary or convenient to aid and to co-operate in carrying out the provisions of this chapter." Under this section, board activity is not limited to the boundary of the county. Storage of equipment outside the county is permissable.

July 3, 1978

MUNICIPALITIES: Dedication of Land for Public Purpose—Chapter 41, Code of Iowa, 1851. When land is dedicated for public purpose in an unincorporated area, the fee title remains in the grantor, and the public receives an easement. (Blumberg to Neighbor, Jasper County Attorney, 7-3-78) #78-7-2

Mr. Charles G. Neighbor, Jasper County Attorney: We have your opinion request of May 25, 1978, regarding ownership of a public square. It appears that in the 1850's, Albert and Mahala Shipp owned and platted land for the city or village of Greencastle. The certification of the plat was approved by a District Judge, filed and recorded. The plat included an area designated as a public square. Greencastle was never incorporated as a city, and apparently has never been operated as a city or village. The public square has always been called such on all plats and has never been taxed. The remaining residents of the area and/or the county now wish to construct a ball park on the square for Little League. You ask:

1. Who has title to the public square?
2. Who has control and jurisdiction of the square?
3. What governmental entity could be held liable for injury and damages?

Pursuant to Chapter 41, §§632 through 637, Code of Iowa, 1851, land owners could lay out a village by surveying the land area, making a map of the plat, acknowledging to a proper official their desires and their consent, and presenting the matter to a county judge for an order. The acknowledgment and recording of the plat was equivalent to a deed in fee simple of the land set apart for public use. We assume from the facts that the property owners intended to create a village rather than an incorporated town or city.

The first issue to be determined is whether there was a dedication. Dedication can be either statutory or common law. Note, *Acquisition of Public Ways in Iowa,* 32 Iowa L.Rev. 746, 748 (1947). The doctrine of dedication is based upon public policy and public convenience. A statutory dedication operates by way of a grant. Whereas a common law dedication operates by way of estoppel. There need not be a grantee in *esse* at the time of the dedication. Although a dedication is like a contract, and therefore there must be an offer and an acceptance, long use by the public may operate as a dedication. *Dugan v. Zurmuehlen,* 1927, 203 Iowa 1114, 211 N.W. 986. See also, *De Castello v. City of Cedar Rapids,* 1915, 171 Iowa 18, 153 N.W. 353; *Wolfe v. Kemler,* 1940, 228 Iowa 733, 293 N.W. 322; *Kelroy v. City of Clear Lake,* 1942, 232 Iowa 161, 5 N.W.2d 12.

The filing of a plat dedicating a highway in an unincorporated village does not convey the fee title. The general public acquires only an easement to use it

for public purposes. The fee remains in the original owner. When the tender is accepted by the public, the right to the easement becomes complete. *Town of Kenwood Park v. Leonard,* 1916, 177 Iowa 337, 158 N.W. 655; *Henry Walker Park Association v. Mathews,* 1958, 249 Iowa 1246, 91 N.W.2d 703; *Headly v. City of Northfield,* 1949, 227 Minn. 458, 35 N.W.2d 606. From the above cases it is apparent that once a dedication to the public is complete, the owner is estopped from using the land in any manner other than that which is consistent with the dedication. Since the dedication was made and platted in the 1850's, abutting property has been sold or conveyed since that time, and, according to your facts, the public has used the square since that time, a dedication to the public was made. Pursuant to the above cases, the fee title remained in the grantors and their heirs with a right of easement to the public.

Since the title remains in the grantor or heirs, it is they who have control and jurisdiction of the square, subject of course, to the public easement. Greencastle cannot have such control since it was not a public entity which could accept any grant. *Kelroy v. City of Clear Lake, supra.* There is no evidence that the county or township accepted the dedication. Therefore, they could not exercise control or jurisdiction over it. The importance of this issue is evident since there is a desire to construct a ball field for Little League on the square. In *Headley v. City of Northfield, supra,* a public square was dedicated to and accepted by the city. The public square had always been used by the public for various purposes. The city attempted to enter into an agreement with the school district to convert the square to athletic fields for the school. The court held that the public had an easement to the use of the square, even though the fee may still have been in the grantor, and that the city was a trustee of the square for the public. Since the grantor would not be able to use the square for any other purpose than that which was consistent with the dedication, neither could the city. The proposed agreement with the school district was voided. The suit brought by the abutting property owners resulted in having the square remain for the public use as it had in the past.

We believe that the *Headley* case is applicable here. Thus, not only would permission of the owners in fee of the square be necessary before any such improvement could be made, but also permission of the public users, assuming such permission could be granted, would also be necessary.

Your final question is what governmental entity could be held liable for injuries or damages. Since no governmental entity has control or jurisdiction over the square, and since none, to our knowledge, has maintained or attempted to have any control over said square, we fail to see how any such governmental entity could be liable. One is held liable for its negligent or wrongful acts. And, each case is determined on its own set of facts. If an individual or entity commits a negligent or wrongful act regarding the square, liability could be imposed. This, most assuredly, includes the owners in fee, as well as anyone else. However, we are not disposed at this time, without any specific facts, to render an opinion regarding hypothetical liability.

Accordingly, we are of the opinion that the fee title to the public square remained in the grantors and their heirs. They, therefore, have control of the square, subject to the public easement. The liability question cannot be answered, although a governmental entity would probably not be held liable for any injuries or damages received on the square without some action or acceptance of responsibility, and the like, on its part.

July 3, 1978

JUDICIAL MAGISTRATES: COMMISSION APPOINTMENTS. §§602.52, 602.51 and 602.50, Code of Iowa, 1977. County judicial magistrate appointing commissions are not required under §602.52 to appoint lawyer applicants rather than nonlawyer applicants to §602.50 judicial magistrate positions unless lawyer applicants are equally or better qualified than nonlawyer applicants. (Erickson to Shirley, Dallas County Attorney, 7-3-78) #78-7-3

Alan Shirley, Dallas County Attorney: You have requested an attorney general opinion on the following questions: Does §602.52, Code of Iowa, 1977, require county judicial magistrate appointing commissions to appointing lawyer applicants (licensed to practice law in Iowa) rather than nonlawyer applicants to §602.50 judicial magistrate positions? If in the commission's opinion a nonlawyer applicant is suited for the position, may the nonlawyer be appointed even though a lawyer has also applied?

Section 602.52 provides:

"A judicial magistrate shall be an elector of the county of appointment during his or her term of office. A person shall not be qualified for appointment and shall not be appointed as a judicial magistrate unless that person can complete prior to his or her reaching the age of seventy-two years the entire two-year or four-year term of office of judicial magistrate for which nomination and appointment is being made. A *judicial magistrate appointed pursuant to section 602.50 may be licensed to practice law in Iowa, and the commission in selecting persons for those positions shall first consider for appointment applicants so licensed.* After July 1, 1973, a judicial magistrate nominated and appointed pursuant to section 602.51 shall be licensed to practice law in Iowa." (emphasis added).

Under §602.52 magistrates appointed pursuant to §602.50 may be licensed to practice law in Iowa. Section 602.52 does not require that lawyers hold §602.50 magistrate positions. Clearly, under the terms of the statute, nonlawyers may hold such positions.

In selecting persons for §602.50 positions, the statute provides that commissions "shall first consider for appointment" applicants licensed to practice law in Iowa. Your questions center on whether the language "shall first consider for appointment" requires lawyer applicants to be appointed rather than nonlawyer applicants.

Section 602.52 indicates a legislative intent to have commissions appoint persons with legal training to magistrate positions. The legislature has required §602.51 judicial magistrates to be licensed to practice law in Iowa and has indicated a preference that §602.50 judicial magistrates be so licensed. In *Krohn v. Judicial Magistrate Appointing Comm'n,* 1976, 239 N.W.2d 562, 563 (Iowa), the Iowa Supreme Court indicated, in obiter dictum, that §602.52 expresses a preference for lawyers to hold judicial magistrate positions.

Of course, appointing officers need some discretion in selecting persons for positions which require discretion and judgment. See *Krohn v. Judicial Magistrate Appointing Comm'n,* 1976, 239 N.W.2d 562, 564 (Iowa); *Tusant v. City of Des Moines,* 1941, 231 Iowa 116, 126, 300 N.W. 690, 695. Magistrates are judicial officers who are called upon to perform discretionary and judgmental functions of great importance. *Krohn, supra.* Although lawyers are entitled under §602.52 to preference in appointments of §602.50 magistrate positions,

nonlawyers may also be appointed under §602.52 to such positions. Section 602.52 thus gives commissions a certain degree of discretion in determining whether to appoint lawyers or nonlawyers to §602.50 positions.

It is our opinion that if a nonlawyer and a lawyer apply for a §602.50 judicial magistrate position and each is equally qualified or suited for the position, §602.52 indicates the commission should appoint the lawyer. The commission may find that a nonlawyer applicant has certain qualities or characteristics which outweigh the attributes of the lawyer applicant. Also a lawyer applicant may have negative characteristics or habits which would lessen his or her qualifications or suitablility for the position. In such situations the nonlawyer may be appointed to the §602.50 position. The commission, utilizing its sound discretion, must weigh the qualities of each applicant and appoint the person best qualified for the §602.50 judicial magistrate position. Commissions are not required under §602.52 to appoint lawyer applicants rather than nonlawyer applicants to §602.50 judicial magistrate positions unless lawyer applicants are equally or better qualified than nonlawyer applicants.

July 3, 1978

ENVIRONMENTAL PROTECTION: Platting - Chapter 409; Contract purchaser may not plat land without joinder by record title holder and release of all encumbrances. (Davis to Bauercamper, Allamakee County Attorney, 7-3-78) #78-7-4

John J. Bauercamper, Esquire, Allamakee County Attorney: You have requested an opinion of the Attorney General as to whether or not the Allamakee County Recorder must file a plat in the following situtation, as described by you:

"1. A is the fee owner of Blackacre, which is 160 acres of land not located within the corporate limits of any city of town.

"2. In 1967 A entered into a real estate installment contract with B providing for the sale of Blackacre to B, with payment in installments and delivery of Warranty Deed therefore upon performance in full.

"3. In 1970 A assigned his vendors interest in the above real estate installment contract to X Bank for collateral security for a loan.

"4. In 1977 B had a plat prepared of Lots 1 and 2 in Blackacre by a licensed surveyor. Lot 1 consists of one acre and Lot 2 consisted of .3 of an acre. The surveyor prepared a written plat containing a metes and bounds description of each lot and signed and sealed the same. B also signed and acknowledged the plat.

"5. B entered into a real estate installment contract to sell Lots 1 and 2 in Blackacre to C, such contract providing for payment of the purchase price in installments over a period of time and delivery of a Warranty Deed upon performance in full.

"At present, the County Recorder has refused to file and record the plat of Lots 1 and 2 in Blackacre for the reason that they are signed and acknowledged only by B and not by A. Our question is, then, who must sign the plat before the County Recorder has a duty to file and record the same?"

The laws of Iowa pertaining to the filing of plats and their use are contained in Chapter 409 of the 1977 Code of Iowa. Section 409.1 reads in pertinent part:

"Every original proprietor of any tract or parcel of land...of more than 40

acres if divided into parcels any of which are less than 40 acres... shall cause a registered land surveyor's plat of such subdivision, with references to known or permanent monuments, to be made by 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 a 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 course 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 409.8 states:

"Each plat shall be accompanied by a correct description of the land or parcel of land subdivided and by a statement to the effect that the subdivision as it appears on the plat is with the free consent and in accordance with the desire of the proprietor, signed and acknowledged by such proprietor and his spouse, if any, before some officer authorized to take the acknowledgment of deeds."

Section 409.9 states:

"Every plat shall be accompanied by a complete abstract of title and an opinion from an attorney at law showing that the fee title is in the proprietor and that the land platted is free from encumbrance other than that secured by the bond provided for in section 409.11, and a certified statement from the treasurer of the county in which the land lies that it is free from taxes, and from the clerk of the district court that it is free from all judgments, attachments, mechanics' or other liens as appears by the record in his office, and from the recorder of the county that the title in fee is in such proprietor and that it is free from encumbrance other than that secured by the bond provided for in section 409.11, as shown by the records of this office.

"Utility easements shall not be construed to be encumbrances hereunder and the location thereof with reference to the land platted may be shown by drawing on the plat described under section 409.1. Grantees of said utility easements shall not be construed to be original proprietors of the land to be platted and shall not join in platting or dedicating the platted land."

Section 409.12 states:

"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 409.1 and any plat so supersedes shall be voided."

We assume from your letter that this land lies beyond two miles distant from the boundaries of any Iowa municipality.

We last addressed a similar question in OAG #69-10-12 on October 23, 1969 (Nolan to Koch) in holding that platting must be done in compliance with Chapter 409 of the Code and if these requirements are met, the Recorder must record the plat.

In considering whether the title in question meets the requirements of Chapter 409, you have stated that B's attorney maintains that the contract between A and B created an equitable conversion with the interest of the contract purchaser being treated as real estate and the interest of the contract seller being treated as personal property. While that is certainly the general rule in an equity case, it is not and cannot be the rule in platting property under present Iowa law.

Section 409.9 set out above states that:

"Every plat shall be accompanied by a complete abstract of title and an opinion from an attorney at law showing that the fee title is in the proprietor (B) and that the land is platted free from encumbrance...and a certified statement...from the records of the county that the title in fee is in such proprietor and that it is free from encumbrance..."

A general proposition of law is that fee title can be either equitable or legal and can even perhaps be obtained through adverse possession, instead of a warranty deed. *Creel v. Hannans,* 234 Iowa 532, 13 N.W.2d 305 (1944). However, the term "abstract of title" has reference to the record title as does the recorder's certificate. Therefore, record fee title is a condition precedent to filing and recording a plat. Both the abstract of title and the recorder's certificate to the land B wishes to platted would indicate that A never parted with the record title to the land. They would further show A's interest encumbered by his assignment to X Bank. With this outstanding title and encumbrance, B would not have a good title sufficient to allow him to file a plat under the provisions of Section 409.9. *Fagen v. Hook,* 134 Iowa 381, 105 N.W. 155 (1905).

By dividing his 160 acre parcel into three parcels, two of which are less than 40 acres, B has placed himself squarely within the purview of Chapter 409. That being the case, any such plat must be signed by A as well as B and released of record by X Bank and there must be an abstract and an opinion of title filed therewith under the provisions of §409.9 as well as the certificates therein required.

The recorder was absolutely correct to refuse to record this document as the recorder's certificate endorsed upon a plat is prima facia evidence that the plat was properly recorded and that subsequent purchasers may rely upon the description of their property as a lot within the plat to show that there is fee simple title residing in the person who platted the property. *Pierson v. City of Guttenberg,* 245 N.W.2d 519 (Iowa 1976).

July 11, 1978

CONSTITUTIONAL LAW: GENERAL ASSEMBLY, SINE DIE ADJOURNMENT. Art. III, §14 and Art. IV, §13, Const. of Iowa, §4.1(22), Code of Iowa, 1977. (1) The constitutional prohibition against one house adjourning for more than 3 days without the consent of the other means 3 calendar days. (2) The House's unilateral sine die adjournment without the Senate's consent, and the Senate's subsequent adjournment to a time more than 3 calendar days later, violated Art. III, §14. (3) Having discovered a

violation of Art. III, §14, the General Assembly could reconvene and lawfully transact business more than 3 days after an attempted unlawful adjournment. (4) Art. IV, §13, vests the Governor with power to determine whether a disagreement exists between the two houses with respect to the time of adjournment and, upon making such determination, to adjourn the General Assembly to such time as he may think proper before the regular meeting of the next General Assembly. (Turner to Redmond, State Senator, 7-11-78) #78-7-5

Honorable James M. Redmond, State Senator: You have requested an opinion of the Attorney General relative to problems arising from the unilateral *sine die* adjournment of the Iowa House of Representatives on Saturday, July 1, 1978, without the Senate's consent and the Senate's subsequent adjournment on that day to July 7, 1978. You say:

"I have several significant constitutional questions which have not been directly decided by the courts of the State of Iowa. As you will see, these questions are of urgent importance to the Sixty-Seventh General Assembly, so I would greatly appreciate your prompt consideration of these issues.

"First, the Iowa Senate adjourned on Saturday, July 1, 1978 to a day certain—that day being Friday, July 7, 1978. There was considerable discussion at that time as to whether or not the Senate had complied with Article III, §14 of the Iowa Constitution which reads as follows:

" '§14. ADJOURNMENTS.

'Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which they may be sitting.'

"The question then is the meaning of the word 'day'. If one reads 'day' in its ordinary meaning to be calendar day, then both Sunday, July 2 and Tuesday, July 4, should be included in the computation of the 'three days'. Therefore, the Senate has violated the constitutional provision as it should have adopted a resolution to reconvene on Wednesday, July 5.

"In addition, Article III, §16 of the Iowa Constitution specifically excludes Sundays from the computation of days which the governor has to consider bills passed by the legislature. Therefore, applying the rules of statutory construction in which the provisions of the constitution should be construed together as a whole, one would conclude that the absence of the words 'Sunday excepted' from Article III, §14 means that Sundays are included.

"However, if one interprets 'day' to mean working day then the Senate has complied with the constitutional provision by reconvening on Friday, July 7, 1978. Therefore, the specific questions are:

"1. What is the meaning of the word 'day' for the purpose of computation of the three days in Article III, §14 of the Iowa Constitution?

"2. If 'day' means calendar days for the purposes of Article III, §14 of the Iowa Constitution, then has the Senate violated the Constitution by its adoption of Senate Concurrent Resolution 150?

"3. If the Senate has violated the constitution, what is the legal effect of any action taken by the Senate upon reconvening?

"And finally, Article IV, §13 of the Iowa Constitution reads as follows:

" '§13. ADJOURNMENT OF GENERAL ASSEMBLY BY GOVERNOR.

'In case of disagreement between the two Houses with respect to the time of adjournment, the Governor shall have power to adjourn the General Assembly

to such time as he may think proper; but no such adjournment shall be beyond the time fixed for the regular meeting of the next General Assembly.'

"As the House passed a resolution to adjourn *sine die* and the Senate refused to concur in that resolution, thereby forcing the House to return to session within three days, this might actually be termed 'disagreement between the two Houses with respect to the time of adjournment.' Thus the fourth question is:

"4. Whether or not the present situation regarding the Sixty-Seventh General Assembly can be termed 'disagreement' for the purposes of Article IV, §13? If the answer to the above is yes, does the governor now have the power to adjourn the Sixty-Seventh General Assembly?"

In answer to your first two questions, it is our opinion that the word "days" for the purpose of computation of the three days in Article III, §14, Constitution of Iowa, refers to calendar days, that Sundays are not excepted, and that therefore the Senate had not complied with the constitutional requirement by delaying its reconvening until July 7, 1978.

A case considering the meaning of the term "days" in a context similar to Article III, §14 of the Iowa Constitution is *Opinion of the Justices,* 133 A.2d 506 (N.H. 1957). There the New Hampshire high court construed a provision of the New Hampshire Constitution that "the house of representatives shall have power to adjourn themselves but no longer than five days at a time" to mean five clear calendar days, that Sundays and holidays were to be included in the computation of such five day period and that neither the day of adjournment nor the day of reconvening were to be included. The Court also found that a statutory provision for reckoning time was not controlling and observed:

"The Constitution was *before* this state (sic) and was and is *above* it, and paramount to it in authority, and cannot certainly be changed in its letter or form by the provisions of any statute." 133 A.2d 506 at 507.

Thus, upon the reasoning of this case, §4.1(22), Code of Iowa, 1977, relative to the computation of time would be irrelevant insofar as the interpretation of the meaning of the word "days" in Article III, §14 of the Constitution. In addition, there is abundant authority with respect to the meaning of such word as found in constitutional provisions relating to the Governor's veto power and in general. As stated in 73 Am.Jur. 2d 310, *Statutes,* §78:

"Computation of time.

"In computing the period of time within which a chief executive may approve an act of the legislature presented to him, or within which the act, if not returned, will become a law, the terms used in the constitutional provision are to be given the meaning they have in common use, unless there are strong reasons to the contrary. In computing the time allowed for the approval or disapproval of a bill by the chief executive, the period is regarded as beginning when the bill is presented to the chief executive. It is a general rule that the day of presentation is to be excluded and the last day of the specified period included. For this purpose, 'days' consist of 24 hours each and begin at twelve o'clock midnight and extend through 24 hours to the next twelve o'clock midnight. There is authority for the rule that each fraction of a day is to be considered in the computation as a full day. While Sundays are often excluded in the computation of time within which a bill must be approved or rejected, holidays are included."

The rule is stated in 82 C.J.S. 79, *Statutes,* §49, as follows:

"* * *

"Where a certain number of days is prescribed within which the governor

must either approve, veto, or return a bill, such days are to be computed by excluding the day on which the bill was received and including the last day; and the time must be measured by calendar days. . . .

"* * *"

In construing the United States Constitution, the United States Supreme Court has said:

"The word 'days,' when not qualified, means in ordinary and common usage calendar days. This is obviously the meaning in which it is used in the constitutional provision, and is emphasized by the fact that 'Sundays' are excepted. There is nothing whatever to justify changing this meaning by inserting the word 'legislative' as a qualifying adjective. And no President or Congress has ever suggested that the President has ten 'legislative days' in which to consider and return a bill, or proceeded upon that theory." *Okonogan, et al. Indian Tribes or Bands of the State of Washington v. United States,* (the Pocket Veto Case) 279 U.S. 655, 73 L.Ed. 894. 49 S.Ct. 463 (1928). See also 11 *Words and Phrases 175.*

Furthermore, as you point out, if the unqualified use of the word "days" in the Iowa Constitution did not mean calendar days, it would not have been necessary for the framers of the Constitution in Article III, §16 to specifically exclude Sundays. The fact that they did so must be taken to evidence an understanding by the authors of the Constitution that otherwise Sundays would have been included. We agree with you that the word "days" has the same meaning whenever found in the constitution. See *Newby v. District Court of Woodbury County,* 259 Iowa 1330, 147 N.W.2d 886 (1967); *Schooler v. U.S.,* 231 F.2d 560 (1956).

It should be noted that the Senate is no more in violation of Art. III, §14 than the House. The Senate refused to concur in the House's resolution to adjourn *sine die* and, therefore, the House had no power to adjourn for more than three days.

The answer to your third question as to the effect of failure of compliance with Article III, §14, is by no means clear. There is a paucity of cases and authorities on this question[1] but logic and common sense compel the conclusion that the effect of such noncompliance would not result in the involuntary *sine die* adjournment of both houses of the General Assembly so that they could not reconvene except upon the call of the Governor. To reach such a conclusion would mean that either house has power to evade Article III, §14. One house could, by simply adjourning for more than three days, effectively and involuntarily (so far as the other house was concerned) terminate the session altogether, thereby defeating the constitutional requirement that *both houses* consent to adjournment. This result of noncompliance with the constitutional mandate

[1]*Opinion of the Justices,* 257 So.2d 336 (Ala. 1972) was a case involving a situation where the Alabama House of Representatives refused to consent to the adjournment by the Senate of that state for more than three days. Article IV, §58 of the Alabama Constitution provided in relevant part: "Neither house shall without consent of the other, adjourn for more than three days***" The Alabama Supreme Court concluded that the Senate's adoption of a motion to adjourn for more than three days was a nullity and void *ab inito* and that therefore the day following that of such purported adjournment was a legislative day whether the house met or not and should be counted in computing the fifty days which the Alabama Constitution allowed the legislature to be in session.

is too severe to be tenable. Accordingly, it is our opinion that the failure to reconvene within three days does not render it impossible for the two houses to meet again and transact business. Moreover, any action taken at such reconvened session would be valid since otherwise the noncompliance would produce the prohibited adjournment.

An annotation found in *56 A.L.R. 721* discusses the "Power of legislature or branch thereof as to time of assembling, and length of session." However, the cases cited in this annotation are inopposite to the question you raise as they involve legislative action taken after adjournment or after the expiration of constitutionally mandated limits on the lengths of sessions. In Iowa, we have no constitutional limitations on the lengths of sessions and as we have seen the failure to meet within three days did not result in the involuntary adjournment of the current session.

It is true, of course, that reaching the conclusion we have that noncompliance with the three day requirement does not terminate the session so as to prevent the General Assembly from meeting and transacting business could be said to effectively nullify the three day requirement. However, in our opinion the remedy for such noncompliance must be left to the members of the General Assembly themselves. All members of the General Assembly have taken an oath to uphold the Constitution of the State of Iowa and it is to be assumed that they will do so.

Turning to your fourth question, under the plain language of Article IV, §13, the Governor undeniably has the power to adjourn the General Assembly to such time as he may think proper in the event of a disagreement between the two houses with respect to the time of adjournment. The only question which remains is whether or not the situation you describe amounts to such disagreement. This is a fact question the determination of which is constitutionally vested in the Governor. As stated in 72 Am.Jur. 2d 456, *States,* §58:

"State constitutions sometimes give the governor power to adjourn the legislature where the two houses are in disagreement about adjournment. The governor's determination that such a disagreement exists is conclusive, and not reviewable by the courts."

In the present case, the Governor has not asked for our advice as to the existence of a disagreement and has indicated no inclination to adjourn the General Assembly. Under these circumstances, we believe it would be presumptuous for us to gratuitously volunteer advice as to the existence of a disagreement, especially in view of the fact that we have concluded as we have that the present General Assembly is competent to meet again and transact business notwithstanding the expiration of the three day period.

July 12, 1978

ELECTIONS: Primary Election, Withdrawal of Candidate. §43.76, Code of Iowa, 1977. An attempted withdrawal of his candidacy by a primary election candidate less than sixty days before the primary is ineffective. (Haesemeyer to Synhorst, Secretary of State, 7-12-78) #78-7-6

Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your letter of June 30, 1978, in which you request an opinion of the Attorney General with respect to a problem which has been presented to you by the Polk County Auditor. In his letter to you of June 28, 1978, Polk County Auditor Jim Maloney states:

"On or about April 27, 1978 Murry Drake called and asked how he could withdraw as a candidate for the Primary Election.

"I responded that it was too late to have his name removed from the ballot but I thought that if he simply wrote a letter to me and released a copy to the press that would take care of it. A copy of the letter I received is enclosed.

"Mr. Drake out-polled his opponent in spite of this 'withdrawal' and was certified as the nominee by the canvassing board. Mr. Drake has since announced that he has had a change of heart and accepts his party's nomination to this post.

"My question is this: Was this 'withdrawal' legally effective? And if so, can a candidate who has withdrawn change his mind and accept a nomination under these circumstances?"

Section 43.76, Code of Iowa, 1977, provides in relevant part:

"* * *

"2. A candidate nominated in a primary election for any office for which nomination papers are required to be filed with the commissioner may withdraw as a nominee for that office on or before, but not later than, the sixtieth day prior to the date of the general election by so notifying the commissioner in writing."

Since the primary election was held on June 6, 1978, it is clear that Mr. Drake's attempted withdrawal as a candidate in the primary election was not within the sixty-day time limit set forth in the statute and was therefore ineffective. Since he won the primary election and has been certified as a nominee by the canvassing board, Mr. Drake is the nominee for election in the general election in November.

It is true, of course, that Mr. Drake could withdraw his general election candidacy but it is evident from Mr. Maloney's letter that he does not wish to do so but instead desires to be the general election candidate. Under the circumstances, it is our opinion that Murray Drake's name should be placed on the general election ballot.

July 12, 1978

COURTS: Rules and Forms of Procedure, Effective Date. §684.19, Code of Iowa, 1977. Changes in the rules and forms of civil and criminal procedure reported by the Supreme Court to the General Assembly on January 17, 1978 do not become effective until July 1, 1979. (Haesemeyer to DeKoster, State Senator, 7-12-78) #78-7-7

Honorable Lucas J. DeKoster, State Senator: You have requested an opinion of the Attorney General as to the effective date of certain changes in the rules and forms of civil and criminal procedure prescribed by the Supreme Court and reported by the Court to the General Assembly during the 1978 Session of the Iowa General Assembly. Section 684.19, Code of Iowa, 1977, provides:

"Report to general assembly-enrollment. Any such rules and forms prescribed by the Supreme Court shall be reported by it to the general assembly within twenty days after the commencement of either regular session and shall take effect July 1 following the adjournment of such session, with such changes, if any, as may have been enacted at such session; and thereafter all laws in conflict therewith shall be of no further force or effect.

"At adjournment of the general assembly where such report has been filed, an enrolled copy thereof, together with any changes, shall be made in substantially the same manner as Acts are enrolled. The enrolled copy shall be certified as to whether or not any action was taken by the general assembly and if any, what action, and thereupon it shall be filed with the secretary of state and bound with the Acts of the general assembly."

The 67th General Assembly of Iowa convened on January 9, 1978. On January 17, 1978, the Supreme Court reported certain changes in the rules and forms of civil and criminal procedure to the General Assembly in full compliance with the twenty day requirement contained in the statute set forth above. The General Assembly recessed from May 13 to June 30, 1978. Senate Concurrent Resolution 136, 67th G.A., 2nd Session (1978). On July 1, the House of Representatives purported, without the Senate's consent, to adjourn *sine die* and the Senate on that same day adjourned to July 7, 1978. However, neither the action of the House in attempting to adjourn *sine die* nor the action of the Senate in attempting to adjourn for more than three days was effective to terminate the session. OAG Turner to Redmond, State Senator, July 11, 1978. On July 7, both houses met and adjourned to July 11, 1978. On that day, the Senate adjourned to July 13, 1978 and the House adjourned to July 14, 1978. Thus, at the present time the Iowa General Assembly still has not finally adjourned. Certainly it did not adjourn prior to July 1, 1978.

Accordingly, it is our opinion that the changes in the rules and forms of civil and criminal procedure reported by the Supreme Court to the General Assembly during the first twenty days of the current legislative session do not become effective until July 1, 1979.

July 13, 1978

CONSTITUTIONAL LAW: GENERAL ASSEMBLY: GOVERNOR: VETO POWER. Art. III, §16, Constitution of Iowa. It is not enough that the house in which a vetoed bill originates enter the bill and the Governor's objections upon its journal. It must also reconsider the bill either by voting on the same bill again or voting to table it. (Turner to Redmond, State Senator, 7-13-78) #78-7-8

The Honorable James M. Redmond, State Senator: You have requested an opinion of the attorney general as to whether Article III, §16, Constitution of Iowa, requires affirmative action by the General Assembly upon a bill vetoed by the Governor or whether it is enough that the Governor's objections or veto message be entered upon the journal of the house in which the bill originated.

The pertinent part of Article III, §16 provides that if the Governor does not approve a bill:

"...he shall return it with his objections, to the house in which it originated, which *shall* enter the same upon their journal, *and proceed to reconsider it;* if, after such reconsideration, it again passes both houses, by yeas and nays, by a majority of two-thirds of the members of each house, it shall become a law, notwithstanding the Governor's objections...." (emphasis added)

The plain words of the quoted constitutional provision are too clear to require construction. It is not enough that the house in which the bill originated enter the same upon its journal on receipt of the objections from the Governor, it *must* also proceed to reconsider the bill. The word "shall" is mandatory and applies here to the conjunctive phrase "proceed to reconsider it."

"We start, then, with the proposition that the provisions of our Constitution are mandatory, and their mandates bind as closely and as firmly the legislative branch of the government as they do the citizen of the commonwealth. The legislative branch must obey the Constitution or fundamental law, and must follow and obey its requirements and directions..." *C. C. Taft Co. v. Alber,* 185 Iowa 1069, 171 N.W. 719, 720 (1919).

"...all provisions of the Constitution, unless the contrary appears therefrom, are to be regarded as mandatory. It is hard to understand arguments construing any portion of the fundamental law as discretionary, for, if so, there could be no adequate reason for including it therein. As observed by Judge Cooley, in his work on Constitutional Limitations (page 94):

'The courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a Constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the things to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all departments of the government must at all times shape their conduct; and, if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not therefore to expect to find in a Constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or mode of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end; especially when, as has been already said, it is but fair to presume that the people in their Constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leaving as little as possible to implication.' " *State ex rel. Hammond v. Lynch,* 169 Iowa 148, 151 N.W. 81, 88 (1915).

"In Iowa, we have consistently held that our constitutional provisions are mandatory, and that they must apply to and govern the people as well as all government agencies, including the Legislature." *Smith v. Thompson,* 219 Iowa 888, 258 N.W. 190, 200 (1934).

The authorities you cite in support of a requirement of affirmative action to reconsider a vetoed bill are impressive and persuasive, but no more so than the plain meaning of the words. Of course, the framers of the constitution could have added "and by golly we mean it!" but surely that is not a necessary inducement to those who take an oath to uphold the constitution. Upon receiving the veto message and entering it on the journal, the house receiving it must vote on the same bill again or vote to table it. Perhaps the vote may be temporarily postponed to a day certain during the session, or even referred to committee, but in my opinion referring it to a committee by vote or otherwise is not in itself enough to constitute reconsideration by that house. Somehow the vetoed bill must be acted upon at least by the house receiving it before adjournment *sine die.*

I realize that Art. III, §9 gives each house the enormous power to "determine

its rules of proceedings..." and that it has the power to make the law. But the Constitution is the supreme law of this state and the legislature has no power to override its mandates by rule, resolution, law or simply by ignoring them. See *Luse v. Wray,* 254 N.W.2d 324 (1977 Iowa) and cases cited therein including *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663 and *Bond v. Floyd,* 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235. See also *1906 OAG 96* which holds that even a mere statute cannot be overridden by a joint resolution passed by the legislature with all the formalities of a bill, including approval of the Governor. Obviously, if a joint resolution, being higher in formal dignity than a concurrent resolution, cannot overturn a mere law, a concurrent resolution cannot abrogate a constitutional mandate.

July 14, 1978

CRIMINAL LAW: BRIBERY: CAMPAIGN CONTRIBUTIONS: PUBLIC OFFICIALS. Ch. 56, Code of Iowa, 1977. §§722.1 and 722.2, Supplement to the Code of Iowa, 1977. SF 2201, 67th G.A. 2nd. Failure of enactment of SF 2201 relating to gifts and bribery because it was vetoed did not render campaign contributions unlawful although the bill would have corrected an apparent irreconcilable conflict between the campaign finance disclosure law and the bribery sections by excepting such contributions as gifts thereunder. (Turner to Harbor, State Representative, 7-14-78) #78-7-9

The Honorable William H. Harbor, State Representative: You have requested an opinion of the Attorney General as to whether, assuming it is not overridden, the Governor's veto of Senate File 2201, Acts of the 67th General Assembly, 2nd Session, a bill for an Act relating *inter alia* to gifts and bribery, might now render campaign contributions unlawful as bribery under existing Sections 722.1 and 722.2, Supplement to the Code of Iowa, 1977, because Senate File 2201 contained a provision which clearly and specifically excepts campaign contributions from the definition of a gift therein and proposed to amend the aforesaid bribery sections which are in irreconcilable conflict with Chapter 56, Code of Iowa, 1977, the Campaign Finance Disclosure Law.

The Governor's veto does not render campaign contributions unlawful and my opinion to you dated January 10, 1978, that campaign contributions are lawful under the new disclosure law and are not bribery, remains unchanged despite the bill's failure of enactment.

Failure to adopt a proposed amendment to an existing law does not ordinarily influence construction of that law. *State v. Lancashire F. Ins. Co.,* 66 Ark. 466, 45 LRA 348, 51 SW 633, 70 ALR 25, note 28. See also 73 Am.Jur.2d 375, Statutes, §171. If it were otherwise, the General Assembly would find itself the tool of those seeking changes, both subtle and substantial, in statutory construction and its calendar would be cluttered with bills introduced with no intention of actual passage but only to accentuate the negative from elimination of the positive.

July 17, 1978

STATE OFFICERS AND DEPARTMENTS: General Assembly, members expenses and per diem. §§1, 15, 16 and 25, Constitution of Iowa, §§2.10, 2.14, 2.44, Code of Iowa, 1977. (1) Senate Concurrent Resolution 136, 67th G.A. Second Session (1978) notwithstanding, members of the general assembly are entitled to $20 per day for expenses of office, except travel, for each day the general assembly is in session, commencing with the first day of a legislative session and ending with the day of final adjournment of each legislative

session as indicated by the journals of the House and Senate. Travel expenses are to be paid at the rate established by §79.9 for *actual travel* in going to and returning from the seat of government by the nearest traveled route for not more than one time per week during a legislative session. (2) The Committee on Interest Rates created by Senate Concurrent Resolution 136, is a joint standing committee and the members of such committee are entitled to per diem and expenses only when the general assembly is not in session. (3) Members of the legislative council are entitled to per diem and expenses when they meet on any day except those on which the General Assembly is actually sitting as an organized body in Des Moines. (Haesemeyer to Hill and Selden, Senator and Comptroller, 7-17-78) #78-7-10

Honorable Philip B. Hill, State Senator, Mr. Marvin R. Selden, Jr., State Comptroller: You have each separately requested an opinion of the Attorney General with respect to certain questions which have arisen because of the adoption by the General Assembly of Senate Concurrent Resolution 136, 67th G.A., 2nd Session (1978). In his letter to the Attorney General, Mr. Selden has stated:

"The General Assembly has submitted documents to our payroll division for payment of per diem for some legislators pursuant to subsection six (6) of section two point ten (2.10) of the Code for days which have occurred since May 13, 1978. This is in accordance with item seven (7) of Senate Concurrent Resolution 136 of the Sixty-seventh General Assembly, 1978 Session which was adopted by both the Senate and the House.

"Some questions have resulted from the submission of these documents.

"Pursuant to Senate Concurrent Resolution 136, is the Sixty-seventh General Assembly, 1978 Session, still in session?

"If the answer is yes, in light of the following provision of 2.10(6), Code 1977, for paying the per diem: '. . . when the general assembly is not in session.', can the per diem be paid in accordance with item (7) of Senate Concurrent Resolution 136?"

Senator Hill's letter to the Attorney General states:

"Recently some questions have arisen in my mind concerning the legal effect of the resolution under which the General Assembly recessed from May 13, 1978 until June 30, 1978. The resolution clearly indicates that the General Assembly recessed and did not adjourn. The resolution also discusses an 'interim' between the dates of May 13 and June 30. Although I do not know of any definition of 'interim' for these purposes, the interim has usually been thought of as the period between the final adjournment of one legislative session and the convening of the following legislative session.

"As you know, the resolution which recessed the General Assembly also created a special committee to study certain questions set forth in the resolution. This committee has held some meetings and will be holding additional meetings between now and June 30. The Legislative Council and committees of the Council will meet on Wednesday, June 14. Also, I have received notice from the Senate Majority Leader that the standing committees of the Senate and subcommittees of the budget committee will meet on Thursday, June 29.

"Under Subsection 1 of Section 2.10 of the Code, each member of the General Assembly receives the sum of $20 per day for expenses of office, except travel, for each day the General Assembly is in session commencing with the first day of a Legislative Session and ending with the day of Final Adjournment of each Legislative Session as indicated by the journals of each house. As you know, members of the General Assembly from Polk County receive $10 per day.

Subsection 5 of Section 2.10 contemplates that expense allowances shall be paid upon the submission of vouchers to the State Comptroller indicating a claim for the same. The members of the General Assembly normally do not submit vouchers for the expense allowance although travel vouchers are submitted. The resolution which recessed the General Assembly stated that the expense allowances under subsection 1 of 2.10 of the Code could not be paid during the period of the recess. Can a resolution of the General Assembly in effect repeal a provision of the Iowa Code?

"Subsection 1 of 2.10 clearly defines the period during which expenses are to be paid, however, the section does not define 'in session'. For example, during recent years, the members of the General Assembly have been paid a $20 per day seven days a week even though the General Assembly had adjourned on a Friday and would not convene again until the following Monday. The prior language of subsection 1 provided for the expense allowance to be paid each day the General Assembly 'is actually in session.' See subsection 1 of Section 2.10, Code of Iowa, 1973.

"Is the General Assembly 'in session' as defined in Subsection 1 of Section 2.10 during the period from May 13 until June 30?

"It would appear very clear that the General Assembly will be in session on June 30 and that the members would be entitled to claim travel allowances and the expense allowances permitted by Section 2.10 of the Code.

"With respect to the meetings of the usury committee, the Legislative Council and its committees, and the standing committees and subcommittees during the period in which the General Assembly is in recess, there appears to be some question as to whether the legislators involved are entitled to claim and receive the $40 per diem which is normally paid for 'interim' work, plus actual travel expenses, whether the legislators are entitled to claim the expense allowance provided in Section 2.10, or whether the legislators are entitled to no allowances whatsoever.

"Subsection 6 of Section 2.10 covers payments to legislators who serve on standing or interim committees or subcommittees, subject to the provisions of Section 2.14. Section 2.14 subsection 5 provides for the payment of $40.00 per day to a member of the General Assembly and necessary travel and actual expenses incurred in attending the meetings of a standing committee or subcommittee if the meeting is held 'when the General Assembly is not in session.'

"Section 2.44 provides for reimbursement for actual and necessary expenses to members of the Legislative Council and payment of a per diem of $40 per day. This section is limited by the following: 'However, such per diem compensation and expenses shall not be paid when the General Assembly is actually in session at the seat of government.' Section 2.44 is the only section referring to payment of per diem and expenses which refers to the General Assembly 'actually' being in session. Also, it refers to the General Assembly being in session at the seat of government, and this reference is different than the other references in the section.

"I am concerned that the members of the General Assembly may be entitled to the expense allowance provided for in Section 2.10, subsection 1, of the Code during the period we are in recess, that is, from May 13 to June 30.

"Also, it would appear that members of the special usury committee as well as members of the standing committees and subcommittees that meet on June 29 may not be entitled to payment of any per diem or expense allowances, however, the members of the Legislative Council would be entitled to payment of per diem and expenses for the day on which the Council meets."

Senate Concurrent resolution 136 is:

"A concurrent resolution creating a standing committee for the purpose of studying the statutory limitations upon and the procedures for establishing interest rates and finance charges, providing for a recess of the general assembly, and providing that the standing committee shall carry out its study during the interim between dates of the recess."

Sections 3, 4, 5 and 7 of such Consurrent Resolution 136 provide:

"3. That the joint standing committee on interest rates shall have the powers, duties, and authority of standing committees as provided in the Constitution of Iowa, the rules of the general assembly, and chapter two (2) of the Code.

"4. That the costs of the joint standing committee on interest rates shall be paid from funds available under section two point twelve (2.12) of the Code, which costs shall include, but are not limited to, salaries, travel, and expenses provided for in subsection six (6) of section two point ten (2.10) of the Code; the costs for the employment of necessary staff and experts; witness fees; and such other costs and expenses as are provided for in section two point twelve (2.12) of the Code or are otherwise necessary.

"5. That the general assembly shall recess on Saturday, May 13, 1978 and reconvene on Friday, June 30, 1978 at 10:00 a.m., and that between the date on which the general assembly recesses and the date it reconvenes the joint standing committee shall carry out its duties as provided in this resolution and provided by chapter two (2) of the Code and make a report of its findings to the governor and members of the general assembly not later than June 30, 1978 containing such recommendations as the committee shall approve.

"* * *

"7. That the lieutenant governor and the secretary of the senate and the speaker and chief clerk of the house are directed neither to authorize nor sign warrants for expenses of office or travel for members of the senate and house of representatives pursuant to subsection one (1) of section two point ten (2.10) of the Code for the interim from the day after the recess on May 13, 1978 through June 29, 1978. Nothing in this resolution shall preclude the payment of per diem, expenses, and travel pursuant to subsections two (2) through six (6) of section two point ten (2.10) or section two point forty-four (2.44) of the Code during the interim between the dates of recess."

Article III, §25, Constitution of Iowa, as amended by Amendment 5 of the Amendments of 1968, provides:

"Compensation of members. SEC. 25. [Each member of the first General Assembly under this Constitution, shall receive three dollars per diem while in session; and the further sum of three dollars for every twenty miles traveled, in going to and returning from the place where such session is held, by the nearest traveled route; after which they shall receive such compensation as shall be fixed by law; but no General Assembly shall have power to increase the compensation of its own members. And when convened in extra session they shall receive the same mileage and per diem compensation, as fixed by law for the regular session, and none other.]"

Article III, §§1 and 15, Constitution of Iowa, provides respectively:

§1

"General assembly. SECTION 1. The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives: and the style of every law shall be 'Be it enacted by the General Assembly of the State of Iowa.' "

§15

"Bills. SEC. 15. Bills may originate in either house, and may be amended, altered, or rejected by the other; and every bill having passed both houses, shall be signed by the Speaker and President of their respective houses."

Article III, §16, requires that for a bill to become a law it must be signed by the governor or passed over his veto by a two-thirds vote. It is clear from §25 of the Constitution that the compensation and allowances for expenses of members of the General Assembly must be fixed by *law*. It is equally clear that Senate Concurrent Resolution 136 is not a *law*. It does not purport to be a law and was not signed by the governor or passed over his veto.

Relevant statutory provisions concerning the compensation of members of the general assembly are found in Chapter 2, Code of Iowa, 1977. Section 2.10(1) provides:

"Salaries and expenses-members of general assembly and lieutenant governor. Members of the general assembly and the lieutenant governor shall receive salaries and expenses as provided by this section.

"1. Every member of the general assembly except the speaker of the house and majority and minority floor leaders of the senate and house shall receive an annual salary of eight thousand dollars for each year while serving as a member of the general assembly. The majority and minority floor leaders of the senate and house shall receive an annual salary of nine thousand five hundred dollars for each year while serving in such capacity. In addition, each such member shall receive the sum of twenty dollars per day for expenses of office, except travel, for each day the general assembly is in session commencing with the first day of a legislative session and ending with the day of final adjournment of each legislative session as indicated by the journals of the house and senate. However, members from Polk county shall receive ten dollars per day. Travel expenses shall be paid at the rate established by section 79.9 for actual travel in going to and returning from the seat of government by the nearest traveled route for not more than one time per week during a legislative session. However, any increase from time to time in the mileage rate established by section 79.9 shall not become effective for members of the general assembly until the convening of the next general assembly following the session in which the increase is adopted; and this provision shall prevail over any inconsistent provision of any present or future statute.

"* * *"

Section 2.10(1) was amended by §3, Chapter 3, 67th G.A., 1st Session (1977). However, such amendments are not germane to your inquiry. Moreover, the amendments do not take effect until January 1, 1979. Section 5, Chapter 3, 67th G.A. (1977). Also, as Senator Hill points out, the 1973 Code used the language "is actually in session". As we shall see, the change to the present language which omits the word "actually" may be significant particularly in view of the language found in §2.44.

Section 2.10(6) provides in relevant part:

"6. In addition to the salaries and expenses authorized by this section, members of the general assembly shall be paid forty dollars per day, except the speaker of the house who shall be paid sixty dollars per day, and necessary travel and actual expenses incurred in attending meetings for which per diem or expenses are authorized by law for members of the general assembly who serve on statutory boards, commissions, or councils, and for standing or interim committee or subcommittee meetings subject to the provisions of section 2.14, or when on authorized legislative business when the general assembly is not in session...."

Section 2.14(5) provides:

"5. When the general assembly is not in session, a member of the general assembly shall be paid forty dollars per day and his necessary travel and actual expenses incurred in attending meetings of a standing committee or subcommittee of which he is a member in addition to his regular compensation. Such compensation and expenses shall be allowed only if the member attends a meeting of the committee or subcommittee for at least four hours."

Section 2.44 provides:

"Expenses of council and special interim committees. Members of the legislative council shall be reimbursed for actual and necessary expenses incurred in the performance of their duties, and shall receive a per diem of 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. Such expenses and per diem shall be paid in the manner provided for in section 2.12.

"Members of special interim study committees which may from time to time be created and members of the legislative fiscal committee who are not members of the legislative council shall be entitled to receive the same expenses and compensation provided for the members of the legislative council."

The Attorney General has issued a number of opinions in the past discussing the differences existing among laws, joint resolutions, concurrent resolutions and simple resolutions. 1970 OAG 66, 1968 OAG 286, 1906 OAG 96, 1898 OAG 102. The 1967 opinion referred to above (1968 OAG 286) quoted extensively from the Iowa Manual of Legislative Procedure, 3rd Edition, to describe the differences between the several forms of resolutions:

"* * *

"A simple resolution is to be distinguished from an ordinary motion by its form; it is above an ordinary motion in formal dignity. A concurrent resolution is similar to a simple resolution, except that it is adopted by both branches of the legislature, instead of by just one house: it expresses the action of the legislature as one body, while a simple resolution expresses the action of but one of the branches of the legislature. A joint resolution is above a concurrent resolution in formal dignity and, although it is similar to a concurrent resolution, it has thrown around it all the formalities of a bill and passes through all the stages that a bill passes through: it is, in addition to the ordinary use of the resolution, employed for the making of temporary laws, for proposing amendments to the Constitution, and for administrative orders.

"* * *

"Concurrent resolutions do not differ greatly in their function from simple resolutions, except that they express the will of the whole legislature. By them joint conventions and sessions are arranged; Congress is memorialized to take some action; recommendations for amendments to the Federal Constitution are suggested; final adjournment and recesses beyond the constitutional limit during the session are provided; and joint rules are adopted. Moreover, conveniences for the legislature are established by concurrent resolution, such as providing for mail service and for parking facilities during the session. Furthermore, the concurrent resolution is used for issuing administrative orders. For example, by it the Superintendent of Printing is directed to furnish copies of different publications of the State, such as the Code, the session laws, legislative bills and journals to county officials and members of the press. This use of the concurrent resolution approaches very near to the character of lawmaking, and will be discussed later in that connection."

As this opinion points out, a joint resolution is above a concurrent resolution in formal dignity, force and effect. Nevertheless in 1906 OAG 96 at 106, the Attorney General concluded:

"No citation of authority is necessary to establish the proposition that it takes a law to repeal a law. The act which destroys should be on equal dignity with that which creates or establishes.

"As we have seen, a joint resolution is not a law under the constitution of our state, and the statute of the state can neither be repealed nor amended by a joint resolution of the general assembly...."

If a joint resolution cannot alter, amend or repeal a law, then *a fortiori* a mere concurrent resolution such as Senate Concurrent Resolution 136 cannot alter, amend or repeal any right or entitlement of members of general assembly to the expenses allowed them under §2.10. Therefore, in the present context, Senate Concurrent Resolution 136 is irrelevant and should be disregarded to the extent that it is in conflict with any statutory provisions, including those found in Chapter 2 of the Code.

Under §2.10(1), members of the general assembly are entitled $20.00 per day for expenses of office, except travel, for each day the general assembly is in session, commencing with the first day of a legislative session and ending with the day of final adjournment of each legislative session as indicated by the journals of the House and Senate. Travel expenses are to be paid at the rate established by §79.9 for *actual travel* in going to and returning from the seat of government by the nearest traveled route for not more than one time per week during a legislative session. As shown by the journals of the Senate and the House, the general assembly did not finally adjourn on May 13, 1978 but merely recessed until June 30, 1978, pursuant to Senate Concurrent Resolution 136. Thus, there was no final adjournment as required by §2.10 to terminate the members' entitlement to the $20.00 per day expenses. Insofar as mileage is concerned, that provision of §2.10(1) relates only to "actual travel" and if a member did not make the trip, he would not be entitled to be compensated for the weekly travel mileage allowance during this period of recess.

The term "session" has been defined in various ways. For example, Ballentine's Law Dictionary, 3rd Edition, the Lawyer's Cooperative Publishing Company, Rochester, New York, 1969, defines it as follows:

"SESSION. The time during which a legislative body, other assembly, or court meets for the transaction of business. *People v. Auditor of Accounts, 64 Ill. 82, 86. The meeting of an administrative board, agency or commission, 2 AmJ2d Admin L* §§227 et seq. The meeting of any organized body or group. A meeting of a legislative body for a day; the entire period during a particular year in which a legislature assembled for business, as the 45th session of the General Assembly of Iowa."

Subsection 5 of §781, Mason's Manual on Legislative Procedure provides:

"SESSION. The sitting of a court, Legislature, council, commission, etc., for the transaction of its proper business. Hence, the period of time, within any one day, during which such body is assembled in form, and engaged in the transaction of business, or, in a more extended sense, the whole space of time from its first assembling to its prorogation or adjournment sine die. *Ralls v. Wyand,* 40 Okl. 323, 138 P. 158, 162."

The definition found in Black's Law Dictionary, 4th Edition, West Publishing Company, St. Paul, Minnesota, 1951 is:

"SESSION. The sitting of a court, Legislature, council, commission, etc., for the transaction of its proper business. Hence, the period of time within any one day, during which such body is assembled in form, and engaged in the transaction of business, or, in a more extended sense, the whole space of time from its first assembling to its prorogation or adjournment sine die. *Ralls v. Wyand,* 40 OKL. 323, 138 P. 158, 162."

For further definitions of the word "session" see 1970 OAG 66 at 68 and 38A Words and Phrases, "Session" p. 599 et seq. In any event, it seems clear from the language employed in §2.10(1) that the word "session" is used therein in the more extended sense and begins with the first day of a legislative session and continues uninterrupted until the day of final (or *sine die*) adjournment of such legislative session as indicated by the journals of the House and the Senate. Thus, members of the general assembly are entitled to $20.00 per day for each day during the period from May 13 to June 30, 1978 including weekends, holidays and intra-session recesses. Moreover, the General Assembly did not finally adjourn on June 30, 1978 but continued in session until July 16, 1978. Therefore, members of the legislature are entitled to twenty dollars ($20.00) per day until that time. This conclusion comports with the practice of paying members an expense allowance for Saturdays, Sundays, holidays and other periods of temporary recess.

Also, it should be noted that §2.10(1) of the 1973 Code provided in relevant part:

"In addition, each such member shall receive the sum of $15.00 per day for expenses of office, except travel, for each day the general assembly is actually in session."

In 1973, the 65th General Assembly enacted Chapter 119 which amended the foregoing language of §2.10(1) to increase the daily expense allowance to $20.00 per day, deleted the word "actually" and added at the end thereof "commencing with the first day of a legislative session as indicated by the journals of the House and the Senate." The explanation accompanying such Chapter 119 (House File 796) states in part:

"This bill increases compensation for members of the general assembly, effective commencing with the 66th General Assembly, as follows:

"* * *

"4. Expense allowance is increased from $15.00 per day for a five day week to $20.00 per day for a seven day week. The expense allowance for Polk County legislators is increased from $7.50 per day to $10.00 per day.

"* * *"

This, we believe, buttresses the conclusion that legislators are entitled to the $20.00 per day expense allowance for each and every day the legislature is in session beginning with the first day of the session and ending with the day of final adjournment even though on some of those days the general assembly may actually not be sitting. Finally, it should be noted that in order to obtain the expense allowance, vouchers must be submitted to the State Comptroller indicating a claim for the same. Section 2.10(5). It may well be that many if not, indeed, all members of the general assembly will be mindful of the intent clearly expressed in Senate Concurrent Resolution 136 that they not receive the daily expense allowance on days after May 13, 1978 when the legislature is not actually sitting to conduct business and will not submit vouchers to

obtain payment of the same.

It is clear from Senate Concurrent Resolution 136 that the Committee on Interest Rates created thereby is a joint standing committee and the members of such committee are entitled only to such per diem and expenses as are authorized under §2.10(6) and 2.14(5). Under those sections, members of standing committees are entitled to per diem and reimbursement for expenses only when the general assembly is not in session. And as we have seen, the current session of the general assembly recessed from time to time but did not end until July 16, 1978. Accordingly, it is our opinion that members of the joint standing committee on usury are not entitled to per diem and expenses.

However, the legislative council is a special case with a special statute governing its entitlement to per diem. Section 2.44 authorizes members of the legislative council to receive their actual and necessary expenses incurred in performance of their duties together with a per diem of $40.00 for each day in which engaged in the performance of such duties except that "such per diem compensation and expenses shall not be paid when the general assembly is *actually* in session *at the seat of government.*" In our opinion, the addition of the words "actually" and "at the seat of government" must be taken to have been intended to give the words "in session" a more restrictive meaning than the use of the words "in session" without qualification. In other words, members of the legislative council would be entitled to per diem and expenses when they meet on any day except those on which the General Assembly was actually sitting as an organized body in Des Moines.

July 17, 1978

TAXATION: Property Tax: Rezoning of Agricultural Realty to Residential Realty. Chapter 441 and §441.21, Code of Iowa, 1977, as amended by Chapter 43, §§18 and 19, Acts of 67th G.A., First Session. The rezoning of a tract of land from an agricultural classification to a residential classification without a change in the actual agricultural usage of the land does not require the assessor to increase the actual value of such agricultural realty. (Griger to Anderson, Winneshiek County Attorney, 7-17-78) #78-7-11

Mr. Calvin R. Anderson, Winneshiek County Attorney: You have requested an opinion of the Attorney General as follows:

"The question that I would like answered is whether or not the rezoning of a tract of land located within a city limits from an agricultural classification to a residential classification without a change in the actual usage of the land would increase the valuation of that property for real estate taxes within the purview of Chapter 441, and more specifically, Section 441.21 of the Iowa Code. In other words, does Chapter 441 require an assessor to increase the value of real estate for tax purposes because of such a zoning change even though the land usage remains the same, that is, agricultural?"

Section 441.21, Code of Iowa, 1977, as amended by Chapter 43, §§18 and 19, Acts of 67th G.A., First Session, provides for the methods of valuation, for property tax purposes, of agricultural and residential realty by the local assessor. These methods are not identical for both of these property classifications (agricultural and residential).

For agricultural realty, §441.21, as amended by §18 of Chapter 43, provides the following method and valuation:

"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 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 and not on its potential value for other uses.

"Notwithstanding the provisions of this section, in assessing and determining the actual value of agricultural property as of January 1, 1978, and January 1, 1979, the actual value of agricultural property shall be determined on the basis of productivity and net earning capacity of the property determined on the basis of its use for agricultural purposes capitalized at a rate of seven percent and applied uniformly among counties and among classes of property."

Section 441.21, as amended by §19 of Chapter 43, provides that the method of valuation of residential realty to be used by local assessing officials is the "fair and reasonable market value" of such realty.

In the situation you posed, the rezoning of the tract of land from an agricultural classification to a residential classification occurred without a change in the agricultural usage of the land. Clearly, §441.21, as amended, requires the assessor to value agricultural realty according to the productivity method as set forth in the statute as long as the agricultural usage existed as of January 1, 1978 for the 1978 assessment year and as of January 1, 1979 for the 1979 assessment year. A mere rezoning of such land without a change in agricultural usage is not mentioned in the statute as a criterion for increasing the actual value of that land.

It is the opinion of this office that Chapter 441, Code of Iowa, 1977, as amended by Chapter 43, Acts of 67th G.A., does not require an assessor to increase the actual value of agricultural realty, for property tax purposes, because of a rezoning of such agricultural realty to residential classification without a change in the actual agricultural usage of the land.

July 21, 1978

CRIMINAL LAW: BRIBERY, ELECTIONS, GIFTS OF CAMPAIGN MATERIALS. §722.4, Supplement to the Code, 1977. It is not unlawful to give pencils, matchbooks, emery boards, buttons, bumper stickers, shopping bags and like items with a candidate's name or political message thereon as part of a political campaign so long as the individual value of such items is less than 25 cents. (Turner to Egenes, State Representative 7-21-78) #78-7-12

The Honorable Sonja Egenes: You have requested an opinion of the attorney general as to whether a small gift from a candidate for political office to an elector for the purpose of influencing his vote at an election constitutes bribery under §722.4, Supplement to the Code of Iowa, 1977, the new criminal code revision. You list items such as pencils, matchbooks, emery boards, buttons, bumper stickers and other items, none of which would cost more than a few cents. Specifically you say:

"Section 722.4, Supplement to the Code, 1977, provides as follows:

" 'A person who offers, promises, or gives *anything of value or benefit* to any elector for the purpose of influencing the elector's vote, in any election authorized by law, or any elector who receives *anything of value or benefit*

knowing that it was given for such purposes, commits an aggravated misdemeanor.' (emphasis added)

"The foregoing section of the Code became effective January 1, 1978. The prior law relating to the subject of the bribery of electors is found in Section 738.1 of the 1977 Code and preceding Codes. This section provided:

" 'Any person offering or giving a *bribe* to any elector for the purpose of influencing his vote in any election authorized by law, or any elector entitled to vote in such election receiving such *bribe*, shall be fined not exceeding $500.00 or imprisoned in the county jail not exceeding one year, or both. (emphasis added)

"It is very clear that the Legislature changed the language from 'a bribe' to 'anything of value or benefit'. Questions have arisen as to the interpretation of the new Code section. Looking at previous Opinions of the Attorney General, we find a 1911 - 1912 Opinion at page 695 that a candidate for public office may not legally give away lead pencils containing matter advertising his candidacy. In the same volume at page 785 we find an Opinion that it would not be an offense for a candidate to hand to voters of his district a card bearing his announcement on one side and a political map or chart on the other unless the political chart or map was a thing of value.

"However, in 1934 we find an Opinion at page 526 that the giving away of a small pad of matches upon which a political advertisement appears would not be sufficient to constitute a bribe.

"The question then is: Has the legislative change of language from the word 'bribe' to the words 'anything of value or benefit' extended the meaning of the statute?

"Specifically, would it be a violation of the statute for a candidate to distribute various pieces of campaign material such as, but not limited to:

"1. Pencils with the candidate's name imprinted thereon.

"2. Matchbooks with campaign advertising.

"3. Shopping bags with the candidate's message printed thereon.

"4. Yardsticks with a candidate's message.

"5. Emery boards.

"6. Recipe books with a message from the candidate or candidate's spouse.

"In an entirely separate category I would include campaign brochures, buttons, bumper strips, and other printed materials. It would seem that such campaign literature would not constitute anything of value or benefit to any elector for the purpose of influencing the elector's vote, but it would be appropriate for you to address this subject along with the specific items listed above."

In *1911 OAG 695*, an Assistant Attorney General overruled an opinion of a former Iowa Attorney General and said that the giving of an advertising pencil with a name of a Democratic candidate for sheriff with his likeness thereon, was a thing of value and could not lawfully be given to influence a voter.

Subsequently, in *1934 OAG 526*, an opinion of the Attorney General, citing no authority, found that it was not bribery to give away a small pad of matches with a political advertisement thereon. The author of the opinion said that it appeared that giving the matches was not to bribe the individual voter but

to have the voter advertise the candidacy of the aspired for the political office. "At any rate, I would not advise criminal prosecution upon the above set of facts," the then Attorney General said.

There have been few cases on this subject, probably because most prosecutors take refuge in the vast seemingly endless, refuge called "prosecutorial discretion," knowing that they probably could not get 12 people to find a candidate guilty beyond a reasonable doubt for giving away a matchbook or any emery board worth a penny or so. It is doubtful that 12 people would agree that any American citizen would sell his vote for so little.

I agree with the 1934 opinion and believe that such gifts, of a value of less than 25 cents, would be considered de minimus. *De minimus non curat lex.* The purpose of such gifts is to advertise the candidate's name rather than to buy a vote. If the general assembly wanted to limit the amount which candidates could expend for advertising purposes, it would not have repealed §§56.14 and 56.15, Code of Iowa, 1975. Such limitations of advertising are subject to First Amendment attacks as abridging the freedom of speech of a candidate. *Buckley v. Valeo,* 424 U.S.1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

As I told Representative Dyrland in a letter dated April 11, 1978, questions of this kind point up the need for clarifying the existing bribery law. There is no reason why prosecutors should be called upon to play guessing games as to whether an official has violated a vague law or should be prosecuted. Anyone ought to be able to read the statute and determine the question quite readily. At present a prosecutor is blamed whatever he decides: not because he is wrong, but because the law is vague.

July 25, 1978

SCHOOLS: DIRECTORS. When time for filling vacancy by board of directors has expired and neither the secretary of area administrator has called a special election under §279.7 then the vacancy should be filled at the next "pending" election if the requirements of §69.12 are met. (Nolan to Davitt, State Representative, 7-25-78) #78-7-13

Honorable Philip A. Davitt, State Representative: On June 14, 1978, you requested an opinion of this office interpreting the various statutes which pertained to the filling of a vacancy on the board of directors of a community school district. Your letter indicated that an immediate problem has arisen in the Martensdale-St. Mary's Community School District where a director whose term of office does not expire until September, 1979 has resigned. The resignation became effective in May, 1978 but the remaining directors did not exercise their power to appoint a successor to fill the vacancy within the time allowed by Iowa Code Sections 279.6 and 279.7. At this point then the question of how the vacancy should be filled was presented to the board's legal counsel who in turn analyzed the applicable sections of the Iowa Code and contacted you to secure an opinion of this office on the following questions:

"1. Under the facts presented, does Iowa Code Section 279.7 or Iowa Code Section 69.12 control for the purposes of an election to fill a vacant school board director's seat?

"2. What is the effect of Iowa Code Section 277.30 upon the resolution of this matter?

"3. Has the Martensdale-St. Mary's School Board lost its power to appoint a successor to fill the vacancy?"

In answer to the questions presented we advise as follows:

1. It is the view of this office that Code Section 279.7 originally controlled in the matter of determining how to fill this vacancy on the school board. Section 279 is a statute relating only to the filling of vacancies on a school board as distinguished from §69.12 which pertains to the filling of vacancies in all nonpartisan elective offices. Accordingly the rule of statutory construction found in Code §4.7 applies:

"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."

Based on the facts presented in your letter it now appears that the time for filling the vacancy by appointment and the time for the calling of a special election by the secretary of the board pursuant to §279.7 has expired. Section 279.7 provides:

"In any case where a vacancy or vacancies occur... and the remaining members of such board have not filled such vacancy *within ten days* after the occurrence thereof...the secretary of the board...shall call a special election in the district, subdistrict, or subdistricts, as the case may be, to fill such vacancy or vacancies....*which election shall be held not* sooner than thirty days nor *later than forty days after the tenth day following the occurrence of the vacancy.* In any case where the secretary fails for more than three days to call such election, the [area education] administrator shall call it. [emphasis added]

* * *

"Nomination petitions shall be filed in the manner provided in section 277.4, except that the petitions shall be filed not less than ten days prior to the date set for the election."

Thus it appears that it is no longer possible to call the special election allowed under §279.7. We then look to §277.29 and §277.30 to determine the procedure to be followed. These sections contain additional provisions relating to the filling of vacancies by election and direct that the provisions of §69.12 shall control. An examination of §69.12 leads us to consider whether there is a "pending election" at which voters of the same political subdivision will be filling another office or voting on a public question. The regular school election held annually on the second Tuesday in September in each school district for the election of officers of the district qualifies as a pending election. (§277.1).

The vacancy to be filled here could be filled at the next pending election because the unexpired term has more than seventy days to run after the date of the next pending election and the vacancy occurred forty-five or more days prior to the election. (§69.12).

Nomination papers must be filed by 5:00 p.m. on the fortieth day prior to a regularly scheduled school election. The regular school election day this year falls on September 11, 1978. There remains adequate time for filing nomination papers for the vacancy to be filled.

Accordingly, Code §69.12 now applies to the filling of this vacancy on the school board.

2. The effect of Code §277.30 on the resolution of the filling of the vacancy on the Martensdale-St. Mary's board is to remove the exceptions created by statutory construction under §4.7 and to make §69.121 applicable.

3. Due to the lapse of time beyond the limits set in §279.29 the Martensdale-St. Mary's board has relinquished its power to fill this vacancy by appointment. If the vacancy is not filled at the pending election in September than a special election can be called. (§277.29).

July, 1978

CONSTITUTIONAL LAW

General Assembly; Governor; Veto Power. Art. III, §16, Constitution of Iowa. It is not enough that the house in which a vetoed bill originates enter the bill and the Governor's objections upon its journal. It must also reconsider the bill either by voting on the same bill again or voting to table it. (Turner to Redmond, State Senator, 7-13-78) #78-7-8

General Assembly; Sine Die Adjournment. Art. III, §14 and Art. IV, §13, Constitution of Iowa. §4.1(22), Code of Iowa, 1977. (1) The constitutional prohibition against one house adjourning for more than 3 days without the consent of the other means 3 calendar days. (2) The House's unilateral sine die adjournment without the Senate's consent, and the Senate's subsequent adjournment to a time more than 3 calendar days later, violated Art. III, §14. (3) Having discovered a violation of Art. III, §14, the General Assembly could reconvene and lawfully transact business more than 3 days after an attempted unlawful adjournment. (4) Art. IV, §13, vests the Governor with power to determine whether a disagreement exists between the two houses with respect to the time of adjournment and, upon making such determination, to adjourn the General Assembly to such time as he may think proper before the regular meeting of the next General Assembly. (Turner to Redmond, State Senator, 7-11-78) #78-7-5

COURTS

Rules and Forms of Procedure, Effective Date. §684.19, Code of Iowa, 1977. Changes in the rules and forms of civil and criminal procedure reported by the Supreme Court to the General Assembly on January 17, 1978 do not become effective until July 1, 1979. (Haesemeyer to DeKoster, State Senator, 7-12-78) #78-7-7

CRIMINAL LAW

Bribery; Elections, Gifts of Campaign Materials. §722.4, Supplement to the Code, 1977. It is not unlawful to give pencils, matchbooks, emery boards, buttons, bumper stickers, shopping bags and like items with a candidate's name or political message thereon as part of a political campaign so long as the individual value of such items is less than 25 cents. (Turner to Egenes, State Representative, 7-21-78) #78-7-12

Bribery; Campaign Contributions; Public Officials. Chapter 56, Code of Iowa, 1977. §§722.1 and 722.2, Supplement to the Code of Iowa, 1977. Senate file 2201, 67th G.A. 2nd Session. Failure of enactment of Senate File 2201 relating to gifts and bribery because it was vetoed did not render campaign contributions unlawful although the bill would have corrected an apparent irreconcilable conflict between the campaign finance disclosure law and the bribery sections by excepting such contributions as gifts thereunder. (Turner to Harbor, State Representative, 7-14-78) #78-7-9

ELECTIONS

Primary Elections, Withdrawal of Candidate. §43.76, Code of Iowa, 1977. An attempted withdrawal of his candidacy by a primary election candidate

less than sixty days before the primary is ineffective. (Haesemeyer to Synhorst, Secretary of State, 7-12-78) #78-7-6

ENVIRONMENTAL PROTECTION

Platting. Chapter 409, Code of Iowa 1977. Contract purchaser may not plat land without joinder by record title holder and release of all encumbrances. (Davis to Bauercamper, Allamakee County Attorney, 7-3-78) #78-7-4

County Conservation Boards. §§111A.6, 111A.7, 336.1, 336.2(6), §610, Appendix, Code of Professional Responsibility, Canon 5. A county conservation board may expend board funds for legal service provided by an attorney other than the county attorney and may store equipment outside the county. (Davis to Van Gilst, State Senator, 7-3-78) #78-7-1

JUDICIAL MAGISTRATES

Commission Appointments. §§602.52, 602.51, 602.50, Code of Iowa, 1977. County judicial magistrate appointing commissions are not required under §602.52 to appoint lawyer applicants rather than nonlawyer applicants to §602.50 judicial magistrate positions unless lawyer applicants are equally or better qualified than nonlawyer applicants. (Erickson to Shirley, Dallas County Attorney, 7-3-78) #78-7-3

MUNICIPALITIES

Dedication of land for public purpose. Chapter 41, Code of Iowa, 1851. When land is dedicated for a public purpose in an unincorporated area, the fee title remains in the grantor, and the public receives an easement. (Blumberg to Neighbor, Jasper County Attorney, 7-3-78) #78-7-2

SCHOOLS

Directors. When time for filling vacancy by board of directors has expired and neither the secretary or area administrator has called a special election under §279.7, then the vacancy should be filled at the next "pending" election if the requirements of §69.12 are met. (Nolan to Davitt, State Representative, 7-25-78) #78-7-13

STATE OFFICERS AND DEPARTMENTS

General Assembly, members expenses and per diem. §§1, 15, 16 and 25, Constitution of Iowa; §§2.10, 2.14, 2.44, Code of Iowa, 1977. (1) Senate Concurrent Resolution 136, 67th G.A., 2nd (1978) notwithstanding, members of the general assembly are entitled to $20 per day for expenses of office, except travel, for each day the general assembly is in session, commencing with the first day of a legislative session and ending with the day of final adjournment of each legislative session as indicated by the journal of the House and Senate. Travel expenses are to be paid at the rate established by §79.9 for *actual travel* in going to and returning from the seat of government by the nearest traveled route for not more than one time per week during a legislative session. (2) The Committee on Interest Rates created by Senate Concurrent Resolution 136, is a joint standing committee and the members of such committee are entitled to per diem and expenses only when the general assembly is not in session. (3) Members of the legislative council are entitled to per diem and expenses when they meet on any day except those which the General Assembly is not actually sitting as an organized body in Des Moines. (Haesemeyer to Hill, State Senator and Selden, State Comptroller, 7-17-78) #78-7-10

TAXATION

Property Tax; Rezoning of Agricultural Realty to Residential Realty.

Chapter 441, 441.21, Code of Iowa, 1977, as amended by Chapter 43, §§18 and 19, Acts, 67th G.A., First Session. The rezoning of a tract of land from an agricultural classification to a residential classification without a change in the actual agricultural usage of the land does not require the assessor to increase the actual value of such agricultural realty. (Griger to Anderson, Winneshiek County Attorney, 7-17-78) #78-7-11

STATUTES CONSTRUED

Code, 1977	Opinion
2.10	78-7-10
2.14	78-7-10
2.44	78-7-10
4.1(22)	78-7-5
43.76	78-7-6
56	78-7-9
69.12	78-7-13
111A.6	78-7-1
111A.7	78-7-1
279.7	78-7-13
336.1	78-7-1
336.2(6)	78-7-1
409	78-7-4
441	78-7-11
441.21	78-7-11
602.50	78-7-3
602.51	78-7-3
602.52	78-7-3
684.19	78-7-7
722.1	78-7-9
722.2	78-7-9
722.4	78-7-12

Code, 1851	Opinion
Chapter 41	78-7-2

67th GENERAL ASSEMBLY

Chapter 43, §§18 & 19	78-7-11
Senate File 2201	78-7-9
Senate Concurrent Resolution 136	78-7-10

CONSTITUTION OF IOWA

Art. III, §14	78-7-5
Art. III, §16	78-7-8
Art. IV, §13	78-7-5

August 1, 1978

SOCIAL SERVICES, DEPARTMENT OF — Claim reimbursement from county of legal settlement. §§252.16, 252.22, 252.23 and 252.24. The county providing services to individuals under Title XX of the Social Security Act, has the right to claim reimbursement from the county of the individual's legal settlement for the expense of such service, and this action does not

provide a requirement as to duration of residence for those seeking service contrary to federal law. (Robinson to Kopecky, Linn County Attorney, 8-1-78) #78-8-1

Eugene J. Kopecky, Linn County Attorney: You requested an opinion of the Attorney General as follows:

"Two questions have been raised regarding the liability of counties for services to their residents under Title XX which is administered by the Iowa Department of Social Services.

"The first question is: 'Does a county providing community services to individuals under Title XX have the right to claim reimbursement from the county of the individual's legal settlement for the expense of such services?'

"Section 228.11, Title 45 of Federal Register, Vol. 42, No. 20, January 31, 1977, states the following:

'The state plan shall provide that no requirements as to duration of residence or citizenship will be imposed as a condition of participation in the State's program for the provision of services.'

"Another county has interpreted this regulation to release it from the liabilities imposed by Chapter 252, Iowa Code, when its residents are provided services by Linn County under Title XX. The provisions of Chapter 252 require other counties to reimburse the county providing services for the expense of such services to their residents. Linn County does not interpret the above federal regulations to refer to county residency provisions."

In our opinion the county providing services to individuals has a right to claim reimbursement from the county of the individual's legal settlement for the expense of such service. This does not provide a requirement as to duration of residence nor impose a condition of participation upon the individual seeking service. It is merely a method we use in Iowa to determine which county shall be liable for the 25% total cost vis-a-vis the 75% federal cost under Title XX of the Social Security Act.

In 1972 OAG 328 [Turner to Sarcone, 1/12/72] this office analyzed the U.S. Supreme Court decisions in *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 and *Pease v. Hansen,* 404 U.S. 70,92 S.Ct. 318, 30 L.Ed.2d 224 dealing with the question of the constitutionality of residency laws as they pertain to welfare programs. The Attorney General opinion also dealt with Ch. 252, Code of Iowa, and particularly §§ 252.16, 252.22, 252.23 and 252.24 and concluded:

"Pertinent portions of these sections read:

'252.16 Settlement — how acquired. A legal settlement in this state may be acquired as follows:

1. Any person continuously residing in any county in this state for a period of one year acquires a settlement in that county.

2. Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such person shall have continuously resided in said county for a period of one year.

3. * * * .'

'252.22 Contest between counties. When relief is granted to a poor person having a settlement in another county, the auditor shall at once by mail notify the auditor of the county of his settlement of such fact, and, within fifteen days

after receipt of such notice...'

'252.23 Trial. If the alleged settlement is disputed, then, within thirty days after notice thereof as above provided, a copy of the notices sent and received shall be filed in the office of the clerk of the district court...'

'252.24 County of settlement liable. The county where the settlement is shall be liable to the county rendering relief for all reasonable charges and expenses incurred in the relief and care of a poor person...'

Reading these statutes together, one can really observe that the county of legal settlement must reimburse the county of the residence of a poor person for county relief extended by the residence county and that said §252.16 defines 'legal settlement' solely for reimbursement purposes."

Your second question asked whether the reimbursement would be for 100% of the cost of service or 25%. In our opinion it would be for 25%.

August 1, 1978

SOCIAL SERVICES, DEPARTMENT OF — Authority to lease beyond appropriation period of one year. §247A.5, Code of Iowa, 1977; Art. VII, §1, Constitution of Iowa. The Department of Social Services has the authority to enter into a lease which extends beyond the time limit of an appropriation as such action does not lend the credit of the State in violation of Art. VII, §1 of the Constitution. (Robinson to Wellman, Secretary, Executive Council of Iowa, 8-1-78) #78-8-2

W. C. Wellman, Secretary Executive Council of Iowa: Your letter of July 19, 1978 to Mr. Victor Preisser, Acting Commissioner of the Department of Social Services, regarding the lease of certain facilities to the Adult Corrections Division of the Department of Social Services has been forwarded to me for the proper opinion of the Attorney General. In this letter you note the following:

"Executive Council approval was given with the provision that this Office received from the Office of the Attorney General an opinion in which it is stated that the Executive Council of Iowa has the authority to approve this five year lease for facilities to be used as an Auto Body Repair Shop and Printing and Data Processing Center for Government Agencies to have this type of work completed when the department receives an appropriation for a lease of such facilities on a one year basis."

In our opinion, the Executive Council of Iowa has the authority to approve this five year lease. Apropos to the question which you presented is *Kersten Co., Inc. v. Department of Social Services,* 207 N.W.2d 117, 119-120 (Iowa 1973) where the Court states:

"The appropriations are for 'all purposes' of the department 'including public assistance, salaries, support, maintenance, repairs, replacement, alterations, equipment, and miscellaneous purposes for the department's general administration, bureau offices, institutions, welfare services and parole services.'

"An examination of the responsibilities with which the department is burdened under chapters 217 and 218, The Code, and a review of the purposes of the appropriations as set out above demonstrate to a certainty the department cannot function without countless day-to-day contractual dealings. 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." [Emphasis by the court]

The lease in question involves housing facilities for inmates on work release from an institution. The statutory authority for said lease is found in §247A.5, Code of Iowa, 1977, which provides in part:

"247A.5 Housing facilities.
The department shall designate and adopt facilities in the institutions and camps under its jurisdiction for the housing of inmates granted work release privileges. In areas where facilities are not within reasonable proximity of the place of employment of an inmate so released, *the department may contract with the proper authorities* of political subdivisions of the state or suitable public or *private agencies* for the quartering of the inmate in local housing facilities." [Emphasis added]

A straightforward interpretation of this statute indicates there is proper authority for entering into this lease.

The question now is: does a five year lease extend the credit of the state in violation of Article VII, Section 1 of the Iowa Constitution because the lease extends beyond the period of the annual appropriation? We answer in the negative. Article VII, Section 1 provides:

"*Credit not to be loaned.* SECTION 1. 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 language we quoted from *Kersten Co., Inc.* above, indicates to us that the Iowa Supreme Court would uphold a five year lease. There are, however, no Iowa cases directly answering this question, so we, therefore, look to other states for further guidance. The Supreme Court of Michigan stated *In Re Request for Advisory Opinion, Etc.,* 254 N.W.2d 544, 547 (Mich. 1977) in response to an inquiry from the legislature concerning a similar provision in their constitution, as follows:

"Const. 1908, art 10, §10 provided in part: 'The state may contract debts to meet deficits in revenue, but such debts shall not in the aggregate at any time exceed two hundred fifty thousand dollars'. The ban on the issuance of scrip, certificate or other evidence of state indebtedness except for debts expressly authorized was continued.

"We read the phrase 'contract debts to meet deficits in revenue' in the foregoing to mean simply 'borrow money'.

"*The obligation to pay rent under a lease does not involve borrowing. Consequently it does not result in the incurring of a debt as that word is used in limitations thereon.* See Walinske v. Detroit-Wayne Joint Building Authority, 325 Mich. 562, 39 N.W.2d 73 (1949), and cases cited therein. See also 56 Am.Jur. 2d, Municipal Corporations, §§660-665." [Emphasis added]

In summary, it is our opinion that the Department of Social Services has the authority to enter into the lease which extends beyond the time limit of an appropriation, and that the Executive Council of Iowa has the authority in the exercise of its discretion, to approve of this lease.

August 1, 1978

MUNICIPALITIES: Motel and Hotel Tax — S.F. 336, Acts of the 67th G.A. (1978). The question of a motel and hotel tax shall be submitted at a general election. The procedure for getting such a question on the ballot is the same as that for all general elections. April 1, 1979, is the earliest date such a tax can be imposed. The amount of the tax shall be included in the question. The tax can be repealed by the city or county repealing the ordinance or resolution. (Blumberg to Synhorst, Secretary of State, 8-1-78) #78-8-3

The Honorable Melvin D. Synhorst, Secretary of State: We have your opinion request of July 11, 1978, regarding Senate File 336, Acts of the 67th G.A. (1978). That Act establishes a hotel and motel tax to be imposed by cities and counties. You ask:

"1. Can the proposition of imposing such a tax be submitted to the voters of a city at the general election or only at a regular municipal election?

"2. What procedure should be used by cities and counties in getting the question on the ballot?

"3. Is April 1, 1979 the earliest date such a tax can be imposed?

"4. Should the question as submitted to the voters include the percentage rate of the tax to be imposed and the length of time the tax will remain in effect? Must another election be held in order to terminate the tax? If not, who has the authority to decide these provisions?

"5. How long must a city or county wait after the question has failed to pass before the question can be placed on the ballot again?"

Senate File 336 provides in pertinent parts:

"Section 1. NEW SECTION. HOTEL AND MOTEL TAX. A city or county may impose by ordinance of the city council or by resolution of the board of supervisors a hotel and motel tax, at a rate not to exceed seven percent, which shall be imposed in increments of one or more full percentage points upon the gross receipts from the renting of any and all rooms, apartments, or sleeping quarters in any hotel, motel, inn, public lodging house, rooming house, or tourist court, or in any place where sleeping accommodations are furnished to transient guests for rent, whether with or without meals except the gross receipts from the renting of sleeping rooms in dormitories and in memorial unions at all state of Iowa universities and colleges....

"A local hotel and motel tax shall be imposed on January first, April first, July first, or September first, following the notification of the director of revenue. Once imposed, the tax shall remain in effect at the rate imposed for a minimum of one year. A local hotel and motel tax shall terminate only on March thirty-first, June thirtieth, September thirtieth, or December thirty-first. At least sixty days prior to the tax being effective or prior to a revision in the tax rate, or prior to the repeal of the tax, a city or county shall provide notice by certified mail of such action to the director of revenue.

"A city or county shall impose a hotel and motel tax, only after an election at which a majority of those voting on the question favors imposition. The election shall be held at the time of that city's or county's general election."

In the last paragraph of the above section the Legislature mandates that such a tax can only be imposed when the voters approve it at an election. That election shall be held at the time of that city's or county's general election. The problem with that sentence is the use of the term "general election". Section 39.2(3), 1977 Code of Iowa, defines "general election" to mean the biennial

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. Section 39.2(5) defines "city election" as an election held in a city for nomination or elections of the officers thereof. City elections do not fall within the definition of "general elections." General elections are normally held in even numbered years, whereas city elections are held in odd numbered years. See §376.1.

The wording in that sentence is unfortunate. One cannot determine, merely by reading that sentence, whether the Legislature intended cities to propose the question only at a general election, only at a city election, or at either. Generally, when employing statutory construction, the manifest intent of the Legislature will prevail over the literal import of the words used. *Northern Natural Gas Company v. Forst,* 205 N.W.2d 692 (Iowa 1973). The statute must be construed as a whole, and it should be given a sensible, practical, workable and logical construction *Doe v. Ray,* 251 N.W.2d 496 (Iowa 1977); *Northern Natural Gas Co. v. Forst, supra.* It would be manifestly unfair to say that the term "general election" refers to the regular elections held for that city or county. If that were the case, counties could submit the question at this fall's election, but cities would have to wait another year. Since one of the purposes of this Legislation is to provide additional revenue to the political subdivisions in lieu of or in addition to property taxes, allowing counties to impose the tax a year before cities can is unfair, illogical and unsensible.

In *Wing v. Ryan,* 1938, 255 App. Civ. 163, 6 N.Y.S.2d 825, the Court was faced with the use of the terms "city election" and "general election" in statutes regarding the filling of vacancies and the successors in office respectively. After noting that the use of "city election" was not the best, the Court concluded that both terms were synonymous. It held that use of "city election" was meant to describe the geographical location of the election, not its character. The same can be said here. By stating "that city's... general election," the Legislature apparently was referring to a general election held in the city wishing to impose the tax. We say "general election" because that is a specific term with a specific definition, as cited above. We cannot conclude that the use of the word "general" was inadvertent. In addition, the definition of "general election" includes the decision of questions as provided by law. Therefore, cities wishing to impose this tax shall submit the question at a general election held in that city.

Your second question is much easier to answer. Senate File 336, in the first sentence of section 1, provides that the tax can be imposed by city ordinance or county resolution. After the council or board of supervisors has decided to enact such an ordinance or resolution, it should follow the same procedure as is used for all general elections.

The Legislature provides in §1 that the tax shall be imposed quarterly[1] on the first day of the month, following notification of the director of revenue. Said notice must be given at least sixty (60) days prior to the time the tax becomes effective. Thus, if the proposal is submitted at the election this fall, November 7, 1978, and is approved, sixty days notice to the director would put the

[1]The intent was quarterly because the dates of January 1, April 1, and July 1 are used in the Act. The fourth quarter would be October 1, however, the Legislature included September 1. Thus, the imposition of such tax is on a quarterly basis except for September 1.

date beyond January 1, 1979. Since the Legislature mandated that the tax be imposed on a quarterly basis, the first date it could be imposed would be April 1, 1979.

Cities and counties can impose the tax in full percentage increments up to seven (7) percent. Since the rate can be from one to seven percent, and since the voters must approve the tax, it stands to reason that the percentage to be imposed must be included in the proposal on the ballot. That section also indicates that the minimum time the tax can be imposed is one year. No maximum is given. The section also provides that the tax can only terminate at the end of each yearly quarter, and also speaks to repeal of the tax and the city's or county's notification to the director of such a repeal. No mention is made of any election regarding repeal of the tax. These provisions, read together with the first sentence of §1 regarding an ordinance or resolution to establish the tax, indicate that repeal of the tax can be done at any time after one year and by repeal of the ordinance or resolution. Such a repeal can only become effective at the end of a quarter.

Finally, you wish to know how long a city or county must wait, after the proposal has been defeated, before the proposal can be submitted again. Unless there is something in the Code which specifically prohibits the resubmission of questions to the electorate, such matters can be resubmitted as often and as quick as possible. In this case, it could be resubmitted at the next general election.

Accordingly, we are of the opinion that:

1. The election of a motel and hotel tax shall be submitted at a general election.

2. The procedure for getting such a question on the ballot is the same as that for all general elections.

3. April 1, 1979, is the earliest date such a tax can be imposed.

4. The question on the ballot should include the percentage of tax to be imposed. The maximum time the tax is to be imposed need not be put in the question. Repeal of the tax can be done through the repeal of the applicable ordinance or resolution.

5. The proposition can be submitted at successive elections.

August 9, 1978

AGRICULTURE: Soybean Promotion Board. §185. 29, Code of Iowa 1977. Proposed use of part of Iowa Soybean Production Fund to move A.S.A. office from Hudson, Iowa to St. Louis is not authorized by contract or otherwise unless it can clearly be shown that such move is "necessary" for research, promotion and education. (Nolan to Coleman, State Senator, 8-9-78) #78-8-4

Honorable C. Joseph Coleman, State Senator: This is written in response to your letter of April 19, 1978 requesting an opinion concerning the legality of use of Iowa Soybean Promotion Board funds for the purpose of moving the American Soybean Association Office from Hudson, Iowa to St. Louis, Missouri. You also ask whether the Iowa State Promotion Board can take action to recover such funds from the American Soybean Association. From the information supplied to this office, it appears that the expenditure for the A.S.A. Board move is to be funded from unbudgeted investment income,

net proceeds from the sale of Hudson property, and accumulated savings from previously allocated funds as of September 30, 1977.

On January 27, 1976 the Iowa Soybean Promotion Board entered into a contract with the American Soybean Association Market Development Fund. This Fund is a subsidiary of the American Soybean Association which supports the association's legislative and marketing activities. Under the contract between the Iowa Soybean Promotion Board and the A.S.A. Market Development Fund, $600,000 was made available in 1976, and subsequently, for purposes set forth in the contract. The contract also stated:

"Inasmuch as a portion of the funds paid to CONTRACTOR hereunder will of necessity be spent for the maintenance and operation of that portion of its sub-contractor's American office, staff and personnel necessary for supervision of such sub-contract, and the balance of such funds will be disbursed for operation of such market development work in foreign countries, and inasmuch as additional sums may or will be allocated to such subcontractor for the same type of foreign market development work by the Foreign Agricultural Service of the U.S. Department of Agriculture, it is specifically contemplated and agreed that a necessary and sufficient portion of the aforesaid compensation payable hereunder may be expended and allocated for payment of expenses incurred by its sub-contractor in the continental United States in developing and implementing such subcontracted services hereunder. In addition to the foregoing, it is mutually agreed that CONTRACTOR will, out of the Compensation described above and from similar funds received from other agencies, and as such funds are availble, accumulate reserves of sufficient amount to furnish 75% of the CONTRACTOR'S anticipated annual market development, promotion and education contracts with American Soybean Association to enable American Soybean Association to enter into long term program and staffing commitments, and may cooperate with its said sub-contractor to enable American Soybean Association to accumulate a cash reserve equal to 25% of its anticipated annual expenses in carrying out its contractual obligations with the CONTRACTOR, all as authorized in By-Laws of the CONTRACTOR."

The Iowa Soybean Promotion Board is not a State agency. Section 185.34, Code of Iowa, 1977. Iowa Soybean Promotion funds are remitted by the State Comptroller on written requisition "to such organizations as the Iowa Soybean Association, American Soybean Association and the American Soybean Institute for Market Development Activities to include developing and expanding new markets for soybeans and soybean products worldwide." §185.29 further provides that:

"The funds can only be used for research, promotion, and education in cooperation with agencies who are equipped to do this kind of work."

Inasmuch as the promotion board funds are subject only to such maintenance and operation charges as are "necessary" for the carrying out of the contract between the promotion board and the market development fund, it is our view that the proposed use of any part of these funds to move the A.S.A. office would not be authorized unless it can be clearly shown that such move is "necessary". Use of promotion board funds for an unnecessary move would be tantamount to breach of contract.

In answer to your second question the monies in the soybean promotion fund have been appropriated for the administration of Chapter 185 and the payment of "claims based upon obligations incurred in the performance of activities and functions set forth in this Chapter". Under §185 the soybean promotion board is empowered to employ "professional counsel as necessary". Since it's pointed

out above the soybean promotion board is not a State agency, we suggest that the matter of recovery of the funds be discussed with the soybean promotion board's lawyer.

August 10, 1978

MOTOR VEHICLES: §321.1(16), Code of Iowa, 1977, as amended by Chapter 103, Acts, 67th G.A. A self-propelled chemical spreader and a truck chassis fitted with equiment specifically designed for spreading fertilizer and agricultural chemicals are implements of husbandry. (Goodwin to Schroeder, State Representative, 8-10-78) #78-8-5

The Honorable Laverne Schroeder, State Representative: Reference is made to your letter of July 12, 1978, in which you asked whether "...self-propelled chemical spreaders specifically designed for such purposes including truck chassis equipped with specific equipment designed for spreading of fertilizer and chemicals" are included in the definition of implements of husbandry in 1977 Ch. 103 Acts 67th G.A. amending Code of Iowa §321.1(16) (1977). We are of the opinion that the machines in question would be included in the definition of implements of husbandry.

The amendment expands the definition of implements of husbandry to include, "All self-propelled machinery operated at speeds of less than thirty miles per hour specifically designed for or especially adapted to be capable of, incidental on the road and primary off-road usage and used exclusively for the application of... agricultural chemicals, and specifically designed or intended for transportation of... such chemicals... ."

A self-propelled chemical spreader would be a machine specifically designed for the purpose of application of chemicals as stated in the amendment. A truck chassis modified by the addition of equipment designed for applying agricultural chemicals would be a vehicle especially adapted to that purpose and would also be included in the amended definition of an implement of husbandry.

The amended definition states that the machinery must be operated at speeds under thirty miles per hour, used primarily off the road and used exclusively for the application rather than the transportation of agricultural chemicals. The information we have been able to collect concerning the machines in question indicates that they are capable of operating at speeds in excess of thirty miles per hour. The limitation on the speed of the machines was prompted by concern about the safety of the low pressure flotation-type tires used on the machines. At high speeds the tires quickly become overheated and are prone to blow outs. The amendment also envisioned that the machines in question would be driven empty on the highways and then filled in the fields because when fully loaded the machines often exceed statutory axle weight limits.

Any owner or operator of such machines should be advised that any long distance transportation of chemicals on the highways at speeds in excess of thirty miles per hour could remove the machinery from the definition of an implement of husbandry.

You also made a general inquiry as to what vehicles are included in the amended definition. It would be impossible to provide an inclusive list of all vehicles that would be defined as implements of husbandry. It is necessary to evaluate any machine in question on the basis of its individual specification and uses.

At the time the amendment was accepted by the Iowa Department of Transportation, the major types of vehicles mentioned by you were intended to be included in the definition of implement of husbandry. If there are any other types of vehicles which may fall under the definition, inquiries should be made to the Iowa Department of Transportation.

August 10, 1978

ELECTIONS: Color of Ballots, Voting Machines. §§49.43 and 52.10, Code of Iowa, 1977. Ballots on public measures must be of a color other than white except where such public measures appear on a voting machine in which case white paper must be used. (Haesemeyer to Synhorst, Secretary of State, 8-10-78) #78-8-6

Honorable Melvin D. Synhorst, Secretary of State: You have requested an opinion of the Attorney General and state:

"Section 49.49, Code 1975, printing of ballots on public measures, provided in part as follows:

" 'All of such ballots for the same polling place shall be of the same size, similarly printed, upon yellow colored paper.'

"This section was interpreted to include voting machine ballots.

"In 1975 (66th GA) section 49.49 was repealed and section 49.43 was rewritten in part as follows:

" 'In precincts using paper ballots all public measures to be voted upon by an elector at a given election shall be printed upon one ballot of some color other than white.'

"Does this mean that voting machine ballots for public measures are to be printed on white paper in accordance with section 52.10, Code 1977?"

The full text of §49.43, Code of Iowa, 1977, reads as follows:

Constitutional amendment or other public measure. "In precincts using paper ballots all public measures to be voted upon by an elector at a given election shall be printed upon one ballot of some color other than white. In precincts using voting machines all public measures shall be placed in the question row on the machine; however, if it is impossible to place all the public measures on the machine ballot, or if only a portion of the qualified electors of the precinct are entitled to vote upon any measure presented, the commissioner may provide a separate paper ballot for the public measure or measures."

Section 52.10, Code of Iowa, 1977, provides:

"Ballots-form. All ballots shall be printed in black ink on clear, white material of such size as will fit the ballot frame, and in as plain, clear type as the space will reasonably permit. The party name for each political party represented on the machine shall be prefixed to the list of candidates of such party. The order of the list of candidates of the several parties or organizations shall be arranged as provided in sections 49.30 to 49.42, except that the lists may be arranged in horizontal rows or vertical columns."

In our opinion, the repeal of §49.49 of the 1975 Code and the rewriting of §49.43 has the effect of limiting the requirement that public measures be printed upon a ballot of some color other than white to precincts using paper ballots. *Expressio unius est exclusio ulterius.* In view of the language of §52.10, set forth above, voting machine ballots for public measures should be printed on white paper. However, in view of the language of the last clause of §49.43, it would

be our opinion that in precincts where voting machines are in use, if it is impossible to place all public measures on the machine ballots or if only a portion of the qualified electors of the precinct are entitled to vote upon any measure presented, the separate paper ballot provided by the Commissioner should be printed on paper of some color other than white.

August 10, 1978

MUNICIPALITIES: Abandoned Vehicles — §§321.89, 364.1, 364.2 and 364.3, Code of Iowa, 1977. Although a municipality may set standards higher or more stringent than state law, where those standards are irreconcilable with state law they must fall. (Blumberg to Rush, State Senator, 8-10-78) #78-8-7

The Honorable Bob Rush, State Senator: We have your opinion request of July 27, 1978. In reference to §321.89, 1977 Code of Iowa, you ask whether a municipality can by ordinance, define "abandoned vehicle" other than the definition in that section. As an example, you ask whether the ordinance can define an abandoned vehicle as one left on private property for ten, rather than twenty-four hours.

Section 321.89 provides for the procedure to be used regarding abandoned vehicles. You made specific reference to §321.89(1)(b)(3) which defines "abandoned vehicle" to include, among others:

A vehicle that has been unlawfully parked on private property or has been placed on private property without the consent of the owner or person in control of the property for more than twenty-four hours, ...

Section 321.89(2) provides:

A police authority may, and on the request of any other authority having the duties of control of highways or traffic, shall take into custody any abandoned vehicle on public property and may take into custody any abandoned vehicle on private property. A police authority taking into custody an abandoned vehicle determined to create a traffic hazard shall report the reasons constituting the hazard in writing to the appropriate authority having duties of control of the highway. The police authority may employ its own personnel, equipment and facilities or hire other personnel, equipment and facilities for the purpose of removing, preserving, storing, or disposing abandoned vehicles.

"Police authority" is defined in §321.89(1)(a) as the Iowa highway patrol or any law enforcement agency of a county or *city.* Thus, §321.89 applies to municipalities. The following subsections of §321.89 detail the procedures for notification and sale of abandoned vehicles.

Section 364.3(3) provides that a city may not set standards and requirements which are lower or less stringent than those imposed by state law. However, a city may set standards and requirements more stringent or higher than those imposed by state law, unless a state law provides otherwise. You made reference to an earlier opinion of this office, No. 77-12-4, McGrane to Johnson, wherein it was stated:

Where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a governmental subdivision may make such additional reasonable regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality and the fact that an ordinance enlarges provisions of the statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the

requirements for all cases to its own prescriptions.

That quote is from *Garnett v. Cook,* (1954) 245 Iowa 750, 755-756, 61 N.W. 2d 703, 706-707, cited to with approval in *City of Des Moines v. Reiter,* 1960, 251 Iowa 1206, 102 N.W.2d 363.

In *Reiter,* the state statute in question prohibited resisting or obstructing officers of the state or other persons authorized by law to serve or execute a legal writ or process. The city ordinance prohibited the same conduct with reference to an officer or *employee* of the city in the performance of any official duty. It was held that the ordinance was not in conflict with the state law. In *Garnett,* the statute in question provided that a county's zoning regulations did not become effective until a majority of the affected property owners approved the regulation. The local provision provided that the effective date of the zoning regulation was the date the approval was filed. It was held that the local provision was not in contravention with the state statute because the local government could make additional and reasonable requirements if not prohibited by the statute.

The requirements and other provisions in §321.89 can be said to be minimum requirements. That is, where it is provided in that statute that notice must be given within ten days, that time period is, in effect, a minimum standard. A municipality could require that notice be given within seven days. Such a requirement would be more stringent than the statute but would not be inconsistent therewith since the state provides for notice *within* ten days.

Generally, municipalities can do anything that is not inconsistent with state law. See, §364.1. Pursuant to §364.2(3), "inconsistent" means irreconcilable with state law. When the state statute prescribes that an abandoned vehicle is one illegally parked on private property for over twenty-four hours, any municipal ordinance defining an abandoned vehicle as one left on private property for only ten hours is in irreconcilable conflict with the statute. The same can be said of the twenty-one day waiting period after notice for reclaiming the vehicle since §321.89(3)(a) provides that no court shall recognize any right, title, claim or interest of any owner or lien holder after expiration of the twenty-one day period.

Accordingly, we are of the opinion that, although a municipality may set higher or more stringent standards than state law, where those standards are irreconcilable with state law they must fall. An ordinance defining "abandoned vehicle" as one placed on private property for a period of ten hours is irreconcilable with a state statute prescribing more than twenty-four hours.

August 10, 1978

PUBLIC RECORDS — CONFIDENTIALITY. §§68A, 68A.1, 68A.2, 68A.6, 68A.7 and 249A, Code of Iowa, 1977; 42 U.S.C. §§1396 et seq. Information submitted to the Iowa Department of Social Services by intermediate care facilities on financial and statistical report forms as a requirement of participation in Title XIX program, may be retained as confidential information and need not be considered as a public record. (Cosson to Rowen, Director, Administrative Services, 8-10-78) #78-8-8

Mr. Jim Rowen, Director, Administrative Services: You have asked for an opinion of the Attorney General as to whether or not the Iowa Department of Social Services may continue to maintain as confidential the information provided the Department on forms AA-4036-0. These forms are financial and

statistical report forms prepared by intermediate care facilities which describe the financial operation of each facility submitting the forms. The Department requires each facility receiving payment from the Title XIX program (Medical Assistance under 42 U.S.C. §§ 1396 et seq. and Chapter 249A, The Code) to prepare one of these forms every six months. Amongst other things, the information includes the salaries of key employees.

Chapter 68A, Code of Iowa, relates to the examination of public records, which include "all records and documents of or belonging to this state or. . . any (state) department." Section 68A.1, The Code. Under Section 68A.2, The Code, any citizen may examine and copy any public record unless some other section of the Code requires the information be kept confidential.

Section 68A.7 lists certain public records required to be kept confidential. This includes subsection (6) which allows to be kept confidential: "Reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose."

The Department of Social Services has determined categorically that the information on forms AA-4036-0 fall within the above subsection, and such a decision appears to be correct. The shortage of nurses and qualified nursing home administrators is well known. Permitting competing nursing homes to examine these report forms could easily result in raids on the staffs of competing homes by making attractive salary offers, which would result in rapid turnover and, in turn, likely result in a reduction in the quality of care offered the patients.

Accordingly, it is our opinion you may continue to hold as confidential the data on these forms. This opinion does not reach the issue of confidentiality as it relates to a specific request to see a specific form for specific reasons.

August 10, 1978

MUNICIPALITIES: Military Leaves — §§29A.1(5), 29A.1(6), 29A.28 and 29A.43, Code of Iowa, 1977. Weekend training, competitions or other training sessions of a city employee who is a member of the National Guard, if within the definitions of "active state service" and "federal service", and if ordered by the proper authority, fall within §29A.28. (Blumberg to Hansen, State Senator, 8-10-78) #78-8-9

The Honorable Willard R. Hansen, State Senator: We have your opinion request of July 26, 1978, regarding military leave for employees. The City of Cedar Falls indicates that it has a problem with some members of its police force who are in the National Guard. It seems that they have been taking leaves of absence not only for their annual training summer encampment, but also for weekend training sessions, competitive matches and other training sessions. Because the city feels that a police officer is actually on duty twenty-four hours a day, seven days a week, it has trouble scheduling the weekend patrol shifts. In order to solve this problem, the city has proposed a policy on military leave. This policy permits leaves with pay for the first thirty days for a member in active duty or the summer encampment. Weekend training, competitions and other training sessions are defined as inactive duty, and a paid leave similar to one under active duty is not offered. You, therefore, ask to what extent a local government must grant leave.

"All officers and employees of the state, or a subdivision thereof, or a municipality other than employees employed temporarily for six months or less, who are members of the national guard, organized reserves or any component

part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active state or federal service, be entitled to a leave of absence from such civil employment for the period of such active state or federal service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence."

Section 29A.43 provides in pertinent part:

"No person, firm, or corporation, shall discriminate against any officer or enlisted person of the national guard or organized reserves of the armed forces of the United States because of his membership therein. No employer, or agent of any employer, shall discharge any person from employment because of being an officer or enlisted person of the military forces of the state, or hinder or prevent the officer or elected person from performing any military service such person may be called upon to perform by proper authority."

There have been many opinions issued under these sections. In 1973 OAG 234, we stated that the plain language of §29A.28 is clear that all that is required for it to be applicable is that the employee be ordered by proper authority. In 1973 OAG 31, we stated that requiring an employee to submit a schedule of weekend training sessions to the employer was not illegal, citing to 1968 OAG 715, wherein we held that §29A.43, prohibiting discrimination against an employee in the military, applied in part to government employees. We stated in 1936 OAG 619 that government employees should not be required to take their vacation during field training. For other opinions on military leaves of government employees, see 1940 OAG 245, 1942 OAG 41, 130, and 1944 OAG 134.

We cannot agree with the city's proposed policy. It presumes that everything but the summer training encampment and regular military duty fall outside the applicability of §29A.28. Such a presumption is clearly erroneous. The key to the applicability of §29A.28 is the phrase "when ordered by proper authority". Although we have not so stated, we have presumed and accepted that weekend training in the National Guard has been ordered by the proper authority and is considered either active state or federal service. See, 1973 OAG 31.

"Active state service" is defined in §29A.1(5) as follows:

" *'Active state service'* shall mean service on behalf of the state in case of public disaster, riot, tumult, breach of the peace, resistance of process, or whenever any of the foregoing is threatened, whenever called upon in aid of civil authorities, or under martial law, or at encampments ordered by state authority, or upon any other state duty requiring the entire time of the organization or person. Active state service does not include and shall not mean training or duty required or authorized under Title 32, United States Code, sections 502 through 505, or any federal regulations duly promulgated thereunder; nor shall such service mean any other training or duty required or authorized by federal laws and regulations."

"Federal service" is defined in §29A.1(6) as service exclusively under federal laws and regulations. If the weekend training sessions, competitions or other training sessions fall within either of the above definitions, §29A.28 is applicable.

Accordingly, we are of the opinion that if weekend training, competitions, or other training sessions fall within §§29A.1(5) or (6) and are ordered by the

proper authority, §29A.28 is applicable. The city should also be aware that §29A.43 prohibits discrimination against any employee in the military forces and prohibits the city from hindering or preventing military service by an employee.

August 10, 1978

COUNTIES AND COUNTY OFFICERS: County Road Bridges-Vacation of Road. §306.16, Code of Iowa, 1977. The County Board of Supervisors is not legally required to either replace a washed out bridge or vacate the road. Baty to Gee, Page County Attorney, 8-10-78) #78-8-10

Mr. Gary T. Gee, Page County Attorney: You requested an opinion on several issues involving the following facts: A county bridge was washed away. Landowners in the vicinity have property on both sides of the river. A vacation was started and apparently dismissed in accordance with Section 306.16, Code of Iowa, 1977. The county cannot afford to pay for either a new bridge or the damages claimed.

You first inquired as to whether the Board of Supervisors must either replace the bridge or vacate and close the road. In connection with that question you inquired whether those alternative actions may be compelled by mandamus. In my opinion neither action is required by statute nor can either action be compelled by mandamus. There are other alternatives. The Board may wish to retain the road in its system without currently replacing the bridge. If so, it should take necessary precautions to warn and protect innocent and unwary travelers from the dangerous condition of the washed out bridge. See *Leonard et al v. Wakeman et al,* 1903, 120 Iowa 140, 94 N.W. 281. This is not to say that a court on constitutional grounds would never mandamus the Board to institute a condemnation proceeding to compensate landowners for impaired access if the Board exercised its discretion to neither replace the bridge nor vacate and close the road. See *Anderlik v. ISHC,* 1949, 240 Iowa 919, 38 N.W.2d 605.

The Iowa Supreme Court has adopted certain formulas and guidelines in connection with Chapter 306, Code of Iowa, road closure and vacation proceedings, which in some instances results in compensation. *Braden v. Board of Supervisors of Pottawattamie County,* 1968, 261 Iowa 973, 157 N.W.2d 123. The dissent in *Braden, supra* says that under similar factual situations (but a different chapter) recovery from a road closure is more restricted. Sometimes no recovery is attained. *Fleenor v. Board of Supervisors of Poweshiek County,* Iowa 1976, 246 N.W.2d 335.

You further inquired whether vacating only the portion of the road between the banks of the river formerly occupied by the bridge would prevent liability. Those facts were involved in *Braden, supra* and the Court held that since the stream bed was owned by abutting owners that defense was without substance. *Braden, supra* 157 N.W.2d at 125.

Your final question is the measure of damages to be applied in a vacation and closing procedure. I believe a court would use an adaptation of Uniform Jury Instruction 14.3. The instruction would state the measure of recovery is the difference in the fair and reasonable market value of the property as a whole before and after the vacation and closing of the road. This instruction is invariably given in eminent domain cases even though the court also instructs the jury that fair and just compensation is such sum of money as will serve to make the owner whole. See *Fleenor, supra* 246 N.W.2d at 338.

August 15, 1978

ELECTIONS: Soil Conservation District Commissioners; the number of signatures required on a nominating petition for Soil Conservation District Commissioner. §§45.1, 467A.5(3), Code of Iowa, (1977). The petition of a candidate for Soil Conservation District Commissioner must be signed by at least twenty-five eligible electors of the Soil Conservation District. The two percent formula of Section 45.1 does not apply to the petition of candidates for Soil Conservation District Commissioner. (Benton to Schnekloth, State Representative, 8-15-78) #78-8-11

Honorable Hugo Schnekloth, State Representative: In your letter of July 11, 1978, you requested an opinion from this office concerning the number of signatures required on a nominating petition for county district soil conservation commissioner pursuant to Section 467A.5(3), The Code, 1977. According to your letter, the present county commissioner of elections is requiring 1300 signatures, apparently relying upon the two percent formula found in Section 45.1, The Code, 1977. The resolution of this question will depend upon an analysis of the interrelationship between these distinct statutory provisions.

Chapter 45 of The Code, 1977 deals generally with the procedures required for nominations by petition. Specifically, Section 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 then twenty-five eligible electors, residents of such township, city or ward."

The two percent formula to which your letter alludes, refers to the requisite number of signatures for candidates for offices filled by the voters of a county, district or other division; that is, a number of signatures equal 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. Apparently, the county commissioner of elections has decided that 1300 signatures must be required on petitions for county district soil conservation commissioner under this formula.

Section 467A.5 The Code, 1977, delineates the procedural mechanism for the election of district soil conservation commissioners to serve in the soil conservation districts created pursuant to Chapter 467A. Section 467A.5(3) states:

"At each general election a successor shall be chosen for each commissioner whose term will expire in the succeeding January. Nomination of candidates for the office of commissioner shall be made by petition in accordance with chapter 45, except that each candidate's nominating petition shall be signed by at least twenty-five eligible electors of the district. The petition form shall be furnished by the county commissioner of elections. Every candidate shall file with the nomination papers an affidavit stating his name, his residence, that he is a candidate and is eligible for the office of commissioner, and that if elected he will qualify for the office. An eligible elector shall not in any one year sign the nominating petitions of a number of candidates greater than the number commissioners to be elected in that year. The signed petitions shall be filed with the county commissioners of elections not later than five o'clock p.m. on the fifty-fifth day prior to the general election. The votes for the office of district

commissioner shall be canvassed in the same manner as the votes for county officer, and the returns shall be certified to the commissioners of the district. A plurality shall be sufficient to elect commissioners, and no primary election for the office shall be held. If the canvass shows that the two candidates receiving the highest and the second highest number of votes for the office of district commissioner are both residents of the same township, the board shall certify as elected the candidate who received the highest number of votes for the office and the candidate receiving the next highest number of votes for the office who is not a resident of the same township as the candidate receiving the highest number of votes."

The second sentence of this section mandates that the nomination of candidates for the offices of district commissioner be made by petition in accordance with Chapter 45, except that each candidate's nominating petition requires the signatures of at least twenty-five eligible electors of the district.

Given the unambiguous language of Section 467A.5(3) we find no conflict between this Section and Section 45.1, nor is there need to resort to any canons of construction to discern its meaning. There is no necessity for construction when the statutory language is plain and unambiguous. *Iowa National Industrial Loan Co. v. Iowa State Department of Revenue, 1974, 224 N.W.2d 437, 440, In re Johnson's Estate,* 1973, 213 N.W.2d 536, 539. Moreover, this situation presents no need to reconcile conflicting statutory provisions. While Section 467A.5(3) clearly provides that the provisions of Chapter 45 shall govern the nomination of candidates for district soil commissioner, the section further provides that the nomination petitions for these candidates must have only the signatures of, "...at least twenty-five eligible electors of the district.", plainly exempting the petitions of candidates for district soil commissioner from the two percent formula found in Section 45.1.

Accordingly, we are of the opinion that a petition of a candidate for district soil commissioner must be signed by at least twenty-five eligible electors of that district. By the plain terms of Section 467A.5(3), the two percent formula found in Section 45.1 and apparently relied upon by the county commissioner of elections does not apply to the petitions of candidates for district soil commissioner.

August 15, 1978

TOWNSHIPS: Township Halls—§§359.29, 360.1 and 360.8, Code of Iowa, 1977. Where a township hall is acquired by gift, an election is not required to levy a tax for repairs and maintenance. (Blumberg to Martin, Davis County Attorney, 8-15-78) #78-8-12

Mr. John B. Martin, Davis County Attorney: We have your opinion request of July 10, 1978, regarding the maintenance and repair of a township hall. Under your facts, the owner of a building is considering giving it to the township by gift for use as a township hall. You ask whether an election to levy a tax for repairs is necessary.

Section 359.29, Code of Iowa, 1977, provides that townships can receive, by gift, property for the purpose of establishing and maintaining a township hall. Section 360.8 provides that where a township hall has been erected, or acquired by purchase, lease with purchase option, or by *gift,* the trustees can certify to the board of supervisors a tax to be used in keeping such building in repair, to furnish it, and provide for care of it. There is nothing in that section, or any other, which mandates an election in order to levy a tax for township hall

repairs and maintenance. The only election required relative to such a building is mandated in §360.1 where the trustees wish to build, acquire by purchase, or acquire by lease with a purchase option. Said section is not applicable to your fact situation.

Accordingly, we are of the opinion that where a township hall is acquired by gift, an election is not required to levy a tax for repairs and maintenance.

August 16, 1978

MOTOR VEHICLES: Motorcycle Operation §321.275, Code of Iowa, 1977. Passengers are prohibited from riding on a motorcycle in front of the operator. There is no express statutory provision stating the number of passengers allowed on a motorcycle. (Dundis to Larson, Commissioner, Department of Public Safety, 8-16-78) #78-8-13

Charles W. Larson, Commissioner, Department of Public Safety: In your letter of December 1, 1977 you requested an Attorney General's opinion regarding the following questions:

"1. May passengers ride on a motorcycle in front of the operator? Small children are occasionally observed riding in this manner.

"2. Is there a maximum number of people that can legally ride on a motorcycle?"

1. Section 321.275, Code of Iowa, 1977, regulates the operation of motorcycles within this state. Subsection two of §321.275 states:

"A person operating a motorcycle shall ride only upon the permanent and regular attached seat thereto, and such operator shall not carry any other person nor shall any other person ride on a motorcycle unless such motorcycle is designed to carry more than one person, in which event a passenger may ride upon the permanent and regular seat if designed for two persons, or upon another seat firmly attached to the motorcycle at the rear of the operator."

This subsection expressly prohibits a motorcycle operator from transporting another person unless the motorcycle is designed for more than one person. If so designed, the statute expressly permits a passenger to "ride upon the permanent and regular seat..., or upon another seat firmly attached to the motorcycle *at the rear of the operator.*" [Emphasis is Added]. By implication this subsection forbids a passenger from riding in front of the operator for it is a rule of statutory interpretation that "the express mention of one thing" by the legislature "implies the exclusion of others." *In Re Estate of Wilson, 1972, 202 N.W.2d 41, 44 (Iowa).*

It is arguable, however, that the phrase "at the rear of the operator" applies only to the location of a separate seat attached to the motorcycle, and not to the permanent and regular seat. This possible ambiguity merits further examination os §321.275.

The first rule concerning judicial construction of ambiguous statutes is the search for the true intention of the legislature. Iowa National Industrial Loan Co. v. Iowa State Department of Revenue, 1974, 224 N.W.2d 437, 439 (Iowa). This intent, when manifest, will even prevail over the literal import of the words used. *Janson v. Fulton,* 1968, 162 N.W.2d 438, 443 (Iowa).

Secondly, legislative intent is to be gleaned from the statute read as a whole, and not from any single or isolated portion. *Georgen v. State Tax Commission,*

1969, 165 N.W.2d 782, 786 (Iowa). In determining such intent the following should also be considered: the purpose for which the legislation was enacted; the subject matter effect, consequence and the reason and spirit of the statute; whether the statute has been given a sensible, practical, workable, and logical construction. *Olsen v. Jones,* 1973, 209 N.W.2d 64, 67 (Iowa).

The purpose behind Chapter 321 in general is to establish laws of the road and "to promote safety upon the highways." *Crow v. Shaeffer,* 1972, 199 N.W.2d 45, 47 (Iowa). Section 321.275 is specifically concerned with the safe operation of motorcycles. In addition to subsection two, there are other subsections in §321.275 which deal with the safe transport of passengers. The statute requires that anyone riding upon a motorcycle sit "astride the seat, facing forward with one leg on either side of the motorcycle" [§321.275(3)]; and further requires that "[a]ny motorcycle carrying a person other than in a sidecar or enclosed cab shall be equipped with foot rest for such passengers" [§321.275(10)].

It is conceivable that a motorcycle could be designed to carry two person with passenger foot rest located in front of those for the operator. However, §321.275(5) also mandates that "[n]o operator shall carry any person, nor shall any other person ride in a position that will interfere with the operation or control of the motorcycle or the view of the operator." The question then becomes: is a passenger seated in front of the operator in such a position that will interfere?

The phrase "In a position that *will* interfere" [Emphasis added] denotes not only interference in fact, but passenger positions that have the certain potential of interfering with operation or control of the motorcycle, or the view of the operator. An adult passenger seated in front of an operator would most certainly interfere with both the control of the motorcycle and the view of the operator. Although a child might not obstruct the operator's vision, there would be interference with control or operation. A child would have to grasp the handlebars or operator's arms for proper stability. Furthermore, an operator carrying a child in front might very well have to sit further back on the motorcycle than safe operation would normally allow.

It is the opinion of this office that reading the various subsections of §321.275 as a whole, it was the intent of the legislature to prohibit a passenger from riding on a motorcycle in front of the operator. This provides a sensible and workable construction of the statute.

Additionally, this interpretation promotes sound motorcycle operation and highway safety in general, which coincides with the spirit and purpose of §321.275 and the entire Chapter 321 of the Iowa Code.

2. Section 321.275 does not expressly state the maximum number of passengers allowed on a motorcycle. However, as already stated, there are provisions within §321.275 that either expressly or impliedly regulate *how* passengers shall be carried.

Conceivably, an unlimited number of persons could ride as passengers upon a motorcycle provided they are: (1) sitting behind the operator (see Division 1 of this opinion); (2) on either a permanent or firmly attached seat [§321.275(2)]; (3) Sitting astride the seat, facing forward with one leg on either side of the motorcycle [§321.275(3)]; in a position that would not interfere with the operation or control of the motorcycle or the operator's view [§321.275(5)]; on a motorcycle providing foot rests for passengers and designed to carry more than

one person [321.275(2) & (10)].

Therefore, it is also the opinion of this office that a citation would not issue solely because of the number of persons that were riding upon a motorcycle, but rather, because there had been a failure to comply with one or more of the previously discussed provisions.

August 17, 1978

BANKS & BANKING: Interest Rates on Savings Accounts. Banks and savings and loans are not allowed to solicit or initiate a pooling arrangement, whereby funds of different depositers would be pooled in order to obtain higher interest rates than would otherwise be allowed. (Garret to Miller, State Representative, 8-17-78) #78-8-14

Honorable Kenneth D. Miller, House of Representatives: You have asked about the legality of an Iowa law permitting banks and savings and loans to establish a program to pool small savings accounts to establish one account in excess of $100,000. The purpose of this pooling arrangement would be to allow banks and savings and loans to pay more interest to persons with savings accounts and persons who hold certificates of deposit than would otherwise be allowed under federal regulations. Federal regulations control the amount of interest that can be paid to those with savings accounts or holding certificates of deposit in amounts of less than $100,000.

Under the federal regulations and under state law, there is no regulation of the amount of interest that can be paid on accounts of $100,000 or more or on certificates of deposit of $100,000 or more.

The relevant federal provisions for banks that are regulated by the Federal Reserve Board are found in 12 U.S.C.A. 371b, which sets out the law and 12 C.F.R. 217.7, which contains the regulation actually setting the amount of interest that can be paid by member banks.

Banks that are not federal reserve member banks but whose accounts are insured by the Federal Deposit Insurance Corporation are controlled by 12 U.S.C.A. 1828(g) and the regulations are found in 12 C.F.R. 329.6.

Savings and loan associations are governed by the Federal Home Loan Board and the relevant law is found in 12 U.S.C.A. 1425b and the regulations are found in 12 C.F.R. 526.5 and 526.5-1 where the rates are actually set.

12 C.F.R. 217.7(a) and 12 C.F.R. 329.6 provide that:

"There is no maximum rate of interest presently prescribed on any time deposit of $100,000 or more."

12 C.F.R. 526.5-1 having to do with savings and loans states:

"...no maximum rate of return is prescribed on any certificate account of $100,000 or more with a fixed or minimum term or qualifying period of not less than 30 days."

As you can see if a person deposits more than $100,000 that person can negotiate with the bank or savings and loan on the rate of interest.

The agencies involved have had occasion in the past to render opinions on the practice of pooling in order to obtain higher interest rates than could otherwise be obtained.

The Federal Home Loan Bank Board has a policy prohibiting pooling

arrangements. In a letter received from the associate general counsel of that board, it is stated:

"The anti-pooling policy has been in effect since 1970, and reflects the board's conclusion, also held by the Board of Governors of the Federal Reserve System, that pooling of funds, except as indicated above [members of the same household may pool funds], is contrary to the spirit of rate control regulations (see 12 C.F.R., part 526." (brackets added)

We have contacted the Federal Reserve Board and their policy is somewhat unclear where the bank does not initiate the pooling idea. Statements have been issued in the past indicating that if the bank knows that an account is formed from pooling funds from different individuals for the purpose of obtaining a higher interest rate, then the regulations have been violated. However, on April 7 of 1977, a statement was issued stating that a proposed regulation to prohibit pooling would not be adopted.

The Federal Deposit Insurance Corporation states that it would not prohibit pooling in banks whose deposits are insured by it. Of course, not all banks are Federal Reserve member banks though virtually all would be insured by the F.D.I.C. The position the F.D.I.C. takes is that a bank may not solicit or initiate the pooling arrangement, but it is doing nothing wrong if it accepts pooled funds and pays the higher rate.

It is our opinion that under the current federal regulation, as interpreted by the federal agencies, a bank or savings and loan would not be able to initiate or solicit a pooling arrangement.

August 17, 1978

STATE OFFICERS AND DEPARTMENTS: Board of Nursing—Closed Meetings—§§28A.3, 68A.1, 68A.7, and 147.21, Code of Iowa, 1977; §9, Ch. 69, Acts of the 67th G.A. (1977); H.F. 2074, Acts of the 67th G.A. (1978). Closed meetings cannot be held for the purpose of discussing statistical data regarding the rank of graduates from the several nursing schools according to their performances on the examination. Such statistical data are public records. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 8-17-78) #78-8-15

Mrs. Lynne M. Illes, R.N. Executive Director: We have your opinion request of August 1, 1978, relating to closed meetings. In your request you stated:

A question has recently arisen relating to the "statistical" data the Iowa Board of Nursing receives from the national testing service. This "statistical" data is compiled by the national testing service each time the licensing examination is administered.

The "statistical" data being referred to does not identify the names of individuals who wrote the licensing examination or the scores these individuals achieved. Scores which are received by individuals writing the licensing examination are:

1. given to the candidate who wrote the licensing examination;

2. given to the head of the nursing program from which the candidate graduated pursuant to an Attorney General opinion dated September 5, 1975;

3. upon request, given to other state boards of nursing for purposes of endorsement, pursuant to an Attorney General opinion dated September 5, 1975; and

4. placed in the candidate's permanent record on file in the office of the Iowa Board of Nursing.

Statistical data, as well as the individual scores of each candidate, have been reviewed by the Board during this closed session. The reason being, that although the statistical data does not relate specifically to individual scores, one statistical table does relate to the overall performance of candidates by nursing program. A confidential code number has been assigned by the Iowa Board of Nursing to each nursing program in Iowa. When the statistical data is publicly released relating to the overall candidate performance by nursing program, a nursing program can only identify its own particular ranking by confidential code number assigned. It cannot identify the ranking of any other nursing program by name.

The questions the Board would specifically request that you address are as follows:

1. Can statistical data which does not make reference to individuals' scores be reviewed in closed session?

2. Can the Iowa Board of Nursing continue to assign confidential code numbers to nursing programs in Iowa or should the identity of each nursing program be made known to the public when listing the overall performance of candidates by nursing program?

In closing, the above stated questions can be simplified by determining if the public has a right to know how an individual nursing program compares to other nursing programs in the performance of its graduates on the licensing examination.

The statistical data to which you refer consists of how well the graduates of the several nursing schools did. For example, they might show that 90 percent of the graduates of school A passed the exam, 80 percent of the graduates of school B and so forth for all the nursing schools. Or, they may show that the graduates of school A had an average score of 700, those of school B had an average score of 680, and the like.

Pursuant to §147.21, 1977 Code, amended by §9, Ch. 69, Acts of the 67th G.A. (1977), a member of an examining board shall not disclose information relating to the examination results other than final score, except for information of the results of a specific exam to the person who took it. In 1976, OAG 232, we discussed this section as it related to the dissemination of certain information to others. You were concerned at that time about liability for such dissemination. Now, you are concerned about liability for non-dissemination.

Because some of the matters contained in §147.21 are required to be kept confidential, it is not only advisable but mandatory that any discussion of them be done in closed session. These would include criminal history of an applicant, results of an applicant's examination other than final score, and the contents of the examination. However, the matters which are of issue here are not those just mentioned. Nor are they mentioned in any other section of the Code. Thus, one must look to the Open Meetings Law (Ch. 28A of the Code) to determine if they fall within the confines of a closed meeting.

Chapter 28A prescribes that all meetings of public agencies shall be open unless closed meetings are otherwise permitted by law. Section 28A.3 permits an agency to hold a closed meeting for three reasons: (1) to prevent irreparable

and needless injury to the reputation of an individual regarding employment; (2) to prevent premature disclosure of information on real estate; or (3) for some other exceptional reason so compelling as to override the general public policy in favor of open meetings. In a prior opinion of this office to you, 1972 OAG 103, we held that certain matters involving the revocation of licenses or the accreditation of schools may be discussed in closed sessions. In 1970 OAG 287, we held that discussions relating to the reorganization of school districts could not, as a general matter, be said to fall within the third listed exception as being exceptional.

Your concern appears to be that the statistics showing the relative rank of the schools may cause irreparable harm to the schools. This is so because a school's graduates may rank low on one examination, but may, in fact, be listed at the top on the next examination. We do not feel that the type of statistical information to which you refer falls within the exceptions to the open meetings law. Closed sessions should not be called for the sole purpose of discussing these statistics. This does not mean that during a closed session the board must refrain from discussing such statistics if they are otherwise relevant to the discussion. It does mean, however, that such statistics are available to the public regardless of whether they are discussed in closed session. Reference here should be made to Chapter 68A, 1977 Code of Iowa, which is known as the public records law. Section 68A.1 provides that all records and documents belonging to the state or one of its boards are public records. Section 68A.7 sets forth eleven types of confidential records. The statistics to which you refer do not appear to fall within any of those exceptions.

You also ask your questions in relation to the new open meetings law. House File 2074, Acts of the 67th G.A. (1978), which becomes effective January 1, 1979, replaces the current Chapter 28A. The concept of open meetings unless expressly excepted by law is still inherent in the new Act. Section 6 of the Act sets forth ten reasons upon which a closed session can be held. Your statistical data do not appear to be included within those exceptions.

Accordingly, we are of the opinion that closed meetings cannot be held for the purpose of discussing statistical data regarding the rank of graduates from the several schools according to their performances on the examination. This is especially true since the names and individual scores of the applicants are not given. Such statistical data are public records or documents.

August 17, 1978

COUNTIES: EMPLOYEES: NATIONAL GUARD: LEAVE OF ABSENCE: §§29A.1(5),29A.1(6), 29A.28, Code of Iowa, 1977. 10 U.S.C. §101(12), 10 U.S.C. §101(24), 32 U.S.C. 101(12), 32 U.S.C. §501, 32 U.S.C. §501(5). A county employee absent from work due to his attending his National Guard Unit's annual training encampment is entitled to the benefits provided by Section 29A.28, Code of Iowa, 1977. (Boecker to Mason, Page County Attorney, 8-17-78) #78-8-16

Mr. Donald R. Mason, Page County Attorney: This is in response to your request for an opinion of the Attorney General with respect to the following question:

"Whether a county is required to pay a civil employee for time absent from work due to his attending his National Guard Unit's annual training encampment?"

Section 29A.28, Code of Iowa, 1977, concerning leave of absence granted

civil employees is a pertinent statute in resolving your question. Section 29A.28, Code of Iowa, 1977, states:

"All officers and employees of the state, or a subdivision thereof, or a municipality other than employees employed temporarily for six months or less, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active state or federal service, be entitled to a leave of absence from such civil employment for the period of such active state or federal service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence."

The reading of Section 29A.28, Code of Iowa, 1977, leads us to the ultimate question of whether or not annual training encampment is active state or federal service so that the provisions of Section 29A.28 come into operation.

"Active state service" is defined by Section 29A.1(5), Code of Iowa, 1977, which states:

" 'Active state service' shall mean service on behalf of the state in case of public disaster, riot, tumult, breach of the peace, resistance of process, or whenever any of the foregoing is threatened, whenever called upon in aid of civil authorities, or under martial law, or at encampments ordered by state authority, or upon any other state duty requiring the entire time of the organization or person. Active state service does not include and shall not mean training or duty required or authorized under Title 32, United States Code, Sections 502 through 505, or any federal regulations duly promulgated thereunder; nor shall such service mean any other training or duty required or authorized by federal laws and regulations.

It should be noted that Section 29A.1(5) specifically outlines what is not included in "active state service".

Section 29A.1(6), Code of Iowa, 1977, defines "federal service" as "service exclusively under federal laws and regulations". Annual encampments are required for National Guard Units. 32 U.S.C. §502 states:

"(a) Under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, each company, battery, squadron, and detachment of the National Guard, unless excused by the Secretary concerned, shall:

(1) assemble for drill and instruction, including indoor target practice, at least 48 times each year; and

(2) participate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year.

However, no member of such unit who has served on active duty for one year or longer shall be required to participate in such training if the first day of such training period falls during the last one hundred and twenty days of his required membership in the National Guard."

32 U.S.C. §501 provides, in part, as follows:

"(b) The training of the National Guard shall be conducted by the several states * * * in conformity with this title."

Our conclusion drawn from the statutes set forth above is that annual encampments are included under "active federal service".

32 U.S.C. §101(12) defines "active duty":

" 'Active duty' means full-time duty in the active military service of the United States. It includes such Federal duty as duty on the active list, full-time training duty, *annual training duty,* and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned."

Virtually the same definition appears in 10 U.S.C. §101.(12). "Active service" as stated in 10 U.S.C. §101(24), "means service on active duty".

An overview of both the Federal and State statutes leads us to conclude that a county employee is entitled to receive his or her regular pay from the county during the period he or she is absent from work due to his or her attending his or her National Guard Unit's annual training encampment.

Considerable precedent favoring the requirement of paying the National Guardsman while on encampment is found in previous Attorney General Opinions. In 1936, this office was asked to determine whether being called into camp for field training constituted "active service" within the meaning of the 1935 version of §29A.28. 1936 O.A.G. 619. Section 467-f25 of the 1935 Iowa Code provided:

"All officers and employees of the state or subdivision thereof, or a municipality therein, who are members of the national guard shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment for a period of such active service, without loss of status or efficiency rating and without loss of pay during the first thirty days of such leave of absence."

It was the opinion of this office that the statute was enacted to encourage participation in the National Guard, because the state ultimately benefited from such participation. We opined that for the purposes of this statute, annual encampment training was to be considered active service, and public employees were to continue to receive their regular civil pay, in addition to their military pay, throughout the period of encampment. 1936 O.A.G. 619. This position has basically remained the same through the years. 1940 O.A.G. 587, 1956 O.A.G. 166, 1956 O.A.G. 179, 1974 O.A.G. 404.

In our opinion, 1956 O.A.G. 166 we stated:

"It is our opinion that the phrase 'without loss of pay' as used in section 29.28 means without loss of pay from the state, subdivision thereof or municipality. There is no authority in the section for deduction of military pay from regular salary. The section clearly contemplates that the first thirty days of military leave shall be with full pay. This is the administrative construction which has consistently been followed by all state departments since the enactment of the law."

Such an interpretation is consistent with the general rule that statutes intended to benefit military service personnel should be given a liberal construction. *See e.g., Borden v. World War II Service Compensation Board,* 243 Iowa 892, 54 N.W.2d 496 (1952). Other courts have construed their statutes in support of the position taken by this opinion. *Parks v. Union County Park Commissioner,* 7 N.J. Super 5, 71 A.2d 651 (App. Div. 1950), cited with approval in *In the matter of Fidek,* 146 N.J. Super 338, 369 A.2d 977 (1977); *City of Tulsa v. Taylor,* 555 P.2d 885 (Okl. 1976).

A county employee absent from work due to his attending his National

Guard Unit's annual training encampment is entitled to the benefits provided by Section 29A.28, Code of Iowa, 1977.

August 25, 1978

CONSTITUTIONAL LAW; EQUAL PROTECTION; INSURANCE. Skilled Nursing Care Coverage. H.F. 2273, 67th G.A. (1978). House File 2273, which makes the sale and renewal of accident and health insurance policies containing skilled nursing care benefits an unfair trade practice, violates the equal protection requirements of the Constitution of Iowa, article I, section 6, and is unconstitutional in its entirety. (Foudree to Miller, State Representative, 8-25-78) #78-8-17

Honorable Kenneth D. Miller: In your letter of July 25, 1978, you request an opinion on the validity of House File 2273 recently enacted by the 67th General Assembly.

You specifically ask about the constitutionality of the Act as to its effect on insurance policies providing skilled nursing care benefits, whether it invalidates insurance contracts on which such policies are based, and whether it is possible for insurance companies to continue those insurance policies pending enactment of an amendment to the law if such an amendment is necessary.

H.F. 2273 is entitled: "AN ACT AMENDING THE LAW APPLICABLE TO ACCIDENT AND HEALTH INSURANCE POLICIES BY RESTRICTING THE SALE OF SKILLED NURSING CARE COVERAGE AND REQUIRING THAT THE INSURED BE GIVEN THIRTY DAYS AFTER DELIVERY OF THE POLICY WITHIN WHICH TO RETURN THE POLICY AND OBTAIN A REFUND OF THE PREMIUM PAID." It was enacted into law on May 12, 1978 and was signed by the Governor on June 13, 1978. It became effective on July 1, 1978.

The Act contains three sections, the first of which is divided into two subsections. Section 1 amends Iowa Code §507B.4(1977), the Unfair Trade Practices law, by adding two new subsections as additional unfair trade practices.

Section 1. Section five hundred seven B point four (507B.4), Code 1977, is amended by adding the following new subsections:

The first subsection provides that the following shall be an unfair trade practice:

NEW SUBSECTION. Selling, offering for sale, delivering or issuing for delivery, or renewing in this state a policy of accident and sickness insurance as defined in section five hundred fourteen A point one (514A.1) of the Code which contains any insurance or indemnity benefit, whether as primary coverage or as supplemental coverage, for loss incurred as a result of expenses for health care provided by a skilled nursing facility as defined in subsection three (3) of section one hundred thirty-five C point one (135C.1) of the Code. Provided, however, that nothing contained in this subsection shall be deemed to prohibit the renewal of any existing insurance or indemnity benefit contained in a policy which was issued for delivery or delivered in this state prior to the effective date of this Act if the benefit, by the terms of the policy, is guaranteed by the company to be renewable at the election of the policyholder.

The second subsection of Section 1 provides that the following shall be an unfair trade practice:

NEW SUBSECTION. Selling, offering for sale, delivering or issuing for delivery, or renewing in this state a policy of accident and sickness insurance as defined in section five hundred fourteen A point one (514A.1) of the code which contains any insurance or indemnity benefit, whether as primary coverage or as supplemental coverage, for loss incurred as a result of expenses for skilled nursing services rendered at an intermediate care facility as defined in subsection two (2) of section one hundred thirty-five C point one (135C.1) of the Code, except when included in a policy which:

a. Provides an insurance or indemnity benefit which is determined by the total amount of the expenses incurred by the insured for care provided at the intermediate care facility; and

b. Provides for payment of the insurance or indemnity benefit irrespective of the nature of the care received and irrespective of the person administering the care. Nothing in this paragraph, however, shall be deemed to prohibit an insurer from excluding from coverage under an intermediate care facility policy any expenses incurred for the delivery of goods or services which are not reasonably necessary in rendering health care at an intermediate care facility, or any portion of expenses for reasonably necessary goods or services which under the particular circumstances is excessive when compared with charges for the same or similar goods or services provided at other intermediate care facilities in this state.

Provided, however, that nothing contained in this subsection shall be deemed to prohibit the renewal of any existing insurance or indemnity benefit contained in a policy which was issued for delivery or delivered in this state prior to the effective date of this Act if the benefit, by the terms of the policy, is guaranteed by the company to be renewable at the election of the policyholder.

Section 2 of the Act amends Iowa Code §514A.3, the Accident and Health Insurance law, and reads:

Sec. 2. Section five hundred fourteen A point three (514A.3), subsection one (1), Code 1977, is amended by adding the following new lettered paragraph:

NEW LETTERED PARAGRAPH. A provision as follows:

RIGHT TO RETURN POLICY. The insured has the right, within ten days after receipt of this policy, to return it to the company at its home office or branch office or to the agent through whom it was purchased, and if so returned the premium paid will be refunded and the policy will be void from the beginning and the parties shall be in the same position as if a policy had not been issued.

(In addition to incorporating the foregoing provision into the policy, the insurer shall deliver to the insured at the time of delivery of the policy a duplicate statement of the foregoing provision which shall be contained in conspicuous print on a separate and otherwise blank sheet of paper.)

Section 3 of the Act provides:

Sec. 3. The provisions of this Act shall apply to any insurance policy which is delivered or issued for delivery or renewed in this state on or after the effective date of this Act.

For reasons set forth below, it is the opinion of the Attorney General that H.F. 2273, which makes the sale and renewal of accident and health insurance

policies containing skilled nursing care benefits an unfair trade practice, violates the equal protection requirements of the Constitution of Iowa, article I, section 6, and is unconstitutional in its entirety.

We begin by recognizing that the Iowa Supreme Court has stated that, ordinarily, statutes regularly enacted by the legislature will be accorded a strong presumption of constitutionality and all reasonable intendments must be indulged in favor of the validity of legislation. One who challenges legislation on constitutional grounds has the burden of negating every reasonable basis upon which the statute may be sustained. Where the constitutionality of a statute is merely doubtful or fairly debatable, the courts will not interfere. Thus a statute will not be declared unconstitutional unless it clearly, palpably and without doubt infringes the constitution. *Keasling v. Thompson,* 217 N.W.2d 687, 689 (Iowa 1974), reaffirmed by the Court in *Chicago Title Insurance Co. v. Huff,* 256 N.W.2d 17, 25 (Iowa 1977).

The Iowa constitution, article I, section 6, puts substantially the same limitations on state legislation as does the equal protection clause of the fourteenth amendment to the United States Constitution. *City of Waterloo v. Selden,* 251 N.W.2d 506, 509 (Iowa 1977); *Graham v. Worthington,* 259 Iowa 845, 863, 146 N.W.2d 626, 638 (1966). These two set out substantially the same safeguards. *State v. Books,* 225 N.W.2d 322, 323 (Iowa 1975). There is considerable case law on the subject of equal protection, but the general principles applied in any equal protection analysis have been frequently reiterated by both the United States and the Iowa Supreme Court. The focus of any equal protection analysis is always the classification which a statute makes. Any classification is a legislative discrimination, and the legislature is accorded wide discretion in defining classes when a statute involves a categorization of persons or things. *Chicago Title Insurance Co. v. Huff,* 256 N.W.2d at 28. The only question is whether it is permissible under the constitution. If a statute involves neither a suspect classification (one drawn upon inherently suspect distinctions such as sex, race, religion, or alienage) nor a fundamental right, then it is subject to the traditional equal protection analysis. *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976); *Frontiero v. Richardson,* 411 U.S. 677, 681 (1976); *State v. Wehde,* 258 N.W.2d 347, 352 (Iowa 1977).

The traditional equal protection test consists of basically three elements. When examining a classification under that test, "[t]he only consitutional requirement is that such a classification is a reasonable one, operates equally on all within the class, and bears logical relationship to the purpose to be accomplished." *State v. Robbins,* 257 N.W.2d 63, 67 (Iowa 1977). These elements have been variously stated and developed throughout numerous Iowa cases often with reference to what the United States Supreme Court has said. In *Becker v. Board of Education of Benton Co.,* 258 Iowa 277, 282, 138 N.W.2d 909, 912 (1965), the Iowa Court stated:

The federal court cases establish the general rule that the equal protection clause of Amendment 14 does not take from the state the power to classify in the adoption of public laws, but permits the exercise of a wide scope of discretion in that regard. Legislation will be held void only when it is without reasonable basis and therefore purely arbitrary. The equal protection clause goes no further than to prohibit invidious discrimination....

This court has adopted and consistently applied the same general rule.

"The general rule is that if there is any reasonable ground for the classification and it operates equally upon all within the same class, there is uniformity

in the constitutional sense." *Collins v. State Board of Welfare,* 248 Iowa 369, 375, 81 N.W.2d 4, 7 (1957). "All persons need not be treated alike to meet constitutional standards of equal protection. It is enough if all members of the same *class* are treated equally. Of course, the classification itself must be reasonable." *Hack v. Auger,* 228 N.W.2d 42, 43 (Iowa 1975). "If a classification is reasonable and operates equally upon all within the class, it is a valid classification." *Keasling v. Thompson,* 217 N.W.2d at 689. "The constitutional equal protection safeguard requires that the line drawn be a rational one, and that there be nondiscriminatory application of the law within the class established." *Brightman v. Civil Service Commission of Des Moines,* 204 N.W.2d 588, 591 (Iowa 1973). The third element has also been relied on by the Iowa Court along with the first two: "[S]tates are accorded wide latitude in regulating local affairs, and allowed to create statutory discriminations so long as the classifications drawn are rationally related to a legitimate state interest." *State v. Wehde,* 258 N.W.2d at 352. "The statute must be sustained unless its classifications are patently arbitrary and bear no rational relationship to a legitimate governmental interest or defendant has negated every conceivable basis which might support the classification." *Id.*

Under the test the classification must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest....

It does not deny equal protection simply because in practice it results in some inequality; practical problems of government permit rough accommodations; and the classification will be upheld if any state of facts reasonably can be conceived to justify it.

Lunday v. Vogelmann, 213 N.W.2d 904 (Iowa 1973). In summary, then, there must be some reasonable basis for a classification; once a classification is made by a statute it must treat all within each class equally; and finally, a classification must be rationally related to the purpose to be accomplished by the statute, i.e. to some legitimate governmental interest.

I. Upon close examination, H.F. 2273 appears to make several classifications. In Section 1 of the Act, the first subsection prohibits the selling or renewing of any insurance policy, as defined in Iowa Code §514A.1 (1977), which provides for loss incurred as a result of expenses for *health care* provided by a *skilled nursing facility* (SNF). The second subsection also prohibits selling or renewing any such policy for loss incurred as a result of expenses for *skilled nursing services* rendered at an *intermediate care facility* (ICF) unless such policy also meets additional requirements as set forth in paragraphs 'a' and 'b' of that subsection.[1] Thus, the Act first classifies by distinguishing between accident and health insurance policies pertaining to SNFs and accident and health policies pertaining to ICFs.

This classification, partly by operation of the Act and partly by the Act's definitions, results in two additional classifications. By distinguishing between accident and health policies pertaining to SNFs and those pertaining to ICFs, the Act thereby makes a classification of SNFs and ICFs for purposes of the Act. Thus, an SNF is to be distinguished from an ICF for the purpose of selling or renewing certain accident and health insurance. Secondly, present or

[1]There is no statutory definition of "skilled nursing services". We assume looking at the statute on its face, that the legislature intended the broader term "health care" to include skilled-nursing-type care.

potential SNF insured (patients) are distinguished from present or potential ICF insured (patients).

By totally prohibiting insurance to cover the cost of health care in an SNF, the statute amounts to an economic regulation. In this regard, the Iowa Supreme Court has stated "[t]he right to operate a legitimate business is one which the state may regulate but may not prohibit or unreasonably restrict. We have often so held." *Central States Theatre Corp. v. Sar,* 245 Iowa 1254, 1260, 66 N.W.2d 450, 453 (1954). "It is true the police power of the state permits the licensing and regulation of legitimate businesses where necessary for the public good. But this regulation must not be capricious, arbitrary, or unreasonable. It must have some relation to the general welfare, and it may not ordinarily go to the extent of entire prohibition of operation of business." *Id,* 66 N.W.2d at 453-54. The Iowa Court, in *City of Waterloo v. Selden,* 251 N.W.2d at 509, relied on the language of the U.S. Supreme Court in *City of New Orleans v. Dukes,* 427 U.S. at 303-04, which stated:

When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations....States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude....Legislatures may implement their program step by step....In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines...; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

The Iowa Court later explained that "*Central States Theatre* significantly accorded recognition to the fact that our legislature may not *ordinarily* prohibit the operation of a business but is free to do so if such forbiddance has 'some relation to the general welfare'." *Chicago Title Insurance Co. v. Huff,* 256 N.W.2d at 24. "Pursuing the subject further, it is apparent *Central States Theatre* recognized the right vested in our state legislature to prohibit any business venture deemed inimical to general welfare." *Id.* Thus where a business endeavor is found to be essentially injurious to public welfare, it may be prohibited. *See State ex rel. Turner v. Koscot Interplanetary, Inc.,* 191 N.W.2d 624 (Iowa 1971).

The question, then, is whether this economic regulation is constitutionally permissible. Applying the tests already set forth, we believe the classification is not rationally related to any legitimate government interest or purpose. Iowa has no legislative history, and it is therefore necessary to look to the statute itself to discern any legislative purpose. In doing so, we are unable to find any purpose of H.F. 2273 other than that of restricting the sale of insurance which covers loss due to the cost of skilled nursing care by treating such insurance as an unfair trade practice. It is therefore reasonable to assume the legislature, by amending Iowa Code §507B.4(1977), decided the sale of skilled nursing care benefits constitutes an unfair trade practice. In the exercise of its judgment the legislature is accorded broad discretion in classifying, and the courts are unwilling to judge the merits of legislation. *City of New Orleans v. Dukes,* 427 U.S. at 303; *Lee Enterprises, Inc. v. Iowa Tax Commission,* 162

N.W.2d 730, 754 (Iowa 1969). However, a classification must not be arbitrary, *and its means must be related to its objectives. Chicago Title Insurance Co. v. Huff,* 256 N.W.2d at 28.

We believe the classifications of the Act as outlined above are without a reasonable basis and have no rational relation to accomplishing its purpose. We can see no reasonable basis for distinguishing between SNF insurance policies and ICF policies if the object is to restrict the sale of skilled nursing care coverage as unfair trade practice. If it is a mischief for one, why is it not a mischief for the other? Why is it that SNF policies under the Act cannot be sold or renewed and are treated as an unfair trade practice while ICF policies can be sold and are not treated as an unfair trade practice if additional criteria are met? We can find no rational basis for allowing one to be sold under certain criteria and not the other. If the sale of such insurance is an evil to be restricted, why may it be sold or renewed only with respect to ICFs?

Normally there is a basis for distinguishing between SNFs and ICFs since the two are different entities as defined by Iowa law. Nevertheless, we see no reason for distinguishing between the two *for the purpose of this Act.* A classification may be valid for one purpose and not another. *Dickinson v. Porter,* 240 Iowa 393, 401, 35 N.W.2d 66, 72 (1948). Here, we cannot see that the classification serves any governmental purpose or interest. Under the Act, SNFs are unable to have patients covered by the specified insurance for *any* of the care they provide (including skilled nursing services) while ICFs may have patients covered by such insurance for skilled nursing care if those insurance policies meet certain conditions. It does not require much imagination to see that the Act will have a detrimental economic impact on SNFs, and if this is to be permitted there must be some rational basis for doing so. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Hartford Steam Boiler Inspection & Insurance Co. v. Harrison,* 301 U.S. 459, 461-62 (1937). "[M]ere difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any basis.' [citation omitted]" *Id.* 462. In the present case, assuming the purpose to be accomplished is to protect the public by declaring the sale of skilled nursing care benefits to be an unfair trade practice, there is no reasonable basis for treating SNFs differently from ICFs for the purpose of selling or renewing such insurance.[2] *These two entities are treated differently when they are offering the same product-skilled nursing care.*

[2]It could conceivably be argued that because an ICF policy has the added criteria as required by paragraphs 'a' and 'b' of the second subsection that this makes the sale or renewal of such a policy no longer something to be considered an unfair trade practice. However, there is no reason for declaring it an unfair trade practice when an individual accident and health insurance policy providing skilled nursing care benefits, which does not meet the additional criteria of the second subsection, is sold with respect to an ICF while at the same time it is not an unfair trade practice if a group accident and health policy providing such benefits is sold respecting an ICF. That is, a group policy may not meet these additional criteria and yet it would not be an unfair trade practice for it to be sold or renewed. See part II, *infra.*

In addition, we are unable to see how treating present or potential SNF insureds (patients) differently from present or potential ICF insureds (patients) accomplishes any government interest by protecting the public welfare. Those in the first category are simply unable to obtain skilled nursing care insurance as defined by the Act, while those in the second class may obtain such insurance when the policies meet certain criteria. Here, too, the classification is arbitrary and fails to meet the rational-relation test. Persons in the first class are denied equal protection of the laws.

II. There is an additional element to be considered in light of what has been said thus far. H.F. 2273, as it is intended to be applied, also distinguishes between individual accident and health policies and group accident and health policies and, hence, between *individuals* who are insureds or potential insured and *persons in groups* who are insureds or potential insureds.[3]

Individuals insureds or potential insureds will no longer be able to obtain insurance to cover the cost of skilled nursing care in an SNF while those in groups will be free to do so. As a practical matter, the Act will most likely force individuals in SNFs to purchase group policies to obtain skilled nursing care benefits, and it may not always be possible for elderly persons to do so. This is an additional burden on them which should be recognized. (There may also be many individuals who will be unable to obtain such insurance coverage for skilled nursing care in ICFs as well, although the statute does permit this when the policies conform to certain criteria as noted.)

This particular distinction results because the statute specifically and by definition limits its scope to accident and health insurance policies as defined by Iowa Code 514A.1 (1977). That section provides: "The provisions of this chapter shall apply to all *individual* policies of such accident and sickness insurance..." (Emphasis added.) The legislature could have chosen to apply the Act to "accident and health insurance," but it instead deliberately limited it to individual accident and health insurance by twice referring to Section 514A.1. Section 1 of H.F. 2273 proclaims that it amends Iowa Code Chapter 507B, the Unfair Trade Practices law. At the same time, by its definition of insurance, the Act is limited to Section 514A.1 insurance as already noted. Chapter 507B applies to all insurance policies, both group and individual; Chapter 514A applies only to individual accident and health insurance policies. (Group accident and health policies are regulated by Chapter 509 of the Code.) Thus, to say the Act applies to all insurance policies would require ignoring the deliberate reference to Section 514A.1. The only way to construe the two by giving effect to both is to interpret the Act as meaning only *individual* accident and health insurance policies are contemplated as falling within the ambit of unfair trade practices.

Because the statute amends Iowa Code §507B.4, the result is that the legislature has declared it an unfair trade practice when an individual policy is involved, but it is not an unfair trade practice when a group policy is being

[3]There is apparently no real distinction between companies which write individual accident and health policies and companies which offer group accident and health policies because essentially the same companies can write both types. *See* Iowa Code §§509.5 and 514A.1 (1977). Therefore it is doubtful that the statutes deny insurance companies equal protection. Nevertheless, it should be pointed out that companies can continue to write skilled nursing care policies by writing group policies.

sold or renewed. If the sale or renewal of insurance policies covering loss due to costs of skilled nursing care is an evil to be prohibited for the protection of the public welfare when offered to individuals, we can see no reason for allowing it to be offered by insurers in the form of group policies. In other words, while a classification which distinguishes between group insurance and individual insurance may have a reasonable basis, we believe such a classification has no reasonable basis when viewed in light of the assumed purpose of the Act.

H.F. 2273 is clearly *under-inclusive.* Equal protection requires that all persons similarly situated be treated similarly. The legislature can make classifications in its attempts to eliminate public mischiefs, provided such classifications include all persons having a similar relationship to the laws purpose. "A classification denies equal protection unless it includes all who are similarly situated and none who are not. That is, it is unreasonable if it is either under-inclusive or over-inclusive." *Keasling v. Thompson,* 217 N.W.2d at 701 (dissent). *See generally* Joseph Tussman and Jacobus ten-Broek, "The Equal Protection of the Law," 37 Cal. L. Rev. 341 (1949), which the Iowa Court took note of in *Chicago and Northwestern Railway Co. v. Fachman,* 225 Iowa 989, 997, 125 N.W.2d 210, 214 (1963). There, the Court said:

It is often said a reasonable classification is one which includes all who are similarly situated, and none who are not.

However, as pointed out in the California Law Review article, supra, we must also look beyond the classification to the purpose of the law. Therefore, a reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law, which may be either the elimination of a public "mischief" or the achievement of some positive public good.

Id. at 214-15. The difficulty with H.F. 2273 arises due to the trait selected by the legislature. A trait is the legislative definition of a classification's characteristics. When the trait is viewed in relation to the purpose of the Act, the unreasonableness of the classification scheme under H.F. 2273 becomes apparent. H.F. 2273, in its classification, includes all individual accident and health insurance policies but excludes all group accident and health policies. In this regard the Iowa Supreme Court, in the early case of *State v. Garbroski,* 111 Iowa 496, 498-99, 82 N.W. 959, 960 (1900), set out the requirements for a statute's ambit:

'Not only must it [legislation] treat alike, under the same conditions, all who are brought within its influence, but in its classification it must bring within its influence, all who are under the same conditions.' [Quoting the Minnesota Supreme Court.]...'The true principle requires something more than a mere designation by such characteristics as will serve to classify, for *the characteristics which thus serves as a basis of classification must be of such a nature as to make the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded.* The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation.' [Quoting the New Jersey Supreme Court. Emphasis added.]

There exists no observable reasonable basis upon which the legislature could conclude that individual accident and health insurance policies which are any greater an evil to be restricted than are group accident and health insurance

policies are excluded from coverage under the Act. "The classification should be based upon some apparent natural reason, some reason suggested by necessity, such as difference in situation and circumstances of the subjects, place in the one class or the other as suggest the necessity or propriety of discrimination with respect to them." *Dunahoo v. Huber,* 185 Iowa 753, 756, 171 N.W. 123, 123-24 (1919), reaffirmed by *Chicago and Northwestern Railway Co. v. Fachman,* 125 N.W.2d at 214. The Court in *Fachman* noted that, *"Where the evil to be remedied, or the economic benefits to be realized, relates to members of one class quite as well as to another, such classification would be unwarranted." Id.* at 215 (emphasis added). *See also Sperry & Hutchinson Co. v. Hoegh,* 246 Iowa 9, 19, 65 N.W.2d 410, 416 (1954). The omission of group accident and health insurance policies in H.F. 2273 is a classic example of under-inclusiveness under the Tussman-ten Broek analysis. Insofar as protecting the public with respect to the issuance of health care policies containing skilled nursing benefits is concerned, no discrimination in the availability of individual and group policies seems warranted.

Language relied on by the Iowa Supreme Court, when applied here, leaves no doubt that the Act violates the equal protection requirements of the constitution. The Court has said:

[B]ut where the evil to be remedied relates to members of one class quite as well as to another and is quite as obnoxious to good morals, such a classification would be unwarranted. The [equal protection] section of the Constitution quoted exacts that the General Assembly shall not grant to any class of citizens, privileges and immunities which upon the same terms shall not equally belong to all citizens, and this necessarily includes any class in which the citizens may be divided.

Dunahoo v. Huber, 185 Iowa 753, 756, 171 N.W. 123, 124 (1919), also quoted by *State v. Books,* 225 N.W.2d 322, 324 (Iowa 1975). The next year in *Redmond v. Carter,* 247 N.W.2d 268, 271 (Iowa 1976), the Court stated:

The equal protection clause proscribes state action which irrationally discriminates among persons. *Brightman v. Civil Serv. Com'n of City of Des Moines,* 204 N.W.2d 588, 591 (Iowa 1973). We recognize that it is often necessary for the state to divide persons into classes for legitimate state purposes, but the distinction drawn between classes must not be arbitrary or unreasonable. *The classification must be based upon some apparent difference in situation or circumstances of the subjects placed within the one class or the other which establishes the necessity or propriety of discrimination between them.* Such discrimination is unreasonable if the classification lacks a rational relationship to a legitimate state purpose. [Emphasis added.]

To same effect: *Chicago Title Insurance Co. v. Huff,* 256 N.W.2d at 29. It must appear the public interest requires such interposition and that the means are reasonably necessary for accomplishing the purpose and not unduly oppressive to individuals. *Id.* at 26, 27.

A recent North Carolina Supreme Court case, *Hartford Accident & Indemnity Co. v. Ingram,* 290 N.C. 457, 226 S.E.2d 498 (1976), involves a situation analogous in certain respects to the present one. There, insurance companies issuing "general liability insurance" (personal injury and property damage) were required to join an insurance exchange, and the statute made it mandatory for each member of the exchange to write medical malpractice insurance.

That statute, however, *by its definition* of "general liability insurance", excluded automobile liability insurance. Automobile insurers were thus excluded from the statute's requirements. The court found the classification had no reasonable basis and that it violated the state constitution by denying equal protection.

In making this classification between individuals and persons in groups the Act clearly infringes upon the equal protection requirements of the Iowa Constitution, article I, section 6. As has been pointed out, both individual insureds who now have skilled nursing benefits under accident and health policies and potential individual insureds cannot renew these policies[4] or obtain such insurance coverage with respect to SNFs; however, group insureds or potential group insureds can renew their policies and can obtain such insurance to cover the costs of skilled nursing care in an SNF. If the purpose is to proscribe as an unfair trade practice the selling and renewing of insurance to cover the costs of skilled nursing care, we cannot see how such a purpose is rationally served by this classification which the statute makes. *See Redmond v. Carter,* 247 N.W.2d at 272. Even given the fact that the insurance business is peculiarly subject to special supervision and control, *Chicago Title Insurance Co. v. Huff,* 256 N.W.2d at 29, we cannot find any reasonable basis for the classification nor can we see how it is rationally related to protecting the public welfare or serving any legitimate government interest. In short, the classifications which the statute makes are arbitrary and therefore not constitutionally valid.

III. You also ask whether the Act invalidates insurance contracts on which present policies were based prior to the effective date of the Act, July 1, 1978 and if so, whether any of those policies can nevertheless be continued in force. While Section 1 of the Act prohibits selling or renewing individual accident and health insurance policies containing skilled nursing benefits provided by SNFs and ICFs (except, as noted, in certain permitted cases), the Act does allow for such policies to be renewed if the benefit contained in a policy is, by the terms of the policy, "guaranteed by the company to be renewable at the election of the policyholder". Thus, any contracts in force remain in force and are valid until they expire. And when they expire they may not be renewed unless by their terms they give the insured the option of renewing.

IV. Finally, we must also draw your attention to the fact that there is a clear conflict between the title of the Act and the text thereof. The title specifies that an individual has the right to return a policy and obtain a refund within *thirty* days after its delivery. The text of the Act, however, provides that an individual must do so within *ten* days after delivery. The Iowa Supreme Court has in the past looked to the title of statutes in deciding their constitutionality. *See Keasling v. Thompson,* 217 N.W.2d at 689; *Lee Enterprises, Inc. v. Iowa Tax Commission,* 162 N.W.2d 730 (Iowa 1969). While we doubt this conflict affects the Act's constitutionality, the Iowa Court stated in *Lee Enterprises* that it is

[o]nly when the act is so indefinite and uncertain that the courts are unable, by accepted rules of construction, to determine with any reasonable degree of certainty what the legislature intended, or when it is so incomplete and

[4]Unless their contracts specifically allow for renewal at the election of the policyholder. See part III., *infra.*

inconsistent that it cannot be executed, that the law will be invalidated as indefinite and uncertain.

162 N.W.2d at 739.

The Act is far from being clear and definite.

August 25, 1978

STATE OFFICERS AND DEPARTMENTS: State Department of Health; Hospital Rate Review Program; Antitrust Exemption. House File 630, Acts of the 67th G.A., 1978 Session. Section 553.6(4), Code of Iowa. 15 U.S.C. §1. To qualify for an antitrust exemption, the Iowa Hospital Rate Approval Program requires additional state participation. (Swanson to Middleton, Chief, Division of Health Facilities, 8-25-78) #78-8-18

Mr. Rick L. Middletion, Chief Division of Health Facilities: We have received your opinion request concerning the sufficiency of the Iowa Hospital Association Rate Approval Program (RAP) *vis a vis* the State and Federal antitrust laws, and the RAP's congruence with the intent of the amended House File 630.

You may recall that our earlier opinion (OAG, Swanson to Middleton, 29 March 1978) set out what will be referred to as the "state action", or *Parker v. Brown,* 317 U.S. 341 (1943), judicial doctrine of immunity from prosecution for acts normally proscribed, but exempt when undertaken pursuant to state direction. That opinion also describes the more recent progeny of *Parker* and concludes that an active state role is a necessary component in a scheme designed to avoid antitrust liability.

Two more recent developments are of note in analyzing the *Parker* line of cases. First, the Supreme Court on 29 March 1978 decided *City of Lafayette, La. v. La. Power & Light Co.,* 98 S.Ct. 1132 (1978). Second, on 5 April 1978 the House Amendment to Senate Amendment to House File 630 was filed, and subsequently adopted. The question here is whether either event modifies the scope or conclusions of the 29 March 1978 opinion.

City of Lafayette, supra, is not of a similar factual setting to our concern, but is important nonetheless because of its restatement of the Court's demand that the state action exemption is predicated on whether the activities are an act of government by the State as sovereign 98 S.Ct. 1134-1137.

House File 630 as amended now reads:

NEW SECTION: CONTRACTS FOR ASSISTANCE WITH ANALYSIS, STUDIES AND DATA. In furtherance of the department's responsibilities under sections sixteen (16), seventeen (17) and eighteen (18) of this chapter, the commissioner may contract with the Iowa hospital association and third party payers, or the Iowa health care facilities association and third party payers, or the Iowa association of homes for the aging and third party payers for the establishment of pilot programs dealing with prospective rate review in hospitals or health care facilities, or both. *Such contract shall be subject to the approval of the executive council and shall provide for an equitable representation of health care providers, third party payers and health care consumers in the determination of criterion for rate review. No third party payer shall be excluded from positive financial incentives based upon volume of gross patient revenues.* No state or federal funds appropriated or available to the department shall be used for any such pilot program. (etc.) (new portion

underlined).

We believe that the substantive conclusions of the 29 March opinion remain in force in consideration of both the Court's recent decision in *City of Lafayette,* and the amended portion of H.F. 630. That is, some active state role must be in evidence in the RAP for the program to sufficiently immunized from both state and federal antitrust prosecution. Our examination of the RAP reveals some deficiencies in meeting the *Parker* doctrine, as well as some portions quite sufficient for that test.

The 29 March opinion notes that the U.S. Department of Justice does not intend to institute proceedings against the Wisconsin program (OAG, supra, page 4.) As our Iowa H.F. 630 amendment is similar to Wisconsin's §146.60, a look at the implementing program of that statute, and a direct comparison with the Iowa Hospital Association RAP should be illuminating, keeping in mind that the Wisconsin program is sufficient under a *Parker* doctrine analysis. Thus we have culled several of the portions of each program which lead to a "state action" exemption:

Wisconsin Hospital Rate Review Program of 1 July 1976,

A. "This document describes the next logical evolutionary step of that Program-expansion to cover the Wisconsin Medical Assistance Program (Title XIX) for hospital inpatients and to *make the State of Wisconsin a partner* in the program." page 1 (emphasis added).

B. ..."and this proposal is intended to *fulfill the intent of these statutes."* page 1. (emphasis added).

C. "This program is also a direct result of a *series of meetings involving* the Wisconsin Hospital Association, *various state agencies,...*" page 1.

D. "To aid the rate review committee in determining reasonableness, standards will be developed by a Standards Development Committee *staffed by the Department of Health and Social Services."* page 3. (emphasis added).

E. "To maintain a close relationship with health planning, all projects reviewable under Section 1122 of the Social Security Act must *receive the approval of the State Health Planning and Development Agency* before receiving payment." page 3. (emphasis added).

F. "Once fully *implemented by the State of Wisconsin,* Blue Cross, and the Wisconsin Hospital Association, the program should be able to meet its objectives and protect the rights of Wisconsin hospitals and the patients they serve." page 3. (emphasis added).

G. "The Rate Review Committee is a *committee of the State of Wisconsin,* the Wisconsin Hospital Assoc., and Blue Cross of Wisconsin,..." page 6. (emphasis added).

H. *"Composition of committee.* The Committee shall consist of 20 members: (1) six members appointed by the Governor;...; (3) six members appointed by the Blue Cross Board of Directors; ...three of whom must be approved by... the State Department of Health and Social Services; and, (4) two members selected jointly by the Wisconsin Hospital Association and the State Department of Health and Social Services." page 6.

I. "*Standards Development Committee,* The composition of the committee is as follows:...; (4) *Four representatives of the State of Wisconsin,* appointed by the Secretary of the Department of Health and Social Services." page 12. (emphasis added).

By way of comparison let us look at the references to state-private action contained in the Iowa RAP of 13 January 1978:

A. "To test the overall premise that the voluntary health system in Iowa, *in partnership with the community and state government,...*" page 5. (emphasis added).

B. "A Rate Approval Board, consisting of,..., public member representatives (State) will be appointed." page 5. (emphasis added).

C. "Implementation provisions of the initial RAP will be formulated by participating hospitals..., and be *subject to final approval by the Insurance Commissioner of Iowa,* the Rate Approval Board, and participating hospitals." page 5. (emphasis added).

D. "On or before July 1, 1979, the State of Iowa and RAP participating hospitals will contribute to the Program's costs to the extent agreed upon with the Rate Approval Board. page 5.

E. "*Six members appointed by the Governor* of Iowa or his designee. One of the six members shall act as chairman" page 7. (emphasis added).

F. "Program Administrator. His responsibilities shall include:...

B. Serve as liaison with the State Department of Health,..." page 12. (emphasis added).

G. "Standards Development Committee, (4) *Two public representatives appointed by the Governor* or his designee." page 15. (emphasis added).

This comparison is not intended to extol any relative virtues of either program except for *Parker* doctrine sufficiency. But aside from the funding limitations imposed by H.F. 630, which would seem to preclude the Iowa program from including provisions similar to the Wisconsin program's state funding provisions (citation omitted), many of the Wisconsin program's stipulations, noteably A, B, and G (see above) more closely follow the type of acknowledgment of "state action" necessary for *Parker* immunity.

Indeed, two portions of the Iowa RAP so cloud a finding of possible *Parker* immunity that they should be eliminated. We refer to the following:

A. "It is intended that the program will evolve into a separate non-profit, self-supporting organization..." page 5.

B. "It is important that the Rate Approval Board operate as a *body separate from* the hospitals, third-party payers, and *state government.*" page 6. (emphasis added).

We cannot emphasize too strongly that the State must be a partner with an *active* role in all phases of the Iowa Program (see 29 March opinion for an extended analysis of the *Parker* doctrine). If the U.S. Department of Justice accords the Wisconsin program only a provisional exemption (29 March opinion page 4, 5) it could hardly be imagined that any program less in evidence of "state action" will find similar approval.

The most dissimilar portions of the two respective programs concern composition of the Standards Development Committee. As an integral working component of the program, the committee could serve as a direct acknowledgment of the state's participation. But the Iowa RAP board's only recognition of state participation is through public members appointed by the Governor. No direct state participation is mentioned, as in the Wisconsin program.

Obviously, state personnel, acting in that capacity are not precluded from appointment-but without specific provisions for this in the RAP it is doubtful that "state action" can be claimed. It may be that other portions of the program, within the limitations of H.F. 630, could be better developed to accede to the Court's demand of an active state role. But the most demonstrative example of state action is state employees or officials, acting in this capacity, with a continuous and daily presence in the inner workings and decision making process of the RAP. It is most strongly urged that this portion of the Iowa RAP be redeveloped to include an active state role.

The extended analysis of the Iowa RAP for *Parker* doctrine sufficiency may be distinguished from an analysis for an exemption under the State antitrust law. Chapter 553, Code of Iowa (1977), contains an exemption for "The activities or arrangements expressly approved or regulated by any regulatory body or officer acting under authority of this state or of the United States." §553.6(4). It is our opinion that this exemption is somewhat broader than the *Parker* doctrine immunity, which, as noted in the 29 March opinion, seems to require some active state role where the activities are of a mixed public and private enterprise nature. Programs initiated pursuant to H.F. 630, therefore, may be granted State exemption with a lessor degree of State participation than will suffice for the *Parker* doctrine federal exemption. This situation, though, is purely circumstanced on Iowa's antitrust exemption qualifications under §553, Code of Iowa (1977). We may assume that the Iowa legislature took notice of §553.6(4) in formulating H.F. 630. But the State oriented analysis is mooted by the insufficiency of the RAP under *Parker* guidelines.

The state of Wisconsin has no legislative provision analogous to Iowa's §553.6(4) in its antitrust statute, W.S.A. Chapter 133. We assume that when the U.S. Department of Justice granted its provisional exemption the immunity was based purely on *Parker* considerations, and not upon any state legislative or judicial doctrine of antitrust immunity. Thus, in the final analysis, the practicable course is to pursue federal immunity for the RAP solely on the basis of the "state action" doctrine, as noted above.

Certainly, much of the RAP as detailed in the 13 January 1978 proposal is quite well developed in its mechanism for general public participation and accountability, standards development, and procedural steps. Our analysis is intended only to avoid probable conflicts with accountability, standards development, and procedural steps. Our analysis is intended only to avoid probable conflicts with federal antitrust statutes.

A revision of the RAP, to provide for direct State participation, as in the Wisconsin program, should afford a sufficient barrier between implementation of the RAP and federal antitrust proscriptions. The revised RAP may also be submitted to U.S. Department of Justice (Antitrust Division) for a business review under 28 C.F.R. 50.6 for a definitive federal interpretation.

August 24, 1978

MINORS: CUSTODIAN: DEPARTMENT OF SOCIAL SERVICES: SPECIAL EDUCATION. §§232.2(9), 281.6, 600A.2(8), Code of Iowa, 1977. Local office of Iowa Department of Social Services, as custodian of minor child, has authority to sign special education agreement for child. Local office of Iowa Department of Social Services should give parent of such child notice of child entering into special education. (O'Meara to Jackson, Director, Division of Field Operations, 8-24-78) # 78-8-19

Mr. Larry Jackson, Director Division of Field Operations, Iowa Department of Social Services: You have requested an opinion of the Attorney General concerning whether or not a local office of the Iowa Department of Social Services, which has custody of a child pursuant to an order of court under §232.33, The Code, may sign the consent form allowing the placement of such child in special education. You have also inquired concerning the relationship between the parent and the custodian in such a situation.

It is stated that the Department of Social Services has custody pursuant to Chapter 232, The Code. Section 232.2(9), Code of Iowa, 1977, states:

" 'Custodian' means custodian as defined in Section 600A.2, subsection 8."

It is therefore, necessary to examine §600A.2(8), Code of Iowa, 1977, to determine the general authority and responsibility of the Department of Social Services in the situation you pose.

Section 600A.2(8), Code of Iowa, 1977, states in pertinent part:

" 'Custodian' means a... person appointed by a court or juvenile court having jurisdiction over a child. The rights and duties of a custodian with respect to a child shall be as follows:

a. To maintain or transfer to another the physical possession of that child.

b. To protect, train, and discipline that child."

Chapter 281, The Code, deals with special education in Iowa. Section 281.6, Code of Iowa, 1977, provides in pertinent part:

"When the school district or area education agency has provided special education services and programs as provided herein for any child requiring special education, either by admission to a special class or by supportive services, it shall be the duty of the parent or guardian to enroll said child for instruction in such special classes or supportive services as may be established...."

Section 232.2(9) [600A.2(8)] appears to grant the Department of Social Services authority to sign the consent form in the situation you describe. At the same time, §281.6 appears to indicate that the parent or guardian must sign such form.

To construe §232.2(9) with §281.6, we turn to the statutory guide to construction of statutes given in Chapter 4 of The Code. Section 4.7, Code of Iowa, 1977, provides in pertinent part:

"If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both."

Reading §232.2(9) [see §600A.2(8)] with §281.6, it is the interpretation of this office that in those instances wherein a court has ordered a local office of the Iowa Department of Social Services to serve as custodian of a minor child, that local office has the authority (responsibility) to sign a special education agreement on behalf of the ward, if factually appropriate to do so.

You have also inquired with regard to the relationship between the custodian and the parent. (It is recalled that §232.2(9) refers to §600A.2(8).) Section 600A.2(8), The Code, states in pertinent part:

"All rights and duties of a custodian shall be subject to any residual rights and duties remaining in a parent or guardian."

Section 281.6, The Code, states in pertinent part:

"A child, or his parent or guardian, or the school district in which the child resides, may obtain a review of any action or omission of state or local authorities pursuant to the procedures established in chapter 290 on the ground that the child has been or is about to be:

1. Denied entry or continuance in a program of special education appropriate to his condition and needs.

2. Placed in a special education program which is inappropriate to his condition and needs.

3. Denied educational services because no suitable program of education or related services is maintained.

4. Provided with special education which is insufficient in quantity to satisfy the requirements of law.

5. Assigned to a program of special education when he is not handicapped."

Section 290.1, Code of Iowa, 1977, provides in pertinent part:

"Any person aggrieved by any decision or order of the board of directors of any school corporation in a matter of law or fact may, within thirty days after the rendition of such decision or the making of such order, appeal therefrom to the state board of public instruction..."

Whereas, consistent with the above opinion concerning the role of the custodian, these sections allow the custodian to seek a review of one of the five actions of the local school authorities given in §281.6, The Code, it is not inconsistent with such opinion that the parent have the ability to challenge the actions of the custodian or other persons relative to the care, education and training of the child. Therefore, it is concluded that one of the residual rights a parent has pursuant to §600A.2(8), The Code, is the right to notice of significant happenings relative to the child. Without such notice, the parent could not reasonably be expected to be capable of exercising whatever further residual rights" the parent has.

The right to notice of significant happenings relative to the child would appear to be fundamental concept. Even a non-custodial parent appears to have a right to notice in appropriate circumstances. See *Stanley v. Illinois,* 405 U.S. 645 (1972).

This is not to state that with regard to every action taken by a custodian concerning a child notice must be given to the parent. However, where a statutory enactment applies a right to the parent, and such right is not necessarily extinguished in the parent by the appointment of a custodian over the child, this office believes the custodian should notify the parent of the action taken concerning the child.

It is the opinion of this office that enrollment into, and the conditions relative to the offering of special education of a child is a matter concerning which the parent is entitled to notice from the custodian.

August 29, 1978

TAXATION: Property Tax Exemptions for Forest or Fruit-Tree Reservations §§161.1, 161.12, 161.13, 428.4, 441.22, Code of Iowa, 1977. Where no application for the forest or fruit-tree exemption has been properly made for the particular assessment year, the assessor must determine the value

of the real estate without regard to whether, in fact, it would otherwise qualify for the tax exemption. (Griger to Folkers, Mitchell County Attorney, 8-29-78) #78-8-20

Jerry H. Folkers, Mitchell County Attorney: You have requested an opinion of the Attorney General as follows:

"We have in our county, certain land owners with property which would ordinarily qualify as a forest and fruit-tree reservation who have neglected to file the application and sworn statement for certain years. Controversy has developed over whether or not the assessor may require a land owner to file such an application and sworn statement for each fiscal year or whether a filing of the sworn statement and application in one year will qualify the land owner for the exemption in any future year in which the property actually qualifies as a forest and fruit-tree reservation.

Please give me your opinion on the following questions:

"1. Does the sworn statement referred to in Section 161.12 need to be filed for each fiscal year for which the exemption is claimed?

2. If a filing under Section 161.12 will qualify a land owner for the exemption for more than one fiscal year, for what period of time may the assessor grant the exemption on the basis of the initial filing?

3. If an initial filing will qualify a land owner for the exemption for more than the fiscal year for which the application is filed, does the application follow the land in case of a transfer of the property to a new owner?"

Section 161.1, Code of Iowa, 1977, provides as follows:

"Any person who establishes a forest or fruit-tree reservation as provided in this chapter shall be entitled to the tax exemption provided by law."

Section 441.22, Code of Iowa, 1977, provides in relevant part as follows:

"Forest reservations fulfilling the conditions of sections 161.1 to 161.13, inclusive, shall be assessed on a taxable valuation of fourteen dollars and eighty-two cents per acre. Fruit-tree reservations shall be assessed on a taxable valuation of fourteen dollars and eighty-two cents per acre for a period of eight years from the time of planting."

Section 161.12, Code of Iowa, 1977, provides:

"It shall be the duty of the assessor to secure the facts relative to fruit-tree and forest reservations by taking the sworn statement, or affirmation, of the owner or owners making application under this chapter; and to make a special report to the county auditor of all reservations made in the county under the provisions of this chapter."

Section 161.13, Code of Iowa, 1977 provides:

"It shall be the duty of the county auditor in every county to keep a record of all forest and fruit-tree reservations within his county; and to make a report of the same to the state conservation commission on or before June 15 of each year."

In 1932 O.A.G. 272, the Attorney General opined:

"We are therefore of the opinion that it was the duty of the owners to claim the exemption [for forest reservations] at the time the real estate was assessed and that it was not the duty of the assessor to continue the valuations of 1 per acre unless the same were claimed at the time the real estate was assessed."

When this opinion was rendered, real estate was generally assessed in each

odd-numbered year. See §6959, Code of Iowa, 1931.

In a subsequent opinion, 1938 O.A.G. 738, the Attorney General was asked whether the assessor could grant the exemption for fruit-tree reservations for each year in which the claimant makes application therefor or whether such exemption could not be claimed until the next regular real estate assessment year. In opining that the exemption should be granted to qualifying claimants in each year they make application the Attorney General stated in 138 O.A.G. 739:

"It is therefore the opinion of this department that *the assessor should receive the sworn statements of those owners claiming fruit-tree reservations each year; should report the same to the auditor;* that the exemption can be granted in any intermediate year, and that there is no necessity of waiting until the next regular period for assessing real estate, to-wit, 1941 to grant the exemption." (emphasis supplied).

Section 428.4, Code of Iowa, 1977, provides for the assessment of real estate in 1978 and every two years thereafter. However, the assessor, in §428.4, is authorized and, indeed, has the duty to assess or reassess real estate as of January 1 of each assessment year for the purpose of determining the value thereof in accordance with the circumstances set forth in this statute which require such assessment or reassessment. Such circumstances can include a determination by the assessor whether the §441.22 taxable value applies.

In reading all of these statutes in pari materia, it is clear that the assessor has the duty, each year, to ascertain whether particular real estate qualifies for the special forest or fruit-tree taxable value only in the event that an application for such special value is made. But, if no application is made for that year, the assessor has no duty "to secure the facts relative to fruit-tree and forest reservations by taking the sworn statement, or affirmation," of the applicant. And, if the assessor has no duty to "secure the facts," he or she has no duty to determine whether the real estate qualifies for forest or fruit-tree tax exemption. Consequently, when no application for the exemption has been properly made for the particular assessment year, the assessor must determine the value of the real estate without regard to whether, in fact, it would otherwise qualify for the tax exemption.

August 29, 1978

CITIES AND TOWNS: COUNTIES: SHERIFFS: MUTUAL ASSISTANCE LAW ENFORCEMENT CONTRACTS: §28E.3, §748.4, 1977 Code of Iowa. Repeal of §748.4 of the 1977 Code of Iowa does not effect the right of municipalities to enter into mutual assistance for the provision of law enforcement services under the provisions of Chapter 28E of the 1977 Code of Iowa. (Williams to Swanson, Assistant Montgomery County Attorney, 8-29-78) #78-8-21

Mr. Mark D. Swanson: You have requested an opinion of the Attorney General indicating whether or not repeal of Section 748.4 of the 1977 Code of Iowa invalidates mutual assistance contracts which allow peace officers of one jurisdiction to assist those of another.

Section 748.4 of the 1977 Code of Iowa sets out the duties of a peace officer and simply provides that:

"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...."

It is noted that the Legislature in enacting the new Criminal Code contained in the Supplement to the Code of Iowa, 1977, not only omitted the reference to mutual assistance contracts contained in Section 748.4 but entirely deleted the provisions of the duties of a peace officer.

Chapter 28E of the 1977 Code of Iowa is the chapter of the Code covering generally the joint exercise of governmental powers and Section 28E.3 contains a very broad description of those powers and privileges or authorities which may be exercised jointly by public agencies within the State of Iowa. Unquestionably, the exercise of the power of a peace officer would be included within the scope of this section.

It is, therefore, the opinion of this office that the repeal of Section748.4 of the 1977 Code of Iowa does not prohibit law enforcement. Therefore, the opinion of this office that the repeal of Section 748.4 of the 1977 Code of Iowa does not prohibit law enforcement agencies from entering into mutual assistance contracts.

August 3, 1978

STATE OFFICERS AND DEPARTMENTS: Records. §§554.9403, 554.9404, 304.2, 304.8, 343.13, Code of Iowa, 1977. Numerical copy of lapsed or terminated financing statement filed in Uniform Commercial Code Division of Office of Secretary of State may be destroyed one year from the occurrence of the lapse or receipt of termination statement. (Nolan to Farrell, Director, Uniform Commercial Code Division, Office of Secretary of State, 8-3-78) #78-8-22

Mr. Robert E. Farrell, Director Uniform Commercial Code Division: This is written in reply to your request for an opinion on the legality of proposed destruction of both lapsed and terminated financing statements and financing statement changes. Your letter indicates that your office desires to destroy the numerical copy which is the only remaining copy of a lapsed or terminated financing statement and statement change. Authority for such disposal appears in the following Code sections:

"554.4903... Unless a statute on disposition of public records provides otherwise, the filing officer may remove a lapsed statement from the files and destroy it immediately if he has retained a microfilm or other photographic record, or in other cases after one year after the lapse. ... ."

"§554.9404 ...If the filing officer has a microfilm or other photographic record of the financing statement, and of any related continuation statement, statement of assignment and statement of release, he may remove the originals from the files at any time after receipt of the termination statement, or if he has no such record, he may remove them from the files at any time after one year after receipt of the termination statement."

Your letter states that a uniform commercial code termination register has been maintained in Iowa since July 5, 1966. This register identifies each financing statement and financing statement change as to date originally filed, the file number and date terminated and the termination number assigned. You also indicate that a similar register will be established for "lapsed" statements. It does not appear that any attempt is made to microfilm these records, thus the originals cannot be removed until one year has passed from the date

of the receipt of the termination statement or the occurence of the lapse.

In connection with your inquiry we have examined Chapter 304, Code of Iowa, 1977 which is known as the "Records Management Act". Under §304.2 a record is defined to mean "a document, book, paper, photograph, sound recording or other material...received pursuant to law in connection with the transaction of official business of state government". However, this section of the Code further excludes from the definition of record "miscellaneous papers or correspondence without official significance".

It is the view of this office that lapsed or terminated financial statements are miscellaneous papers without official significance. Accordingly the prohibition contained in §304.8 that records shall not be disposed of unless prior approval of the state records commission has been obtained does not apply.

Further, the statutory limitation contained in §343.13 permitting the destruction of records after ten years by county officers does not have application to the Uniform Commercial Code Division of the Secretary of State's Office. Therefore, we advise that it is permissible under §§554.9403(3) and 554.9404(2) to destroy the remaining numerical copy of a lapsed or terminated financing statement after the passage of one year from the occurrence of the lapse or the receipt of the termination statement.

August 30, 1978

TAXATION: Valuation of Real Estate Subject to Taxation and Implementation of Equalization Orders — §§428.4, 441.21, 441.49, 441.52, Code of Iowa, 1977. In implementing the final equalization order of the Director of Revenue, the assessor shall not limit his or her actions to merely making the adjustments specified in said order, but shall reassess all real estate at its actual value to the end that the assessment of said real estate shall reflect the actual values as of January 1st of the year of reassessment. (Kuehn to Shaff and West, 8-30-78) #78-8-24

Roger Shaff, State Senator, James West, State Representative: We acknowledge receipt of your letter in which you have requested an opinion of the Attorney General as follows:

"There appears to be a conflict in the Code of Iowa and between the Code and the Iowa Administrative Code concerning assessment and equalization procedures to be followed by assessors.

Chapter 441.49 of the Code of Iowa states:

The assessor shall prior to May 15 of the year following, in completing the reassessment of real estate as provided in section 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 441.21.

Yet 428.4 states:

'The assessment of real estate shall be the value of the real estate as of January 1 of the year of the assessment.' [The year 1978 and each even numbered year thereafter shall be a reassessment year... The assessor shall determine the actual value and compute the taxable value thereof as of January 1 of the

year of the revaluation and reassessment].

The Director of Revenue has set forth the following rule concerning equalization and assessments: 730-71.16(1) Determination of actual value. In implementing the final equalization order of the director of revenue, the assessor shall not limit his or her actions to merely making the adjustments specified in said order or merely applying the adjustment percentages equally to all properties within the class of property adjusted, but shall reassess all real estate at its actual value to the end that the reassessment of said real estate shall reflect the actual values as of January first of the year of reassessment.

The situation posed by these conflicts needs to be cleared up. Nearly half of the assessors in Iowa are following the Director of Revenue's equalization order. The rest are valuing real property at its actual value, which in most cases greatly exceeds the equalization order due to time lags built with the equalization system. Assessors are doing this as they are interpreting the law in two ways. Some interpret the law to mean strict adherence to the equalization order; others to mean strict adherence to actual value. Meanwhile, the taxpayers are the losers as equalization is not being achieved due to dissimilar assessment practices by various assessors. This is especially true in counties having more than one assessing district. Some property owners have 1-1-78 assessed valuations based on 1977 market value, while others have 1-1-78 assessed valuations based on the equalization order which is 1976 market values.

My question to you is whether or not Chapter 441.49 takes precedence over the other parts of the Code and Iowa Administrative Code cited above."

Important in determining whether or not there is a conflict between the various Iowa Code sections you cited and the Iowa Administrative Code are other sections of the Code of Iowa which you did not cite. Said sections of the Code of Iowa, 1977, include §§441.21 and 441.52, Code of Iowa, 1977, which state:

"441.21 Actual assessed and taxable value.

1. *All real...property* subject to taxation *shall be valued* at its *actual value*...and *shall be assessed at one hundred percent of such actual value,* and such value so assessed shall be taken and considered as the assessed value and *taxable value* of such property upon which the levy shall be made.

The actual value of all property subject to assessment and taxation shall be the fair and reasonable market value of such property. 'Market value' is defined as the fair and reasonable exchange in the year in which the property is listed and valued between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and each being familiar with all the facts relating to the particular property. Sale prices of the property or comparable property in normal transactions reflecting market value, and the probable availability or unavailability of persons interested in purchasing the property, shall be taken into consideration in arriving at its market value. In arriving at market value, sale prices of property in abnormal transactions not reflecting market value shall not be taken into account, or shall be adjusted to eliminate the effect of factors which distort market value, including but not limited to sales to immediate family of the seller, foreclosure or other forced sales, contract sales, discounted purchase transactions or purchase of adjoining land or other land to be operated as a unit.

* * *

Actual value of property in one assessing jurisdiction shall be equalized as compared with *actual value of property* in an adjoining assessing jurisdiction. If a variation of five percent or more exists between the actual values

of similar, closely adjacent property in adjoining assessing jurisdictions in Iowa, the assessors thereof shall determine whether adequate reasons exist for such variation. If no such reasons exist, the assessors shall make adjustments in such actual values to reduce the variation to five percent or less.

441.52 Falure to perform duty. If any *assessor or member of any board of review shall* knowingly fail or *neglect to make or require the assessment of property for taxation to be of and for its taxable value as provided by law or to perform any of the duties required of him by law,* at the time and in the manner specified, he shall forfeit and pay the sum of five hundred dollars to be recovered in an action in the district court in the name of the county or in the name of the city as the case may be, and for its use, and the action against the assessor shall be against him and his bondsmen. "(Underscoring added)

The question is, how should that part of §441.49 which states that "the assessor shall...in completing the reassessment of real estate...*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" be construed in light of other parts of this section and other Iowa Code sections cited above involving the same subject matter.

Jansen 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."* (Emphasis 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."* (Emphasis added)

Also, see *Northern Natural Gas Company v. Forst,* 1973, Iowa, 205 N.W.2d 692, on construing together statutes which involve the same subject matter for the purpose of reaching reasonable results.

In addition to the positions the Iowa Supreme Court stated in the three cases cited above, there is the proposition that the Court will not attribute to the legislature and intention to enact a law which would lead to absurd consequences. *Graham v. Worthington,* 1966, Iowa, 146 N.W.2d 626.

If §§428.4, 441.21, 441.49 and 441.52 are construed together, it is obvious that the intention of the legislature was to require all assessors to assess real estate at *actual value* as of January 1 of the year of reassessment and, at the same time, implement the final equalization order of the Director of Revenue. Any other construction or interpretation would result in absurd consequences thereby resulting in tremendous inequities for taxpayers. For example, all property does not move upward or downward at the same rate. Data which the Department of Revenue has been collecting for years indicates that this is correct. After data for an equalization order is gathered one assessing jurisdiction may experience a building boom or inflated prices for real estate (such as from a new plant or industry being built), while another assessing jurisdiction may experience a building slump or deflated prices for real estate (such as

from a plant or industry closing). If the assessor from a jurisdiction which is experiencing inflated or deflated real estate values does not make adjustments so that the assessment of real estate is at actual value, said assessor will be in violation of all the above Iowa Code sections cited including §441.49 which states:

"...in no case shall the assessed value of an individual property exceed one hundred percent of its actual value *determined in accordance* with section 441.21." (Emphasis added)

Section 441.21, Code of Iowa, 1977, states:

"All real...property *subject to taxation shall be* valued at its *actual value* ...*and shall be* assessed at *one hundred percent of such actual value,* and such value so assessed *shall be*...*the*...*taxable value* of such property upon which the levy *shall be* made." (Emphasis added)

Furthermore, the legislature in §441.52 states that if the assessor knowingly neglects to assess property at taxable value which is established by §441.21 at actual value, the assessor (or member of any board of review) shall forfeit and pay the sum of five hundred dollars to be recovered in an action in the District Court. Thus, the legislature has made it clear that the assessor must assess all property at actual value at all times.

Also, in the event that the local assessing officials merely applied the Director of Revenue's final equalization order in the exact percentage adjustment to all properties within the same class, there could not be internal equalization within said class. For example, it is no secret that certain residential property within an assessing jurisdiction will increase in value faster than other residential property within that same jurisdiction. If the actual value of such property is fixed as of January 1, 1978, there is internal equalization. If the assessor merely adjusts all parcels of residential property within his or her jurisdiction by the exact percentage of the equalization order or merely determines the aggregate actual value of such class of property in exact equivalence to the Director's equalization order, without regard to actual value of property as of January 1, 1978, there is no equalization within the same class.

Another example of absurd consequences if the assessor does not assess property at actual value occurs when new property is constructed (in 1977). Does the assessor add no value as of January 1, 1978 to comply totally with the aggregate valuation per class of property as set in the director's final equalization order; does the assessor use 1976 actual values on property that was not even built until after 1976 (however, assessed values of old properties would still have to be lowered to comply with the aggregate total valuation per class of property as set by the final equalization order); or does the assessor harmonize all the sections of the Iowa Code and assess the new property at actual value as set forth in §441.21? The only reasonable, sensible and workable solution is to follow the latter course.

In brief conclusion, it is the opinion of the Attorney General that all assessors, while implementing the final equalization order of the Director of Revenue, must always assess real estate subject to taxation at its actual value. If all assessors followed this procedure dictated by the Code of Iowa, 1977, there would not be the problems that are discussed in your request for an opinion of the Attorney General and the absurd consequences discussed in this opinion. In other words, the Department of Revenue Rule 730-71.16(1), in our opinion, correctly sets forth the duties of the assessor.

This opinion does not take into account the ultimate taxable value of agricultural and residential property because the ultimate taxable values are not finally determined by the assessor. These classes of property (agricultural and residential) are assessed at a percentage of actual value and said percentage is determined by the Director of Revenue pursuant to §20 of Chapter 43, Acts of the 67th General Assembly (1977). However, the actual values of agricultural and residential property as fixed by the assessors and approved by local boards of review are used by the Director of Revenue to perform his ministerial duty of computing the percentages for which the ultimate taxabe values will be determined. Thus, if the actual values of residential and agricultural property are not properly determined by local assessing officials, the ultimate taxable values will likewise have the aforementioned inequities discussed in this opinion.

August 30, 1978

CONSERVATION: Conservation Commission eligibility for participation in a cooperative agreement with the United States Department of the Interior for the preservation of endangered or threatened species. Chapter 109A, The Code 1977, The Endangered Species Act of 1973, 16 U.S.C. Section 1531 et seq. Chapter 109A is in compliance with the Endangered Species Act of 1973, qualifying the Conservation Commission for participation in a cooperative agreement with the Federal government. To comply with Federal law however, the director may not issue a permit for the destruction of an endangered species to reduce damage to propety pursuant to Section 109A.8. (Benton to Priewert, Director Iowa Conservation Commission, 8-30-78) #78-8-25

Mr. Fred A. Priewert, Director Conservation Commission: In a letter to this office, you have indicated that as a prerequisite to the Conservation Commission entering a cooperative agreement with the Federal Government for a cost-sharing program relating to the conservation of endangered species, the Commission must verify that the state endangered species statute is in compliance with federal law. You further state that the Fish and Wildlife Service of the Department of Interior has examined Iowa's endangered species law, and has determined there are several possible discrepancies between Chapter 109A, The Code, 1977, the Iowa endangered species statute, and the Endangered Species Act of 1973, 16 U.S.C. §1531. To insure that the Conservation Commission may participate in this cooperative agreement, you have requested an opinion, clarifying the possible discrepancies listed by the Fish and Wildlife Service.

It must be noted that since your receipt of the letter from the Fish and Wildlife Service, the Endangered Species Act of 1973 has been amended. With this amendment, a state may more easily qualify for the cooperative agreement with its attendant cost-sharing, and the discrepancies described above have been largely clarified.

Finding that certain species of fish, wildlife, and plants were endangered or threatened with extinction, the Federal Government enacted the Endangered Species Act of 1973. To fulfill the policy of the Act to provide a program for the conservation of such endangered and threatened species, §1531(5) provides that the states and other interested parties be encouraged through Federal financial assistance and a system of incentives to develop and maintain conservation programs which meet national and international standards. §1535 provides generally for the Secretary of the Interior to cooperate with the States

in carrying out the program authorized by the Endangered Species Act of 1973. Prior to the amendment mentioned earlier in this opinion, §1535(c) provided as follows:

"(c) In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this subsection, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species and threatened species, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program -

(1) authority resides in the State agency to conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened;

(2) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(3) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;

(4) the State agency is authorized to establish programs, including the acquisition of land or acquatic habitat or interests therein, for the conservation of resident endangered or threatened species; and

(5) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened."

This section has now been amended by the addition of the following language:

"(5) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened: or that under the state program -

(A) the requirements set forth in paragraphs (3), (4), and (5) of this subsection are complied with, and

(B) plans are included under which immediate attention will be given to those resident species of fish and wildlife which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to subparagraph (A) and this subparagraph shall not affect the applicability of prohibitions set forth in or authorized pursuant to Section 1533(d) of this title or section 1538 (a) (1) of this title with respect to the taking of any resident endangered or threatened species."

Further, Section 1535(i) was amended to state:

"For the purposes of this section there are authorized to be appropriated

not to exceed the following sums:

(1) $10,000,000 through the period ending September 30, 1977.

(2) $16,000,000 for the period beginning October 1, 1977, and ending September 30, 1981."

Under the amended language of the Federal law, the requirements necessary for a State to enter a cooperative agreement have been reduced. As a consequence, those discrepancies between Iowa and Federal law relating to Section 1535(c)(1) have been eliminated; this opinion will therefore examine the extent of Iowa's compliance with other, relevant provisions of the Endangered Species Act of 1973.

Section 1535(c)(5)(A) now compels that the State program fulfill the requirements of paragraph (3), (4), and (5) of the subsection. Paragraph (3) requires that the State agency be authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife. Chapter 109A is the Iowa statute pertaining to endangered plants and wildlife. Section 109A.3 provides:

"The director shall conduct investigations on fish, plants, and wildlife in order to develop information relating to population, distribution, habitat needs, limiting factors, and other biological and ecological data to determine management measures necessary for their continued ability to sustain themselves successfully. On the basis of these determinations and other available scientific and commercial data, which may include consultation with scientists and others who may have specialized knowledge, learning, or experience the commission shall pursuant to chapter 17A promulgate a rule listing those species of fish, plants, and wildlife which are determined to be endangered or threatened within the state.

The commission shall review the state list of endangered and threatened species at least every two years and may amend the list."

This section clearly empowers the director of the Conservation Commission to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife, and thus complies with Section 1535(c)(3) of the federal law. Section 109A.4 of the Iowa Code states:

"The director shall establish programs, including acquisition of land or aquatic habitat, necessary for the management of endangered or threatened species.

In carrying out the programs authorized by this section, the commission may enter into co-operative agreements with federal and state agencies, political subdivisions of the state, or with private persons for the administration and management of any area or program established under this section or for investigation as outlined in section 109A.3."

Considering the terms of this section, the Iowa statute would seem to be in compliance with Section 1535(c)(4), which requires that the State agency be authorized to establish programs, including the acquisition of land, for the conservation of resident endangered species. Paragraph (5) of the relevant subsection compels that the state statute make provision for public participation in designating resident species of fish or wildlife as endangered or threatened. Section 109A.3 provides in pertinent part that the Commission shall:

"...pursuant to Chapter 17A promulgate a rule listing those species of fish, plants, and wildlife which are determined to be endangered or threatened

within the state."

This language directs the Commission to promulgate a rule listing endangered fish, plants, and wildlife pursuant to the rule-making procedures of Chapter 17A, The Code, 1977. Sections 17A.4(1)(a) and (b) state:

"1. Prior to the adoption, amendment, or repeal of any rule an agency shall:

a. Give notice of its intended action by submitting two copies of the notice to the Code editor to be published in the Iowa Administrative Code created pursuant to section 17A.6. Any notice of intended action shall be published at least thirty-five days in advance of the action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may present their view thereon.

b. Afford all interested persons not less than twenty days to submit data, views or arguments in writing. If timely requested in writing by twenty-five interested persons, by a governmental subdivision, by the administrative rules review committee, by an agency, or by an association having not less than twenty-five members, the agency must give interested persons an opportunity to make oral presentation according to agency rules which give the public not less than twenty days notice of the time when and the place where oral presentation may be made, and which provide for the presentation prior to agency action on the rule which is the subject of the proceeding. The agency shall consider fully all written and oral submissions respecting the proposed rule. Within one hundred eighty days following either the notice published according to the provisions of subsection 1, paragraph 'a' or within one hundred eighty days after the last date of the oral presentations on the proposed rule, whichever is later, the agency shall adopt a rule pursuant to the rule-making proceeding or shall terminate the proceedings by publishing notice of termination in the Iowa administrative code. If requested to do so by an interested person, either prior to adoption or within thirty days thereafter, the agency shall issue a concise statement of the principal reasons for and against the rule it adopted, incorporating therein the reasons for overruling considerations urged against the rule."

The rulemaking procedures of Section 17A.4 provide clearly for the public participation contemplated by Section 1535(c)(5) of the Federal Act. Moreover, your letter indicates that public hearings were held on August 22, 1977 concerning the preparation of Iowa's endangered species lists, therefore the Commission did not bypass public participation pursuant to Section 17A.4(2).

Section 1535(c)(5)(B) of the amended Act, further requires that to qualify for the cooperative agreement, a State must include plans under which:

"...immediate attention will be given to those resident species of fish and wildlife which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs..."

To qualify for the cooperative agreement, the Conservation Commission must submit plans as described above. This section further makes explicit that a cooperative agreement entered into with a state pursuant to these provisions does not affect the applicability of the prohibitions found in sections 1523(d) and 1538(a)(1) of the Act.

Although the Endangred Species Act of 1973 has been amended to simplify state participation in the cooperative agreement program, there remain certain

discrepancies between Iowa and Federal law, as the letter you received from the Fish and Wildlife Service indicates. For example, Sections 109A.7 and 109A.8 provide:

"The director may permit the taking, possession, purchase, sale, transportation, importation, exportation, or shipment of endangered or threatened species which appear on the state list for scientific, zoological, or educational purposes, for propagation in captivity of such fish, plants, or wildlife, to ensure their survival.

Upon good cause shown and where necessary to reduce damage to property or to protect human health, endangered or threatened species found on the state list may be removed, captured, or destroyed, but only pursuant to a permit issued by the director."

Section 1535(f) of the Federal law provides in pertinent part:

"Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined."

This section further voids any State law or regulation which may permit that which is prohibited by the Endangered Species Act of 1973. Section 1539(a) states:

"The Secretary may permit, under such terms and conditions as he may prescribe, any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species."

Those activities which the director may undertake under Section 109A.7 are explicitly limited by that section's concluding phrase, "...to ensure their survival." This limitation seems coextensive with the conditions found in Section 1539(a), limiting exceptions to the prohibitions in Section 1538 to "scientific purposes", and "to enhance the propagation or survival of the affected species."

Section 109A.8 however, authorizes the director to issue a permit to destroy a listed endangered species either to reduce damage to property or to protect human health. In contradiction to the rather broad powers granted the Iowa director in this area, 50 C.F.R. §17.21(c)(2) and (3) do not list the protection of property as a justification for the taking of an endangered species. Section 109A.8 is less restrictive than the Federal prohibition. To comply with Federal law and retain eligibility for the cooperative agreement, the director should not issue a permit for the destruction of an endangered species to protect property.

To determine Iowa's eligibility for the cooperative agreement, the Fish and Wildlife Service also requested clarification of Sections 109A.1(3) and 109A.1(4). Section 109A.1(3) states:

"3. 'Endangered species' means any species of fish, plant life, or wildlife which is in danger of extinction throughout all or a significant part of its range. 'Endangered species' does not include a species of insect as determined by the commission or the secretary of the United States department of interior to constitute a pest whose protection under this Act would present an overwhelming and overriding risk to man."

Under this language, if the Commission were to classify a particular insect a pest, and that insect were listed under the Federal Act, Iowa would not be

in compliance with Section 1535(c)(1). This should not be an obstacle to the Conservation Commission entering a cooperative agreement, however, given the amendment to Section 1535(c)(1), which eliminates compliance with this section as a prerequisite to State participation. Section 109A.1(4) provides:

"4. 'Fish' or 'wildlife' means any member of the animal kingdom, including any mammal, fish, amphibian, mollusk, crustacean, arthropod, or other invertebrate, and includes any part, product, egg, or offspring, or the dead body of parts thereof. Fish or wildlife includes migratory birds, non migratory birds, or endangered birds for which protection is afforded by treaty or other international agreement."

The Fish and Wildlife Service noted a possible ambiguity in this definition, questioning whether the limiting phrase "for which protection is afforded..." applies to all three classifications of birds or only endangered birds. To construe the phrase "for which protection is afforded..." as applying to all three classifications would unduly circumscribe this definition. In the construction of an ambiguous statute, the first subject of consideration must be the object sought to be attained by the statute. Section 4.6(1), The Code, 1977. A statute must be construed to accomplish its purpose, rather than to defeat it. *Doe v. Ray,* 1977, 251 N.W.2d 496, 500. In the construction of statutes designed to remedy a particular evil, it is proper to adopt the construction which will best suppress that evil. 73 Am.Jur.2d Statutes Section 157, p. 361. Considering these established principles we would construe the phrase in question as applying only to endangered birds. Accordingly, the terms "fish" and "wildlife" should be read to include all migratory and nonmigratory birds, as well as endangered birds for which protection is afforded by treaty or other international agreement.

In summary, we would consider Chapter 109A in sufficient compliance with Section 1535(c) to render the Conservation Commission eligible for participation in a cooperative agreement with the Federal government. Those discrepancies noted in the letter from the Fish and Wildlife Service have been largely removed by the amended version of Section 1535(c) of the Endangered Species Act of 1973. We would caution, however, that in its present form, Section 109A.8 is less restrictive than the Federal law in this area, and should the director issue a permit for the destruction of an endangered species to reduce damage to property, the Conservation Commission's continued participation in this program could be jeopardized.

August 30, 1978

DEPARTMENT OF SOCIAL SERVICES; IOWA TRAINING SCHOOLS: JUVENILES: CRIMINAL LAW. Juveniles placed pursuant to §242.6, The Code, §§232.72, 232.73, 242.6, 242.12, 242.13, 246.39, Code of Iowa, 1977. A juvenile committed to an Iowa Training School pursuant to §242.6 should be treated as a juvenile, not as an adult offender; a juvenile committed to an Iowa Training School pursuant to §242.6 is subject to the parole and discharge provisions of §§242.12 and 242.13 and the Training School is not required to maintain the physical custody until expiration of sentence; and if the juvenile is committed to an Iowa Training School, the parole provisions of §242.12 apply rather than the "good time" provisions of §246.39. (Robinson to Hoy, Superintendent, Iowa Training School for Boys, 8-30-78) #78-8-26

Mr. James Hoy, Superintendent: You have requested an opinion of the

Attorney General concerning the status of juveniles committed to the Iowa Training School for Boys pursuant to Section 242.6, Code of Iowa, 1977. In general you wish to know (1) whether a juvenile so committed should be treated as an adult offender, or should be treated as a juvenile consistent with the provisions of Section 242.6, The Code; (2) if an adult criminal court has committed a juvenile to an Iowa Training School under Section 242.6, and assigned a determinate sentence, must an Iowa Training School maintain physical custody of the juvenile until the expiration of the sentence, or do the provisions of Section 242.12, The Code, apply; and (3) if a juvenile is committed to an Iowa Training School pursuant to Section 242.6, The Code, do the "good time" provisions of Section 246.39 apply to the duration of the term the juvenile is committed to the Iowa Training School, or do the provisions of Section 242.12 control.

For the reasons given below, it is the opinion of this office (1) that a juvenile committed to an Iowa Training School pursuant to Section 242.6, The Code, should be treated as a juvenile, not as an adult offender. (2) It is the further opinion of this office that a juvenile committed to an Iowa Training School pursuant to Section 242.6, The Code, is subject to the parole and discharge provisions of Section 242.12 and 242.13, The Code, and the Training School is not required to maintain the physical custody until expiration of sentence. (3) If the juvenile is committed to an Iowa Training School, the parole provisions of Section 242.12 apply rather than the "good time" provisions of Section 246.39.

A juvenile who has committed an adult offense may be dealt with in one of four possible ways:

1. Leave the matter with a juvenile court as a delinquency case. [Sections 232.2(12), 232.34, The Code.]

2. Try the matter in adult criminal court and sentence pursuant to adult criminal sanctions. (Sections 232.72, 232.73, The Code.)

3. Try the matter in adult criminal court, and defer to the juvenile court for disposition. (Section 232.72, The Code.)

4. Try the matter in adult criminal court and place the juvenile in the Iowa Training School for Boys or Girls, as the case may be. (Section 242.6, The Code.)

If options 1, 3 or 4 are used, the person shall be treated as a juvenile for all purposes of the law. If option 2 is used, the person shall be treated as an adult and the provisions pertaining to adult correction and parole shall apply. This is based on a comparison of the juvenile and criminal code sections that apply.

The principal juvenile statutes in question are Sections 232.72 and 242.6, Code of Iowa, 1977. Section 232.72 states:

"232.72 Prosecution under criminal law. When a petition alleging delinquency is based on an alleged act committed after the minor's fourteenth birthday, and the court, after a hearing, deems it contrary to the best interest of the minor or the public to retain jurisdiction, the court may enter an order making such findings and referring the alleged violation to the appropriate prosecuting authority for proper action under the criminal law. When such child pleads guilty or is found guilty of a public offense in another court that court may with the consent of the juvenile court refer the child back to juvenile

court for further disposition. In any event the court before whom the plea was made or the conviction was had is expressly authorized to set aside such plea or conviction but only after the child has successfully completed a period of probation of not less than one year."

Section 242.6 states:

"242.6 Conviction for crime. When a boy or girl over twelve and under seventeen years of age, of sound mind, is found guilty in the district court of any crime except murder, the court may order the child sent to the state training school for boys, or for girls, as the case may be."

Section 902.3 [Criminal Law Supplement] by comparison states:

"902.3 INDETERMINATE SENTENCE.

When a judgment of conviction of a felony other than a class A felony is entered against *any person,* the court, in imposing a sentence of confinement, shall commit the person *into the custody of the director of the division of adult corrections* for an indeterminated term, the maximum length of which shall not exceed the limits as fixed by section 902.9 nor shall the term be less than the minimum term imposed by law, if a minimum sentence is provided. [Emphasis added.]"

Section 902.5 [Criminal Law Supplement], The Code, 1977, states:

"902.5 PLACE OF CONFINEMENT.

The director of the division of adult corrections shall determine the appropriate place of confinement of any person committed to director's custody, *in any institution administered by the director,* and may transfer the person from one institution to another during the person's period of confinement. [Emphasis added.]"

For the purpose of this opinion, these sections of Iowa statute are important in that, contrary to prior law (Section 789.13, Code of Iowa, 1977), the reference to minimum age limit (16 years of age) is removed. However, the limitation on sentencing is given. Sentencing is to the director of the division of adult corrections for placement at an institution under said director's control. This is in clear contrast to Chapter 242, The Code (§§242.6 and 242.12) which has a maximum age limit and is under control of the director of the division of child and family services. This distinction is readily interpreted to segregate those juveniles treated as adult offenders from those juveniles treated as youthful offenders.

This intention is further emphasized in examining the purpose statements of the legislature with regard to an Iowa Training School and comparing such to the penal institutions within this State. Section 242.2 and 242.4, The Code, 1977, provide such statements. Section 242.2 provides:

"242.2 Superintendent—powers and duties. The superintendent shall have charge and custody of the inmates of the school. He shall discipline, govern, instruct, employ, and use his best endeavors to reform the pupils in his care, so that, while preserving their health, he may promote, as far as possible, moral, religious, and industrious habits, and regular, thorough, and progressive improvement in their studies, trade as possible, moral, religious, and industrious habits, and regular, thorough, and progressive improvement in their studies, trade, and employment."

Section 242.4, The Code, provides:

"242.4 Instruction and employment. The state director shall cause the

boys and girls in said schools to be instructed in piety and morality, in such instruction on the Constitutions of the United States and of this state as is required in the common schools, and in such branches of useful knowledge as are adapted to their age and capacity, including the effect of alcoholic liquors, stimulants, and narcotics on the human system, and in some regular course of labor, either mechanical, agricultural, or manufactural, as is best suited to their age, strength, disposition, capacity, reformation, and well-being."

The essential difference between the purpose of an Iowa Training School and the adult correctional facilities is well stated in the 1976 Report of the Attorney General at page 439 (February 9, 1976, Opinion of the Attorney General, Robinson to Doderer):

"We are of the opinion that the term 'penal institution' does not include the Juvenile Home or Training Schools.

* * *

We certainly agree with the conclusion reached in your letter, to-wit:

* * *

'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.' "

It is, therefore, concluded that Section 242.6, Code of Iowa, 1977, is in essence a youthful offender provision of Iowa law. As such, it is found to mandate treatment of a juvenile sanctioned pursuant to said section as a juvenile, and not as an adult criminal.

You have also requested the opinion of this office with regard to the period of time during which the Iowa Training Schools must maintain custody of a juvenile who has been placed there by the court for a determinate period of time. In a 1947 Opinion of the Attorney General (1948 Report of the Attorney General at page 95) this office held:

"However, if the district court elects to impose judgment of conviction, a commitment to the Iowa training school for boys still may be accomplished under section 242.6. However, where the court acts pursuant to section 242.6 the court cannot impose imprisonment for a term of years, but must commit the minor to that institution for such period until said minor reaches the age of 21 years."

Therefore, it has already been determined that the maximum period of time during which a juvenile may be held under Section 242.6 is until said juvenile attains the age of majority. The narrower question is whether or not a juvenile can be sentenced to the Iowa Training Schools for a determinate period of time which period does not extend beyond the attaining of the age of majority; and whether the Iowa Training Schools must maintain physical custody of the juvenile until the juvenile has "served" the specific number of years ordered by the court.

Section 242.12, Code of Iowa, 1977, states:

"242.12 Discharge or parole. The state director may at any time after one year's service order the discharge or parole of *any* inmate as a reward for good

conduct, and may in exceptional cases, discharge or parole inmates without regard to the length of their service or conduct, when satisfied that the reasons therefor are urgent and sufficient. If paroled upon satisfactory evidence of reformation, the order may remain in effect or terminate under such rules as the state director may prescribe." [Emphasis added.]

Section 242.13, Code of Iowa, 1977, provides:

"242.13 Binding out or discharge. The binding out or the discharge of an inmate as reformed, or having arrived at the age of eighteen years, shall be a complete release from all penalties incurred by the conviction for the offense upon which the child was committed to the school."

It is axiomatic in Iowa law that a statute should be read according to its clear and unambiguous language, affording words used therein their usual and ordinary meaning. *Spilman v. Board of Directors of Davis County Community School District,* 253 N.W.2d 593 (Iowa 1977); *In Interest of Clay,* 246 N.W.2d 263 (Iowa 1976). Section 4.4(2), Code of Iowa, states:

"4.4 Presumption of enactment. In enacting a statute, it is presumed that:

* * *

2. The entire statute is intended to be effective."

In reading Section 242.12, The Code, it is obvious that the provisions with regard to discharge or parole apply to any inmate of the Iowa Training Schools. There is no exception for juveniles committed to the Training Schools pursuant to Section 242.6. Therefore, no such exception should be read into the statute. It must be concluded that juveniles placed at the Iowa Training Schools pursuant to Section 242.6 are subject to the authority of the state director of the division of child and family services of the Department of Social Services (Section 242.1, Code of Iowa, 1977) concerning discharge or parole.

This interpretation of Section 242.6 is supported by reference to the statutory provisions dealing with adult parole and the jurisdiction of the board of parole. Section 906.3 [Criminal Law Supplement], Code of Iowa, 1977, states the authority of the parole board as follows:

"906.3 AUTHORITY OF PAROLE BOARD.

The board of parole shall promulgate regulations regarding a system of paroles from correctional institutions, and shall direct, control, and supervise the administration of such system of paroles. The board shall determine which of those *persons who have been committed to the custody of the director of the division of adult corrections,* by reason of their conviction of a public offense, shall be released on parole." [Emphasis added.]

This section of Iowa law clearly limits the authority of the board of parole to those persons under the authority of the director of the division of adult corrections.

Therefore, to answer your second question, a juvenile committed to the Iowa Training School pursuant to Section 242.6, may be held by the Training School for the term of years ordered by the Court, so long as said term of years does not exceed the term of years between commitment and the attainment of the age of majority by the juvenile. The state director may discharge or parole a juvenile prior to the expiration of a term of years ordered by a court, even if such term of years might have been completed prior to the juvenile attaining the age of majority. Section 242.12, The Code.

The final question you raise is whether or not "good time" provisions apply to juveniles committed to the Iowa Training Schools pursuant to Section 242.6, The Code. "Good time" is described in Section 246.39, Code of Iowa, 1977:

"246.39 Reduction of sentence. Each prisoner who shall have no infraction of the rules of discipline of the penitentiary or the men's or women's reformatory or laws of the state, recorded against him, and who performs in a faithful manner the duties assigned to him, shall be entitled to a reduction of sentence as follows..."

This section applies specifically to prisoners of the Penitentiary, Men's or Women's Reformatory. It is inconsistent with the canons of statutory construction, above, to extend the provisions of Section 246.39, The Code, to include inmates of the Iowa Training Schools. Had the Legislature intended such, it could have so stated. *In Interest of Clay, supra.*

Sections 242.12 and 242.13, The Code, clearly place authority regarding parole or discharge of inmates of the Iowa Training Schools with the state director of the division of child and family services. To read Section 246.39 as applying to inmates of the Training Schools would create a conflict between statutes. Section 4.7, Code of Iowa, 1977, states that if a conflict persists between a general provision and a special or local provision, the special or local provision prevails. Hence, even should a conflict be found between Sections 246.39 and 242.12, Section 242.12 must prevail as the special provision dealing with inmates of the Iowa Training Schools.

Therefore, it is the conclusion of this office that statutory "good time" (reduction of sentence pursuant to Section 246.39, The Code) is not applicable to inmates of the Iowa Training Schools so placed pursuant to Section 242.6. Rather the provisions of Section 242.12, Code of Iowa, 1977, apply. It should be noted that Section 242.12 will normally result in a quicker release of the juvenile.

August 31, 1978

COUNTIES AND COUNTY OFFICERS: County Indemnification Fund—§§4.5, 4.13(2), 1977 Code of Iowa; §§332.36, 332.40, 332.4, 1977, 1975, 1973 Codes of Iowa. H.F. 2246, §§1, 2, 3 Acts of the 67th G.A. (1978); Ch. 189, §1, Acts of the 66th G.A. (1975); Ch. 1081, §1, Acts of the 64th G.A. 1972). A person covered by the county indemnification fund is covered for acts occurring subsequent to the date specified in the version of §332.41 appearing in the Code bringing the person under the fund. Appointed county officials are covered by the fund if they fall under the special definition of "officer" under Iowa law or are otherwise "employees" of the county. Volunteer county workers are covered by the fund if the county possesses the requisite right of control over them; whether this right exists in an individual case will depend on the unique facts therein. (Haskins to Hoth, Des Moines County Attorney, 8-31-78) #78-8-27

Mr. Steven S. Hoth, Des Moines County Attorney: You ask our office three questions concerning the county indemnification fund existing under §332.36, 1977 Code of Iowa. Your first question whether the county indemnification fund provides coverage for errors or omissions occurring prior to its effective date. In answering this question, a bit of background is in order.

The statute creating the county indemnification fund was enacted in 1972. See Ch. 1081, §1, Acts of the 64th G.A. (1972). The key provision of the fund

appeared as §332.36, 1973 Code of Iowa, which stated:

"There is created in the office of the treasurer of state a fund to be known as 'the county indemnification fund' to be used to indemnify and pay on behalf of any county treasurer, recorder, auditor, attorney, clerk of court, sheriff, and engineer on matters relating to road and bridge design only, and any deputies, assistants or employees in such offices, all sums that such officers, deputies, assistants or employees are legally obligated to pay because of their negligent acts, errors or omission in the performance of their official duties, except that the first five hundred dollars of each such claim shall not be paid from this fund."

Section 332.36 was amended in 1975. *See* Ch. 189, §1, Acts of the 66th G.A. (1975). Section 332.36, 1977 and 1975 Codes of Iowa, state:

"There is created in the office of the treasurer of state a fund to be known as 'the county indemnification fund' to be used to indemnify and pay on behalf of any elected county officer and any deputies, assistants or employees of the county, all sums that such officer, deputies, assistants or employees are legally obligated to pay because of their errors or omissions in the performance of their official duties, except that the first five hundred dollars of each such claim shall not be paid from this fund."

In 1978, §332.36 was again amended. *See* H.F. 2246, §1, Acts of the 67th G.A. (1978). As so amended, §332.36 now provides:

"There is created in the office of the treasurer of state a fund to be known as 'the county indemnification fund' to be used to indemnify and pay on behalf of any county officer, and township trustee and any deputies, assistants or employees of the county or the township, all sums that such officers, deputies, assistants or employees are legally obligated to pay because of their errors or omissions in the performance of their official duties, except that the first five hundred dollars of each such claim shall not be paid from this fund."

The question of the applicability, time-wise, of the county indemnification fund is governed by §332.41, 1977 Code of Iowa, as amended by H.F. 2246, §3, Acts of the 67th G.A. (1978). That section, as amended states:

"If a final judgment is obtained against any county officer, any township trustee, or any deputies, assistants, or employees of the county of the township *for an act committed subsequent to July 1, 1978,* which is payable from the county indemnification fund the county attorney shall ascertain if any insurance policy exists indemnifying such persons against such judgment or any part thereof. If no insurance exists, or if the judgment exceeds the limits of such insurance the county attorney shall submit a claim to the state comptroller against the county indemnification fund on behalf of the plaintiff to the action for the amount of the judgment exceeding the amount recoverable by reason of such insurance. The state comptroller shall promptly issue a warrant payable to the plaintiff for such amount, and the treasurer of state shall pay the warrant. Such payment shall forever discharge such persons from any and all liability therefor." (Emphasis added)

The clear effect of this section is that the fund provides coverage only for acts (or, in the terminology of §332.36, "errors or omissions") occurring subsequent, and not prior, to a certain date. In effect, the key provision of the county indemnification fund, §332.36, 1977 Code of Iowa, as amended by H.F. 2246, §1, Acts of the 67th G.A. (1978), is accorded a prospective-only construction. This result is consistent with §4.5, 1977 Code of Iowa, which provides that all statutes are to be prospective in application unless expressly made retrospective (which is not the case here). Under §332.41, the key event

is the date of the acts producing liability and not the date of final adjudication of liability. However, given that this is so, the question remains as to what is the statutory cut-off date for coverage.

As it originally appeared, §332.41, in the 1973 Code of Iowa, specified the date "July 1, 1973". It stated as follows:

"If a final judgment is obtained against the county treasurer, recorder, auditor, attorney, clerk of court, sheriff, or engineer in matters relating to bridge or road design only, or any deputies, assistants, or employees in such offices indemnified by such fund for an act committed subsequent to *July 1, 1973,* which is payable from the county indemnification fund, the county attorney shall ascertain if any insurance policy exists indemnifying such persons against such judgment or any part thereof. If no insurance exists, or if the judgment exceeds the limits of such insurance the county attorney shall submit a claim to the state comptroller against the county indemnification fund on behalf of the plaintiff to the action for the amount of the judgment exceeding the amount recoverable by reason of such insurance. The state comptroller shall promptly issue a warrant payable to the plaintiff for such amount, and the treasurer of state shall pay the warrant. Such payment shall forever discharge such persons from any and all liability therefor." (Emphasis added)

As §332.41 appeared in the 1975 and 1977 Codes, the date "July 1, 1975 was specified. In those Codes, §332.41 provided:

"If a final judgment is obtained against any elected county officer, or any deputies, assistants, or employees of the county for an act committed subsequent to *July 1, 1975,* which is payable from the county indemnification fund, the county attorney shall ascertain if any insurance policy exists indemnifying such persons against such judgment or any part thereof. If no insurance exists, or if the judgment exceeds the limits of such insurance the county attorney shall submit a claim to the state comptroller against the county indemnification fund on behalf of the plaintiff to the action for the amount of the judgment exceeding the amount recoverable to the plaintiff for such amount, and the treasurer of state shall pay the warrant. Such payment shall forever discharge such persons from any and all liability therefor. (Emphasis added)

Now, however, in H.F. 2246, the date "July 1, 1978" is specified. Does this mean that a county officer or employee can seek indemnification only for acts occurring after July 1, 1978, even though the officer or employee was covered by versions of the fund found in the 1973, 1975, or 1977 Codes with their earlier effective dates? Were this construction placed on the county indemnification fund, legitimate expectations of coverage engendered by §332.41 as it appeared in prior Codes would be dashed and possible reliance by counties in not obtaining insurance coverage for their officers or employees would be ignored. We cannot believe that the legislature intended such a result. The more reasonable construction of §332.41 is that a county officer or employee seeking indemnification is covered for acts occurring subsequent to that date specified in the version of §332.41 appearing in the Code bringing the officer or employee under the county indemnification fund. Thus, if a county officer was covered by §332.36 as it appeared in the 1973 Code, then the officer is entitled to coverage for his or her acts committed subsequent to July 1, 1973—the date specified in the version of §332.41 appearing in the 1973 Code. Correspondingly, for example, a township trustee, who was brought under §332.36 for the first time only by H.F. 2246, will be covered only for acts committed subsequent to July 1, 1978—the date specified in the version of

§332.41 appearing in H.F. 2246. This construction is further mandated by §4.13(2), 1977 Code of Iowa, which provides that the amendment of statute does not affect any right previously acquired thereunder. In the present case, persons covered by §332.36 acquired a right to indemnification as of the date specified in the version of §332.41 appearing in the Code under which they were first covered. A later change in that date cannot affect these persons.[1]

Your next question is whether appointed officials serving in a county capacity are covered by the county indemnification fund. As §332.36 appeared in the 1977 Code, it stated:

"There is created in the office of the treasurer of state a fund to be known as 'the county indemnification fund' to be used to indemnify and pay on behalf of any *elected* county officer and any deputies, assistants or employees of the county, all sums that such officers, deputies, assistants or employees are legally obligated to pay because of their errors or omissions in the performance of their official duties, except that the first five hundred dollars of such claim shall not be paid from this fund." (Emphasis added)

However, H.F. 2246 struck the word "elected" in the phrase "elected county officer", thereby evincing an intent to cover appointed, as well as elected, county officers. But the word "officer", as it pertains to positions in government, has a special meaning under Iowa law. This meaning is delineated in *Vander Linden v. Crews,* 205 N.W.2d 686, 688 (Iowa 1973):

"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, 71 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. Tylor, supra.*"

Nevertheless, even if an "appointed official", as you refer to him or her, does not meet the special requirements for being an "officer", he or she could still fall under the coverage of the county indemnification fund by reason of being an "employee" of the county under §332.36.

Your final question is whether volunteer workers for the county are covered

[1]Further evidence of the prospective—only coverage of the fund from a certain date is found in §332.40, 1977 Code of Iowa, as amended by H.F. 2246, §2, Acts of the 67th G.A. (1978), which states as follows:

"Any claim for any error or omission of any county officer, any township trustee or any deputy, assistant or employee of the county or the township relating to such matters, committed after *July 1, 1978,* shall be processed in accordance with provisions of chapter 613A and paid from such funds, except that any payment of a claim, except a final judgment, in excess of fifteen hundred dollars shall have the unanimous approval of all members of the state appeal board, the attorney general, and the district court of Polk county." (Emphasis added)

As with §332.41, the date in §332.40 is July 1, 1975 in the 1977 and 1975 Codes and July 1, 1973 in the 1973 Code of Iowa.

by the county indemnification fund. In order to be covered, said question is whether volunteer workers for the county are covered by the county indemnification fund. In order to be covered, such workers would have to be "employees" under §332.36, 1977 Code of Iowa, as amended by H.F. 2246, §1, Acts of the 67th G.A. (1978). Specifically, the issue is whether the presumably unpaid status of volunteer workers precludes them from being considered as "employees". It is well established that the right of control of the manner or work is the principal test of the existence of an employer—employee relationship. *See Bengford v. Carlem Corporation,* 156 N.W.2d 855, 863 (Iowa 1968). The payment of or right to collect a wage is not essential to the existence of a master and servant relationship; it is enough that there is lawful consideration for the employment. *See Crum v. Walker,* 241 Iowa 1173, 44 N.W.2d 701, 704 (1950). The requisite right of control appears to be determinative regardless of whether compensation is paid. Obviously, the existence of such a right will depend on the facts of each case.

To summarize, a person covered by the county indemnification fund is covered for acts occurring subsequent to the date specified in the version of §332.41 appearing in the Code bringing the person under the fund. Appointed county officials are covered by the fund if they fall under the special definition of "officer" under Iowa law or are otherwise "employees" of the county. Volunteer county workers are covered by the fund if the county possesses the requisite right of control over them; whether this right exists in an individual case will depend on the unique facts therein.

August 10, 1978

STATE OFFICERS AND DEPARTMENTS: State Division of Communications, Rules and Regulations. §§18.1, 18.133 and 18.135. The Board of Regents and Department of Transportation are state departments within the meaning of §§18.133 and 18.135. Rules relating to standard communication procedures and policies are mandatory in character and must be followed by all departments and agencies in state government. Communications activities which affect the overall operation of the state's communication system fall within the administrative jurisdiction of the director but only if his involvement is requested. In the case of operational communications activities, the director has no jurisdiction. (Haesemeyer to Gallagher, State Senator, 8-10-78) #78-8-28

Honorable James V. Gallagher, State Senator: You have requested an opinion of the Attorney General with respect to the statutory authority of the State Division of Communications. Specifically you ask:

"1. What is the definition of 'state departments and agencies' as used in Sections 18.133 and 18.135 of the Code? Does the phrase include the department of transportation and institutions governed by the board of regents?

2. Are the rules relating to state communications and standard communication procedures and policies mandated by Section 18.135 binding on 'all departments and agencies of state government' or merely advisory?

3. What constitutes 'state communications'? Is the definition provided in Section 18.133 of the Code all inclusive?

4. Does the following paragraph from Section 18.135 confer mandatory or advisory powers on the division of communications:

'Communication activities of departments of state government which affect the overall operation of state communications shall fall within the

administrative jurisdiction of the director for review and action upon request from any department of state government."?"

Sections 18.133 and 18.135, Code of Iowa, 1977, provide:

"§18.133

Definitions. When used in this chapter, unless the context otherwise requires:

1. 'State communications' means a system to serve communications needs of state departments and agencies.

2. 'Director' means the director of the department of general services or his designee.

3. 'Council' means the communications advisory council.

4. 'Radio and television facility' means transmitters, towers, studios, and all necessary associated equipment for educational broadcasting.

5. 'Board' means the educational radio and television facility board.

§18.135

Rules. The director shall promulgate rules relating to state communications in accordance with the provisions of this chapter. The director shall also adopt and provide for standard communications procedures and policies to be used by all departments and agencies of state government.

Communications activities of departments of state government which affect the overall operation of state communications shall fall within the administrative jurisdiction of the director for review and action upon request from any department of state government.

Communications activities which are operational and the responsibility of a particular department of state government shall continue to fall within the administrative jurisdiction of that department of state government and be financed through its appropriations.

The director and the state educational radio and television facility board shall co-ordinate their activities to achieve the maximum possible cooperation and effective use of the available facilities."

Also pertinent to your inquiry is §18.1, which provides in relevant part:

"When used in this chapter, unless the context otherwise requires:

* * *

6. 'State communications' means a system to serve communications needs of state departments and agencies.

7. 'State agency' means an executive board, commission, bureau, division, office, or department of the state."

It seems to us that the Department of Transportation and institutions governed by the Board of Regents fall within the definition of "state agency" set forth above in §18.1(7). Therefore, those departments are included within the ambit of §§18.133 and 18.135.

The answers to your second and fourth questions involve an interpretation of the meaning to be given §18.135. However, a clear answer to the question of whether or not rules relating to state communications and standard communication procedures and policies are binding on all departments and agencies of

state government or are merely advisory is by no means clear. Nevertheless, in view of the language in the first paragraph of such §18.135, it would be our opinion that rules relating to standard communication procedures and policies are mandatory in character and must be followed by all departments and agencies in state government. Communications activities which affect the overall operation of the state's communication system fall within the administrative jurisdiction of the director but only if his involvement is requested. In addition, the third paragraph of §18.135 makes a distinction between communications activities which are operational and the responsibility of a department and those communications activities which affect the overall operation of state communications. In the case of operational communications activities, it would seem that the director has no jurisdiction.

Your third question is somewhat difficult to understand. The statute contains its own definition of the term "State communications". Section 18.133(1). This definition certainly seems to be quite broad and indeed it may be, as you put it, "all inclusive".

Looking at Division 5 of Chapter 18 and particularly the purpose of that division as stated in §18.132, we would have to say that we discern a legislative intent to create a standardization of communications activities through a cooperative effort of the involved state departments to be coordinated by the director. And it was for that purpose that the advisory council established by §18.136 was established. It is noteworthy that the membership on this council includes representatives from the various state departments (including the Department of Transportation and the Board of Regents) which are involved in communication activities. It is evident from this division that the legislature contemplated that the various departments and agencies would work cooperatively toward the common goal of unification and standardization through rules and regulations adopted by the director with the advice of the advisory council but that individual departments and agencies would have some flexibility in handling their day to day operational requirements and special problems unique to them.

While we appreciate that the answers we have given to your questions may not provide hard and fast rules with respect to the jurisdiction of various involved parties, it would appear that the statute we have before us makes it impossible to do so.

August, 1978

AGRICULTURE

Soybean Promotion Board. §185.29, Code of Iowa, 1977. Proposed use of part of Iowa Soybean Production Fund to move ASA office from Hudson, Iowa to St. Louis is not authorized by contract or otherwise unless it can clearly be shown that such move is "necessary" for research, promotion and education. (Nolan to Coleman, State Senator, 8-9-78) #78-8-4

BANKS AND BANKING

Interest Rates on Savings Accounts. Banks and savings and loans are not allowed to solicit or initiate a pooling arrangement, whereby funds of different depositors would be pooled in order to obtain higher interest rates than would otherwise be allowed. (Garrett to Miller, State Representative, 8-17-78) #78-8-14

CONSERVATION

Eligibility for participation in a cooperative agreement with United States Department of the Interior for the preservation of endangered or threatened species. Chapter 109A, Code of Iowa, 1977. The Endangered Species Act of 1973, 16 U.S.C. Section 1531 et seq. Chapter 109A is in compliance with the Endangered Species Act of 1973, qualifying the Conservation Commission for participation in a cooperative agreement with the Federal government. To comply with Federal law however, the director may not issue a permit for the destruction of an endangered species to reduce damage to property pursuant to Section 109A.8 (Benton to Priewert, Director, Conservation Commission, 8-30-78) #78-8-25

CONSTITUTIONAL LAW

Equal Protection; Insurance; Skilled Nursing Care Coverage. House File 2273, 67th G.A. (1978). House File 2273, which makes the sale and renewal of accident and health insurance policies containing skilled nursing care benefits an unfair trade practice, violates the equal protection requirements of the Constitution of Iowa, Article I, §6, and is unconstitutional in its entirety. (Foudree to Miller, State Representative, 8-25-78) #78-8-17

COUNTIES AND COUNTY OFFICERS

County Road Bridges-Vacation of Road. §306.16, Code of Iowa, 1977. The County Board of Supervisors is not legally required to either replace a washed out bridge or vacate the road. (Baty to Gee, Page County Attorney, 8-10-78) #78-8-10

County Employees; National Guard; Leave of Absence. §§29A.1(5), 29A.1(6), 29A.28, Code of Iowa, 1977. 10 U.S.C. §101(12), 10 U.S.C. §101(24), 32 U.S.C. 101(12), 32 U.S.C., §501, 32 U.S.C. §501(5). A county employee absent from work due to his attending his National Guard unit's annual training encampment is entitled to the benefits provided by §29A.28. (Boecker to Mason, Page County Attorney, 8-17-78) #78-8-16

County Indemnification Fund. §§4.5, 4.13(2), 332.36, 332.40, 332.41, Code of Iowa, 1977, 1975, 1973. House File 2246, §§1,2,3, Acts, 67th G.A. (1978); Chapter 189, §1, Acts, 66th G.A. (1975); Chapter 1081, §1, Acts, 64th G.A. (1972). A person covered by the county indemnification fund is covered for acts occurring subsequent to the date specified in the version of §332.41 appearing in the Code bringing the person under the fund. Appointed county officials are covered by the fund if they fall under the special definition of "officer" under Iowa law or are otherwise "employees" of the county. Volunteer county workers are covered by the fund if the county possesses the requisite right of control over them, whether this right exists in an individual case will depend on the unique facts therein. (Haskins to Hoth, Des Moines County Attorney, 8-31-78) #78-8-27

ELECTIONS

Soil Conservation District Commissioners; Number of Signatures Required on a nomination petition for Soil Conservation District Commissioner. §§45.1, 467A.5(3), Code of Iowa, 1977. The petition of a candidate for Soil Conservation District Commissioner must be signed by at least twenty-five eligible electors of the Soil Conservation District. The two percent formula of §45.1 does not apply to the petition of candidates for Soil Conservation District Commissioner. (Benton to Schnekloth, State Representative, 8-15-78) #78-8-11

Color of Ballot, Voting Machines. §§49.43 and 52.10, Code of Iowa, 1977. Ballots on public measures must be of a color other than white except where such public measures appear on a voting machine in which case white paper must be used. (Haesemeyer to Synhorst, Secretary of State, 8-10-78) #78-8-6

MINORS

Custodian; Department of Social Services; Special Education. §§232.2(9), 281.6, 600A.2(8), Code of Iowa, 1977. Local office of Iowa Department of Social Services, as custodian of minor child, has authority to sign special education agreement for child. Local office of Iowa Department of Social Services should give parent of such child notice of child entering into special education. (O'Meara to Jackson, Director, Division of Field Operations, 8-24-78) #78-8-19

MOTOR VEHICLES

Motorcycle Operation. §321.275, Code of Iowa, 1977. Passengers are prohibited from riding on a motorcycle in front of the operator. There is no express statutory provision stating the number of passengers allowed on a motorcycle. (Dundis to Larson, Commissioner, Department of Public Safety, 8-16-78) #78-8-13

Implements of Husbandry. §321.1(16), Code of Iowa, 1977, as amended by Chapter 103, Acts, 67th G.A. A self-propelled chemical spreader and a truck chassis fitted with equipment specifically designed for spreading fertilizer and agricultural chemicals are implements of husbandry. (Goodwin to Schroeder, State Representative, 8-10-78) #78-8-5

MUNICIPALITIES

Abandoned Vehicles. §§321.89, 364.1, 364.2, 364.3, Code of Iowa, 1977. Although a municipality may set standards higher or more stringent than state law, where those standards are irreconcilable with state law they must fall. (Blumberg to Rush, State Senator, 8-10-78) #78-8-7

Military Leave. §§29A.1(5), 29A.1(6), 29A.28, 29A.43, Code of Iowa, 1977. Weekend training, competitions or other training sessions of a city employee who is a member of the National Guard, if within the definitions of "active state service" and "federal service", and if ordered by the proper authority, fall within §29A.28. (Blumberg to Hansen, State Representative, 8-10-78) #78-8-9

Motel and Hotel Tax. Senate File 336, Acts, 67th G.A. (1978). The question of a motel and hotel tax shall be submitted at a general election. The procedure for getting such a question on the ballot is the same as that for all general elections. April 1, 1979, is the earliest date such a tax can be imposed. The amount of the tax shall be included in the question. The tax can be repealed by the city or county repealing the ordinance or resolution. (Blumberg to Synhorst, Secretary of State, 8-1-78) #78-8-3

Cities and Towns; Counties; Sheriffs; Mutual Assistance; Law Enforcement Contracts. §§28E.3, 748.4, Code of Iowa, 1977. Repeal of §748.4 of the 1977 Code of Iowa does not effect the right of municipalities to enter into mutual assistance for the provision of law enforcement services under the provisions of Chapter 28E of the 1977 Code of Iowa. (Williams to Swanson, Assistant Montgomery County Attorney, 8-29-78) #78-8-21

PUBLIC RECORDS

Confidentiality. §§68A, 68A.1, 684.2, 68A.6, 68A.7, 249A, Code of Iowa,

1977. 42 U.S.C. §§1396 et seq. Information submitted to the Iowa Department of Social Services by intermediate care facilities on financial and statistical report forms as a requirement of participation in title XIX program, may be retained as confidential information and need not be considered as a public record. (Cosson to Rowen, Director, Administrative Services, 8-10-78) #78-8-8

STATE OFFICERS AND DEPARTMENTS

Social Services; Authority to lease beyond appropriation period of one year. §247A.5, Code of Iowa, 1977; Art. VII, §1, Constitution of Iowa. The Department of Social Services has the authority to enter into a lease which extends beyond the time limit of an appropriation as such action does not lend the credit of the State in violation of Article VII, §1 of the Constitution. (Robinson to Wellman, Secretary, Executive Council of Iowa, 8-1-78) #78-8-2

Social Services; Claim reimbursement from county legal settlement. §§252.16, 252.22, 252.23, 252.24, Code of Iowa, 1977. The county providing services to individuals under Title XX of the Social Security Act, has the right to claim reimbursement from the county of the individual's legal settlement for the expense of such service, and this action does not provide a requirement as to duration of residence for those seeking service contrary to federal law. (Robinson to Kopecky, Linn County Attorney, 8-1-78) #78-8-1

Social Services; Iowa Training Schools; Juveniles; Criminal Law. §§242.6, 232.72, 232.73, 242.6, 242.12, 242.13, 246.39, Code of Iowa, 1977. A juvenile committed to an Iowa Training School pursuant to §242.6 should be treated as a juvenile, not as an adult offender; a juvenile committed to an Iowa Training School pursuant to §242.6 is subject to the parole and discharge provisions of §§242.12 and 242.13, and the Training School is not required to maintain the physical custody until expiration of sentence; and if the juvenile is committed to an Iowa Training School, the parole provisions of §242.12 apply rather than the "good time" provisions of §246.39. (Robinson to Hoy, Superintendent, Iowa Training School for Boys, 8-30-78) #78-8-26

Records. §§554.9403, 554.9404, 304.2, 304.8, 343.13, Code of Iowa, 1977. Numerical copy or lapsed or terminated financing statement filed in Uniform Commerical Code Division of Office of Secretary of State may be destroyed one year from the occurrence of the lapse or receipt of termination statement. (Nolan to Farrell, Director, Uniform Commercial Code Division, Office of Secretary of State, 8-3-78) #78-8-22

Board of Nursing; Closed Meetings. §§28A.3, 68A.1, 68A.7, 147.21, Code of Iowa, 1977; §9, Chapter 69, Acts, 67th G.A. (1977); House File 2074, Acts, 67th G.A. (1978). Closed meetings cannot be held for the purpose of discussing statistical data regarding the rank of graduates from the several nursing schools according to their performance on the examination. Such statistical data are public records. (Blumberg to Illes, Executive Director, Board of Nursing, 8-17-78) #78-8-15

Department of Health; Hospital Rate Review Program; Antitrust Exemption. House File 630, Acts, 67th G.A. (1978). §553.6(4), Code, 1977. 15 U.S.C., §1. To qualify for an antitrust exemption, the Iowa Hospital Rate Approval Program requires additional state participation. (Swanson to Middleton, Chief, Division of Health Facilities, 8-25-78) #78-8-18

State Division of Communications, Rules and Regulations. §§18.1, 18.133 and 18.135. The Board of Regents and Department of Transportation are

state agencies within the meaning of §§18.133 and 18.135. Rules relating to standard communication procedures and policies are mandatory in character and must be followed by all departments and agencies in state government. Communications activities which affect the overall operation of the state's communication system fall within the administrative jurisdiction of the director but only if his involvement is requested. In the case of operational communications activities, the director has no jurisdiction. (Haesemeyer to Gallagher, State Senator, 8-10-78) #78-8-28

TAXATION

Valuation of Real Estate Subject to Taxation an Implementation of Equalization Orders. §§428.4, 441.21, 441.49, 441.52, Code of Iowa, 1977. In implementing the final equalization order of the Director of Revenue, the assessor shall not limit his or her actions to merely making the adjustments specified in said order but shall reassess all real estate at its actual value to the end that the assessment of said real estate shall reflect the actual values as of January 1st of the year of reassessment. (Kuehn to Shaff and West, 8-30-78) #78-8-24

Property Tax Exemptions for Forest or Fruit Tree Reservations. §§161.1, 161.12, 161.13, 428.4, 441.22, Code of Iowa, 1977. Where no application for the forest or fruit tree exemption has been properly made for the particular assessment year, the assessor must determine the value of the real estate without regard to whether, in fact, it would otherwise qualify for the tax exemption. (Griger to Folkers, Mitchell County Attorney, 8-29-78) #78-8-20

TOWNSHIPS

Township Halls. §§359.29, 360.1, 360.8, Code of Iowa, 1977. Where a township hall is acquired by gift, an election is not required to levy a tax for repairs and maintenance. (Blumberg to Martin, Davis County Attorney, 8-15-78) #78-8-12

STATUTES CONSTRUED

Code, 1977	Opinion
4.5	78-8-27
4.13(2)	78-8-27
28.A.3	78-8-15
28E.3	78-8-21
29A.1(5)	78-8-16
29A.1(5)	78-8-9
28A.1(6)	78-8-9
29A.1(6)	78-8-16
29A.28	78-8-9
29A.28	78-8-16
29A.43	78-8-9
45.1	78-8-11
49.43	78-8-6
52.10	78-8-6
68A	78-8-8
68A.1	78-8-15
68A.1	78-8-8
68A.2	78-8-8
68A.6	78-8-8
68A.7	78-8-8
68A.7	78-8-15

109A	78-8-25
147.21	78-8-15
161.1	78-8-20
161.12	78-8-20
161.13	78-8-20
185.29	78-8-4
232.2(9)	78-8-19
232.72	78-8-26
232.73	78-8-26
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242.12	78-8-26
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CONSTITUTION OF IOWA

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September 6, 1978

CONSTITUTIONAL LAW: Item Veto, Manner of Exercise. Article III, §16, Constitution of Iowa. In exercising the item veto power, the item vetoed portions of an appropriation bill do not have to be physically removed from the enrolled document and returned to the house of origin and it is sufficient if the Governor's veto message clearly identifies the portions vetoed. The house of origin after entering the vetoed provision on its journal must proceed to reconsider it. (Haesemeyer to Redmond, State Senator, 9-6-78) #78-9-4

The Honorable James M. Redmond, State Senator: Reference is made to your letter of August 30, 1978, in which you request an opinion of the Attorney General with respect to certain questions involving the exercise by the Governor of his item veto power under Article III, §16, Constitution of Iowa. In your letter you state:

"It has been the governor's practice to return only an 'item veto message' to the house of origin and not the actual portion of the enrolled appropriation bill item vetoed. It seems to me that it would be very untidy and unnecessary to require the vetoed portions to be physically removed from the original document and actually returned to the appropriate house. Yet the constitutional language seems to imply that form and not substance must be honored. Accordingly, in an order to clarify this situation, I submit the following questions of law:

"1. Does the item vetoed portions of an appropriation bill have to be physically removed from the enrolled document and returned to the house of origin or is it sufficient that the governor's veto message clearly identify the portions vetoed?

"2. If you find that the Iowa Constitution requires actual physical return of the portion vetoed, does the failure to perform this act invalidate the Governor's item veto?

"The 27th Amendment specifically provides that the procedure for item vetoes 'shall be the same as provided for other bills.' Again, for purposes of clarity, I submit this final question:

"3. Once returned, does the 'same procedure' encompass Article III, Section 16's provision that the house of origin, after entering the vetoed provision on its journal, shall proceed to reconsider it, thus making reconsideration of item vetoes mandatory as per the July 13, 1978 O.A.G.?"

Article III, §16, Constitution of Iowa, as amended by Amendment 4 of the

Amendments of 1968 provides:

"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."

The answer to your first question is found in *State, ex rel Turner v. Iowa State Highway Commission,* 186 N.W.2d 141 (Iowa 1971). In that case, which was the first instance in which the Iowa Supreme Court was called upon to interpret the item veto power, the Governor transmitted the bill in question to the Secretary of State with a letter approving the same with the exception of the item which he had vetoed and in such letter gave his reason for the item veto. No endorsement of any kind was made on the bill itself. The sufficiency of this method of exercising the item veto was specifically raised and argued in the Supreme Court. The Court held:

"We further hold the veto by the Governor and the manner in which he exercised the same, by transmitting the bill to the Secretary of State with a separate letter indicating his disapproval of item 5 was a proper method of indicating his disapproval in vetoing section 5. We find no authority which would indicate such a procedure is not a proper one." 186 N.W.2d 141 at 152.

Thus, in answer to your first question, it is our opinion that the item vetoed portions of an appropriation bill do not have to be physically removed from the enrolled document and returned to the house of origin and that it is sufficient if the Governor's veto message clearly identifies the portions vetoed. It is our understanding that it is now the Governor's practice to endorse his disapproval on the bill itself in addition to sending a separate veto message and certainly this procedure is also valid.

Having answered your first question as we have, it is unnecessary to respond your second inquiry.

In response to your third question, it would be our opinion that where an item of an appropriation bill is vetoed, the same procedure would apply as in the case of a bill which is vetoed in its entirety. In other words, the house of origin after entering the vetoed provision on its journal must proceed to reconsider it. OAG Turner to Redmond, July 13, 1978. In this connection, I should point out that it is the Governor's practice in the case of an appropriation bill one or more items of which are item vetoed, to send the bill to the Secretary of State even though the same may not have been submitted to him during the last three days of the legislative session and that a copy of the veto message which recites the vetoed provisions is sent to the originating house. In our opinion, this is the correct procedure and gives ample notice to the General Assembly of the exercise of the item veto power.

September 7, 1978

STATE OFFICERS AND DEPARTMENTS: Open Public Meetings. House File 2074, Acts, 67th G.A., Second Session (1978). The new open

public meetings law, House File 2074, effective January 1, 1979, does not suffer from the constitutional defects which the Iowa Supreme Court found existed in the present open meetings law insofar as the activities prohibited and criminal sanctions imposed are concerned. (Turner to Redmond, State Senator, 9-7-78) #78-9-5

The Honorable James M. Redmond, State Senator: Reference is made to your letter of August 31, 1978, in which you state:

"As you are undoubtedly aware, the Iowa Supreme Court recently held, in *Knight v. Sedgwick,* that the criminal provisions of the state's open meetings law (Chapter 28A, Code, 1977) cannot be enforced. The Court's conclusion was based upon this chapter's failure to adequately define the conduct which was intended to be proscribed. Thus, the Court declared that the criminal sanctions contained in the act were unconstitutionally vague in violation of the due process clauses of the federal and state constitutions.

"I am curious as to whether Iowa's new open meetings law, House File 2074, which takes effect on January 1, 1979, suffers from these same infirmities.

"Therefore, I would appreciate your reviewing the new law and venturing an opinion as to whether House File 2074 cured the constitutional flaws contained in Chapter 28A as far as the activities prohibited and criminal sanctions are concerned."

On August 30, 1978, the Iowa Supreme Court decided *Knight, et al. v. Sedgwick, No. 199-60980,* and found that the current open meetings law, Chapter 28A, Code of Iowa, 1977, insofar as it imposes criminal sanctions on those who violate its provisions is unconstitutional. In doing so, the Supreme Court distinguished its previous opinions upholding Chapter 28A because all of those cases were civil in nature. *Greene v. Athletic Council of Iowa State University,* 251 N.W.2d 559 (Iowa 1977); *Dobrovolny v. Reinhardt,* 173 N.W. 2d 837 (Iowa 1970); *Anti Administration Association v. North Fayette County Community School District,* 206 N.W.2d 723 (Iowa 1973). The Court noted whereas in these previous civil cases the chapter should be accorded the liberal construction favorable to the public; the same was not the case where criminal penalties were being invoked and that in the latter case a strict construction is appropriate. The Court in *Knight* observed:

"Viewed as a penal enactment under which individuals are to be prosecuted Chapter 28A must satisfy two specific standards:

"(1) It must give a person of ordinary intelligence fair warning of what is prohibited, and

"(2) It must provide explicit standards for those who enforce it."

The Court then found that Chapter 28A did not measure up to these standards and concluded:

"In summary, we find not extrinsic aids of sufficient dimensions to mend the gap in §28A.8. That section does not rise to the permissible level of a generally drawn statute which necessarily leaves some definitional decisions concerning coverage to those potentially regulated. Chapter 28A makes no reference to individual conduct. It does not 'sufficiently specify what those within its reach must do in order to comply.' *Hynes v. Mayor of Oradell,* 425 U.S. 610, 621, 96 S.Ct. 1755, 1761, 48 L.Ed.2d 243, 253 (1976). It violates the vagueness standards referred to above and resultantly deprives plaintiffs of due process."

In its opinion, the Court in *Knight* while specifically refraining from passing on the constitutionality of House File 2074 did briefly consider the new law and noted:

"Finally, we have considered Iowa's new open meetings law, House File 2074, Iowa Legis. Serv. 230 (1978), effective January 1, 1979. Section 7.3 of this revision assesses damages against 'each member of the governmental body who participated in [the act's] violation.' It then excepts those members who prove they voted against the closed session, or who had a good faith belief or reasonably relied upon an attorney's opinion or judicial decision that the meeting was legal."

House File 2074, Acts, 67th General Assembly, Second Session (1978), does, it seems to us, sufficiently describe the individual conduct which is proscribed by the statute. Moreover, it should be noted that House File 2074 does not impose criminal penalties and that therefore the strict standards used by the Iowa Supreme Court in *Knight v. Sedgwick* presumably would not be used in any case challenging the constitutionality of the measure.

Therefore, in answer to your question, it is our opinion that House File 2074 cured the constitutional flaws contained in Chapter 28A as far as the activities prohibited and criminal sanctions are concerned.

September 8, 1978

MOTOR VEHICLES: Passenger and Freight Motor Carrier Safety Rules. §325.38, Code of Iowa, 1977; Administrative Procedures Act, §820-(07,F) 4.9(325). To qualify as exempt from the federal safety regulations adopted in Iowa an operation must operate *wholly within* the designated commercial zone. (Hogan to Shaw, Scott County Attorney, 9-8-78) #78-9-6

Mrs. Elizabeth Shaw, Scott County Attorney: Reference is made to your letter of June 8, 1978, in which you state the following question:

Does the Iowa Code and the Administrative Procedures Act Section 820-(07,F)4.9(325)..."supersede Federal Motor Carrier Safety Regulations Section 204, 49 Stat. 546, as amended, 49 U.S.C. 304, "...regarding an Iowa motor carrier's obligation to carry fire extinquishers?"

Iowa Code §325.38 directs the Department of Transportation to..."establish reasonable requirements prescribing standards of equipment for vehicles operated by motor carriers...pertaining to the following:

* * *

"6. Emergency equipment."

820-(07,F)4.9(325) I.A.C. adopts the rules and regulations promulgated by the federal government published in 49 C.F.R. §§390-397 (1976).

49 C.F.R. §393.1 (1976), from which the Federal Motor Carrier Safety Regulations are taken, states:

(a) General. Except as provided in paragraphs (b)...of this section,...no motor carrier shall operate any vehicle or cause or permit it to be operated unless it is equipped in accordance with said requirements and specifications (including requirements for fire extinguishers).

(b) Intracity Operations. The rules in this part do no apply to a driver or a vehicle wholly engaged in exempt intracity operations as defined in §390.16

of this subchapter.

The definition of exempt intracity operations found in 49 C.F.R. §390.16 (1976), states:

The term "exempt intracity operation" means a vehicle or driver used *wholly* within a municipality or the commercial zone thereof, as defined by the Intrastate Commerce Commission in Part 1048 of 49 C.F.R. Parts 1000 to 1199, revised as of October 1, 1975...(emphasis added). (49 C.F.R. Part 1048.10 provides a detailed description of the exempt commercial zone in and surrounding Davenport, Iowa, and Rock Island and Moline, Illinois. In order to be exempt from the Federal Regulations requiring trucks to carry fire extinguishers and other safety equipment, a vehicle must be used wholly within a municipality or the surrounding commercial zone.)

Wholly is defined as ".... In a whole or complete manner; entirely; completely; perfectly." Black's Law Dictionary 1770 (4th ed. 1968). Ready Mix Concrete Company, the motor company involved herein, does not confine its operations wholly to the commercial zone. Trucks owned and operated by Ready Mix Concrete Company have been seen and cited for the same violations at points outside the commercial zone.

The federal regulations pertaining to safety equipment adopted by 820-(07,F) 4.9(325) I.A.C. pursuant to Iowa Code §325.38 were intended to exempt vehicles used only within specified commercial zones. The exemptions are not for trucks operated both inside and outside the commercial zone. The commercial zone is *not* a haven wherein safety regulations may not be enforced. The exemption for intracity operations is to apply only when a motor carrier is operating entirely within the commercial zone and this is not the case for Ready Mix Concrete Company.

In addition, the appropriate rule of statutory construction states that any exception or exemption in a statute contrary to its stated purpose (safety) must be strictly construed and all doubts resolved in favor of the general provisions. *Durant-Wilton Motors, Inc. v. Tiffin Fire Ass'n,* 164 N.W.2d 829 (Iowa 1969); *Wood Bros. Co. v. Eicher,* 231 Iowa 550, 562 N.W.2d 644, 661 (1942). The fact that some of the trucks owned by Ready Mix Concrete Company have been seen and cited for violations outside the commercial zone creates more than the necessary doubt that Ready Mix confines its operations wholly to the commercial zone.

Accordingly, Ready Mix Concrete Company does not fall into the commercial zone exemption of Iowa Code §325.38, 820-(07,F)4.9(325) I.A.C. and 49 C.F.R. §390.16 (1976) and is not immune from the violations for which it was cited.

September 8, 1978

TAXATION: Authority of Boards of Supervisors Regarding Preparation of Assessment Rolls. §§441.23, 441.26, and 441.27, Code of Iowa, 1977. The board of supervisors has no statutory authority to require the assessor to separately list the value of agricultural land and the value of each building located on such land in the assessment rolls sent to agricultural property taxpayers. (Griger to Schneckloth, State Representative, 9-8-78) #78-9-7

Hon. Hugo Schneckloth, State Representative: You have requested the opinion of the Attorney General regarding whether the county board of

supervisors has the authority to require the county assessor to separately list the value of agricultural land and the value of each building located on such land in the assessment rolls sent to agricultural property taxpayers.

The board of supervisors, acting in such capacity, has been generally held to have no statutory authority over the property listing and valuation functions vested by statute in the assessor. *Read v. Hamilton County,* (1942), 231 Iowa 1255, 3 N.W.2d 597; *Griswold Land & Credit Co. v. County of Calhoun,* (1924), 198 Iowa 1240, 201 N.W. 11.

Section 441.23, Code of Iowa, 1977, provides in relevant part:

"If there has been an increase or decrease in the valuation of the property, or upon the written request of the person assessed, the assessor shall, at the time of making the assessment, inform the person assessed, in writing, of the valuation put upon his property, and notify him, if he feels aggrieved, to appear before the board of review and show why the assessment should be changed."

Section 441.26, Code of Iowa, 1977, as amended by Chapter 43, §21, Acts of 67th G.A., First Session, provides in relevant part:

"The director of revenue shall each year prescribe the form of assessment roll to be used by all assessors in assessing real and personal property, including moneys and credits, in this state, also the form of pages of the assessor's assessment book. Such assessment rolls shall be in such form as will permit entering thereon, separately, the names of all persons, partnerships, corporations, or associations assessed; shall contain a form of oath or affirmation to be administered to each person assessed, and shall also contain a notice in substantially the following form:

"If you are not satisfied that the foregoing assessment is correct, you may file a protest against such assessment with the board of review on or after April 16, to and including May 5, of the year of the assessment, such protest to be confined to the grounds specified in section 441.37. Dated _____ day of _____, 19 ____, _____ County/City Assessor."

The dates specified in the notice sent to the owner of the property in even-numbered years shall contain the dates for filing of protests as provided in Section 441.49.

Such assessment rolls shall be used in listing the property and showing the values affixed to such property of all persons, partnerships, corporations, or associations assessed, which rolls shall be signed by the assessor, detached from the original and delivered to the person assessed if there has been an increase or decrease in the valuation of the property, or upon the written request of the person assessed.

Section 441.27, Code of Iowa, 1977, provides:

"The director of revenue shall from time to time prepare and certify to each assessor such instructions as to a uniform method of making up the assessment rolls as the director of revenue thinks necessary to secure a compliance with the law and uniform returns, which shall be printed upon each assessment roll, and also prepare instructions for the same purpose as to making up the assessment book, which shall be printed thereon."

It is clear from the aforementioned statutes that the assessor, in making the assessment, is required under the circumstances set forth therein to notify the person assessed of the valuation determined by said assessor by delivery to such person of the assessment roll in the form prescribed by the director

of revenue. These statutes do not grant to the board of supervisors the power to prescribe the form or instructions for preparation of the assessment rolls. Indeed, such statutory authority is given to the director of revenue.

It is the opinion of this office that the board of supervisors has no statutory authority to require the assessor to separately list the value of agricultural land and the value of each building located on such land in the assessment rolls sent to agricultural property taxpayers.

September 14, 1978

ELECTIONS: Constitutional Law; United States Senator; Qualifications for Office; Inhabitancy. Article I, §3, Clause 3, Constitution of the United States. §§43.5, 44.4, 44.5, 44.6, Code of Iowa, 1977. Objections under §§44.5 and 44.6 to primary election candidacy of U.S. Senator Dick Clark are inapplicable because Senator Clark is a candidate for nomination under Chapter 43. Moreover, such objections were not timely filed. Federal constitutional qualifications for congressional office exclude all other qualifications and the state constitutions and laws can neither add to nor take away from them. A domicile once established continues until a new one is acquired. The word "residence" used in election statutes and in Article II, §1 of the Constitution means domicile. It is doubtful that a challenge to Senator Clark's qualifications could be successfully mounted on the ground that he is not a resident of Marion, Iowa, or that he filed a false affidavit. (Turner to Synhorst and Koogler, 9-14-78) #78-9-8

Honorable Melvin D. Synhorst, Secretary of State; Honorable Fred L. Koogler, State Representative: You have each requested an opinion of the Attorney General with respect to the same question concerning the legality and propriety on the part of United States Senator Dick Clark in using the address at 1825 8th Avenue in Marion, Iowa, as his residence on nomination papers for the June 6, 1978, primary. On May 17, 1978, Representative Koogler wrote:

"A resident of Marion County, Iowa, has approached me and expressed his concern about the legality and propriety on the part of Senator Dick Clark by using the address at 1825 8th Avenue in Marion, Iowa, as his residence on nomination papers for the June 6, 1978, primary election.

"The gentleman indicates that the property was sold by Richard and Jean Clark to Ronald L. and Dorothy A. Romine on January 30, 1974. In view of that transaction the gentleman is of the opinion that it is improper and unlawful for Senator Clark to use the above address in filing his nomination papers."

Subsequently on May 30, 1978, Secretary of State Synhorst wrote and stated:

"Enclosed are copies of papers which were handed to the Director of Elections in this office by Joe Bertoche at 9:24 a.m., May 30, 1978.

"Your advice is respectfully requested as to what should be done with these documents, and your opinion is further requested relative to the applicability of Chapter 44, Code of Iowa, 1977, and other Code sections cited by Mr. Bertroche to the situation about which Mr. Bertroche has filed an objection.

"It is not my intention to take any action on this whole matter until I have had an opinion from you."

The Notice of Objection filed by Mr. Bertroche pursuant to the provisions of §44.5 and §44.6, Code of Iowa, 1977, are quite lengthy and no useful

purpose would be served by setting them forth at length herein. Suffice it to say that essentially the ground of his objection is that United States Senator Dick Clark does not now and has not since January, 1974, lived at the Marion address mentioned above. §44.4 provides in relevant part:

"Nominations made under the provisions of this chapter and chapter 45 which are required to be filed in the office of the state commissioner shall be filed in that office not more than eighty-five days nor later than five o'clock p.m. on the sixty-seventh day prior to the date of the general election to be held in November;...

"Objection to the legal sufficiency of a certificate of nomination or to the eligibility of a candidate may be filed by any person who would have the right to vote for a candidate for the office in question. Such objections must be filed with the officer with whom such certificate is filed and within the following time:

"1. Those filed with the state commissioner, not less than sixty days before the day of election."

§§44.5 and 44.6, relied upon by Mr. Bertroche, provide as follows:

"44.5 *Notice of objections.* When objections are filed notice shall forthwith be given to the candidate affected thereby, addressed to his place of residence as given in the certificate of nomination, stating that objections have been made to said certificate, also stating the time and place such objections will be considered.

"44.6 *Hearing before state commissioner.* Objections filed with the state commissioner shall be considered by the secretary of state and auditor of state and attorney general, and a majority decision shall be final; but if the objection is to the certificate of nomination of one or more of the above named officers, said officer or officers so objected to shall not pass upon the same, but their places shall be filled, respectively, by the treasuer of state, the governor, and the secretary of agriculture."

It seems to us that Mr. Bertroche's reliance on these provisions of Chapter 44 is misplaced. By its terms, §44.4 relates only to nominations made under the provisions of such Chapter 44 and Chapter 45. Chapter 44 is devoted to nominations by non-party political organizations and Chapter 45 deals with nominations by petition. Senator Dick Clark was a candidate for nomination and was nominated in the primary election on June 6, 1978, as the Democratic candidate for United States Senator. Thus, he was seeking nomination under the provisions of Chapter 43, entitled Nominations by Primary Election. We are unaware of any provisions of Chapter 43 corresponding to §§44.4, 44.5 and 44.6. Accordingly, it is our opinion that such provisions of Chapter 44 are inapplicable to candidacy of United States Senator Dick Clark and that the Secretary of State, Auditor of State and Attorney General had no jurisdiction to entertain the objections filed by Mr. Bertroche.

Further support for this conclusion may be found in the fact that §44.4 prior to 1974 specifically included nominations made under the provisions of Chapter 43 as well as those made under the provisions of Chapters 44 and 45. However, the 65th General Assembly in enacting Chapter 1101, §19, specifically deleted the reference to Chapter 43. We must conclude from this that the deletion was deliberate and that the General Assembly intended that the provisions of §44.4 not be applied to nominations made under Chapter 43. Noteworthy, too, is the fact that §43.5 provides:

"*Applicable statutes.* The provisions of Chapters 39, 47, 48, 49, 50, 51, 52, 53, 56, 57, 58, 59, 61, 62 and 738 shall apply, so far as applicable, to all primary elections, except as hereinafter provided."

If the Legislature had intended to make the provisions of Chapter 44 applicablae to Chapter 43, it would have done so in this section. The omission is significant.

Beyond this and to the extent that Mr. Bertroche sought to have Senator Clark's name omitted from the primary ballot, we do not believe there was any basis for doing so even if §§44.4, 44.5 and 44.6 applied to Senator Clark's candidacy. In the first place, §44.4 requires that objections be filed with the State Commissioner of Elections not less than sixty days before the day of election. Mr. Bertroche's objections were not filed until May 30, 1978, only seven days before the primary election, and thus were not timely. Beyond this, it is clear that §44.4 relates only to objections being filed to nominations for the general election. This is eminently reasonable considering the fact that such §44.4 relates only to nominations made under the provisions of Chapters 44 and 45, nominations which do not have anything to do with the primary election process. Indeed, it is the primary election process under Chapter 43 which results in the *nomination* of major party candidates.

Turning to the question of the legal sufficiency of the residence claimed by Senator Clark in his affidavit of candidacy, we must first look to the relevant provisions of the Constitution of the United States, Article I, §3, Clause 3, Constitution of the United States provides:

"No Person shall be a Senator who shall not have attained to the Age of thirty Years and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of the State for which he shall be chosen."

It is clear from the foregoing that under the federal constitutional scheme of things, the relevant qualification so far as Senator Clark is concerned, i.e., that he be an inhabitant of the State of Iowa, need exist only "when elected" an event which cannot occur until November 7, 1978. Thus, even if he were not at the time he filed his affidavit of candidacy or now an inhabitant of the State of Iowa, Senator Clark could still comply with the federal constitutional requirement by becoming an inhabitant on or before November 7, 1978. To this extent, the question raised is premature.

It is very well settled that the constitutional qualifications for congressional office exclude all other qualifications and that the state constitutions and laws can neither add to nor take away from them. *State, ex rel Davis v. Adams,* Fla. 1970, 238 S.2d 415, *State, ex rel Chavez v. Edmunds,* 1968, 446 P.2d 445, 79 N.M. 578; 39 A.L.R. 3rd 290; *Richardson v. Hare,* 1968, 160 N.W.2d 883, 381 Mich. 304; *Barney v. McCreery,* Cl. & H. El. Cas. 167; *Turney v. Marshall,* 1 Bart. El. Cas. 167; *In re O'Connor,* 1940, 17 N.Y.S.2d 758, 173 Misc. 419; *Danielson v. Fitzsimmons,* 1950, 44 N.W.2d 484, 232 Minn. 149. Thus, to the extent that the Iowa Constitution or laws might seek to add requirements as to residency or inhabitancy of candidates for election to the office of United States Senator beyond those prescribed by the United States Constitution such Iowa laws would be unconstitutional.

Nevertheless, Senator Clark in his affidavit of candidacy has stated under oath that he resides at 1825 8th Avenue, Marion, Iowa. A false statement made under oath constitutes the crime of perjury, a Class D felony. §720.2,

Supplement to the Code of Iowa, 1977. It is not the function of the Office of the Attorney General to adjudicate the guilt or innocence of a crime of anyone, such determinations involving factual matters which are properly and exclusively the province of the courts. Thus, we should not and do not make any determination with respect to the truth of the statements contained in Senator Clark's affidavit of candidacy.

In fairness to Senator Clark, we should add that the Iowa Supreme Court has repeatedly held that a domicile once established continues until a new one is acquired. *Edmundson v. Miley Trailer Co.,* 211 N.W.2d 269 (Iowa 1973); *Gulson v. Gulson,* 255 Iowa 301, 122 N.W.2d 329 (1963); *Ruth & Clark v. Emery,* 233 Iowa 1234, 11 N.W.2d 397 (1943); *In Re Jones Estate,* 192 Iowa 78, 182 N.W. 227 (1921); and cases cited 7A Iowa Digest, p. 313, Domicile, Note 4. As stated in a prior opinion of the Attorney General, 1968 O.A.G. p. 950:

"It is well settled in Iowa that the word 'residence' used in election statutes and Article II, §1 of the Constitution means domicile. *Dodd v. Lorenz,* 210 Iowa 513, 231 N.W. 422 (1930); *Vanderpoel v. O'Hanlon,* 53 Iowa 246, 5 N.W. 119 (1880); *State v. Savre,* 129 Iowa 122, 105 N.W. 387 (1905). The acquisition of residence or domicile necessary to confer the right to vote is largely a matter of intent and the inquiry in each case necessarily becomes a subjective one. *Dodd v. Lorenz,* supra. Matters to consider in determining residence of a person in a particular case are: Where is his home, the home where he lives, and to which he intends to return when absent, or when sick, or when his present engagement ends. *Harris v. Harris,* 205 Iowa 108, 215 N.W. 661 (1927).

"A prior attorney general's opinion, 1911-1912 O.A.G. 710, which appears to be directly in point states:

" 'Your question briefly stated is, whether or not a former resident or citizen of Buchanan County, who is and has been in the employ of the state weighing coal for seven or eight years, and has bought a home and moved his family to Polk County, where his place of employment is located, should vote in Polk or in Buchanan County.

" 'It very frequently occurs that a person may have a domicile in one county to which he intends at some future time to return even though he has had for several years his residence in another county, and the question depends so largely upon the intention of the particular person that it is hard to lay down any definite rule. For instance, Governor Carroll has lived in Des Moines for a number of years and owns his home on Ninth street in which he lives, and yet he returns every year to Bloomfield in Davis County to vote because he claims that as his home and it is his intention to return there when his official duties are completed. The Attorney General also owns his home in Des Moines and while he has lived here several years always returns to Audubon County to vote because he claims that as his domicile. So that in the case about which you inquire if the party still has an intention of returning to Buchanan County when his employment with the state is terminated he would doubtless have a right to vote in that county. On the other hand if he has no intention to return to Buchanan County but intends to remain in Polk County even after his employment with the state is terminated then the proper place for him to vote would be Polk County rather than Buchanan County.' " . . .

Thus, it is doubtful that a challenge to Senator Clark's qualifications could be successfully mounted on the ground that he is not a resident of Marion, Iowa, or that he filed a false affidavit.

September 12, 1978

STATUTES: Construction and Interpretation. §§4.11 and 332.7, Code of Iowa, 1977. Senate File 7, Acts, 67th G.A., First Session (1977) and Senate File 2107, Acts, 67th G.A., Second Session (1978). Senate File 7 and Senate File 2107 both amended §332.7 of the Code. Senate File 7 was effective from January 1, 1978 to July 1, 1978 and the Senate File 2107 was effective from that date on. (Haesemeyer to Redmond, State Senator, 9-12-78) #78-9-9

The Honorable James M. Redmond, State Senator: Reference is made to your letter of August 7, 1978, in which you request an opinion of the Attorney General and state in relevant part:

"In the July 26, 1978, Iowa Supreme Court case of *Redmond v. Ray,* Iowa Supreme Court No. 129-61602, the Court held that the Governor's veto of Senate File 7 Acts of the 1977 General Assembly regular session supplement, page 376a was not timely, therefore ineffective, and '. . . became law when not disapproved before midnight, June 3, 1977.' *Redmond v. Ray, supra,* page 18.

"Senate File 7 is an act relating to contracts and bidding procedures for the repair and construction of county buildings. Essentially it amends Chapter 332 of the Iowa Code, 'Powers and Duties of Supervisors.' Specifically, the bill struck Section 332.7 of the Iowa Code (1977), 'Erection and Repair of Buildings,' and inserted in lieu thereof an entire new section, having three numbered subsections.

"The litigation was still pending when Senator Ray Taylor, a member of the County Government Committee, introduced Senate File 2107 in the 1978 Session of the 67th General Assembly. Senate File 2107 is substantively identical to Senate File 7 with an additional provision expressly requiring the county supervisors to accept the lowest bidder. Senate File 2107 passed both houses of the General Assembly and was signed by the Governor becoming law on July 1, 1978.

"There are now two validly enacted statutes, both repealing and inserting in lieu thereof new language for the twice-repealed Section 332.7 of the Iowa Code (1977). The Senate File 2107 Section 332.7 contains four numbered subsections. Subsections 1 and 2 are identical to Subsections 1 and 2 of Senate File 7's Section 332.7. The Subsection 3's of these two bills are identical in substance and identical in language except for some minor differences in the sentence structure of the last sentence. I have set out the last sentences of each Subsection 3 below for convenience of comparison:

"A. Senate File 7: *However,* the minutes of the meeting of the Board of Supervisors at which expenditures for *emergency* repairs are approved shall contain a statement explaining the need for *emergency* repairs and the reasons why the formal and informal bidding and contracting procedures specified in this section could not be followed.

"B. Senate File 2107: The minutes of the meeting of the Board of Supervisors at which expenditures for *such* repairs are approved shall contain a statement explaining the need for *such* repairs and the reasons why the formal and informal bidding and contracting procedures specified in this section could not be followed.

"The difference between these two subsections are underlined and clearly do not create a substantive difference between the two.

"The obvious substantive difference between these two statutes is Senate File 2107's additional subsection containing the requirement that the lowest reasonable bid be accepted. . . ."

"In order to eliminate any confusion I hereby submit the following questions

to be answered by official Opinion as provided in Subsection (4), Section 13.2 of the Iowa Code (1977):

"1. Are Senate Files 7 and 2107 inconsistent and incompatible?

"2. Which of these two valid enactments of the General Assembly should be considered the operative law of the State of Iowa?"

Since, as you point out, the Iowa Supreme Court held that the Governor's veto of Senate File 7 was not timely and therefore invalid, such Senate File 7 became effective by its own terms on January 1, 1978. It became the operative law of the State of Iowa from that date until July 1, 1978, when the provisions of Senate File 2107 became effective. In our opinion, this matter is controlled by §4.11, Code of Iowa, 1977, which provides:

"Conflicting amendments to same statutes - interpretation. If amendments to the same statute are enacted at the same or different sessions of the general assembly, one amendment without reference to another, the amendments are to be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment by the general assembly prevails." *See also* §4.8.

In our opinion, there can be no question that two acts of the General Assembly both amending the same section of the Code are irreconcilable that therefore Senate File 2107 is presently the operative law of the State.

To summarize, Senate File 7 was effective from January 1, 1978, to July 1, 1978, and the Senate File 2107 was effective from that date on.

September 20, 1978

STATE DEPARTMENTS: SOCIAL SERVICES: PUBLIC RECORDS: ABORTIONS. §§68A.1, 68A.2 and 68A.7, Code of Iowa, 1977. §68A.2. Any citizen has a right to examine and copy, and the news media may publish all records and documents belonging to this state or any political subdivision pertaining to abortions or any other medical services, including the names of the doctors, hospitals, nurses or other persons receiving public funds for such services, the number and kind of any such services and the amount of public funds received by each. Any citizen is entitled to develop therefrom statistical information pertaining to such things as the number, ages, sex, marital status, race or religion of patients treated so long as it may be drawn from the records without revealing the identities of those patients. The Iowa Code does not regulate conclusions which can be drawn from this information and the Department of Social Services has no recourse against misrepresentation by the news media or others of information it is authorized or required to provide. (Turner to Baker, Iowa Department of Social Services, 9-20-78) #78-9-10

Mr. C. Joseph Baker, Director Division of Community Services, Iowa Department of Social Services: Reference is made to your letter of September 15, 1978, in which you state:

"Attached is a copy of the request received from THE GLOBE outlining information they want regarding payment for abortions through Title XIX. The information they are requesting is not general information regarding the total amount paid physicians through Medicaid but specific questions regarding the amount of money paid to physicians and the number of claims submitted by them for abortions. The same request is made for information regarding hospitals.

"The Medical Services Section was informed by Steve Robinson that it was

public information and it would have to be provided if THE GLOBE was willing to pay for the programming. THE GLOBE was willing to pay for the cost and therefore we promptly moved forward to obtain the information for them. In checking the data coming out of the computer we have determined that some of the payments for abortions were made under a procedure code whose description includes miscarriage *or* abortion. Therefore, some of the procedure codes cannot be identified as having been abortions. They can only be identified as being a miscarriage or abortion.

"We are about finished with the data request and I have some specific questions regarding the responsibilities of the Department for release of this information:

"1. What section of the Iowa Code covers the release of this information as public information?

"2. Is there any section of the Iowa Code which covers the conclusions that can be drawn based on the information provided? (i.e. they cannot accurately claim they have a list of either abortionists or abortion payments.)

"3. What is our recourse if THE GLOBE misrepresents the information as having been 'abortions' when a significant number may have been miscarriages?

"The data requested will not be released to THE GLOBE until I have received an official opinion answering my questions."

THE GLOBE to which you make reference describes itself as Northwest Iowa's Catholic Newspaper and is located in Sioux City, Iowa. Steve Robinson is an Iowa Assistant Attorney General.

In answer to your first question, the section of the Iowa Code which covers release of the information which you describe is §68A.2, Code of Iowa, 1977 which provides:

"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 622.46."

Section 68A.7 specifically and expressly enumerates 11 types or classifications of public records which "shall be kept confidential, unless otherwise ordered by a court by the lawful custodian, or by another person duly authorized to release information." Public records of the names of the doctors and the hospitals receiving public funds for medical services of any kind are not listed among those which may be kept confidential. *Expressio unius est exclusio alterius.* See OAG Jackwig to Landess, 11-10-77 and 1968 OAG 237.

Accordingly, subject to paying a charge reasonably related to the actual cost of compiling and copying, any citizen of Iowa has a right to examine and copy, and the news media may publish, all records pertaining to abortions or any other medical services, including the names of the doctors, hospitals, nurses or other persons receiving public funds for such services, the number and kind of any such services performed or provided by each, and the amount of public funds received by each, so far as it may be ascertained from "all records and documents 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." §68A.1, 1968 OAG 656.

Hospital records and medical records of the condition, diagnosis, care or treatment of a *specific* patient or former patient, or out-patient, are to be kept confidential under §68A.7(2) but otherwise any citizen is entitled to develop statistical information pertaining to such things as the number, ages, sex, marital status, race or religion of patients treated so long as it may be drawn from the records without revealing the identities of those patients treated. 1976 OAG 448; OAG 11-10-77, supra.

In answer to your second question, there is no section of the Iowa Code which covers the conclusions which can be drawn based on the information provided. Indeed it would be remarkable if the Iowa General Assembly ever attempted by statute to regulate the conclusions which can be drawn from any information gleaned from public records.

In answer to your third question, there is no recourse which the Department of Social Services has against misrepresentation by the news media or others of information it is authorized or required to provide. The Department is entitled to make public statements pointing out errors, misrepresentations or erroneous conclusions which may be or are being drawn for information released, or explaining the information to avoid misconstructions. But possible misuse of public information or injury to those receiving public funds for their services has never been a legitimate ground for covering up that information in absence of statutory authorization or perhaps a clear and present danger to the state or its citizens.

This is not to say, however, that a doctor falsely characterized as an abortionist would necessarily be left without legal redress. That is a matter to be settled in the courts between him and the publisher.

September 26, 1978

COUNTIES AND COUNTY OFFICERS: Hotel and Motel Tax—S.F. 336, Acts of the 67th G.A. (1978). All residents of a county who are otherwise qualified to vote are entitled to vote on the question of whether a county shall impose a hotel and motel tax. (Blumberg to Synhorst, Secretary of State, 9-26-78) #78-9-11

The Honorable Melvin D. Synhorst, Secretary of State: You requested an opinion from this office on September 11, 1978, regarding Senate File 336, Acts of the 67th G.A. (1978), also known as the Hotel and Motel Tax. You ask with respect to a county imposing the tax, whether all qualified voters of the county are entitled to vote on the measure.

Section One of S.F. 336 provides that cities and counties can levy the tax. When a city imposes the tax it only applies within the corporate boundaries of that city. When imposed by a county, it only applies outside of incorporated areas within that county. The third unnumbered paragraph of that section provides: "A...county shall impose a hotel and motel tax, only after an election at which a majority of those voting on the question favors imposition." This part, read with the provision that a county tax shall only apply to unincorporated areas, creates the problem. That is, who is entitled to vote? Are all qualified electors in the county entitled, or only those residing in the unincorporated areas?

The United States Supreme Court has considered the question of voting rights in relation to equal protection on several occasions. In *Kramer v. Union Free School Dist.,* 1969, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, the question of limiting the vote to certain "interested" individuals was raised. There, a state statute provided that for the election of school board members only those owning or leasing taxable property in the district, their spouses, or parents or guardians of children enrolled in a district school were entitled to vote. The Court stated that statutes granting the franchise to residents on a selective basis pose the danger of denying some citizen an effective voice in governmental affairs which affect their lives. Thus, such statutes must be viewed with respect to a compelling state interest. The issue, as stated by the Court, was whether classifications limiting the vote to those residents primarily interested deny those excluded equal protection. This depends on whether all those excluded are in fact substantially less interested or affected than those included. It was held that the statute in question was unconstitutional.

Cipriano v. City of Houma, 1969, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647, was a similar case. The statute in question authorized municipalities to issue revenue bonds for public utilities. It also provided that the bonds had to be approved at an election at which only the property taxpayers could vote. The city held an election on the revenue bonds, but refused to permit the plaintiff to vote because he was not a property taxpayer, although he was otherwise qualified to vote. The Court, in a Per Curiam opinion, found that nonproperty taxpayers had an interest in the utilities as much as the property taxpayers. The benefits and burdens of the bond issue fell indiscriminately on property owner and nonproperty owner alike. The Court further stated (395 U.S. at 705-706, 23 L.Ed.2d at 651):

Moreover, *the profits of the utility systems' operations are paid into the general fund of the city and are used to finance city services that otherwise would be supported by taxes.* Of course, property taxpayers may be concerned with expanding and improving the city's utility operations; such improvements could produce revenues which eventually would reduce the burden on the property tax to support city services. On the other hand, nonproperty taxpayers may feel that their interests as rate payers indicate that no further expansion of utility debt obligations should be made. Of course, these differences of opinion cannot justify excluding either group from the bond election, when, as in this case, both are substantially affected by the utility operations. For, as we noted in *Carington v. Rash,* 380 U.S. 89, 94, 13 L.Ed.2d 675, 679, 85 S.Ct. 775 (1965), " '[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissable." [Emphasis added]

It was concluded that the statute contained a classification which excluded otherwise qualified voters who were as substantially affected and directly interested in the matter as those permitted to vote. On this basis the statute was declared unconstitutional.

The Court further expanded these principles in *Phoenix v. Kolodziejski,* 1970, 399 U.S. 204, 90 S.Ct. 1890, 26 L.Ed.2d 523. The issue there was substantially the same as *Cipriano,* however, the election was for general obligation bonds rather than revenue bonds. The argument was made that because general obligation bonds were payable from property taxes, only those paying property taxes had a sufficient interest entitling them to vote. The Court stated that *all*

residents had a substantial interest in the public facilities and services available in the city and would be substantially affected by the outcome of the bond election. It also stated (399 U.S. at 209, 26 L.Ed.2d at 527):

Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise.

Salyer Land Co. v. Tulare Water District, 1973, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659, is a case which resulted in a different holding. There, pursuant to a statutory scheme establishing water storage districts for the irrigation of land, only those who were property owners in the district could vote for members of the board, and those votes were apportioned based upon the amount of land owned. The Court distinguished this case from *Kramer, Cipriano* and *Phoenix* in holding that the statute was not unconstitutional. The Court, in effect, found that nonproperty owners in the district did not have substantially the same interests as the property owners. In a sharp dissent, Mr. Justice Douglas, with concurrences by Mr. Justice Brennan and Mr. Justice Marshall, felt that the previous rulings were controlling.

Although we are not concerned here with a statute that disenfranchises certain citizens, we have that possibility by a construction of a statute that is silent on the subject. All residents of the county have a substantial interest in the tax and are affected by it. Section 2(3) of the Act provides that all moneys generated by the tax shall be credited to the general fund of the county. Subsection 4 of that section provides that a county can spend fifty (50) percent of such money for any purpose authorized by law, while the remaining fifty (50) percent must be used for certain facilities listed therein. In either event, the use of that money will affect all residents of the county.

Accordingly, based upon the several Supreme Court decisions discussed above, we are of the opinion that residents of a county who are otherwise qualified to vote are entitled to vote on the question of whether a county shall impose a hotel and motel tax.

September 28, 1978

STATE OFFICERS AND DEPARTMENTS: CHILD ABUSE LAW: §§235 A.1, 235A.5(1) and (2), The Code; H.F. 2404, 67th G.A., 1978 Session. The Child Abuse Law, Chapter 235A, The Code, as amended, does not allow screening of reports. An appropriate investigation of child abuse report does not constitute an invasion of privacy. (Robinson to Gurdin, Protective Services Program Manager, IDSS, 9-28-78) #78-9-12

Ms. Babs Gurdin, Protective Services Program Manager, Iowa Social Services: You recently asked for an opinion as follows:

In regard to the revised Child Abuse Legislation that became effective July 1, 1978 [H.F. 2404, 67th G.A., 1978 Session], the following concerns have been raised:

1. That the policy of investigations of all child abuse referrals constitute an invasion of privacy in those cases that do not fit the criteria of neglect.

2. That the Department should be screening referrals as they are phoned in and that investigations should be conducted on a selected basis.

Despite what may have been the legislative intent that the Department become involved in cases only when a situation in fact constitutes neglect of a child, the law is written in such a way that it does not appear to allow screening of referrals. It states that the Department will investigate and submit reports to the Court, the County Attorney, and the Central Child Abuse Registry.

We agree with your conclusion. The child abuse law, Chapter 235A, The Code, as amended, does not allow screening of referrals. We do not believe "an appropriate investigation" pursuant to §235A.5(1) and (2), The Code, constitutes an invasion of privacy.

The rules of statutory construction to interpret this law as well as others to be cited are well set forth in *Doe v. Ray,* 251 N.W.2d 496, 500-501 (Iowa 1977):

In interpreting these statutes we are guided by familiar principles of statutory construction. Of course, the polestar is legislative intent. *Iowa Dept. of Revenue v. Iowa Merit Employment Comm.,* Iowa, 243 N.W.2d 610, 614; *Cassady v. Wheeler,* Iowa, 224 N.W.2d 649, 651. Our goal is to ascertain that intent and, if possible, give it effect. *State v. Prybil,* Iowa, 211 N.W.2d 308, 311; *Isaacson v. Iowa State Tax Comm.,* Iowa, 183 N.W.2d 693, 695. Thus, intent is shown by construing the statute as a whole. In searching for legislative intent we consider the objects sought to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. *Peters v. Iowa Employment Security Comm.,* Iowa, 235 N.W.2d 306, 310; *Iowa Nat. Indus. Loan Co. v. Iowa State, Etc.,* Iowa, 224 N.W.2d 437, 440. However, we must avoid legislating in our own right and placing upon statutory language a strained, impractical or absurd construction. *Cedar Mem. Park Cem. Ass'n v. Personnel Assoc., Inc.,* Iowa, 178 N.W.2d 343,347.

Finally, we note that in construing a statute we must be mindful of the state of the law when it was enacted and seek to harmonize it, if possible, with other statutes relating to the same subject. *Egan v. Naylor,* 208 N.W.2d 915, 918 and citations.

See also *Schmitt v. IDSS,* 263 N.W.2d 739, 746 (Iowa 1978). When we determine legislative intent, however, we look to what the legislature (as a whole) said rather than what it should or might have said. *In Interest of Clay,* 246 N.W. 2d 263 (Iowa 1976). Also, the language of a statute controls when sufficiently clear in its context and the remarks made in the course of legislative debate or hearings other than persons responsible for the preparation or the drafting of a bill are entitled to little weight. *Ernst and Ernst v. Hochfelder,* 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976).

We recognize that the child abuse definition of §235A.2(2) has been amended to include sexual abuse and neglect. This, however, does not change the legislative intent which is best described in §235A.1 and now reads:

235A.1 LEGISLATIVE FINDINGS—PURPOSE AND POLICY. Children in this state are in urgent need of protection from abuse. It is the purpose and policy of this chapter to provide the greatest possible protection to victims or potential victims of abuse through encouraging the increase reporting of suspected cases of such abuse, insuring the thorough and prompt investigation of these reports, and providing rehabilitative services, where appropriate

and whenever possible to abused children and their families which will stabilize the home environment so that the family can remain intact without further danger to the child.

To carry out this legislative purpose and policy, the legislature first directed an appropriate investigation to be made promptly and they detailed its contents. See §235A5(1) and (2), The Code. It is significant that this part of the law was not amended when the other sections were.

Finally, we will never know if a report of child abuse is valid or not until the appropriate investigation is made. Failure to perform a duty imposed by statute may have serious tort consequences.

September 28, 1978

STATE OFFICERS AND DEPARTMENTS: Child Care Center: Licenses: §§237A.1, 237A.2, 237A.3, Code of Iowa, 1977. A relative may provide child care to any number of children within the proper relationship and not be required to register under §237A.3, The Code. Once a person provides care to more than six children outside the relationship, however, that person must comply with the registration requirements. The departmental rules would apply to *all* children (relatives and nonrelatives alike) and the total number in a facility limited. (Robinson to Jackson, Director, Division of Field Operations, IDSS, 9-28-78) #78-9-13

Mr. Larry Jackson, Director Division of Field Operations, Iowa Social Services: You recently requested an opinion of the Attorney General as follows:

As you are aware, the Department is currently involved in a day care licensure issue with a woman, Ida Rose, in Grinnell. Our concern is over this individual regularly providing care for somewhere between 13 to 20 children....

If an individual is providing care for children of relatives as defined in Chapter 237A, The Code, would those children be included in the count of children in the home? This question would apply to both day care homes and centers. What documentation would a provider be obligated to maintain identifying the relationship to a relative?

If children of relatives are exempt, what would be the logical limits to the number of children who might be exempted?...

What would be the Department's alternatives and sanctions to be imposed if this individual refuses to seek licensure?

The Iowa Supreme Court has said a number of times that the legislature may be its own lexicographer. *Cedar Rapids Comm. School Dist. v. Parr,* 227 N.W.2d 486 (Iowa 1975). This means the legislature may define the terms it uses in writing the various statutes. Chapter 237A provides for the licensing of child care centers and the registration of family day care homes. §§237A.2, 237A.3, The Code. Here the important terms were defined in §237A.1 as follows:

237A.1 Definitions. As used in this chapter unless the context otherwise requires:

* * *

5. *"Child"* means a person under eighteen years of age.

6. *"Relative"* means a person who by marriage, blood or adoption is a parent, grandparent, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, or guardian.

7. *"Child day care"* means the care, supervision, or guidance of a child by a person other than the parent, guardian, relative or custodian for periods of two hours or more and less than twenty-four hours per day per child on a regular basis in a place other than the child's home, but does not include:

* * *

8. *"Child care center"* or *"center"* means a facility providing child day care for seven or more children.

9. *"Family day care home"* means a facility which provides child day care to less than seven children.

10. *"Child day care facility"* or *"facility"* means a child care center or registered family day care home.

11. *"Licensed center"* means a center issued a full or provisional license by the department under the provisions of this chapter or a center for which a license is being processed.

These definitions apply to the registration section which we quote as follows:

237A.3 Registration of family day care homes. A person who operates or establishes a family day care home may apply to the department for registration under the provisions of this chapter. The department shall issue a certificate of registration upon receipt of a statement from the family day care home that the home complies with rules promulgated by the department. The registration certificate shall be posted in a conspicuous place in the family day care home, shall state the name of the registrant, the number of individuals who may be received for care at any one time and the address of the home, and shall include a check list of registration compliances. No greater number of children than is authorized by the certificate shall be kept in the family day care home at any one time. The registration process may be repeated on an annual basis. A facility which is not a family day care home by reason of the definition of child day care in section 237A.1, subsection 7, but which provides care, supervision or guidance to a child may be issued a certificate of registration under the provisions of this chapter.

It is the last few lines of the above statute that gives us the most problems. Once it has been determined that a facility is a family day care home then the rules adopted by the Department of Social Services would apply. In interpreting these sections of the law, we apply the familiar rules of statutory construction as outlined in *Doe v. Ray*, 251 N.W.2d 496, 500-501 (Iowa 1977).

The threshold question is whether or not this facility is "a facility which is not a family day care home by reason of the definition of child day care in section 237A.1 subsection 7." This is specifically recognized as an exception to the registration requirement of §237A.3. In our opinion a relative [a term which includes parent, guardian and others, §237A.1(7)] may provide care, supervision or guidance to any number of children within the proper relationship and still not come within the requirements of registration under §237A.3. By the same statutory sections (above set out) a person or a facility may not provide care supervision or guidance to more than six children outside the relationship without first complying with the registration requirements of

§237A.3.

The next question concerns the rules adopted pursuant to §237A.12 and Chapter 17A, The Code. Rule 770—110.5(5) IAC provides:

110.5(5) The number of children present shall conform to the following standards:

a. No greater number of children shall be received for care at any one time than the number authorized on the registration certificate.

b. The total number of children in the home at any one time shall not exceed six. The provider's children not regularly in school full days shall be included in the total. During times when school is not in session, the provider's school-age children shall not be included in the total.

c. There shall never be more than four children under two years of age present at any one time.

The courts will give weight to administrative interpretations of statutes, particularly when they are of long standing. The plain provisions of a statute, however, cannot be altered by administrative rule. *Schmitt v. I.D.S.S.*, 263 N.W.2d 739, 745 (Iowa 1978).

The departmental rules, of course, do not apply to homes providing care, supervision or guidance to children by a "relative" as that term is defined above. When, however, a person or home provides care, supervision or guidance to more than six children who are not related, then the provisions of §237A.3 (quoted above) apply. This conclusion is based on the following sentence in §237A.3 which is important:

No greater number of children than is authorized by the certificate shall be kept in the family day care home at any one time.

In our opinion, once the home has crossed the threshold of one primarily for relatives to a home qualifying as a "family day care home," it becomes subject to the departmental rules which apply to children of relatives and nonrelatives alike. Children include *all* persons under eighteen years of age. See §§237A.1(5) and 4.1(3), The Code. Thus, the total number of children in the home at any one time could be limited pursuant to the above rule.

This law does not require persons to keep "documentation" on their relatives until such time as the facility qualifies as a family day care home. Before that time, the Department may make sufficient inquiry to satisfy itself as to the relationship of the 13 to 20 children in order to determine whether the statute applies. Our office will assist in this matter if needed. The ultimate authority is the courts and their injunctive power.

Our analysis has been limited primarily to §237A.3 which provides for the registration of family day care homes. Our conclusions would be the same for §237A.2 pertaining to licensing of child day care centers.

September 6, 1978

STATE OFFICERS AND DEPARTMENTS: General Assembly, Member Entitlement to Per Diem and Mileage. §2.10, Code of Iowa, 1977. Members of the General Assembly who served during the 1977 Session are entitled to per diem and expenses for the period May 20, 1977 to June 13, 1977. (Haesemeyer to Light, Acting Secretary of the Senate, 9-6-78)

#78-9-3

Mr. Kevin P. Light, Acting Secretary of the Senate: Reference is made to your letter of July 27, 1978, in which you state:

"In your July 17, 1978 opinion issued in response to questions from Senator Philip B. Hill and Mr. Marvin R. Selden, Jr., you concluded that:

" '...legislators are entitled to the $20.00 per day expense allowance for each and every day the legislature is in session beginning with the first day of the session and ending with the day of final adjournment even though on some of those days the general assembly may actually not be sitting.'

"In light of this opinion, my question to you is whether or not your opinion would apply retroactively to past sessions of the general assembly? For example, last year the Senate adjourned temporarily on Friday, May 20, 1977 to allow time for the enrollment of bills and their presentation to the Governor and returned to adjourn *sine die* on Monday, June 13, 1977 pursuant to Senate Concurrent Resolution 27. Therefore, are the Senators who served during that session legally entitled to receive $20.00 per day for expenses of office for the days between May 20 and June 13, 1977?"

On August 8, 1978, the Iowa Supreme Court decided *Redmond v. Ray,* Civil No. 61602, Petition for Rehearing denied August 28, 1978, a case in which the central issue was the date of final adjournment of the 1977 Session of the General Assembly. The Court concluded that Monday, June 13, 1977, was the final day of the session. Therefore, it is our opinion that the July 17, 1978, opinion of the Attorney General to which you make reference has full application to the period from May 20, 1977 to June 13, 1977, and that senators and representatives who served during the 1977 session are legally entitled to claim and receive $20.00 per day and mileage for that period.

September 6, 1978

TAXATION: Sales Tax on certain activities of Clerks of Court. §§422.43 and 606.15, Code of Iowa 1977. The duties performed by the Clerk of Court under §605.15, Code of Iowa, 1977 do not constitute the sale of tangible personal property under §422.43, Code of Iowa, 1977 when copies of documents are made for participants. However photocopies of documents made by the clerk for third persons would be subject to the Iowa sales tax. (Donahue to Greta, Hardin County Attorney, 9-6-78) #78-9-2

Gordon D. Greta, Hardin County Attorney: This will acknowledge the receipt of your letter in which you requested an opinion of the Attorney General in regard to the possible sales tax liability incurred when a clerk of court renders some service while in the performance of his duties. You asked the following:

"Do any of the services performed by the clerks of court, pursuant to §606.15 Iowa Code (1977) constitute the sale of tangible personal property which would be taxable under §422.43 Iowa Code (1977)?

"Do any of the exemptions provided for in §422.45 Iowa Code (1977) free said sales from the imposition of the sales tax?

"Do any of the services performed by the clerks of court constitute a taxable service as enumerated by §422.43 Iowa Code (1977)?"

Section 422.43 Iowa Code (1977) provides, in pertinent part:

"There is hereby imposed a tax of three percent upon the gross receipts from

all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this division, sold at retail in the state to consumers or users...." (emphasis added)

Initially, we will consider the question of whether the clerks of court are selling tangible personal property consisting of goods, wares, or merchandise. The Iowa Supreme Court in *Ramco, Inc. v. Director, Department of Revenue,* 248 N.W.2d 122 (Iowa 1976) had occasion to deal with that term. In holding that a musical tune did not constitute tangible personal property, the Court, at 248 N.W.2d 124, accepted the following definition:

"Tangible property is that which is visible and corporeal, having substance and body as contrasted with incorporeal property rights such as franchises, choses in action, copyrights, the circulation of a newspaper, annuitities and the like.

* * *

"Thus, 'tangible' personal property would be personal property that can be touched or handled."

Under appropriate circumstances, government entities can engage in sales of tangible goods subject to Iowa retail sales tax. *Des Moines Police Department v. Bair,* CE 3-1591, Polk County District Court November 1, 1976; 1934 O.A.G. 577; 1936 O.A.G. 280; 1938 O.A.G. 592.

It would seem apparent from a review of §606.15 Iowa Code (1977), that only subsection (21) could be considered the sale of tangible personal property. That section provides in part:

"Except in probate matters, the clerk of the district court shall charge and collect...fees,....

* * *

"21. For all copies of records, or papers filed in his office, transcripts, and making complete record, fifty cents for each one hundred words."

Thus, the key determination is whether the clerk's making of photostatic copies of records and papers filed with his office constitutes the sale of tangible personal property.

The Department of Revenue has promulgated certain rules which serve to interpret and explain the sales tax provisions. Particularly applicable to the situation at hand is Departmental Rule 18.16, which reads in part:

"*Photographers and Photostaters* - Tax shall apply to the sale of photographers and photostat copies whether or not produced to the special order of the customer and *to charges for making of photographs or photostat copies out of materials furnished by the customer.*" (emphasis added)

In applying tax statutes and Revenue Department rules, we must be cognizant of judicial determinations made in Iowa or other states. There are no Iowa cases directly on point. The Florida case of *Askew v. Bell,* 1971, 248 So.2d 501 is clearly on point. The *Askew* case deals with imposition of sales tax on the sale of copies of transcripts prepared by a court reporter. The district court of appeal at 248 So. 2d 501 said:

"The trial court found that 'the reporter throughout the entire process is engaged in rendering a service and that the furnishing of any commodity is a mere incident to that service.' The preparation of a transcript is a continuation and completion of the services begun with the recording. We agree."

The Florida District Court of Appeal said in summary at page 502:

"Stated differently, the sales of transcripts are taxable only when the sale is made to third persons who are not parties to the proceedings for which the reporter was engaged."

Hence, the Court reasoned that the making of copies for a fee of transcripts by the court reporter for parties did not constitute the sale of tangible personal property whereas copies for a fee of transcripts by the court reporter for parties did not constitute the sale of tangible personal property whereas the making of copies of existing transcripts for third persons for a fee did constitute the retail sale of tangible personal property subject to Florida sales tax.

There is one Iowa case and an opinion of the Attorney General, which although not directly on point does shed some light on the question of taxability of governmental sales. In *Des Moines Police Department v. Bair,* CE 3-1591, Polk County District Court, 1976, it was held that the police department must charge sales tax in its semi-annual auction sale of stolen and abandoned tangible personal property. In 1938 O.A.G. 492, the Attorney General opined that the Iowa State Printing Board must charge sales tax on the sales of the Code of Iowa and other books sold to private individuals.

Based on the reasoning and decisions above it is the position of this office that photocopies made by the clerk of court under §606.15(21) are not taxable when they are made for a participant in the proceedings enumerated in §606.15. Under such circumstances, the making of photocopies for a fee would be considered only incidental to the service provided by the clerk. See *Booth v. City of New York,* 268 App. Div. 502, 52 N.Y.S.2d 135, (1944) and *Dun & Bradstreet, Inc. v. City of New York,* 276 N.Y. 198, 11 N.E.2d 728 (1937).

The photocopies as set out in §606.15(21) would be taxable as the sale of tangible personal property when they are purchased by third persons who are not parties to the copied proceedings.

There is no statutory exemption which, per se, would exempt from taxation photocopies made by the clerk of court for third parties or persons wanting photocopies made. 1938 O.A.G. 592.

It is the opinion of this office that the duties performed by the clerk under §606.15, Code of Iowa, 1977, do not constitute the sale of tangible personal property taxable under §422.43, Code of Iowa when copies of documents are made for participants. However, photocopies of documents by the clerk for third persons would be subject to the Iowa sales tax.

September 1, 1978

AIRPORT COIMMISSIONS: CITIES AND TOWNS: OFFICER OR EMPLOYEE: CONFLICT OF INTEREST. §§330.21, 362.2(8) and 362.5, Code of Iowa, 1977. No conflict of interest exists merely because the manager of an airport is a majority stockholder of the corporation which is the fixed-base operator of the airport. Under his management contract with the airport commission, the manager is neither an officer nor an employee within the meaning of the conflict of interest statute. (Murray to Lightsey, Director, Aeronautics Division, DOT, 9-1-78) #78-9-1

Mr. James Lightsey, Director, Aeronautics, Division, Department of Transportation: You have asked our opinion on the following question:

Does a conflict of interest exist within the meaning of §362.5, Code of Iowa, 1977, where an airport commission has entered into a contract for the management of the airport operation, when the manager is a majority stockholder in the corporation which is the fixed-base operator of the airport?

In connection with your question, you have supplied us with copies of a lease agreement between the airport commission and the fixed-base operator corporation, the management contract between the manager and the airport commission, and certain relevant minutes of a meeting of the airport commission where these documents were approved by the commission.

Section 362.5, Code of Iowa, 1977, provides in part as follows:

" 'Contract' defined. When used in this section, 'contract' means any claim, account, or demand against or agreement with a city, expressed or implied.

"A city officer or employee shall not have an interest, direct or indirect, in any contract or job 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....

* * *

It is clear from the above quoted statute that the person prohibited from having an interest in a contract with a city must be either a city officer or an employee. The manager of an airport is clearly not a city officer. "Officer" is defined in §362.2(8) as follows:

" 'Officer' means a natural person elected or appointed to a fixed term and exercising some portion of the power of a city."

The manager is not elected or appointed to a fixed term, rather, he renders services to the commission under the terms of a management contract on a year-to-year basis renewable at the discretion of the airport commission.

Is the manager an employee of the airport commission? We think not. One of the documents you have furnished us is titled "Management Contract" and is indicated by a copy of the commission's minutes furnished us. It was properly executed between the airport commission and the manager. A reading of this management agreement clearly indicates that the commission has decided that the day to day operation of the airport is exclusively within the control of the manager. There can be no question that the commission has the right to enter into an agreement of this type as evidenced by the recent case of *Airport Commission for City of Cedar Rapids v. Schade,* 257 N.W.2d 500 (1977). The commission in this case, for reasons of economy of administration, rather than using the city police and fire departments, set up an independent safety force whose members performed many of the duties of police officers and firemen. The Court stated that the powers of an airport commission are outlined in §330.21, Code of Iowa, 1977, and that under that section it was obvious that the airport commission had power to "operate" an airport. It is our opinion that an airport commission, for whatever reason, may determine that the operation of an airport can best be performed by a manager who has expertise in that field, and it has complete authority to enter into a management contract to serve that end.

As we have stated above, the lease with the fixed-base operator and the management contract were executed by the commission after a public hearing and are perfectly valid.

From the documents examined by us, we find no conflict of interest in the dual capacity of the manager who is also a majority stockholder in the corporate fixed-base operator in the contracts executed. The manager is neither an "officer" nor an "employee" within the meaning of §362.5, Code of Iowa, 1977.

September, 1978

CONSTITUTIONAL LAW

Item Veto, Manner of Exercise. Article III, §16, Constitution of Iowa. In exercising the item veto power, the item vetoed portions of an appropriation bill do not have to be physically removed from the enrolled document and returned to the house of origin and it is sufficient if the Governor's veto message clearly identifies the portions vetoed. The house of origin after entering the vetoed provision on its journal must proceed to reconsider it. (Haesemeyer to Redmond, State Senator, 9-6-78) #78-9-4

COUNTIES AND COUNTY OFFICERS

Hotel and motel tax. Senate File 336, Acts, 67th G.A. (1978). All residents of a county who are otherwise qualified to vote are entitled to vote on the question of whether a county shall impose a hotel and motel tax. (Blumberg to Synhorst, Secretary of State, 9-26-78) #78-9-11

ELECTIONS

Constitutional Law; United States Senator; Qualifications for Office; Inhabitancy. Article I, §3, Clause 3, Constitution of the United States; §§43.5, 44.4, 44.5, 44.6, Code of Iowa, 1977. Objections under §§44.5 and 44.6 to the primary election candidacy of U.S. Senator Dick Clark are inapplicable because Senator Clark is a candidate for nomination under Chapter 43. Moreover, such objections were not timely filed. Federal constitutional qualifications for congressional office exclude all other qualifications and the state constitutions and laws can neither add to nor take away from them. A domicile once established continues until a new one is acquired. The word "residence" used in election statutes and in Article II, §1 of the Constitution means domicile. It is doubtful that a challenge to Senator Clark's qualifications could be successfully mounted on the ground that he is not a resident of Marion, Iowa or that he filed a false affidavit. (Turner to Synhorst, Secretary of State and Koogler, State Representative, 9-14-78) #78-9-8

MOTOR VEHICLES

Passenger and Freight Motor Carrier Safety Rules. §325.38, Code of Iowa, 1977; Administrative Procedures Act, §820-(07,F) 4.9(325). To qualify as exempt from the federal safety regulations adopted in Iowa, an operation must operate *wholly within* the designated commercial zone. (Hogan to Shaw, Scott County Attorney, 9-8-78) #78-9-6

STATE OFFICERS AND DEPARTMENTS

Open Public Meetings. House File 2074, Acts, 67th G.A. (1978). The new open public meetings law, HF 2074, effective January 1, 1979, does not suffer from the constitutional defects which the Iowa Supreme Court found existed in the present open meetings law insofar as the activities prohibited and criminal sanctions imposed are concerned. (Turner to Redmond, State Senator, 9-7-78) #78-9-5

General Assembly, Member Entitlement to Per Diem and Mileage. §2.10, Code of Iowa, 1977. Members of the General Assembly who served during the

1977 session are entitled to per diem and expenses for the period May 20, 1977 to June 13, 1977. (Haesemeyer to Light, Acting Secretary of the Senate, 9-6-78) #78-9-3

Social Services; Public Records; Abortions. §§68A.1, 68A.2, 68A.7, Code of Iowa, 1977. §68A.2. Any citizen has a right to examine and copy, and the news media may publish, all records and documents belonging to this state or any political subdivision pertaining to abortions or any other medical services, including the names of doctors, hospitals, nurses or other persons receiving public funds for such services, the number and kind of any such services and the amount of public funds received by each. Any citizen is entitled to develop therefrom statistical information pertaining to such things as the number, ages, sex, marital status, race or religion of patients treated so long as it may be drawn from the records without revealing the identities of those patients. The Iowa Code does not regulate conclusions which can be drawn from this information and the Department of Social Services has no recourse against misrepresentation by the news media or others of information it is authorized or required to provide. (Turner to Baker, Iowa Department of Social Services, 9-20-78) #78-9-10

Airport Commission; Cities and Towns; Officer or Employee; Conflict of Interest. §§330.21, 362.2(8), 362.5, Code of Iowa, 1977. No conflict of interest exists merely because the manager of an airport is a majority stockholder of the corporation which is the fixed-base operator of the airport. Under his management contract with the Airport Commission, the manager is neither an officer nor an employee within the meaning of the conflict of interest statute. (Murray to Lightsey, Aeronautics Division, D.O.T., 9-1-78) #78-9-1

Child Care; Licenses. §§237A.1, 237A.2, 237A.3, Code of Iowa, 1977. A relative may provide child care to any number of children within the proper relationship and not be required to register under §237A.3. Once a person provides care to more than six children outside the relationship, however, that person must comply with the registration requirements. The departmental rules would apply to *all* children (relatives and nonrelatives alike) and the total number in a facility limited. (Robinson to Jackson, Director, Division of Field Operations, IDSS, 9-28-78) #78-9-13

Child Abuse Law. §235A.1, 235A.5(1), (2), Code of Iowa, 1977; House File 2404, 67th G.A., 1978. The child Abuse Law, Chapter 235A, as amended, does not allow screening of reports. An appropriate investigation of a child abuse report does not constitute an invasion of privacy. (Robinson to Gurdin, Protective Services Program Manager, IDSS, 9-28-78) #78-9-12

STATUTES

Construction and Interpretation. §§4.11, 332.7, Code of Iowa, 1977. Senate File 7, Acts, 67th G.A. (1977) and Senate File 2107, Acts, 67th G.A. (1978). Senate File 7 and Senate File 2107 both amended §332.7 of the Code. Senate File 7 was effective from January 1, 1978 to July 1, 1978 and the Senate File 2107 was effective from that date on. (Haesemeyer to Redmond, State Senator, 9-12-78) #78-9-9

TAXATION

Authority of Boards of Supervisors Regarding Preparation of Assessment Rolls. §§441.23, 441.26, 441.27, Code of Iowa, 1977. The board of supervisors has no statutory authority to require the assessor to separately list the value of agricultural land and the value of each building located on such land in the

assessment rolls sent to agricultural property taxpayers. (Griger to Schneckloth, State Representative, 9-8-78) #78-9-7

Sales Tax on Certain Activities of Clerks of Court, §§422.43, 606.15, Code of Iowa, 1977. The duties performed by the Clerk of Court under §605.15 do not constitute the sale of tangible personal property under §422.43 when copies of documents are made for participants. However, photocopies of documents made by the clerk for third persons would be subject to the Iowa sales tax. (Donahue to Greta, Hardin County Attorney, 9-6-78) #78-9-2

STATUTES CONSTRUED

Code, 1977	Opinion
2.10	78-9-3
4.11	78-9-9
43.5	78-9-8
44.4	78-9-8
44.5	78-9-8
44.6	78-9-8
68A.1	78-9-10
68A.2	78-9-10
68A.7	78-9-10
235A.1	78-9-12
235A.5(1)	78-9-12
235A.5(2)	78-9-12
237A.1	78-9-13
237A.2	78-9-13
237A.3	78-9-13
325.38	78-9-6
330.21	78-9-1
332.7	78-9-9
362.2(8)	78-9-1
362.5	78-9-1
422.43	78-9-2
441.23	78-9-7
441.26	78-9-7
606.15	78-9-2

67th GENERAL ASSEMBLY

Senate File 7	78-9-9
Senate File 336	78-9-11
Senate File 2107	78-9-9
House File 2074	78-9-5
House File 2404	78-9-12

CONSTITUTION OF IOWA

Article III, §16	78-9-4

CONSTITUTION OF UNITED STATES

Article I, §3, Clause 3	78-9-8

October 6, 1978

ENVIRONMENTAL PROTECTION: Federally Mandated Pretreatment Program — Chapter 455B, 1977 Code of Iowa, and Title 400, Iowa Administrative Code: Iowa law requires amendment before complete adoption of this federal program although virtually all program elements may be initiated prior to such amendment. (Davis to Crane, Executive Director, Department of Environmental Quality, 10-6-78) #78-10-1

Mr. Larry E. Crane, Director, Iowa Department of Environmental Quality: In response to your request for an opinion of the Attorney General and the detailed questions posed by the Environmental Protection Agency, we have reviewed the laws of Iowa and hereby issue the following:

ATTORNEY GENERAL'S PRETREATMENT STATEMENT

I hereby certify that in my opinion the laws of the State of Iowa provide adequate authority to carry out those aspects of a State pretreatment program, as required by 40 CFR 403, indicated below. I have noted those authorities which are contained in lawfully enacted or promulgated statutes or regulations in full force and effect on the date of this statement. I have also noted those authorities which the State currently is not capable of implementing. All statutory reference, unless otherwise specified, are to the 1977 Code of Iowa and all rule references are to Title 400 of the Iowa Administrative Code. CWA refers to the federal Clean Water Act.

1. Authority to apply Categorical Pretreatment Standards for Industrial Users

State law provides authority to apply to industrial users of Publicly Owned Treatment Works pretreatment effluent standards and limitations promulgated under section 307(b) and (c) of the CWA as amended including prohibitive discharge standards developed pursuant to 40 CFR §403.5 (general pretreatment regulations).

[Federal Authority CWA sections 307, 510 and 40 CFR §§403.5, 403.8, 403.10.]

Remarks of the Attorney General:

Authority *does* exist under §§455B.32(2) and the department has adopted Rule 17.2 to facilitate adoption of federal pretreatment standards and has already adopted certain pretreatment standards in Rules 17.1(6), 17.1(7), 17.4(2) and 17.6(4).

2. Authority to Apply Pretreatment Requirements in Permits for Publicly Owned Treatment Works (POTW)

State law provides authority to apply in terms and conditions of permits issued to Publicly Owned Treatment Works the applicable requirements of section 402(b) (8) of the CWA as amended and 40 CFR part 403 including:

(a) A compliance schedule for the development of a POTW pretreatment program as required by 40 CFR §403.8(d);

(b) The elements of an approved POTW pretreatment program as required by 40 CFR §403.8(c);

(c) A modification clause requiring that the Publicly Owned Treatment Works' permit be modified or alternatively revoked and reissued after the

effective date for approval of the State pretreatment program to incorporate into the Publicly Owned Treatment Works' permit an approved POTW pretreatment program or a compliance schedule for developing a POTW pretreatment program in accordance with the requirements of 40 CFR 403.10(d);

(d) Prohibitive discharge limitations applicable to industrial users as required by 40 CFR §403.5; and

(e) Demonstrated percentages of removal for those pollutants for which a removal allowance was requested in accordance with the requirements of 40 CFR §403.7;

[Federal Authority: CWA sections 402(b)(1)(A), 402(b)(1)(C), 510; 40 CFR §§124.45, 403.8, 403.10]

Remarks of the Attorney General:

Authority *does* exist under §§455B.32(2) and (3), 455B.33(4) and 455B.45, and in Chapter 17 of Title 400 Iowa Administrative Code, Rule 19.6(5)(d) and 19.3(5).

3. Authority to Require Information Regarding the Introduction of Pollutants into Publicly Owned Treatment Works

State law provides authority to require in permits issued to publicly owned treatment works conditions requiring the permittee to:

a. Give notice to the State permitting agency of new introductions into such works of pollutants from any source which would be a new source as defined in section 306 of the CWA if such source were discharging pollutants directly to State waters;

b. Give the State notice of 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;

c. Give the State notice of 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; and

d. Identify in terms of character and volume of pollutants any significant source introducing pollutants subject to pretreatment standards under section 307(b) of the CWA as amended.

[Federal Authority: CWA sections 402(b)(8); 40 CFR §§124.45(d), 403.8, 403.10]

Remarks of the Attorney General:

Authority *does* exist under §§455B.32(3) and (9), 455B.33(4) and 455B.45 and Chapter 18 of Title 400 Rule 19.3(5), 19.6(5)(d).

4. Authority to Make Determinations on Requests for Pretreatment Program Approval and Removal Allowances

State law provides authority to approve and deny:

a. Requests for POTW pretreatment program approval in accordance with the requirements of 40 CFR §§403.8(f) and 403.11; and

b. Requests for authority to reflect removals achieved by the Publicly Owned Treatment Works in accordance with the requirements of 40 CFR §§403.7,

403.10(f)(1) and 403.11.

[Federal Authority: CWA sections 307(b), 402(b)(8); 40 CFR §§403.7, 403.8, 403.10, 403.11]

Remarks of the Attorney General:

Authority *does* exist under §§455B.32(2), §455B.33(4) and 455B.45, and Rule 17.6(4)(a).

These are not direct authority, but any program adopted for permittees is authorized. Direct legislation in this area would resolve any ambiguities.

5. *Authority to Make Determinations on Categorization of Industrial Users and Requests for Fundamentally Different Factors Variances*

State law provides authority to:

a. Make a determination as to whether or not an industrial user falls within a particular industrial subcategory in accordance with the requirements of 40 CFR §403.6; and

b. Deny and/or recommend approval of requests for Fundamentally Different Factors variances for industrial users as required by 40 CFR §§403.10 (f)(1) and 403.13.

[Federal Authority: CWA sections 402(b)(1)(A), 402(b)(8), 510; 40 CFR §§403.6, 403.10, 403.13]

Remarks of the Attorney General:

Authority probably *does not* exist due to industrial user permit prohibition in §455B.45 although language could be extended to make the program possible.

The following statutory/regulatory changes need to be made:

I recommend the repeal or modification of the second sentence of §455B. 45(3).

The Commission or Director could probably make a determination pursuant to question 5a above on application of a permittee but has no direct authority over pretreament operators other than establishing pretreatment standards under §455B.32(2) and inspection, monitoring, record keeping and reporting under §455B.32(9) and Rule 17.7 and 17.8 and Rule Chapter 54.

6.*Authority to Apply Recording, Reporting and Monitoring Requirements*

State law provides authority to:

a. Require any industrial user of a publicly owned treatment works to:

(1) Submit the report required by 40 CFR 403.12(b) which:

a. Sets forth basic information about the industrial user, (e.g., process, flow);

b. Identifies the characteristics and amount of the wastes discharged by the industrial user to the POTW; and

c. Proposes a schedule by which any technology and/or operation and maintenance practices required to meet pretreatment standards will be installed;

(2) Submit the reports required by 40 CFR §403.12(c) which account for the industrial user's progress in installing any required pretreatment or operation and maintenance practices;

(3) Submit the report required by 40 CFR §403.12(d) following the final compliance date for the applicable pretreatment standard; and

(4) Submit periodic reporting on continued compliance with applicable pretreatment standards as required by 40 CFR §403.12(e);

b. Require POTW subject to the requirements of 40 CFR §403.8(a) to:

(1) Report on progress in developing an approvable POTW pretreatment program as required by 40 CFR §403.12(h); and

(2) Report on continued compliance with any authorized modifications of categorical pretreatment standards as required by 40 CFR §403.7, 403.12(i) and (j);

c. Require POTW subject to the requirements of 40 CFR §403.8(a) and all industrial users subject to pretreat-standards to:

(1) Establish and maintain records as required by 40 CFR §403.12(n);

(2) Install, calibrate, use and maintain monitoring equipment or methods (including where appropriate biological monitoring methods) necessary to determine continued compliance with pretreatment standards and requirements;

(3) Take samples of effluents (in accordance with specified methods at such locations, at such intervals, and in such manner as may be prescribed); and

(4) Provide other information as may reasonably be required.

[Federal Authority: CWA section 308(a) and (b), 402(b)(2), 402(b)(9); 40 CFR §§124.45(c), 124.61-63, 124.73(d), 403.7, 403.8, 403.10, 403.12]

Remarks of the Attorney General:

Authority *does not* exist for the Iowa Department of Environmental Quality to require any industrial user of a POTW to do anything except comply with pretreatment standards and report on such compliance. Compliance with question a(1)(a) and (b) and a(4) may be required under §455B.32(9).

Authority *does* exist for the Iowa Department of Environmental Quality to require POTW and industrial users to make such reports as are necessary under *b* and *c* of this question under §§455B.32(9), 455B.33(4) and 455B.45(3), and Chapter 18 of Title 400, Iowa Administrative Code and Rule 19.3(5) and 19.6(5)(d).

A POTW could require compliance with the requirements questioned herein, in its contract with an industrial user and the Iowa Department of Environmental Quality has authority to proceed in enforcement actions under §455B.49.

7. *Authority to apply Entry, Inspection and Sampling Requirements*

State law provides authority to enable authorized representatives of the State, and POTW with approved pretreatment programs, upon presentation of such credentials as are necessary to:

(1) Have a right of entry to, upon, or through any premises of a POTW

or of an industrial user of a POTW 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 a POTW resulting from the activities or operation of the POTW or industrial user.

[*Federal Authority:* CWA section 308(a) and (b), 402(B)(2), 402(b)(9); 40 CFR §§124.45(c), 124.61-63, 124.73(d), 403.7, 403.8, 403.10, 403.12]

Remarks of the Attorney General:

Authority *does* exist for entry, inspection and monitoring of a POTW under §§455B.3(8), 455B.32(5), (6), (9), and 455B.33(2).

Rules for inspection, monitoring, record keeping and reporting from industrial users of a POTW may be established under §455B.32(9).

8. *Authority to Issue Notices, transmit Data, and Provide Opportunity for Public Hearings and Public Access to Information*

State law provides authority to comply with requirements of 40 CFR §403.11 to:

a. Notify the public, affected states and appropriate governmental agencies of:

(1) requests for POTW pretreatment program approval; and

(2) approval of POTW pretreatment programs;

b. Transmit such documents and data to and from the United States Environmental Protetion Agency and to other appropriate governmental agencies as may be necessary;

c. Provide an opportunity for public hearing, with adequate notice thereof, prior to ruling on applications for POTW pretreatment program approval; and

d. Ensure that rquests for POTW pretreatment program approval and all comments received pertaining to these requests for program approval are available to the public for inspection and copying.

[Federal Authority: 40 CFR §403.11]

Remarks of the Attorney General:

Authority *does* exist under §§455B.32(5) and (6) and 455B.36 and Chapter 68A.

Notice, public participation and access provisions for NPDES modifications could seem to apply and are covered in Rule 19.5 and Rule 51.1.

9. *Authority to Enforce Against Violations of Pretreatment Standards and Requirements*

State law provides authority to:

a. Enforce against violations by industrial users and POTW of:

(1) Permit Requirements;

(2) National categorical pretreatment standards;

(3) Prohibitive discharge limitations developed in accordance with 40 CFR §403.5;

(4) Requirements for recording, reporting, monitoring, entry, inspection and sampling;

b. Enforce against violations described in paragraph (a) above using enforcement mechanisms which include the following:

(1) Injunctive relief;

(2) Civil and criminal penalties and fines which are comparable to the maximum penalties and amounts recoverable under section 309 of the CWA or which represent an actual and substantial economic deterrent to the actions for which they are assessed or levied.

[*Federal Authority:* CWA section 309, 402(b)(7), 402(h); 40 CFR §§403.8, 403.10]

Remarks of the Attorney General:

Authority *does not* exist to enforce violations by industrial users of permit requirements since there is a statutory prohibition against such permits in §455B.45(3).

Authority *does* exist to enforce other requirements, assuming adoption of the federal standards pursuant to Rule 17.2 of Title 400, I.A.C., under §§455B.34 and 455B.49.

The executive director has authority to issue administrative compliance orders under §455B.43. His inspection authority under §§455B.3(8) and 455B.33(2) also bears upon the enforcement ability of the department.

October 9, 1978

MUNICIPALITIES: Zoning—§§362.2(13), 384.81, 384.84, and 414.23, Code of Iowa, 1977. Wherever a county has adopted zoning ordinances a city cannot extend its zoning powers beyond its limits. A city is not required to extend water and sewer service beyond its limits. (Blumberg to Merritt, State Senator, 10-9-78) #78-10-2

The Honorable Milo Merritt, State Senator: We have your opinion request of August 11, 1978. You ask whether the city zoning board or the county zoning board have jurisdiction within the two mile limits outside of a city. In addition, you ask whether the city should be required to run sewer and water into that area if it has jurisdiction.

Section 414.23, 1977 Code of Iowa, provides that a city may extend its zoning powers to an unincorporated area up to two miles beyond its limits, *except* for those areas within a county where a county zoning ordinance exists. Where a municipality has so extended its powers, and the county then adopts zoning ordinances, the municipalities' powers shall terminate within three months. Thus, in answer to your first question, if a county has zoning ordinances, a municipality cannot extend its zoning powers beyond its limits to those areas covered by the county.

Section 384.81 of the Code makes mention of a municipality operating a

utility system "within or without its corporate limits". Section 384.84 (2) provides that the governing body of a city utility may, among other things, contract with other governmental bodies for use of a city's utility services, or contract with *persons* and other governmental bodies for the purchase or sale of water and the like. Thus, a municipality may extend water and sewer service beyond its limits. "May", pursuant to §362.2 (13), merely confers a power, not a duty. Therefore, even though a municipality may extend utility services beyond its boundaries, it is not required to do so.

Accordingly, we are of the opinion that wherever a county has zoning ordinances a municipality cannot extend its zoning powers beyond its limits. A municipality is not required to extend water and sewer service beyond its limits.

October 12, 1978

STATE OFFICERS AND DEPARTMENTS: Department of Transportation; Municipalities; Contracts; Highways; Constitutional Law; Police Power. §§306.1(2)(a), 306.3(2), 306.4, 306A.2, 306A.3, 306A.7, 321.236(1), Code of Iowa, 1977. Pursuant to §306A.7, the Department of Transportation and cities may enter into valid agreements to improve primary road extentions as controlled-access facilities which include provisions with regard to the regulation of parking. In so doing, the police power of the state and the city to regulate parking on highways would not be surrendered by contract but only limited in its exercise as authorized by statute. (Mull to Bisenius, State Senator, 10-12-78) #78-10-3

The Honorable Stephen W. Bisenius, State Senator: This is in reply to your request for an opinion of the Attorney General regarding the validity of the provisions with respect to parking of a proposed agreement between the Iowa Department of Transportation and the City of Cascade for replacing a bridge. You request an opinion on the following questions:

1. "[D]oes this contract prevent future decisions by the Department of Transportation, particularly in regard to eminent domain, that this parking, in fact may be eliminated[?]"

2. "Is this contract binding for future decision of the Department of Transportation as to parking along the streets of the City of Cascade?"

Highway U.S. 151 runs through the City of Cascade and spans the Maquoketa River with a two lane bridge. In the vicinity of the bridge, the width of the highway is adequate for four lanes of traffic. East of the bridge the four lanes are open to traffic. West of the bridge lies Cascade's central business district where the two inside lanes are open to traffic and the two outside lanes are utilized for parallel parking.

Highway authorities believe the existing bridge should be replaced. A proposed preconstruction project agreement between Cascade and the Iowa Department of Transportation has been prepared for replacing the existing bridge with a four lane bridge.

Your letter notes that: "The City of Cascade is concerned that with the widening of their existing bridge to a four lane bridge, it may require the vacating of existing parking along the streets of Cascade in the future."

The paragraph of the proposed agreement relating to parking reads as follows:

"In accordance with 306A of the 1977 Code of Iowa, the City does hereby

establish Primary Road No. U.S. 151 as a Class III highway on which through traffic is given primary consideration. Additions or modifications shall be accomplished in accord with applicable rules and regulations, and *parking shall be prohibited on this Project. With reference to future use of Primary road No. U.S. 151 within the City. State and City agree that, except for that portion of said highway from the centerline of Piere Street S.W. to the centerline of Fillmore Street, S.E., parking will not be eliminated from any other portion of said highway not included in the Project without the concurrence of both State and City."* (Emphasis added.)

With regard to parking, the above-quoted clause purports to provide for the following:

(1) prohibiting parking on the project which includes the bridge and the approaches of 77 feet on the west and 46 feet on the east;

(2) except for a specified portion, parking elsewhere on the highway within Cascade will not be eliminated without the concurrence of the Department of Transportation and Cascade.

Your initial question concerns the effect of the proposed agreement on the eminent domain power of the state. Eminent domain is the inherent power of the sovereign to take property for public use without the consent of the owner. *Hinrichs v. Iowa State Highway Commission,* 1967, 260 Iowa 1115, 152 N.W.2d 248; *Reter v. Davenport, R.I. & N.W. Ry Co.,* 1952, 243 Iowa 1112, 54 N.W. 2d 863; Nichols, *On Eminent Domain,* Sec. 1.11 (3d ed. 1976). The general rule is that as an essential attitude of sovereignty, the state cannot even partially bargain away the power of eminent domain by any form of contract. *Herman v. Board of Park Commissioners of Boone,* 1925, 200 Iowa 1116, 206 N.W. 35 (contract made by park commissioners not to take any more property through eminent domain held absolutely void); Nichols, *On Eminent Domain,* Sec. 1.141[3] (3d ed. 1976). The provisions of the proposed agreement with respect to parking do not refer to eminent domain, nor would an additional taking of right-of-way be necessary to provide for four lanes of through traffic. Therefore, the parking provisions of the proposed agreement would not limit any power of eminent domain of the Department of Transportation.

Moreover, the regulation of parking on existing streets is generally considered an exercise of the police power rather than eminent domain. See §321.236(1), Code of Iowa, 1977. The police power is the power of the sovereign to legislate on behalf of the public health, morals or safety by general regulations reasonably adapted to the end sought. *State v. U.S. Express Co.,* 1914, 164 Iowa 112, 145 N.W. 451; *Hubbell v. Higgins,* 1910, 148 Iowa 36, 126 N.W. 914. Nichols, *On Eminent Domain,* Sec. 1.42, p. 1-104 (3d ed. 1976) notes that:

"The distinguishing characteristic between eminent domain and the police power is that the former invovles the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent the use thereof in a manner that is detrimental to the public interest."

Accordingly, your second question will be discussed in the context of the police power rather than eminent domain.

The authority to regulate highways rests in the state. *Tott v. Sioux City,* 1968, 261 Iowa 677, 155 N.W. 2d 502. Such powers, however, may be delegated to municipal corporations. *Iowa Ry. & Light Corporation v. Lindsey,* 1930, 211 Iowa 544, 231 N.W. 461. Section 321.236(1), Code of Iowa, 1977, authorizes

cities to regulate parking of vehicles on the streets and highways of the city in the "reasonable exercise of the police power." Under such a legislative delegation, the use of highways can be regulated by a city "within the limits of public rights." *Gates v. City Council of Bloomfield,* 1952, 243 Iowa 1, 14, 50 N.W. 2d 578, 585.

The state has reserved authority over highways by which it may enlarge or take away any delegated powers. *Iowa Ry & Light Corporation v. Lindsay,* 1930, 211 Iowa 544, 231 N.W. 461. See *Vap v. City of McCook,* 1965, 178 Neb. 844, 136 N.W. 2d 220, 226 ("Parking on the state highway system is a matter of statewide concern."); *Allen v. Ziegler,* 1953, 338 Mich. 407, 61 N.W. 2d 625 (state highway authorities held to have the power to prohibit parking on a city street which constituted a part of the state highway system notwithstanding the objection of the city; the court reasoned that by the establishment of the highway system the state assumed an obligation to the people of the state that the city street in question as well as the entire highway system would be regulated so as to be reasonably available for the normal flow of traffic); Contra, *City of Ellisville v. State Highway Commission,* 1939, 186 Miss. 473, 191 So. 274 (state highway commission rule held invalid because of conflict with parking permitted by city).

The major issue raised by your second question is whether the provisions of the proposed agreement regarding parking would be invalid for surrendering or impairing by contract the police power to regulate parking on highways by the Department of Transportation and a city and their successors. The general rule is that the police power of the state and its subdivisions to regulate the use of highways in the public interest cannot be surrendered or impaired by contract. *Canadian County v. State Highway Commission,* 1936, 176 Okla. 207, 55 P. 2d 106 (state highway commission held to have authority to change the route of a state highway notwithstanding a clause in a contract with a county that the commission "will adhere to and will not change the designation of routes of said highways as now agreed upon," such provision being contrary to public policy and therefore void); *Harmon County v. State Highway Commission,* 1933, 163 Okla. 207, 23 P. 2d 681; *Nairn v. Bean,* 1932, 121 Tex. 355, 48 S.W. 2d 584; *Risser v. Little Rock,* 1955, 224 Ark. 318, 281 S.W. 2d 949, 950; 144 ALR 315 (1943); 39 *Am. Jur.* "Highways, Streets, and Bridges" §208 (1968); See *Snouffer v. Cedar Rapids & M.C. Ry. Co.,* 1902, 118 Iowa 287, 92 N.W. 79.

There is support, however, for the proposition that the general rule is qualified where there is specific legislative authorization for contracts relating to the exercise of the police power. In *Terminal Enterprises v. Jersey City,* 1969, 54 N.J. 568, 258 P. 2d 361, 366, the court states that "the officers of a municipal corporation may limit by contract their own police powers as well as those of their successors where the agreement is authorized by statute." *Vap v. City of McCook,* 1965, 178 Neb. 844, 136 N.W. 2d 224; *Bidlingmeyer v. City of Deer Lodge,* 1954, 128 Mont. 292, 274 P. 2d 821; *Municipal Corporations,* §10.38, p. 839 (3d ed. 1966).

The question of the authority of the Department of Transportation and cities to enter into an agreement with respect to parking on state highways within the corporate limits of a municipality requires an analysis of the statutory provisions relating to the construction and regulation of highways.

The proposed agreement contemplates improving the bridge and its ap-150proaches as a "controlled-access facility". A controlled-access facility is

given the following definition by §306A.2:

"For the purposes of this chapter, a controlled-access facility is defined as *a highway or street especially designed for through traffic,* and over, from or to which owners or occupants of abutting land or other persons have no right or easement or only a controlled right or easement of access, light, air, or view by reason of the fact that their property abuts upon such controlled-access facility or for any other reason. Such highways or streets may be freeways open to use by all customary forms of street and highway traffic or they may be parkways from which trucks, busses, and other commercial vehicles shall be excluded." (Emphasis added.)

Paragraph 10 of the proposed agreement establishes "Primary Road No. U.S. 151 as a Class III highway on which through traffic is given primary consideration." The contractual language tracks the administrative rule which defines Class III highways as "[p]lanned controlled-access highways on which through traffic is given primary consideration." 820-[06,C]1.2(11) (306A) IAC.

Section 306A.3 authorizes the establishment of controlled-access facilities as follows:

"Cities and highway authorities having jurisdiction and control over the highways of the state, as provided by chapter 306, acting alone or in cooperation with each other or with any federal, state, or local agency or any other state having authority to participate in the construction and maintenance of highways, *are hereby authorized to plan,* designate, establish, *regulate,* vacate, alter, improve, maintain, and provide *controlled-access facilities* for public use wherever such authority or authorities are of the opinion that traffic conditions, present or future, will justify such special facilities; provided, that within cities such authority shall be subject to such municipal consent as may be provided by law. Said cities and highway authorities, in addition to the specific powers granted in this chapter, shall also have and may exercise, relative to controlled-access facilities, any and all additional authority now or hereafter vested in them relative to highways or streets within their respective jurisdictions. Said *cities and highway authorities may regulate, restrict, or prohibit the use of such controlled-access facilities by the various classes of vehicles or traffic in a manner consistent with section 306A.2.* (Emphasis added.)

Thus, the Department of Transportation and cities are authorized to establish and regulate controlled-access facilities in cooperation with each other in their respective jurisdictions.

The Department of Transportation and the City of Cascade exercise concurrent jurisdiction and over Highway 151 within the corporate limits of Cascade for the purposes of construction and regulation. Pursuant to Chapter 306, Highway U.S. 151 is classified as being within the freeway-expressway system by the Dubuque County Classification Board. *Report on Functional Classification of Highways, Roads and Streets* (compiled by the Iowa State Highway Commission, 1971); Iowa Roads and Streets Functional Classification for Municipalities, Form 429 (June 14, 1976).

The freeway-expressway system is defined in pertinent part by §306.1 (2) (a) as "those roads connecting and serving the major urban and regional areas of the state with high volume, long-distance traffic movements, and generally connecting with like roads of adjacent states." Being classified as freeway-expressway, Highway 151 falls within the following definition of primary roads under §306.3(2):

"Primary roads" or "primary road system" means those roads and streets,

both inside and outside the boundaries of municipalities, classified under section 306.1 as freeway-expressway, arterial and arterial connector."

Section 306.4 vests jurisdiction and control over the primary roads in pertinent part as follows:

"1) *Jurisdiction and control over the primary roads shall be vested in the department.*

* * *

3) Jurisdiction and control over the municipal street system shall be vested in the governing bodies of each municipality; *except that the department and the municipal governing body shall exercise concurrent jurisdiction over the municipal extensions of primary roads in all municipalities.* The parties exercising concurrent jurisdiction shall enter into agreements with each other as to the kind and type of construction, reconstruction, repair and maintenance and the division of costs thereof." (Emphasis added.)

Accordingly, the Department of Transportation and the City of Cascade exercise concurrent jurisdiction over Highway 151 within the corporate limits of Cascade. It is contemplated that cities and the Department of Transportation will enter into agreements as to construction of highways over which they exercise concurrent jurisdiction.

Section 306A.7 authorizes agreements between the Department of Transportation and cities with regard to controlled-access facilities as follows:

"*Cities and highway authorities* having jurisdiction and control over the highways of the state, as provided by chapter 306 *are authorized to enter into agreements with each other,* or with the federal government, *respecting the* financing, planning, establishment, improvement, maintenance, *use, regulation,* or vacation *of controlled-access facilities* or other public ways in their respective jurisdictions, to facilitate the purposes of this chapter." (Emphasis added.)

The authorization for agreements with respect to the "use" and "regulation" of controlled-access facilities embraces the regulation of parking. *Vap v. City of McCook,* 1965, 178 Neb. 844, 136 N.W. 2d 220 (the words "using" and "regulating" contained in statute nearly identical to §306A.7 held to authorize agreements between the highway commission and a city with respect to parking).

Courts of other jurisdictions have upheld provisions prohibiting parking in contracts for street improvements between cities and state authorities against challenges that the city had invalidly surrendered its police power. *Vap v. City of McCook,* 1965, 178 Neb. 844, 136 N.W. 2d 224; *Bidlingmeyer v. City of Deer Lodge,* 1954, 128 Mont. 292, 274 P. 2d 821; *Farnsworth v. City of Rosewell,* 1957, 63 N.M. 195, 315 P. 2d 839.

Vap v. City of McCook, 1965, 178 Neb. 844, 136 N.W. 2d 224, involved a contractual clause quite similar to the provision of the proposed agreement prohibiting parking. The court rejected the contention that parking would be prohibited for all time and thus a surrender of the city's police power to regulate parking in the future. The court noted:

"It is not to be supposed that if future conditions justify or require a change the state through the Department of Roads and the city would always remain adverse to joining in subsequent appropriate agreements. The state has placed

trust and confidence in the department as well as the city to act in the best interest of the public." *Id.* at 227.

The court concluded on the basis of a statutory provision comparable to §306A.7 that:

"...the city may under section 39-1307, R.R.S. 1943, contract with the state through the Department of Roads to prohibit parking on a street which forms a connecting link on the state highway system. In so doing the police power of the city is not bartered away but only limited in its exercise as specifically authorized by law." *Id.* at 227.

The provision of the proposed agreement for not eliminating other parking without the concurrence of the city and the state presents a closer question than the provision prohibiting parking because it arguably could restrict the police power to regulate parking in the future. It is a fine line between an invalid "surrender of police power" and a valid "limitation upon its exercise."

Note that §306A.7 contains no limitation with respect to the length of time for which an agreement may be made. Certainly the regulation of parking under the proposed agreement to be valid must be reasonable at all times. See *Salomone v. Canton,* 1961, 30 Ill. App. 2d 474, 175 N.E. 2d 663 (ordinance prohibiting parking held unreasonable); 7 McQuillan, *Municipal Corporations* §24.642, p. 744 (3d ed. 1968). What constitutes reasonable regulation of parking in any particular locality depends on a variety of factors, including the volume and direction of the flow of traffic, the need for parking in the particular locality and the availability of parking elsewhere. *Commonwealth v. Sergent,* 1953, 330 Mass. 690, 117 N.E. 2d 154; 1 Yokley, *Municipal Corporations* §61 p. 125 (1956); 7 McQuillan, *Municipal Corporations* §24.642, p. 745 (3d ed. 1968).

In conclusion, §306A.7 expressly authorizes the Department of Transportation and cities to enter into agreements respecting the "regulation" and "use" of controlled-access facilities which should include agreements with respect to parking. Moreover, it is presumed that the Department of Transportation and Cascade would act in the best interest of the public and would join in appropriate subsequent agreements with respect to the reasonable regulation of parking. In our opinion, the provisions of the proposed agreement with respect to parking would not constitute an invalid surrender of police power and therefore would be binding so long as the regulation of the parking is in furtherance of the reasonable exercise of the police power considering such factors as the volume and direction of the flow of traffic, the need for parking in the particular locality, and the availability of alternative parking.

October 18, 1978

PRISONS: MANDATORY MINIMUM SENTENCES: GOOD AND HONOR TIME — §§204.406, 204.413, 246.38, 246.39, 246.43, 902.7, 902.8, 906.5; S.F. 2202, 67th G.A. (1978). Application of good and honor time to mandatory minimum sentences will necessarily affect the date on which an inmate is eligible for parole but will have no effect on the expiration of his full sentence. (Hayward to Preisser, Commissioner, Iowa Department of Social Services, 10-18-78) #78-10-4

Mr. Victor Preisser, Commissioner, Iowa Department of Social Services: You have requested an opinion from this office with regard to the effect of Senate File 2202, 67th G.A. (1978), which amends Sections 246.38, 246.39

and 246.43, Code of Iowa, 1977, as they apply to the computation of mandatory minimum sentences provided in Sections 204.406, 204.413, 902.7, 902.8 and 906.5, Code of Iowa, 1977, *as amended* (Supp., Criminal Law and Procedure, 1977). In your request, you set forth two substantive questions. First, is parole eligibility effected by the mandatory minimum sentences and/or good and honor time? Second, does this replace the maximum sentence with the mandatory minimum sentence?

Senate File 2202, 67th G.A. (1978), amends §246.38, Code of Iowa, 1977, by adding the following language:

Any provision to the contrary notwithstanding, good time earned and not forfeited shall apply to reduce a mandatory minimum sentence being served pursuant to section two hundred four point four hundred six (204.406), two hundred four point four hundred thirteen (204.413), nine hundred two point seven (902.7), nine hundred two point eight (902.8), or nine hundred six point five (906.5) of the Code Supplement.

That section states that an inmate may not be discharged from the penitentiary or men's reformatory until he has served his full sentence less good time earned and not forfeited unless pardoned or otherwise legally released. It also gives credit for certain time spent in other institutions. Almost identical language was added to §246.39 in reference to good time and to §246.43 in reference to honor time.

The effected sentencing provisions create various types of minimum sentences. Section 204.406 provides a minimum sentence of five years for the sale of certain narcotic drugs to a person under 18 years of age by an adult. Section 204.413 states that under certain circumstances persons convicted of specific drug offenses shall serve at a minimum one-third of their maximum sentence. Section 902.7 provides a minimum sentence of five years for persons convicted of participating in a forceable felony while representing that they were in immediate possession and control of a firearm, while displaying a firearm, or while being armed with a firearm. Section 907.8 provides a minimum sentence of three years for habitual offenders. Section 906.5 provides that inmates with prior convictions for forceable felonies or crimes of a similar gravity must serve a minimum of one-half of their sentence.

While these sections provide various minimum sentences, each states that the minimum sentence is set to determine the earliest possible date for parole. In fact, that is clearly what is meant by mandatory minimum sentence. Therefore, the answer to your first question is yes. The application of good and honor time to mandatory minimum sentences set forth in Senate File 2202 must affect the date on which an inmate is eligible for parole.

Therefore, when an inmate is sentenced under one of the above described provisions, the institution must be concerned about two dates. First, of course, is the date on which the sentence will expire, exclusive of good and honor time. Second is the mandatory minimum sentence expiration date, whether a term of years or a fraction of the maximum sentence. Under the provisions of Senate File 2202, good and honor time shall be applied to reduce both the maximum and minimum sentence expiration dates. The effect of Senate File 2202 is that person sentenced to mandatory minimum sentences under the specified Code Sections may earn an earlier parole eligibility date in the same manner as they earn an earlier ultimate sentence expiration date.

In response to your second question, Senate File 2202 in no way whatsoever

replaces maximum with minimum sentences. Considerations which motivated the legislature should be considered when construing statutes. Legislative intent is the polestar of statutory construction. *Schmitt v. Iowa Department of Social Services,* 1978, 263 N.W.2d 739, 746. It is unreasonable to construe these statutes presuming that the legislature intended that persons dealing in dangerous drugs, selling drugs to minors, or using firearms in the course of forceable felonies along with habitual or repeat offenders be dealt with in a less severe manner than other felons. A construction, such as that presented in your opinion request, which would infer that the legislature intended that the persons convicted of the above described acts be released at the end of the set minimum sentence regardless of behavior in the institution without even the minimal controls of parole, is untenable. A rational legislature would not enact a statute to encourage the use of firearms, recidivism or lack of discipline in the prisons. There is no language in Senate file 2202 which is supportive of that position.

The maximum sentence is not affected by the minimum sentence. The former sets the date after which the inmate must be released. The latter sets the date before which the inmate cannot be released. That dichotomy is not effected by Senate File 2202. That bill only applies good and honor time earned to the calculation of the term of both maximum and minimum sentences.

October 18, 1978

CAMPAIGN FINANCE DISCLOSURE: CORPORATE CONTRIBUTIONS: ELECTIONS: BALLOT ISSUE: REFERENDUM: DISCLOSURE AND REPORTING. First Amendment, U.S. Const. §§56.2(6); 56.2(14); 56.3-.7; 56.29(1); 56.29(2); 56.29(3), Code of Iowa, 1977. Corporations may not be statutorily prohibited from espousing views on referendum ballot issues and cannot be required to meet the committee creation, reporting and disclosure requirements of Chapter 56 in publicizing its views since Chapter 56 conflicts with the First Amendment. It is therefore lawful in Iowa for a corporation to directly contribute corporate funds to another committee for the purpose of educating the public on a referendum ballot issue, the conflicting terms of Chapter 56 to the contrary notwithstanding. (Salmons to Thompson, 10-18-78) #78-10-5

Honorable Patricia L. Thompson, State Representative: This office is in receipt of your October 6, 1978, opinion request seeking a declaration as to the constitutionality of 1977 Iowa Code Chapter 56 in light of the United States Supreme Court's recent opinion of *First National Bank of Boston v. Bellotti,* 98 S.Ct. 1407 (1978). You state that citizens in your district on whose behalf this request is made "are involved with the hotel/motel tax issue" and require some clarification on the question "whether a legally constituted committee can accept corporate contributions on positions which the corporation supports." You state:

It is clear that the Campaign Finance Disclosure Act, Chapter 56 of the Code of Iowa, prohibits a corporation from taking a public position for or against a ballot issue, or from making a financial contribution to an organized effort to educate the public. However, our question centers on whether Chapter 56 is constitutional as it affects the right of a corporation to take a position on a ballot issue, in light of the Supreme Court decision in the case of the *First National Bank of Boston v. Bellotti* (98 Supreme Court 1407, decided April 26, 1978). *It is our understanding that in this case the Supreme Court upheld the right of a corporation to take a public position on a ballot issue and to*

contribute to a fund to educate the public on the same issue. (Emphasis added).

You ask the following compound question:

Is it constitutional in Iowa for a corporation to take a public position on a ballot issue, or to contribute corporate funds to educate the public on the same ballot issue?

The significance of your general questions requires concerned attention; all the more so because precious constitutional freedoms are at stake, albeit those of corporate contributors. But the urgent legal merit of your questions, coming as they do so near an election, does not make them more easily answered. All you have given me are the general questions above coupled with the statement that citizens in your district concerned about the hotel/motel tax issue are the apparent impetus for this request. Questions as serious as those who proffer simply should not be answered in a vacuum and would not be if tendered to the Courts.[1]

The Iowa law ostensibly barring any corporate giving the purpose of which is to influence the outcome of a certain ballot questions is Iowa Code Section 56.29(1) reading in material part:[2]

Except as provided in subsection 3 of this section, it shall be unlawful for any insurance company, savings an loan association, bank, and corporation organized pursuant to the laws of this state, territory, or foreign country, whether for profit or not, or any officer, agent, representative thereof acting for such insurance company, savings and loan association, bank or corporation, to contribute any money, property, labor, or thing of value, directly or indirectly, to any committee, or for the purpose of influenceing the vote of an elector...

In the case of *First National Bank of Boston v. Bellotti,* which you cite, the United States Supreme Court considered a Massachusetts statute which prohibited corporations, banks, insurance companies and their officers and agents from making contributions or expenditures "for the purpose of influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." The statute further specified that "[n]o question submitted to the voters solely concerning the taxation of the income, property, or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation."[3]

[1]A 'controversy' [which the courts are empowered to consider]...must be one that is appropriate for judicial determination. ...A justifiable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot...The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts." *Aetna Life Insurance Co. v. Haworth,* 300 U.S. 227, 240-41 (1937).

[2]This section has been interpreted only on one occasion, then, consistent with the statute's plain terms, to bar a local Chamber of Commerce from supporting a civic center ballot question. OAG (Thatcher) November 29, 1977.

[3]Massachusetts General Laws ch. 55, §8 reads:

"No corporation carrying on the business of a bank, trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, no business corporation incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation. No person or persons, no political committee, and no person acting under the authority of a political committee, or in its behalf, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay expend or contribute for any such purpose.

"Any corporation violating any provision of this section shall be punished by a fine of not more than fifty thousand dollars and any officer, director or agent of the corporation violating any provision thereof or authorizing such violation,...shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both."

In that case five corporations wished to spend funds to publicize their views on a Massachusetts constitutional amendment which would have authorized a graduated individual income tax; activity prohibited by the Massachusetts statute. The Massachusetts Supreme Court sustained the statute but was reversed by the United States Supreme Court on First Amendment grounds. In upholding a corporation's right to disseminate its views of the income tax issue, the Court put the question not whether corporations were endowed with First Amendment rights sufficient to permit public exposition of its views, as did the Massachusetts Court, but whether the corporations' communications were within the protections of the First Amendment. *Id.*, at 1415.[4]

In rejecting the Massachusetts Supreme Court's holding that the outer boundaries of a corporation's free speech rights were tied to and defined by the nature of its business which dictated the need for the otherwise barred communications (*Id.*, at 1419-20), the Court said:

As the Court said in *Mills v. Alabama*,...'there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' If the speakers were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether

[4]"The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection." *Id.*, at 1416.

corporation, association, union, or individual. *Id.*, at 1416.

Yet two rationale were offered to support the statute one of which was: preserving the public's confidence in the electoral process by prohibiting rich and powerful corporations from dominating the communicational intercourse on election issues. (*Id.*, at 1422-24).

In concluding neither justification sufficient to sustain the statute the Court construed the Massachusetts statute by the same demanding analysis our Supreme Court would employ where important freedoms are implicated:[5]

The constitutionality of §8's prohibition of the 'exposition of ideas' by corporations turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech. Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling'...'and the burden is on the government to show the existence of such an interest.' Even then, the State must employ means 'closely drawn to avoid, unnecessary abridgement....'*Id.*, at 1421.[6]

Of the State's assertion the legislation was required to restrain the wielding of undue corporate influence and preserve the integrity of the election process, the Court noted that no showing had been made on the effect of such corporate influence (*Id.*, at 1423). More importantly the Court found the arguments unpersuasive in light of earlier precedent:

Nor are appellee's arguments inherently persuasive or supported by the precedents of this court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections...simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'...We noted only recently that 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment...' *Id.*, at 1423.

The holding of *Bellotti* is therefore limited: The First Amendment protects corporations' speech and dissemination of views on public issues to be decided by an electorate in a referendum; the Government cannot compellingly demonstrate in such circumstances the necessity for its law on the basis that the electoral process is jeopardized by a risk of corruption perceived in large corporate expenditures in dissemination of partisan views. The Court expressly stated no challenge was made to "the constitutionality of laws prohibiting or limiting corporate contributions to *political candidates* or *committees,* or other means of influencing *candidate elections.*" (Emphasis added).

[5]E.g. "The right to vote is a fundamental political right...Any alleged infringement of the right to vote must be carefully and meticulously scrutinized." *Devine v. Wonderlich,* 168 N.W.2d 620, 623 (Iowa 1978).

[6]In this connection see *Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974) specifically rejecting this rationale as applied to a corporation barred from expenditures to oppose public referendum under New York Law.

So far as the statement in your opinion request is concerned that "It is our understanding that in [Bellotti] the Supreme Court upheld the right of a corporation to take a public position on a ballot issue *and to contribute to a fund to educate the public on the same issue.*" I would observe there is nothing in the *Bellotti* case to sustain the underscored part of your understanding of it. I would further observe that the Supreme Court did, indeed, "uphold the right of corporations to take a public position on a ballot issue" subject to the limitations I have outlined above.

In brief, the Iowa statute, Section 56.29(1), reads slightly differently than the Massachusetts Act held unconstitutional:

...it shall be unlawful for any...corporation...profit or not...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* ....[7]

But as noted above, this office has construed Section 56.29(1) to prohibit partisan corporate involvement on a referendum issue (OAG Thatcher November 29, 1977) and it seems likely the Iowa Courts would read this section similarly.

To the extent Section 56.29(1) can be so read it too invades free speech territory the First Amendment has carved out as hallowed and sacrosanct from statutory infringement. To that extent, corporations have the free speech rights identified in *Bellotti* and Section 56.29(1) must yield. In direct answer to the first part of your question: It is constitutional in Iowa for a corporation to take a public position on a referendum type ballot issue, Section 56.29(1) to the contrary notwithstanding.

But this does not end the inquiry. You ask additionally: "Is it constitutional in Iowa for a corporation to...contribute corporate funds to educate the public on the same ballot issue?"

While your question does not specify the identity of those to whom such corporate contributions are prohibited and with which you are concerned, it will be assumed such contributions are those to committees.[8] So construed, the provisions of Section 56.29(1) bar a corporation from contributing to a committee, "[e]xcept as provided in subsection 3 of this section." Section 56.29(1).

Section 56.29 (3) reads:

It shall be *lawful* for any insurance company, savings and loan association, bank and corporation organized pursuant to the laws of this state or any other state or territory, whether or not for profit, and for the officers, agents and representatives thereof, to use the money, property, labor, or any other thing of value of any such entity for the purposes of soliciting its stockholders, administrative officers and members for contributions to a committee sponsored

[7]The language of this section is confusing. It appears the prohibition of any contribution "to any committee" is redundant of the prohibition of any contribution "for the purpose of influencing the vote of any elector." To that end the *Bellotti* decision leaves unconsitutional the whole of subsection one, since the prohibition strikes at free speech rights.

[8]See footnote 7, supra.

by that entity and of financing the administration of a committee sponsored by that entity...All contributions made under authority of this subsection shall be subject to the disclosure requirements of this chapter. *A committee member, committee employee, committee representative, candidate or representative referred to in subsection 2 lawfully may solicit, request and receive money, property and other things of value from a committee sponsored by an insurance company, savings and loan association, bank, or corporation as permitted by this subsection.* (Emphasis added)

That portion of Section 56.29(3) not underscored plainly permits a corporation to organize its own committee. And it must do so when it accepts or expends more than one hundred dollars per year. Section 56.2(6). When more than that sum is involved, the provisons of Chapter 56 apply and, as Section 56.29(3) specifically provides "[a]ll contributions made under authority of this subsection shall be subject to the disclosure requirements of this chapter." See Sections 56.3 - .7.

Hence, the statute by its terms permits corporations to contribute funds to its own committee. But,

"virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing independence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech...A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."

Buckley v. Valeo, 424 U.S. 1, 19 (1976)

If a corporation wishes to support some ballot issue and forms a committee complying with Chapter 56 but solicits funds too small in amount to effectively communicate its viewpoint, may the funds of similarly persuaded corporations be aggregated to increase the public dissemination of their views?

While I believe this question is implicit in your opinion request, I do not believe answer to it need be predicated solely on constitutional grounds. The underscored portion of Section 56.29(3) above plainly allows members, employees and representatives of one committee to solicit monies from a corporation's committee. Were there any question that such is permitted, confirmation comes from observing that the committee members, employees and representatives referred to in subsection 2 by subsection 3 are the members, employees and representatives "*of any committee.*" Section 56.29(2). "Committee" is defined in Section 56.2(14) to include "political committee." "Political committee" is defined as any committee,...organized for the purpose of...supporting or opposing a...ballot issue." Section 56.2(6). Hence, the last sentence of Section 56.29(3) clearly contemplates the solicitation, request and receipt of monies from, by and between a Section 56.29(2) committee, which by definition can be a corporation's committee, and another corporation's committee.

Consequently, corporations are statutorily authorized to contribute funds to educate the pubic on ballot issues of interest to them and, to adequately

do so, may contribute to committees of other corporations,[9] subject to the disclosure requirements of Chapter 56.

The more difficult aspect of the second part of your question, comes in deciding whether corporations can contribute funds to support or oppose ballot issues directly to another committee and not through the medium of its own committee in making such donations.

The procedures by which a corporation may satisfy the demands of Chapter 56's committee organization and reporting requirements are complex and exacting. Sections 56.3 through 56.7. For a corporation to lawfully speak out on some ballot issue of interest to it, it must necessarily form a committee (Section 56.29(3)) meeting the rigors of the statutory organizational and disclosure requirements. Too, that corporation will be required to pay careful heed to the Campaign Finance Disclosure Commission's rules and regulations[10] before it spends any monies to publicize its views.

Acknowledging the constitutionality of reporting and disclosure requirements[11] the question becomes whether the First Amendment free speech provisions are impermissibly offended by these onerous statutory demands regulating the exercise of a corporation's views. The constitutionality of these provisions turns on whether the disclosure and reporting requirements can satisfy a showing that is compelling such constitutional freedoms must be subordinated. *Bellotti,* supra, at 1421; Cf. *Buckley v. Valeo,* 424 U.S., at 44-5.

In *Bellotti* no showing had been made of the size of corporate contributions deemed overwhelming and significantly influencing in political debate. *Id.,* at 1423. The Massachusetts statute entirely suppressing corporate speech on referenda ballot issues gave way. Further, even "[t]he risk of corruption perceived in cases involving candidate elections...simply is not present in a popular vote on a public issue.", (*Id.*) and disclosure and reporting requirements cannot serve to expose the potential for graft, part of a system of candidate contributions from willing corporate sponsors.[12] The State must employ a means of regulating " 'closely drawn to avoid unnecessary bridgement' " of free speech rights. *Id.,* at 1421.[13]

In the context of corporate support for or opposition to ballot issues of public interest, the committee creation, disclosure and reporting requirements

[9]This opinion does not consider the effect of any provision in Chapters 491 or 496A in the foregoing analysis.

[10]Iowa Administrative Code. [190] Campaign Finance Disclosure.

[11]See, *Buckley v. Valeo,* 424 U.S. 1, 60 - 84 (1976).

[12]See *Schwartz v. Romnes,* supra n. 6, at 849 - 452.

[13]If the only justification for application of the reporting and disclosure requirements to corporations is a legislative attempt to shed sunshine on the amount of corporate political spending, the objective is fulfilled short of the requirements that each corporation must form a committee to engage in corporate giving [Section 56.29(3)] or sacrifice the right to speak on political issues at all. Section 56.29(1). As construed, a corporation's direct contributions to some other committee, their size, number and purpose will be exposed to public view in the donee committee's reports. Section 56.6(3).

of Chapter 56 impose too greatly on protected First Amendment freedoms. The elaborate statutory scheme may thus be seen to inhabit all except those of the greatest temerity in exercise of rights meant for exercise by all. The statutory scheme, applied in the setting of corporate giving for ballot issue debate, leaves "the free dissemination of ideas...the loser." *Id.*, at 1420, n. 21.

Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions to a public referendum. The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights.

Schwartz v. Romnes, 495 F.2d 844, 852-3 (2d Cir. 1974).

Thus, I must answer the second portion of your question affirmatively but with some modifications: It is lawful in Iowa for a corporation to directly contribute corporate funds to another committee for the purpose of educating the public on a referendum ballot issue, the conflicting terms of chapter 56 to the contrary notwithstanding.

October 19, 1978

STATE OFFICERS AND DEPARTMENTS: Motor Vehicle Reciprocity—§§321.105, 321.106, 321.107 and 326.17, Code of Iowa, 1977. An Iowa based carrier licensed in Iowa cannot be exempted from full year registration fees by purchasing a special restricted plate in another state during the first quarter of the year. (Blumberg to McCoy, Director, Motor Vehicle Division, Department of Transportation, 10-19-78) #78-10-6

Mr. Jon M. McCoy, Director, Motor Vehicle Division, Department of Transportation: We have your opinion request regarding truck licensing fees. It appears that an Iowa company, engaged in highway construction work, licenses its trucks in Iowa, using Iowa as the base state for prorate purposes. Highway construction is not normally done during the winter months and the trucks sit idle in Iowa during those months. Therefore, the company purchases licenses for those trucks for the first quarter of the year in South Dakota. The South Dakota licenses are special plates for highway construction only and are reduced fee plates. The company then licenses the trucks for the remainder of the year in Iowa. In this manner, the company is able to have those trucks licensed for a full year, while not paying a full year's fee to Iowa. You ask whether this is proper.

Section 321.105, 1977 Code of Iowa, requires that there shall be an *annual* registration fee on each vehicle. Section 321.106 permits registration for fractional parts of the year, while §321.107 sets forth the requirements in order to receive a reduction of the fee. That section provides, in pertinent part:

Such reduction in the registration fee shall not be allowed until the applicant first files with the county treasurer [or the Department of Transportation in case of prorated fees] an affidavit stating the date on which the vehicle first came into his possession or control in connection with his purchase or prospective purchase thereof, and the name and address of the party from whom purchased.

No reduction in the registration fee shall be allowed by the department

until the applicant files satisfactory evidence to prove that there is no delinquency in registration.

In 1944 OAG 119, we held, with respect to this chapter, that if a motor vehicle has been registered during the preceding year a renewal registration for the current year cannot be had without paying the *full annual* registration fee for that year, regardless of when it is registered during that current year.

Section 326.17 requires that all resident fleet owners shall be required to list Iowa as the base state for proration purposes. This comports with the Compact and the International Registration Plan (IRP) of which Iowa is a member. Pursuant to this system, if a vehicle is based in Iowa, it will display an Iowa plate which is then honored in each state with which it is prorated. By purchasing the special South Dakota plate for the first quarter, the carrier pays less registration fees for the full year, but is not always displaying the base plate as is required.

If the procedure used by the carrier were permitted, he would be able to buy plates from other states during the year where the fees are less even though Iowa is the base state, and either not pay any Iowa fees, or pay substantially less to Iowa than the annual registration. Nothing would prevent a carrier, under that scheme, from switching plates during the year to find the lowest registration fees possible. The purpose of Chapters 321 and 326 and the proration agreements to which Iowa belongs is contrary to this. If an Iowa carrier were to license his vehicles for the 1978 year, let them sit idle during part of 1979 (without licensing them in any other state) and then attempt to relicense them for the remainder of 1979, the full annual fee would be due. Merely because a special plate is purchased from another state during that same period of time the result should not be any different. The Iowa based carrier would not be able to purchase a base plate from South Dakota if he meets the definition of "base plate" in Chapter 326 and either the Compact or the IRP with relation to Iowa. Also, the special plate from South Dakota does not qualify him to prorate with Iowa. Thus, the fact that the vehicles are based and located in Iowa with that special plate may place the carrier in violation of the motor vehicle laws by not having a proper plate for Iowa.

Section 321.107 appears to only allow fractional year registration fees when a vehicle is purchased or transferred with a new owner.[1] We do not believe that the Legislature intended an Iowa based carrier to be able to forum shop for a cheaper registration for part of the year. Accordingly, we are of the opinion that when an Iowa based vehicle has been properly licensed in Iowa in the preceding year, the renewal of that registration is for a full year, regardless of when the application is made. This does not mean that an Iowa based carrier cannot buy plates in other states. It merely means that when that vehicle is relicensed in Iowa, the fee shall be for the full year.

October 19, 1978

ENVIRONMENTAL PROTECTION: Department of Environmental Quality: Water Quality: Board of Certification — Section 455B.52(3) prohibits disclosure by members of the Board of Certification of the contents of examinations even to like agencies in other states. (Davis to Crane, Executive Director, Department of Environmental Quality, 10-19-78) #78-10-7

[1]"Owner" can mean by title or by a long term lease.

Mr. Larry E. Crane, Executive Diretor, Iowa Department of Environmental Quality: You have requested an opinion of the Attorney General regarding interpretation of Section 455B.52(3)(b), Code of Iowa, 1977, as to whether the prohibition contained therein restrains interstate cooperation between the Iowa Board of Certification and such boards in other states by prohibiting the sharing of Iowa's examinations.

Section 455B.52(3) reads in pertinent part:

"3. 'Disclosure of confidential information.' A member of the board shall not disclose information relating to the following:

* * *

"b. Information relating to the contents of the examination.

* * *

"A member of the board who willfully communicates or seeks to communicate 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 further comment upon the question by stating:

"The question posed is important in that this Department's rules, as do other states, allow reciprocity of certification for persons certified in other states, and equivalency of examinations between states is important in determining whether reciprocity should apply in particular cases. See 400 I.A.C. 21.9(4). Also, sharing of knowledge and procedures among the states is a useful tool in the proper administration of the Board's duties."

The quoted provision of Section 455B.52 was enacted in Section 154 of Chapter 1086, Laws of the 65th General Assembly, 1974 Session. This Chapter was an omnibus revision of the state licensing laws for the various practicing professions as well as for operators certified under Chapter 455B.

Neither that Chapter of the Acts nor Chapter 455B of the Code contains any exculpatory provision exempting interstate cooperation from the plain language of Section 455B.52(3). Unfortunate though it may be in this context, the conclusion that any disclosure of the contents of the Operator Certification examinations is prohibited is inescapable.

This conclusion is based on the clear, explicit language used in that section. 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 Iowa 1142, 260 N.W. 531; *Drazich v. Hollowill,* 1929, 207 Iowa 427, 223 N.W. 253.

Legislative amelioration of this prohibition appears to be the only means by which the board of Certification may share the Iowa tests with similar boards from other states.

October 19, 1978

ENVIRONMENTAL PROTECTION: Conservation Commission — Hunting with mobile radio transmitter and within 200 yards of inhabited building. Section Two, House File 356, Acts of the 67th General Assembly, 1978 Session; Sections 4.1(2), 109.1(8), 109.40, 109.41, 109.42, 109.43, 109.44, 109.45, 1977 Code of Iowa and 109.123 of that Code as amended by Section

6, H.F. 356, Laws of the 67th General Assembly, 1978 Session. The word "game" as used in Section Two, House File 356, Acts of the 67th G.A., 1978 Session, and Section 109.123 1977 Code is defined in §109.41 and does not include fur bearing animals as defined in §109.40. However, Section Two, H.F. 356 is divisible and the prohibition against directing hunters by radio applies to all who "hunt" as defined in §109.1(8). (Davis to Priewert, Director, Iowa Conservation Commission, 10-19-78) #78-10-8

Fred A. Priewert, Director, Iowa Conservation Commission: You have requested an opinion of the Attorney General regarding interpretation of certain sections of House File 356, passed by the 67th General Assembly, 1978 Session.

You stated your question thusly:

"Section Two (of H.F. 356) 'A person who is hunting shall not use a mobile radio transmitter to communicate the location or direction of *game* or to coordinate the movement of other hunters'. (your emphasis)

"Amending Section 109.123 to read: 'Prohibited Hunting Near Buildings. A person shall not hunt any *game* within two hundred yards of any building inhabited by people or domestic livestock unless the owner or tenant has given consent'. (your emphasis)

"The term 'game' is defined in Section 109.41 of the Code. Fur bearing animals are defined in Section 109.40. Would the ban on the use of radios and hunting near buildings be limited to game species only, or would the ban apply to all wildlife species?"

Interpretation of Section 2 of H.F. 356 is a very interesting question, made still more interesting by its legislative history.

As you observed, the word "game" is specifically defined in Section 109.41 thusly:

"Game. For the purposes of this chapter the term 'game' shall be construed to mean all of the wild animals and wild birds specified in this section except those designated as not protected, and shall include the heads, skins, and any part of same, and the nests and eggs of birds and their plumage.

1. The Anatidae: Such as swans, geese, brant, and ducks.

2. The Rallidae: Such as rails, coots, mudhens, and gallinules.

3. The Limicolae: Such as shore birds, plovers, surf birds, snipe, woodcock, sandpipers, tattlers, gotwits, and curlews.

4. The Gallinae: Such as wild turkeys, grouse, pheasants, partridges, and quail.

5. The Columbidae: Morning doves and wild rock doves only.

6. The Sciuridae: Such as gray squirrels, fox squirrels, and flying squirrels.

7. The Leporidae: Cottontail rabbits and jack rabbits only.

8. The Cervidae: Such as deer and elk."

Section Two of House File 356 as enacted reads:

"Section 2. Chapter one hundred nine (109), Code 1977, is amended by adding the following new section:

"*NEW SECTION.* A person who is hunting shall not use a mobile radio transmitter to communicate the location or direction of game or to coordinate

the movement of other hunters."

As the definition of "game" in Section 109.41 applies "(f)or the purposes of this chapter" and since House File 356 Secton 2 specifically inserts the new section into Chapter 109, the word "game" in the new section means what the legislature has said it means.

However, there is more to this new section than that determination. The word "or" is used therein and according to Section 4.1(2) "shall be construed according to the context and the approved usage of the language."

Black's Law Dictionary, Fourth Edition, defines "or" as follows: "A disjunctive particle used to express an alternative or to give a choice of one among two or more things." Webster's New Word Dictionary, Second Edition, concurs.

Therefore this new section states both of the following:

A. "A person who is hunting shall not use a mobile radio transmitter to communicate the location or direction of game...."

and

B. "A person who is hunting shall not use a mobile radio transmitter...to coordinate the movement of other hunters."

Under statement A, a person who is hunting may use a mobile radio transmitter to communicate the location or direction of animals and birds not included in the definition of "game" in Section 109.41, such as fur bearing animals defined in Section 109.40.

Under statement B, such a person may not use a mobile radio transmitter to coordinate the movement of other hunters. Incidentally, "a person who is hunting" and a "hunter" are synonymous and are individuals who "hunt" as defined in Section 109.1(8) which is all encompassing.

That subsection states:

"8. 'Take' or 'taking' or 'attempting to take' or 'hunt' is any pursuing, or any hunting, fishing, killing, trapping, snaring, netting, searching for or shooting at, stalking or lying in wait for any game, animal, bird or fish protected by the state laws or regulations adopted by the commission whether or not such game be then subsequently captured, killed or injured."

I include that definition because I believe it includes any person who causes dogs to pursue such animals as coyotes and raccoons, whether that person be him or herself pursuing, etc., or not.

As to your question regarding Section 109.123 as amended, the word "game" therein is defined in Section 109.41 and does not include any of the other creatures covered in other sections of Chapter 109, such as §109.40, §109.42, §109.43, §109.44, and §109.45.

Where the legislature has so clearly and unambiguously defined a word and then used that precise word in a regulatory statute, there can be no question of legislative intent. The statute is clear on its face.

In summary, Section 109.123 does not prohibit hunting non-"game" such as coyotes, raccoons and varmints within the prohibited distance (100 yards until January 1, 1979; 200 yards thereafter) of an inhabited building, only "game" hunting, without permission, is prohibited.

Likewise, Section 2 of House file 356 only prohibits communicating the location or direction of "game" not coyotes, raccoons or varmints although coordination of hunter movement as contemplated therein is prohibited regardless of the creature hunted.

October 23, 1978

COURTS: RETIRED JUDGES; SOLEMNIZATION OF MARRIAGES. §§595.10, 595.11, 605.24 and 605.25, Code of Iowa, 1977. A retired judge may, with his consent, continue to solemnize marriages in the State of Iowa if authorized to do so by the Supreme Court. (Haesemeyer to Sutton, 10-23-78) #78-10-9

Honorable M. L. Sutton: Reference is made to your letter dated October 9, 1978, in which you request an opinion of the Attorney General on the question of whether or not a retired district court judge may perform marriage ceremonies. Sections 595.10 and 595.11, Code of Iowa, 1977, provide:

"595.10. Marriages must be solemnized by:

"1. A judge of the supreme or district court, including a district associate judge, or a judicial magistrate.

"2. Some minister of the gospel, ordained or licensed according to the usages of his denomination.

"595.11. Marriages solemnized, with the consent of parties, in any other manner than as herein prescribed, are valid; but the parties thereto, and all persons aiding or abetting them, shall forfeit to the school fund the sum of fifty dollars each; but this shall not apply to the person conducting the marriage ceremony, if within fifteen days thereafter he makes the required return to the clerk of the district court."

Section 605.24 provides:

"All judges of the supreme court, court of appeals or district court who shall have reached the mandatory retirement age, shall cease to hold office. The mandatory retirement age shall be seventy-five years for all judges of the supreme court or district court holding office on July 1, 1965. The mandatory retirement age shall be seventy-two years for all judges of the supreme court, court of appeals or district court appointed to office after July 1, 1965."

Section 605.25 provides in part:

"Judges of the supreme court, court of appeals and district court who are hereafter retired by reason of age, or who are drawing benefits under section 605.A.6, may with their consent be assigned by the supreme court to temporary judicial duties on a court in this state."

"* * *"

It is clear from the foregoing that judges may solemnize marriages and that upon reaching the mandatory retirement age a judge ceases to hold office. However, it is equally clear that a retired judge upon his retirement does not sever all his connections with the judicial system since under §605.25 he may, with his consent, be assigned to temporary judicial duties on a court in this state. We have not been able to find any authority on the question you raise, however, it is common knowledge that the judges who have retired continue to be referred to as "judge" and so far as we know a retired judge recalled for temporary duty is not required to requalify for judicial office. Thus, under all the circumstances it would be our opinion that a retired judge

may, with his consent, continue to solemnize marriages in the State of Iowa if authorized to do so by the Supreme Court.

October 23, 1978

ENVIRONMENTAL PROTECTION: Sanitary Disposal Projects — §455B.76, §384.95, §384.96, §23.1, §23.18, §332.7(1), §322.7(1), §322.7(2); Public Competitive Bids are not required for a contract between an area solid waste disposal unit organized pursuant to §455B.76 and a contractor where the contract will not involve the expenditure of public funds. (Valde to Thatcher, Webster County Attorney, 10-23-78) #78-10-10

Mr. William J. Thatcher, Webster County Attorney: You have requested an opinion of the Attorney General in which you asked:

"Is it necessary to submit to public competitive bids a contract between an area solid waste disposal unit organized pursuant to §455B.76 and a contractor?"

Section 455B.76, Code of Iowa, 1977, provides for the establishment of sanitary disposal projects:

"455B.76 *Duty of cities and counties.* Every city and county of this state shall provide for the establishment and operation of a sanitary disposal project for final disposal solid waste by its residents not later than July 1, 1975. Sanitary disposal projects may be established either separately or through co-operation efforts for the joint use of the participating public agencies as provided by law.

"Cities and counties may execute with public and private agencies contracts, leases, or other necessary instruments, purchase land and do all things necessary not prohibited by law for the collection of solid waste, establishment and operation of sanitary disposal projects, and general administration of the same. Any agreement executed with a private agency for the operation of a sanitary disposal project shall provide for the posting of a sufficient surety bond by the private agency conditioned upon the faithful performance of the agreement."

The above statute provides cities and counties with the power to execute contracts with public or private agencies in order to establish and operate a sanitary disposal project. There is no provision in this Chapter requiring competitive bids for such projects.

There are numerous statutes which deal with public contracts and bid requirements. In consideration of the question at hand, Chapters 455B.76, 384.95, 384.96, 23.1, 23.18, and 332.7(1) and (2) are relevant.

Chapter 384, Code of Iowa, 1977, contains city finance provisions. The applicable subsections are: 384.95 *Definitions.*

"As used in this division, unless the context clearly indicates otherwise:

"1. 'Public improvement' means any building or construction work, either within or outside the corporate limits of a city, to be paid for in whole or in part by the use of funds of the city, regardless of sources, including a building or improvement constructed or operated jointly with any other public or private agency, but excluding urban renewal and low-rent housing projects, industrial aid projects authorized under chapter 419, emergency work or work performed by employees of a city or a city utility."

"2. 'Governing body' means the council of a city, a utility board of trustees

or an administrative agency which is charged with the management and control of a building or improvement project."

"384.96 *Sealed bids.* When the estimated total cost of a public improvement exceeds the sum of ten thousand dollars, the governing body shall advertise for sealed bids for the proposed improvement by publishing a notice to bidders as provided in section 362.3."

Chapter 23, Code of Iowa, 1977, encompassing county contracts, contains the applicable statutes on public contracts and bonds. The relevant subsections are:

"23.1 *Terms defined.* The words 'public improvement' as used in this chapter shall mean any building or other construction work to be paid for in whole or in part by the use of funds of any municipality."

"The word 'municipality' as used in this chapter shall mean county, except in the exercise of its power to make contracts for secondary road improvements, township, school corporation, state fair board, state board of regents, and state department of social services."

"23.18 *Bids required — procedure.* When the estimated total cost of construction, erection, demolition, alteration or repair of any public improvement exceeds five thousand dollars, the municipality shall advertise for bids on the proposed improvement by two publications in a newspaper published in the county in which the work is to be done, the first of which shall be not less than fifteen days prior to the date set for receiving bids, and shall let the work to the lowest responsible bidder submitting a sealed proposal; provided, however, if in the judgment of the municipality bids received be not acceptable, all bids may be rejected and new bids requested. All bids must be accompanied, in a separate envelope, by a deposit of money or certified check in an amount to be named in the advertisement for bids as security that the bidder will enter into a contract for the doing of the work. The municipality shall fix said bid security in an amount equal to at least five percent, but not more than ten percent of the estimated total cost of the work. The checks or deposits of money of the unsuccessful bidders shall be returned as soon as the successful bidder is determined, and the check or deposit of money of the successful bidder shall be returned upon execution of the contract documents. This section shall not apply to the construction, erection, demolition, alteration or repair of any public improvement when the contracting procedure for the doing of the work is provided for in another provision of law."

Chapter 332, Code of Iowa, 1977, deals with the powers and duties of the County Board of Supervisors. The relevant subsection dealing with the contracts is as follows:

332.7 *Erection or repair of buildings.*

1. Contract and bids required. No building shall be erected or repaired when the probable cost thereof will exceed five thousand dollars except under an express written contract and upon proposals therefor, invited by advertisement for three weeks in all the official newspapers of the county in which the work is to be done. Contracts for the construction or repair of buildings, the probable cost of which does not exceed five thousand dollars, shall be let either through the formal bidding procedures specified herein or through informal bidding by notifying in writing at least three qualified bidders at least two weeks prior to letting the contract. The informal bids received, together with a statement of the reasons for use of said informal procedure and bid acceptance, shall be entered in the minutes of the board of supervisors meeting at which such action was taken.

2. *Bids—plans and specifications.* Contracts for buildings and repairs specified by subsection 1 shall be let to the lowest responsible bidder at a time and place which shall be distinctly stated in the advertisement. The board may on the day fixed for letting such contract adjourn the hearing to some later date and place, of which all parties shall take notice. The board may reject any and all bids and advertise for new ones. The detailed plans and specifications for such improvements shall be on file and open to public inspection in the office of the auditor of the county in which the work is to be done before advertisement for bids.

You supplemented your request by letter, dated July 25, 1978, detailing the relevant facts of the proposed contract. The facts disclose that an organization known as the Hawkeye Landfill Company, Inc., has approached the Webster County Solid Waste Commission, and has proposed to operate a sanitary disposal project near the City of Fort Dodge. The Commission is organized pursuant to §455B.76, Code of Iowa, 1977, and is comprised of representatives from Webster County, and each of the cities therein. Your letter on July 25 stated that the proposed contract will contain a provision which states:

"...the contractor shall construct and maintain at his expense any facilities, improvements, and buildings within the site necessary for the operation of the structures and improvements thereon shall become the property of the commission or shall be removed by the contractor, at the option of the commission."

This provision specifically states that all costs will be paid by the contractor, and not by any city, county, or the commission. The governing statutes which pertain to the requiring of competitive bids, §§384.96, 23.18 and 332.7(2), are applicable only when there is to be an expenditure of public funds.

Under the given set of facts, no public funds are to be expended for this project. Since under the facts, as you state them, no public funds will be used we see no statutory requirement that the commission submit to public competitive bidding procedures. However, this office has previously recommended that governing bodies obtain bids as a matter of public policy, even though there is no statute mandating such action, to avoid situations which might be questionable, tainted or fraudulent. See 1974 OAG 171.

October 23, 1978

STATE OFFICERS AND DEPARTMENTS: City Development Board—Voluntary Annexations—Chapter 368, Code of Iowa, 1977; §1, Ch. 114, Acts of the 67th G.A. (1977). The City Development Board has no power to disapprove a voluntary annexation in an un-urbanized area. (Blumberg to Tyson, Director, Office for Planning and Programming, 10-23-78) #78-10-11

Mr. Robert F. Tyson, Director, Office for Planning and Programming: You have requested an official opinion of this office regarding Chapter 368, 1977 Code of Iowa, and the City Development Board. You stated in your letter:

1. In reference to Chapter 368.7 *Code*, as amended by Chapter 114, Laws of the 67th G.A., 1977 Session, unnumbered paragraph 2, certain questions arise from the following sentence: "An application for annexation of territory not within the urbanized area of a city other than the city to which the annexation is directed must be approved by resolution of the council which receives the

application."

Does the wording of the sentence in question preclude a city council from denying a voluntary non-urbanized annexation petition? In other words, is a city council *required* by the *Code* language to approve such a petition even if the petition does not meet statutory requirements (e.g. the 200 ft. contiguous boundary requirement)?

2. In reference to the same paragraph as noted above, certain questions arise from the following sentence: "The annexation is completed upon acknowledgment by the Board that it has received the map and resolution and a certification by the city clerk that copies of the map and resolution have been filed with the county recorder and secretary of state and that copies of the resolution, map, and legal description of the territory involved have been filed with the state department of transportation."

a. Upon receiving the required map, resolution, and certification from the city clerk, is the board *required* by the *Code* language to acknowledge such receipt?

b. If the answer to the above question is "No", what legal effect would the board's refusal to acknowledge receipt have?

c. What are the limits of the Board's discretion relative to approving or denying voluntary non-urbanized annexation petitions?

Section 368.7, as amended by §1, Ch. 114, Acts of the 67th G.A. (1977) provides in pertinent part:

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 of territory not within the urbanized area of a city other than the city to which the annexation is directed *must* be approved by resolution of the council which receives the application. Upon receiving approval of the council, the city clerk shall file a copy of the resolution, map, and legal description of the territory involved with the state department of transportation. The city clerk shall also file a copy of the map and resolution with the county recorder, secretary of state, and the board. The annexation is completed upon acknowledgement by the board that it has received the map and resolution and a certification by the city clerk that copies of the map and resolution have been filed with the county recorder and secretary of state and that copies of the resolution, map, and legal description of the territory involved have been filed with the state department of transportation. [Emphasis added]

In your first question, you ask whether the word "must", emphasized above, means that a city is required to annex territory under a voluntary annexation. The answer is no. The use of "must" in that section means that a voluntary annexation cannot become a reality unless the city council accepts it by resolution.

Although you did not so specifically state in your letter, from past discussions with the City Development Board, it appears that some cities have

accepted voluntary annexations without having met the Code requirements. Specifically, §368.7 requires that the land to be annexed must adjoin the city. Section 368.1(11) defines "adjoining" to mean a common boundary for not less than two hundred feet. Some cities have voluntarily annexed land where the common boundary is less than two hundred feet. By asking whether the Board must acknowledge receipt of the maps, resolution and certification, you are really asking whether the Board has any power to stop or correct such a voluntary annexation.

Prior to the recent amendment, the second paragraph of §368.7 read:

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 approval of the council, the city clerk 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 368.20, subsection 2.

Along with the recent amendment to paragraph two of §368.7, a third paragraph has been added:

An aplication for annexation of territory within the urbanized area of a city other than the city to which the annexation is directed must be approved both by resolution of the council which receives the application and by the board. The annexation is completed when the board has filed copies of applicable portions of the proceedings as required by section three hundred sixty-eight point twenty (368.20), subsection two (2) of the Code.

Under the section prior to the amendments, it appeared that the Board had to file applicable portions of the proceedings as required in §368.20 (2). Those included the original petition, amendments, the board's order approving the petition, proofs of service and publication of notices, certification of the election results and other material. However, since the Board did not have to conduct a hearing on a voluntary annexation, these materials could not be filed since most, if not all, did not exist. We assume the recent amendment was intended to clarify this.

What we now have is the requirement for filing pursuant to §368.20(2) applicable only to voluntary annexations within urbanized areas other than the one to which annexation is sought. All that is necessary for other voluntary annexations is an acknowledgement that certain materials have been filed with the Board. The Board can initiate proceedings on its own, §368.13, can accept petitions, §368.11, and dismiss them, §368.12.

However, the procedure for voluntary annexations other than in urbanized areas is different. The approval for such an annextion is vested in the city council. The Board is not given any specific power over that type of annexation. Section 368.17 provides that the City Development Committee may not approve annexations for the reasons listed in subsection four. Section 368.16 provides the basis for the Committee to approve proposals. However, the Committee is a different body than the Board, and is not involved in voluntary annexations. Nowhere in Chapter 368 is the Board alone given the specific power to disapprove a boundary adjustment.

Accordingly, we are of the opinion that the City Development Board

has no authority to disapprove voluntary annexations in un-urbanized areas. If such annexations do not meet Code requirements, the county or individuals could bring an action to stop the annexation. Your Board, however, cannot refuse to acknowledge receipt of the required materials.

October 27, 1978

MENTAL HEALTH: Mental Health Advocate. §229.19, Code of Iowa, 1977. Compensation paid to a mental health advocate by the court shall be based upon reports filed by the advocate according to time spent per patient. Compensation may not be based on a predetermined or average monthly basis. (Robinson to Yarham, Cass County Attorney, 10-27-78) #78-10-12

Mr. Ray Yarham, Cass County Attorney: You asked for our opinion of the Attorney General as follows:

I have been asked by the Cass County Board of Supervisors to make inquiry concerning compensation of the Cass County Mental Health Advocate. The Advocate wishes to receive a set monthly salary rather than having her compensation based on the amount of time spent in the preceding month. While the amount of time which the Advocate spends in the performance of her duties varies somewhat from month to month, the average amount of time which she spends could easily be computed, as could the average compensation. She feels that a set monthly salary would allow her a more systematic ordering of her personal budget.

I would ask for an Opinion addressed to the following questions:

Does Section 229.19 of the 1977 Code of Iowa, which states in part that "(t)he court shall from time to time prescribe reasonable compensation for the services of the advocate", allow the court to prescribe a predetermined monthly salary for the advocate, such salary to be based on the average amount of time which the advocate has spent in performance of her duties in prior months?

Does Section 229.19 of the 1977 Code of Iowa, which states in part that "compensation (of the advocate) shall be based upon reports filed by the advocate at such times and in such forms as the court shall prescribe", allow compensation of the advocate to be a predetermined monthly salary, based upon the reports the advocate has filed, showing the average amount of time which the advocate has spent during prior months in the performance of her duties?

In our opinion, the answer to your questions is in the negative. Although past experience may be an indicator of future experience, the legislature has precluded this alternative for determining compensation for advocates under §229.19, Code of Iowa, 1977. Your questions included pertinent portions of the statute involved, but for a fuller understanding we shall quote all of it.

§229.19 *Advocate appointed.* The district court in each county shall appoint an individual who has demonstrated by prior activities an informed concern for the welfare and rehabilitation of the mentally ill, and who is not an officer or employee of the department of social services nor of any agency or facility providing care or treatment to the mentally ill, to act as advocate representing the interests of all patients involuntarily hospitalized by that court, in any matter relating to the patients' hospitalization or treatment under sections 229.14 or 229.15. The advocate's responsibility with respect to any patient

shall begin at whatever time the attorney employed or appointed to represent that patient as respondent in hospitalization proceedings, conducted under sections 229.6 to 229.13, reports to the court that his or her services are no longer required and requests the court's approval to withdraw as counsel for that patient. The clerk shall furnish the advocate with a copy of the court's order approving the withdrawal. The advocate's duties shall include reviewing each report submitted pursuant to sections 229.14 and 229.15 concerning any patient whose interests, as a patient, the advocate is required to represent under this section, and if the advocate is not an attorney, advising the court at any time it appears that the services of an attorney are required to properly safeguard the patient's interests. The court shall from time to time prescribe reasonable compensation for the services of the advocate. Such compensation shall be based upon reports filed by the advocate at such times and in such forms as the court shall prescribe. The report shall briefly state what the advocate has done with respect to each patient and the amount of time spent. The advocate's compensation shall be paid on order of the court from the county mental health and institutions fund of the county in which the court is located. [66GA, ch 139, §19]

The courts have often held that where the language is clear and plain there is no room for statutory construction and that we must look to what the legislature said rather than what it should or might have said. *First National Bank of Ottumwa v. Bair,* 252 N.W. 2d 723 (Iowa 1977). We shall apply this to the above section of the law.

The advocate's responsibility begins when the attorney's withdrawal has been approved. This is a variable which is not conducive to a standard monthly amount which apparently the Board would like to establish for the advocate.

Further, the statute specifically states that the "compensation shall be based upon reports filed by the advocate"...and "[t]he report shall briefly state what the advocate has done with respect to each patient and the amount of time spent." The word "shall" imposes a duty. §4.1 (36) (a), Code of Iowa, 1977.

This means there is a duty imposed upon the advocate to report to the court what has been done with each patient and the amount of time spent with each patient. When the legislature went into this detail, it indicates to us that they did not intend to allow the courts to establish compensation based upon a prescribed or predetermined monthly salary for the advocate. Nor is the compensation to be based on monthly averages. It is to be paid according to the time spent per patient.

October 30, 1978

STATE OFFICERS AND DEPARTMENTS: Secretary of State, Uniform Commercial Code Division, Public Records. §§4.7, 4.8, 18.8, 69A.3, 554.9407(3), Code of Iowa, 1977. It is not a violation of law for the Secretary of State to make space available to a private corporation in the offices of the Uniform Commercial Code Division and to make a charge therefor to facilitate searches of public records by such corporation. (Haesemeyer to Synhorst, Secretary of State, 10-30-78) #78-10-13

The Honorable Melvin D. Synhorst, Secretary of State: Reference is made to your letter of October 27, 1978, in which you request an opinion of the Attorney General and state:

"This is a request for an opinion concerning the use of space by companies

searching the records of the Uniform Commercial Code Division of this office, and in particular whether the Secretary of State's office is in violation of Chapter 18.8 of the 1977 Code of Iowa in allowing Iowa Public Records Search, Inc. to occupy an 'official apartment' in the Grimes State Office Building."

"The Iowa Uniform Commerial Code was enacted into law by the 61st G.A. and became effective on July 4, 1966, Chapter 413, 61st G.A., 1965. Iowa Public Records Search, Inc. has conducted searches of the records of the Uniform Commercial Code office since July of 1966."

"Senate file 1315 Acts of the 65th G.A., which became effective January 1, 1975 added a new provision (paragraph 3 to Sec. 554.9407 of the Code of Iowa) which outlines methods of providing information to the public."

"No appropriation accompanied the new duties required by SF 1315.. By resolution, the State Executive Council provided additional funds to the Secretary of State's office from the general contingency fund to be used for administering this act for the period from January 1, 1975 through June 30, 1975. This provision did not include funding for telephone search services. In a letter dated December 2, 1974 from the Secretary of State to the Secretary of the Executive Council, the Secretary of State wrote that his office had no contract or agreement, oral or written, with Iowa Search, Inc. to provide telephone service and that shortly after January 1, 1975, Iowa Search, Inc. would be billed for space, telephone use, and any excessive cost of our employees' time in providing information relating to the telephone service only. The Secretary of State also stated that any other organization would be given equal opportunity."

"In January 1975, telephone lines were installed and space was allocated to Iowa Public Records Search, Inc. to conduct telephone search service. Iowa Search paid the entire rental of the State telephone lines and a square footage assessment was made for only the additional space utilized as necessary to the telephone information service. (Note: At the time this arrangement was made it was our understanding that private lines could not be brought into the Grimes Building.) Space allocation to Iowa Public Records Search, Inc., for its regular search activities, other than telephone searches, is the same as that allocated to Dun & Bradstreet, Marion County Credit Bureau and others engaged in regular search for lien information. Such space for all including Iowa Public Records Search, Inc. was made available at no charge to the using parties."

"Senate file 1221 enacted by the 66th GA, 1976 session, provided an appropriation for the Secretary of State to make provisions for telephone searches, and also amended Sec. 554.9407, which two items were vetoed by the Governor." (See copy of Governor's veto message attached.)

"It has been argued that the services of Iowa Public Records Search, Inc. extend far beyond Uniform Commercial searches. The Uniform Commercial Code division office also contains the Federal Tax Liens filed against all corporations and partnerships doing business in the State of Iowa. They may be searched under both Chapter 68A and section 335.21 of the Code. Iowa Public Records Search, Inc. also searches the corporate records of the Corporation Division of the Secretary of State's office under the open records law."

"The Secretary of State's policy in regard to searching public records is to provide an equal opportunity to all who wish to perform such services."

"We specifically ask the following questions:"

"1. Is the Secretary of State authorized to allocate a portion of the office of

the Secretary of State for searching of public records pursuant to Sec. 554.9407 and the open records law Chapter 68A, 1977 Code of Iowa?"

"2. Is the Secretary of State authorized to make a charge for space allocated to the office for searching of public records pursuant to Section 554.9407 and Chapter 68A, 1977 Code of Iowa?"

"3. Is the Director of General Services authorized to permit a private corporation to install telephone lines in a State office, at its own expense, for searching of public records under 554.9407 and Chapter 68A, 1977 Code of Iowa?"

"4. Is there a violation of Sec. 18.8, 1977 Code of Iowa, resulting from the providing of space as described above for the searching of public records under Sec. 554.9407 and Chapter 68A, 1977 Code of Iowa?"

As you have pointed out, it has always been understood that any other corporation, business or individual would have equal opportunity to use the facilities of the office to provide a service like that of Iowa Search. The relevant statutory provisions are those to which you make reference. Section 18.8, Code of Iowa, 1977, provides in relevant part:

"* * *"

"The director shall assign office space in the capitol building, other state buildings, except the buildings and grounds referred to in section 601B.6, subsection 9, and elsewhere in the city of Des Moines, for all executive and judicial state agencies. Assignments may be changed at any time. The various officers to whom rooms have been so assigned may control the same while the assignment to them is in force. *Official apartments shall be used only for the purpose of conducting the business of the state.* The term 'capitol' or 'capitol building' as used in the Code shall be descriptive of all buidlings upon the capitol grounds. The assignment and use of physical facilities for the general assembly shall be pursuant to section 2.43.

"* * *" (Emphasis added)

Section 554.9407(3) provides:

"* * *"

"3. Charging no more than a reasonable estimate of cost, in his discretion the secretary of state or a county recorder may adopt one or more of the following methods of providing information concerning public filings in his office to persons with an interest in this information that is related exclusively to the purposes of this Article:"

"a. subscription telephone service;"

"b. subscription daily, weekly or monthly written summaries;"

"c. *granting suitable space for the preparation of written summaries and the provision of telephone service by those persons deemed by the secretary of state or a county recorder to have a legitimate interest in regular examination of the secretary of state's or the county recorder's public files;* or"

"d. any other appropriate method of disseminating information."

"Except with respect to willful misconduct, the state of Iowa, the secretary of state, a county, a county recorder and their employees and agents are immune from liability as a result of errors or omissions in information supplied pursuant to this subsection." (Emphasis added)

Chapter 68A entitled "Examination of Public Records" articulates the public

policy of this state that documents in the possession of agencies of government at all levels are to be open to public scrutiny and examination. It makes no distinction between such examination by individual citizens on a casual and occasional basis and those which are conducted on a regular day in day out basis by corporations for profit. Certainly it does not concern itself with the purpose of the examination or the use which is made of the information obtained.

Sections 68A.2 and 68A.3 provide respectively:

§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. All rights under this section are in addition to the right to obtain certified copies of records under section 622.46."

§68A.3

"Supervision. Such examination and copying shall be done under the supervision of the lawful custodian of the records or his authorized deputy. The lawful custodian may adopt and enforce reasonable rules regarding such work and the protection of the records against damage or disorganization. *The lawful custodian shall provide a suitable place for such work,* but if it is impracticable to do such work in the office of the lawful custodian, the person desiring to examine or copy shall pay any necessary expenses of providing a place for such work. *All expenses of such work shall be paid by the person desiring to examine or copy.* The lawful custodian may charge a reasonable fee for the services of the lawful custodian or his authorized deputy in supervising the records during such work. If copy equipment is available at the office of the lawful custodian of any public records, the lawful custodian shall provide any person a reasonable number of copies of any public record in the custody of the office upon the payment of a fee. The fee for the copying service as determined by the lawful custodian shall not exceed the cost of providing the service." (Emphasis added)

Section 18.8 is a general statute having to do with the use of state "apartments" in a sweeping and comprehensive manner whereas §§554.9407(3) (c) and 68A.3 are special statutes dealing respectively with the granting of space for the examination of documents filed in the Office of the Uniform Commercial Code Division of the Secretary of State's office and making space and facilities availble for examining public records of all government agencies.

Thus, to the extent that any conflict exists betwen §18.8 on the one hand and §§68A.3 and 554.9407 on the other, the latter two sections prevail. As stated in §4.7:

"Conflicts between general and special statutes. 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."

Moreover, what is now the relevant language of §18.8 has been in the Code since at least 1897. Section 152, Code of Iowa, 1897. Section 554.9407(3) (c) became law in 1974. Section 62, Chapter 1249, 65th G.A., Second Session

(1974), and §68A.3 was enacted in 1967. Section 3, Chapter 106, 62nd G.A. (1967). As stated in §4.8:

"Irreconcilable statutes. 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."

In addition, as you point out, the Governor, in 1976, vetoed a legislative attempt to curtail the present practice and in his veto message, a copy of which is annexed hereto and by this reference made a part hereof, cogently set forth his reasons for so doing. The fact that the general assembly felt it necessary to pass a law amending §554.9407 in order to halt the service provided the public by Iowa Search is tantamount to legislative recognition that without such a law the present practice could continue. In exercising the veto power the Governor is performing a legislative function contemplated by the constitution. Thus, his item veto and veto message are part of the legislative history of Senate File 1221, the measure which attempted to amend §554.9407.

Finally, we find no violation of §18.8 in that the granting of space to Iowa Search is in furtherance of the business of the state and in the public interest. We note for example, as pointed out in the governor's veto message that Iowa Search is providing a service to the public at 25% less than the vetoed Senate File 1221 would have provided. One would hope that saving the people money is still the business of the state.

We cannot refrain from observing, too, that the Iowa Search arrangement is not unique. Abstract companies have maintained desks and telephones in various court houses for a number of years for the purposes of conducting title searches. It would be cumbersome indeed and add to abstract fees charged purchasers of real estate if this were not so. Profit making newspapers, wire services and television and radio stations have for years been furnished desks and telephones in the Senate and House chambers as well as other facilities in state "apartments" for their exclusive use. In adition, a press room is made available to them to facilitate their news gathering activities. The telephone company makes a profit from phone booths placed in state buildings. Newspapers are sold for a profit from vending machines placed in state "apartments". Consultants employed by the state are frequently furnished offices, desks and telephones as a matter of contract presumably on the theory that this enables them to most efficiently and economically perform the services for which they were engaged. Food services are furnished by private concessionaires utilizing significant amounts of space in "official apartments".

In our opinion all of these activities, in one way or another, further the business of and are beneficial to the state and the same is true of the arrangement with Iowa Search.

In conclusion, and in answer to your specific questions, it is our opinion that the Secretary of State and the Director of General Services are authorized under both §§68A.3 and 554.9507(3) to allocate space and make a charge therefor to Iowa Search for the purpose of searching public records and to permit the installation of telephone lines in connection therewith. Moreover, we find no violation of §18.8 by reason of this arrangement. We might add that in our opinion there is no constitutional informity in the arrangement.

OFFICE OF THE GOVERNOR
June 28, 1976

The Honorable Melvin D. Synhorst
Secretary of State
State Capitol Building

I hereby transmit Senate File 1221, An Act relating to and appropriating funds to the department of banking, the office of the secretary of state, the pioneer lawmakers and the occupational safety and health review commission.

Senate File 1221 is approved June 28, 1976, with the following exceptions which I hereby disapprove.

I am unable to approve the item designated in the Act as paragraph "b" of Subsection 2 of Section 1 which reads as follows:

"b. For salaries, support, maintenance and miscellaneous purposes of the uniform commercial code division in performing records searches . . . $38,700."

I am unable to approve the item designated as Section 4 which reads as follows:

"Sec. 4. Section five hundred fifty-four point nine thousand four hundred seven (554.9407), code 1975, is amended to read as follows:"

554.9407 INFORMATION FROM FILING OFFICER.

1. If the person filing any financing statement, termination statement, statement of assignment, or statement of release, furnishes the filing officer a copy thereof, the filing officer shall upon request note upon the copy the file number and date and hour of the filing of the original and deliver or send the copy to such person.

2. Upon *written* request of any person, the filing officer shall issue his *or her* certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any *financing* statement [of assignment thereof] *changes* and if there is, giving the date and hour of filing of each such [statement] filing and the names and addresses of each secured party therein. The uniform fee for such a certificate shall be two dollars if the request for the certificate is on a form conforming to standards prescribed by the secretary of state; otherwise, three dollars. Upon request and the payment of the appropriate fee the filing officer shall furnish a certified copy of any filed financing statement or *financing* statement [of assignment] *changes* for a uniform fee of one dollar per page. (Words in brackets are deleted.)

3. *Upon telephone request of any person, the filing officer in the office of the secretary of state shall respond by phone stating whether there is on file on the date and hour upon which the request is made any presently effective financing statement naming a particular debtor and any financing statement changes and if there is, stating the date and hour of filing of each such filing and the names and addresses of each secured party therein. The uniform fee for this telephone search service shall be four dollars per each debtor name searched. All fees must be prepaid before a person may utilize this telephone search service. A certificate confirming the information given to the person making the request shall be sent to that person by the filing officer upon request*

and payment of a fee of one dollar per debtor name searched. Upon request and the payment of the appropriate fee, the filing officer shall furnish a certified copy of any filed financing statement or financing statement changes for a uniform fee of one dollar per page. The method of payment of fees imposed by this subsection shall be established by the secretary of state.

4. Charging no more than a reasonable estimate of cost, in his *or her* discretion the secretary of state may adopt one or more of the following methods of providing information concerning public filings in his *or her* office to persons with an interest in this information that is related exclusively to the purposes of this Article:

[a. subscription telephone service;] (Words in brackets are deleted.)

[b. subscription] (Words in brackets are deleted.)

a. *Subscription* daily, weekly or monthly written summaries; *or*

[c. granting suitable space for the preparation of written summaries and the provision of telephone service by those persons deemed by the secretary of state to have a legitimate interest in regular examination of the secretary of state's public files; and] (Words in brackets are deleted.)

[d. any] (Words in brackets are deleted.)

b. *Any* other appropriate method of disseminating information.

However, the secretary of state shall not make space or services available to any person for examination and preparation of summaries of the secretary of state's public files except the space and services made available under chapter sixty-eight A (68A) of the Code.

5. *Charging no more than a reasonable estimate of cost, in his or her discretion a county recorder may adopt one or more of the following methods of providing information concerning public filings in his or her office to persons with an interest in this information that is related exclusively to the purposes of this Article:*

a. *Subscription telephone service;*

b. *Subscription daily, weekly or monthly written summaries;*

c. *Granting suitable space for the preparation of written summaries and the provision of telephone service; or*

d. *Any other appropriate method of disseminating information.*

6. Except with respect to willful misconduct, the state of Iowa, the secretary of state, *a county, a county recorder,* and their employees and agents are immune from liability as a result of errors or omissions in information *or assistance concerning the secretary of state's or a county recorder's public files* supplied [pursuant to this subsection] *by them to any person.* (Words in brackets are deleted.)

7. *Fees collected by the secretary of state pursuant to this section shall be remitted by the secretary of state to the treasurer of state for deposit in the general fund of the state."*

The substantive portion of these items imposes a new duty upon the Secretary of State's Uniform Commercial Code (UCC) Division filing officer in the form of a telephone search service and provides an appropriation of $38,700 to

perform the service. In addition, the items prohibit the Secretary of State from making space or services available to any person for examination and preparation of summaries of the UCC files other than the space and services required under the Open Records Law.

Presently, the filing officer of the UCC Division of the Secretary of State's Office does not provide a telephone search service. Instead, the Secretary of State's Office has contracted with a private firm, Iowa Public Records Search, Inc., to provide the telephone search service and subsequent written confirmations. If Senate File 1221 is signed into law without exception, state government will assume the telephone search task presently being accomplished by the private enterprise.

For a number of reasons it appears unlikely that state government would be able to provide service in this area in an improved manner over what is now available by private enterprise.

—The items in Senate File 1221 direct that a uniform fee of $4 be charged for each individual telephone search. This compares with the $3 fee presently being charged by the private firm.

—The items in Senate File 1221 mandate that all fees must be prepaid before a person may utilize the telephone search service. The private firm requires no prepayment.

—Since the Secretary of State and his employees are immune from liability by law, except for willful negligence, the users of the telephone search service will no longer have the protection of the errors and omissions insurance presently maintained by the private firm.

—The UCC Division filing officer will not provide as much information, e.g. collateral itemization, to telephone search requests as the private firm currently does.

I understand the primary reason for the move to preempt the private firm from continuing its activities was the dissatisfaction felt by some with the service being provided. While this once may have been the case, the concern over the quality of service has apparently been resolved. The Secretary of State's Office informs me that they are pleased with the capable and efficient service being provided by the private firm. In addition, I am told that no complaints about the service have been received by the Secretary of State's Office for more than a year. Even one of the chief sponsors of the effort to replace the private firm admits that the complaints about the poor service have subsided to a large extent.

Therefore, I see little reason for the changes contained in these items. Accordingly, I disapprove these two items of Senate File 1221 in accordance with Amendment 4 of the Amendments of 1968 to the Constitution of the State of Iowa. All other items of Senate File 1221 are hereby approved this date.

Robert D. Ray, Governor

October 31, 1978

COUNTIES: Benefited Water District. Chapter 357, Code of Iowa, 1977. An existing in-place water system may be acquired under Chapter 357 Code of Iowa, 1977, but the mandatory duties of an independent engineer set out in §357.6 must be observed. (Nolan to Criswell, Warren County Attorney,

10-31-78) #78-10-14

Mr. John W. Criswell, Warren County Attorney: You have requested an opinion of the Attorney General on five questions pertaining to a Lakewood Benefited Water District in Warren County, Iowa. In your letter you state that the Lakewood area is an unincorporated village which in the past several years has received water service from the Iowa Metropolitan Water Company under a fifty year exclusive lease. Your letter further states that the residents of Lakewood are unhappy with the service they have received and have petitioned Warren County Board of Supervisors to set up a benefited water district under chapter 357 of the Iowa Code. The supervisors have approved such district on a preliminary basis and have appointed a disinterested engineer to make a preliminary study of the water system which is in place.

The questions submitted with your letter are:

"1. Who has good and merchantible title to the 'in-place' water system through which Iowa Metropolitan Water Company transmits water to the residents of Lakewood, an unincorporated village in Warren County, Iowa? Further, with regard to title of said 'in-place' system, what is the effect of the agreement between Iowa Metropolitan Water Company and FHA to the effect that residents of Lakewood cannot be charged for the value of the existing water system if said system is sold to a governmental agency or taken through eminent domain process by a governmental agency?"

"2. Under Chapter 357.6 of the Code of Iowa (1977), may the duties of the independent engineer to"

"(a) Make preliminary designs;"

"(b) Make an accurate cost estimate; and"

"(c) Examine the suitability of a proposed source"

"be waived where an existing water system is found and taken over by the benefited water district? With respect to Chapter 357.8 of the Code of Iowa (1977), may the duties of the independent engineer to prepare preliminary plats be waived where an existing water system exists and is to be taken over by the benefited water district?"

"3. May a Chapter 357 of the Code of Iowa (1977) Benefited Water District purchase an existing water distribution facility?"

"4. May a County Board of Supervisors utilize eminent domain powers described in Chapter 357.31 of the Code of Iowa (1977) to purchase the right of way and the facilities currently existent therein through which the present, private water company distributes water to the residents of Lakewood, an unincorporated village in Warren County, Iowa."

"5. May the levy and bond powers of Chapter 357 of the Code of Iowa (1977) be used to pay back taxes owed by the Iowa Metropolitan Water Company to Warren County should the Lakewood Benefited Water District be permitted to purchase the existing facilities of Iowa Metropolitan Water Company under Chapter 357 of the Code of Iowa (1977)?"

While it appears from the facts stated from your letter that the Metropolitan Water Company would have title to the system now in place, this office cannot make a determination as to whether such company has good and merchantible title from the mere facts set out in such letter. The second part of question 1 presented out of context also cannot be answered by this office on the basis of the facts supplied.

With respect to your second question asking whether there can be a waiver of duties of an independent engineer to make preliminary designs, an accurate cost estimate and an examination of the suitability of a proposed water source pursuant to §357.6, it is our opinion that such duties are mandated by statute and cannot be waived. The same result is reached with respect to the requirement that the independent engineer prepare preliminary plats. It may well be that the existing plat of an in-place water system is sufficient for the needs of such benefited district and that the independent engineer can so certify. However, it is also likely that where a water system is deemed inadequate by the residents of a particular area that extensions and possible reroutings would be required to provide the service which the residents of the benefited district require.

We find no limitation under Chapter 357 of the Code which would prohibit a benefited water district from purchasing an existing water distribution facility.

While there appears to be little precedent for the county board of supervisors to utilize eminent domain powers to acquire the facilities and right of way of an existing system owned by a private water company, it is our view that such authority is necessarily implied by §357.31.

We find no authority for the use of levy and bond powers of Chapter 357 to be used to pay back taxes owed by the Iowa Metropolitan Water Company to Warren County. The supervisors have limited authority to compromise such taxes (§445.16) and those that are not paid or compromised remain a lien on the property to be acquired.

October 9, 1978

STATE OFFICERS AND DEPARTMENTS: General Assembly; Legislative Committees; Employment of Consultants. Article III, §9, Constitution of Iowa. §§2.12 and 2.13, Code of Iowa, 1977. HR 147, 67th G.A., Second Session (1978). An interim committee authorized by either house may employ personnel and consultants without the approval of the legislative council. (Haesemeyer to Krahl, Acting State Comptroller, 10-9-78) #78-10-15

Mr. William Krahl, Acting State Comptroller: Reference is made to your letter dated September 27, 1978, in which you request an opinion of the Attorney General and state:

"The House of Representatives adopted House Resolution 147 on May 12, 1978 (Pages 2753-2756 House Journal which established a committee of the House of Representatives that"

" '. . . expressly authorizes and directs the committee to make a complete investigation and study of all activities of any and all persons or groups of persons or organizations of any kind (including governmental agencies) . . . .' "

"8. That the house of representatives hereby empowers and directs the speaker of the house pursuant to section two point twleve (2.12) of the Code to employ and fix the compensation of such clerial, investigative, legal, technical and other assistants as the *council* (emphasis provided) deems necessary and appropriate to the committee's investigation."

" '9. That, with respect to the investigation by the government operations committee authorized by this resolution, the committee shall exercise all these powers and duties not otherwise consistent with this resolution, which powers and duties the committee is authorized pursuant to chapter two (2) of the Code.' "

" '10. That the committee as an agency of the general assembly and with the approval of the speaker of the house is hereby empowered and directed:' "

" 'f. To obtain the temporary or intermittent services of individual consultants subject to approval of the legislative council (emphasis is provided).' "

"The Legislative Council met September 27, 1978 and determined they had no authority to authorize or approve the employment of personnel or consultants for the house committee. Attached herewith is a memorandum prepared by the Legislative Service Bureau for the Legislative Council relating to this subject. The question arises in light of the above, can a warrant be issued in payment for services of personnel or consultants for the house committee authorized by HR 147 which are duly requisitioned by the speaker and chief clerk of the house?"

Article III, §9, Constitution of Iowa, provides:

"Authority of the houses. Each house shall sit upon its own adjournments, keep a journal of its proceedings, and publish the same; determine its rules of proceedings, punish members for disorderly behavior, and, with the consent of two thirds, expel a member, but not a second time for the same offense; and shall have all other powers necessary for a branch of the General Assembly of a free and independent State."

Sections 2.12 and 2.13, Code of Iowa, 1977, provide respectively:

§2.12

"Expenses of general assembly. There is hereby appropriated out of any funds in the state treasury not otherwise appropriated a sum sufficient to pay for legislative printing and all current and miscellaneous expenses of the general assembly, authorized by either the senate or the house, and the state comptroller is hereby authorized and directed to issue warrants for such items of expense upon requisition of the president and secretary of the senate or the speaker and chief clerk of the house."

"There is hereby appropriated out of any funds in the state treasury not otherwise appropriated, such sums as may be necessary, for each house of the general assembly for the payment of any unpaid expense of the general assembly incurred during or in the interim between sessions of the general assembly, including but not limited to salaries and neessary travel and actual expenses of members and expenses of standing and interim committees or subcommittees and per diem or expenses for members of the general assembly who serve on statutory boards, commissions, or councils for which per diem or expenses are authorized by law. The state comptroller is hereby authorized and directed to issue warrants for such items of expense 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."

"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 employment 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."

§2.13

"Issuance of warrants. The state comptroller shall also issue to each officer

and employee of the general assembly, during legislative session or interim periods, upon vouchers signed by the president and secretary of the senate or the speaker and chief clerk of the house, warrants for the amount due for services rendered. Such warrants shall be paid out of any moneys in the treasury not otherwise appropriated."

The foregoing constitutional and statutory provisions provide sufficient authority for the payment of the expenses of an interim committee authorized by either the house or the senate, and specifically direct the state comptroller to issue warrants for such expenses upon the requisition of either the president and secretary of the seante or the speaker and chief clerk of the house.

We agree with the conclusion reached by the legislative council at its September 27, 1978 meeting that it has no authority to authorize or approve the employment of personnel or consultants for the house committee established by house resolution 147 notwithstanding the fact that such house resolution 147 purports to make the employment of various assistants by the speaker subject to approval by the legislative council. Certainly no harm would have been done if the legislative council had approved the employment. However, the council correctly concluded that it had no statutory authority or duty to do so. Section 2.12 contains the statutory provisions with respect to the employment of assistants for and the payment of interim expenses of committees of either house and the attempt to impose further limitations on that power by house resolution 147 is ineffectual. As we pointed out in an earlier opinion of the Attorney General, a joint resolution cannot repeal or amend a statute. OAG Haesemeyer to Hill, State Senator, July 17, 1978. If a joint resolution cannot override a statute certainly a mere house resolution cannot do so. An examination of the statutory provisions relative to the legislative council and its powers and duties discloses nothing which could be taken to say that a power conferred on each house of the general assembly by §2.12 is somehow subject to approval of the legislative council.

Accordingly, it is our opinion that warrants can be issued in payment for services of personnel and consultants for the house committee authorized by house resolution 147.

October, 1978

CAMPAIGN FINANCE DISCLOSURE

Corporate contributions; Elections; Ballot Issue; Referendum; Disclosure and Reporting. First Amendment, U.S. Constitution. §§56.2(6), 56.2(14), 56.3-7, 56.29(1), 56.29(2), 56.29(3), Code of Iowa, 1977. Corporations may not be statutorily prohibited from espousing views on referendum ballot issues and cannot be required to meet the committee creation, reporting and disclosure requirements of Chapter 56 in publicizing its views since Chapter 56 conflicts with the First Amendment. It is therefore lawful in Iowa for a corporation to directly contribute corporate funds to another committee for the purpose of educating the public on a referendum ballot issue, the conflicting terms of Chapter 56 to the contrary notwithstanding. (Salmons to Thompson, 10-18-78) #78-10-5

COUNTIES

Benefited Water District. Chapter 357, Code of Iowa, 1977. An existing in-place water system may be acquired under Chapter 357, but the mandatory duties of an independent engineer set out in §357.6 must be observed. (Nolan to Criswell, Warren County Attorney, 10-31-78) #78-10-14

COURTS

Retired Judges; Solemnization of Marriages. §§595.10, 595.11, 605.24, 605.25, Code of Iowa, 1977. A retired judge may, with his consent, continue to solemnize marriages in the State of Iowa if authorized to do so by the Supreme Court. (Haesemeyer to Sutton, 10-23-78) #78-10-9

ENVIRONMENTAL PROTECTION

Sanitary Dispoal Projects. §§455B.76, 384.95, 384.96, 23.1, 23.18, 332.7 (1), 332.7(2), Code of Iowa, 1977. Competitive bids are not required for a contract between an area solid waste disposal unit organized pursuant to §455B.76 and a contractor where the contract will not involve the expenditure of public funds. (Valde to Thatcher, Webster County Attorney, 10-23-78) #78-10-10

Conservation Commission; Hunting with mobile radio transmitter and within 200 yards of inhabited building. Section Two, House File 356, Acts, 67th G.A., 1978; §§4.1(2), 109.1(8), 109.40, 109.41, 109.42, 109.43, 109.44, 109.45, Code of Iowa, 1977. §109.123 as amended by §6, House File 356. The word "game" as used in §2, House File 356, and §109.123 is defined in §109.41, and does not include fur bearing animals as defined in §109.40. However, §2, HF 356 is divisible and the prohibition against directing hunters by radio applies to all who "hunt" as defined in §109.1(8). (Davis to Priewert, Director, Iowa Conservation Commission, 10-19-78) #78-10-8

Department of Environmental Quality; Water Quality; Board of Certification. §455B.52(3), Code of Iowa, 1977, prohibits disclosure by members of the Board of Certification of the contents of examinations even to like agencies in other states. (Davis to Crane, Executive Director, Department of Environmental Quality, 10-19-78) #78-10-7

Federally Mandated Pretreatment Program. Chapter 455B, Code of Iowa, 1977; Title 400, Iowa Administrative Code. Iowa law requires amendment before complete adoption of this federal program although virtually all program elements may be initiated prior to such amendment. (Davis to Crane, Executive Director, Department of Environmental Quality, 10-6-78) #78-10-1

MENTAL HEALTH

Mental Health Advocate. §229.19, Code of Iowa, 1977. Compensation paid to a mental health advocate by the court shall be based upon reports filed by the advocate according to time spent per patient. Compensation may not be based on a predetermined or average monthly basis. (Robinson to Yarham, Cass County Attorney, 10-27-78) #78-10-12

MUNICIPALITIES

Zoning. §§362.2(13), 384.81, 384.84, 414.23, Code of Iowa, 1977. Wherever a county had adopted zoning ordinances a city cannot extend its zoning powers beyond its limits. A city is not required to extend water and sewer service beyond its limits. (Blumberg to Merritt, State Senator, 10-9-78) #78-10-2

PRISONS

Mandatory Minimum Sentences; Good and Honor Time. §§204.406, 204.413, 246.38, 246.39, 246.43, 902.7, 902.8, 906.5; SF 2202, 67th GA (1978). Application of good and honor time to mandatory minimum sentences will necessarily affect the date on which an inmate is eligible for parole but will have no effect on the expiration of his full sentence. (Hayward to Preisser, Commissioner, Iowa Department of Social Services, 10-18-78) #78-10-4

STATE OFFICERS AND DEPARTMENTS

Motor Vehicle Reciprocity. §§321.105, 321.106, 321.107, 326.17, Code of Iowa, 1977. An Iowa based carrier licensed in Iowa cannot be exempted from full year registration fees by purchasing a special restricted plate in another state during the first quarter of the year. (Blumberg to McCoy, Director, Motor Vehicle Division, Department of Transportation, 10-19-78) #78-10-6

City Development Board—Voluntary Annexations. Chapter 368, Code of Iowa, 1977; §1, Chapter 114, Acts, 67th G.A. (1977). The City Development Board has no power to disapprove a voluntary annexation in an unurbanized area. (Blumberg to Tyson, Director, Office for Planning and Programming, 10-23-78) #78-10-11

Department of Transportation; Municipalities; Contracts; Highways; Constitutional Law; Police Power. §§306.1(2) (a), 306.3(2), 306.4, 306A.2, 306A.3, 306A.7, 321.236(1), Code of Iowa, 1977. Pursuant to §306A.7, the Dept. of Transportation and cities may enter into valid agreements to improve primary road extensions as controlled-access facilities which include provisions with regard to the regulation of parking. In so doing, the police power of the state and the city to regulate parking on highways would not be surrendered by contract but only limited in its exercise as authorized by statute. (Mull to Bisenius, State Senator, 10-12-78) #78-10-3

Secretary of State; Uniform Commercial Code Division; Public Records. §§4.7, 4.8, 18.8, 68A.3, 554.9407(3), Code, 1977. It is not a violation of law for the Secretary of State to make space available to a private corporation in the offices of the Uniform Commercial Code Division and to make a charge therefor to facilitate searches of public records by such corporation. (Haesemeyer to Synhorst, Secretary of State, 10-30-78) #78-10-13

General Assembly; Legislative Committees; Employment of Consultants. Art. III, §9, Const. of Iowa. §§2.12, 2.13, Code, 1977. HR 147, 67th GA, Second Session (1978). An interim committee authorized by either house may employ personnel and consultants without the approval of the legislative council. (Haesemeyer to Krahl, Acting State Comptroller, 10-9-78) #78-10-15

STATUTES CONSTRUED

Code, 1977	Opinion
2.12	78-10-15
2.13	78-10-15
4.1(2)	78-10-8
4.7	78-10-13
4.8	78-10-13
18.8	78-10-13
23.1	78-10-10
23.18	78-10-10
56.2(6)	78-10-5
56.2(14)	78-10-5
56.3	78-10-5
56.4	78-10-5
56.5	78-10-5
56.6	78-10-5
56.7	78-10-5
56.29(1)	78-10-5

56.29(3)	78-10-5
68A.3	78-10-13
109.1(8)	78-10-8
109.40	78-10-8
109.41	78-10-8
109.42	78-10-8
109.43	78-10-8
109.44	78-10-8
109.45	78-10-8
109.123	78-10-8
204.406	78-10-4
204.413	78-10-4
229.19	78-10-12
246.38	78-10-4
246.39	78-10-4
246.43	78-10-4
306.1(2) (a)	78-10-3
306.3(2)	78-10-3
306.4	78-10-3
306A.2	78-10-3
306A.3	78-10-3
306A.7	78-10-3
321.105	78-10-6
321.106	78-10-6
321.107	78-10-6
321.236(1)	78-10-3
326.17	78-10-6
332.7(1)	78-10-10
332.7(2)	78-10-10
357	78-10-10
362.2(13)	78-10-2
368	78-10-11
384.81	78-10-2
384.84	78-10-2
384.95	78-10-10
384.96	78-10-10
414.23	78-10-2
455B.	78-10-1
455B.52(3)	78-10-7
455B.76	78-10-10
554.9407(3)	78-10-13
595.10	78-10-9
595.11	78-10-9
605.24	78-10-9
605.25	78-10-9
902.7	78-10-4
902.8	78-10-4
906.5	78-10-4
Senate File 2202	78-10-4
House File 356	78-10-8
House File 356, §6	78-10-8
Chapter 114, §1	78-10-11
Art. III, §9, Const. of Iowa	78-10-15

November 2, 1978

MOTOR VEHICLES: Abandoned motor vehicles. Sections 4.1(2), (9), (36), 4.2, 4.6, 321.84, 321.85, 321.89, 321.90, 321.91, 556B.1. Procedures and comparison of procedures between sections in Chapter 321, and Chapter 556B dealing with disposition of abandoned motor vehicles. (Dundis to Redmond, State Senator, 11-2-78) #78-11-1

Honorable James M. Redmond, State Senator: You have requested an attorney general's opinion on six questions dealing with Chapters 321 and 556B, Code of Iowa, 1977. Each one shall be dealt with separately.

"1. When the term 'personal property' is used in Chapter 556B, does it always include motor vehicles? For example, Section 556B.1(1) provides that 'personal property' may be placed in storage; does this include motor vehicles?"

The first sentence of Section 556B.1(1) states:

"The owner or other lawful possessor of real property may remove or cause to be removed any *motor vehicle or other personal property* which has been unlawfully parked or placed on that real property, and may place or cause such personal property to be placed in storage until the owner of the same pays a fair and reasonable charge for *towing*, storage or other expenses incurred." (emphasis added)

It seems clear that the phrase "or *other* personal property" is meant to include "motor vehicles", which immediately precedes it, in that classification. Additionally, the word "such" rather than simply "the" used before "personal property" later in the sentence indicates reference back to "any motor vehicle or other personal property." Finally, it would be difficult to construe "towing" as relating to something other than motor vehicles.

The first sentence in §556B.1(2) using "personal property" alone without "motor vehicles" states notice by publication shall be "in one newspaper of general circulation in the area where the personal property was *parked* or placed"—another obvious reference to vehicles. (emphasis added)

If an argument could conceivably be made that Chapter 556B has been ambiguously worded and therefore subject to judicial construction, the rules for such construction demand that the true intention of the legislature should be gleaned from a statute read as a whole, and that it should be given a sensible, practical, workable and logical construction. *Goergen v. State Tax Commission,* 1969, 165 N.W. 2d 782, 786; *Olsen v. Jones,* 1973, 209 N.W. 2d 64 (Iowa).

The purpose of this statute, enacted in 1974, was to provide some remedy for "property unlawfully placed on public or private property." Acts 1974 (65 G.A.), Ch. 1251, §1. It would be illogical, particularly considering the wording present in Chapter 556B, to assume the legislature intended to exclude a quite common form of abandoned property without a much more explicit qualification.

In addition, if only parts of Chapter 556B could be applied to motor vehicles, it would become unworkable. For instance, a vehicle could be removed from private property but could not be stored or placed anywhere [§556B.1(1)]. There also would be no way of disposing of a vehicle [§556B.1(2)].

Finally, including motor vehicles within the term "personal property" would coincide with the generally and statutorily accepted definition. §4.1(9), Code of Iowa, 1977.

It is therefore the opinion of this office that the term "personal property" used in Chapter 556B always includes motor vehicles.

"2. Is there a statutory conflict between §321.85 and §321.91, and Chapter 556B?"

Section 321.85, Code of Iowa, 1977, applies strictly to vehicles seized under §321.84, or stolen or embezzled. There could be some "overlap" between §321.85 and Chapter 556B in that a stolen vehicle could conceivably be left abandoned and "unlawfully parked" on private property. However, this would merely mean that if an abandoned vehicle was identified as being stolen or embezzled, even though Chapter 556B procedures had been initiated, it would once again come under §321.85 if not already sold.

Section 321.91(1), Code of Iowa, 1977, first provides that "no person, firm, corporation, unit of government, garage keeper, or police authority upon whose property an abandoned vehicle is found...shall be liable for damages by reason of the removal, sale, or disposal of such vehicle." Again, one of the definitions of an abandoned vehicle which could be used here "[(A) vehicle that has been unlawfully parked on private property or has been placed on private property without the consent of the owner or person in control of the property for more than twenty-four hours..." §321.89(1) (b) (3)] could overlap with that of Chapter 556.B. Section 556B.1(1) states that a real property owner, possessor, or his agent [which could be any of the entities protected from liability in §321.91(2)] could be liable for damages by removal or storage if it "is caused willfully or by gross negligence." An individual could theoretically remove and store a vehicle under Chapter 556B, causing damage to the vehicle by gross negligence, and then claim the blanket protection of §321.91(1). However, even if these protections were intended to have a general effect outside of Chapter 321, Chapter 556B expressly allows a limited form of liability in the more narrow vehicle disposal situation described in that Chapter. If there is an irreconcilable conflict between a general provision and a special or local provision, the special provision prevails as an exception to the general provision §4.7, Code of Iowa, 1977.

There is apparently no section in Chapter 321 or elsewhere in the Code that provides for the same procedures of vehicle removal and storage (by the real property owner himself) and for notice and sale as in Chapter 556B. Therefore, once an individual proceeded far enough to indicate his or her actions falling peculiarly within the confines of Chapter 556B, they would be open to the liability set down by that chapter. It would not be possible to proceed all the way through Chapter 556B to and including sale of the vehicle, then claiming inclusion in another statute.

Section 321.91(1) secondly provides its protection to the same parties listed above who dispose of "such abandoned vehicle in accordance with §321.89 and §321.90, Code of Iowa, 1977." Here, once again, a real property owner could start with either these statutes or Chapter 556 since they both initially could cover a motor vehicle unlawfully parked on private property without consent of the owner for more than twenty-four hours.

However, §321.89(2) deals with a police authority taking into custody the vehicle and disposing of it. Similarly, in §321.90(1) the real property owner, in this case a garage keeper, must allow the police to take custody. Section 321.90(2) allows limited action by the real property owner but only concerning authority to sell, give away, or otherwise dispose of a vehicle to a demolisher.

These provisions contain basically different methods of disposing of abandoned vehicles. As stated earlier, once an individual has proceeded with a particular provision past the state where respective removal, notice, or disposition methods differ, he or she must stay within the bounds of that provision and its limits of liability.

Basically then, it is this office's opinion that rather than a statutory conflict between §321.85 and 321.91 and Chapter 556B, there exists an overlapping situation which ends at the point where their respective provisions differ materially from one another.

3. "Under Chapter 556B, are the real property owners, storage facility and the sheriff protected from litigation brought by lienholders?"

As already cited under question two, 556B.1(1) states that "[t]he real property owner or possessor, or his agent, shall not be liable for damages caused to the personal property by the removal or storage *unless* the damage is caused willfully or by gross negligence." [emphasis added] This section does not limit the litigation brought to any one party. Within the context of §556B.1(1) therefore, any rights to compensation available to that lienholder could be pursued.

The storage facility is not expressly included with the property owner as far as liability for damages incurred during removal or storage of the vehicle. It is difficult to know from reading §556B.1(1) whether it is meant to exclude parties other than the real property owner, possessor, or his agent completely from any damage liability, or whether other parties are subject to liability even when damages are not caused willfully or by gross negligence.

Section 4.6, Code of Iowa, 1977, states that a court in determining the legislative intent behind an ambiguous statute, may consider, among other matters "[t]he object sought to be attained" and "[t]he consequences of a particular construction." The purpose of Chapter 556B is, of course, to supply a real property owner a means of disposing of personal property unlawfully placed there. Acts 1974 (65 G.A.) Ch. 1251, §1. However, it also provides a means of compensation to the owner or other party having an interest in the vehicle when damage is caused willfully or by gross negligence. There appears no logical reason for a storage facility to escape liability at this point while the real property owner does not (assuming the storage facility could be liable directly to the lienholder rather than to the real property owner who chose to store the vehicle there). It is the opinion of this office that a storage facility would not be protected from liability, at least by Chapter 556B.

A question concerning the sheriff's possible liability under §556B.1(1) for any damages would not come up since under Chapter 556B the sheriff's office has nothing to do with removal and storage of the vehicle.

Another possible area of litigation brought by lienholders could be the disposition of the vehicle they hold an interest in without their notification. Once the vehicle is sold by the sheriff at public or private sale, there is no provision for transfer of any of the proceeds to the lienholders. Section 556B.1(2) states:

"The net proceeds after deducting the cost of the sale shall be applied to the cost of removal and storage of the property, and the remainder, if any, shall be paid to the county treasurer for the use and benefit of the county general fund."

Section 556B.1(2) states that if the owner of the motor vehicle cannot be determined and accordingly notified of removal by the sheriff by certified mail,

notice by publication in one newspaper of general circulation in the area where the vehicle was parked shall be sufficient to meet all notice requirements. The issue here is what constitutes an "owner."

Chapter 556B provides no definition of this term. Section 4.1(2) states:

"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."

There is no one common definition of "owner" to be found in the Iowa Code. Definitions provided by Black's Legal Dictionary indicate that an owner can be the one who holds title to a thing, or one who has dominion and control over a thing even though the title is in another. The Iowa Supreme Court has stated: "The meaning of the term 'owner' is varied and depends in a great measure on the manner of its use." *In re Estate of Bigham,* 1940, 290 N.W. 11, 227 Iowa 1023. An analogy can be drawn between 321.89 and Chapter 556B. Both of these provisions deal with the disposition of abandoned vehicles. These sections provide for notice to the last known registered owner of the vehicle and "all lienholders of record." It could be argued that since Chapter 556B did not expressly include such a phrase, it must be taken to mean lienholders are not included. However, there is a general definition of "owner" provided for use in Chapter 321. Section 321.1(36) states that "owner" means "a person who holds the legal title of the vehcile, *or in the event a vehicle is the subject of a security agreement with an immediate right of possession vested in the debtor, then such debtor shall be deemed the owner for the purposes of this chapter."* [emphasis added.] In other words, to include lienholders of record in §321.89(3)(a) it was necessary to specifically add them. There is no necessity to carve out a similar exception with Chapter 556B since it does not contain a similar "general" definition.

Section 4.2, Code of Iowa, 1977, states that the Code's "Provisions and all proceedings under it shall be literally construed with a view to promote its objects and assist the parties in obtaining justice." Of course, allowing the lienholders of record to be notified would insure that these "innocent" parties would have an opportunity to protect legitimate interests. These same considerations that undoubtedly prompted the drafters of §321.89 should be used in interpreting "owner" under Chapter 556B. There is no apparent reason why they should not.

It is the opinion of this office that lienholders, of record at least, were meant to be included within the term "owner" in §556B.1(2). Further, if they are discovered and then not notified of the removal by the sheriff's office by certified mail, that office would not be protected by Chapter 556B from litigation.

4. "Under Chapter 556B, who is responsible for the hauling and storage fees incurred if the vehicle is unclaimed by the lawful owner, the vehicle is sold, and the sale price is not sufficient to cover the hauling and storage fees?"

As already stated, §556B.1(2) provides that if the vehicle is not reclaimed and is sold, "[t]he net proceeds after deducting the cost of the sale," shall be applied to costs of removal and storage with any remainder going for the use and benefit of the county general fund [emphasis added]. Since the sheriff is the only party allowed under Chapter 556B to sell the vehicle, he or she would, of course, have the first claim on proceeds from that sale.

The real property owner or possessor is responsible under Chapter 556B for removing a vehicle from his or her property, and storing it. However, if the sale income was not sufficient to cover costs associated with this removal and storage, there is no provision in Chapter 556B for compensation from another source. In the situation presented in this question therefore, the real property owner or possessor would have final responsibility for hauling and storage fees.

5. "Can an abandoned motor vehicle be removed by the property owner under Chapter 556B and then notice given and sale conducted under Chapter 321?"

As stated in the answer to question two, there is a certain amount of "overlap" between Chapter 321 provisions and those of Chapter 556B in that a 556B motor vehicle which has been "unlawfully parked or placed" on real property could fit within the §321.89(1) (3) definition of an abandoned auto if it had remained on the property without the owner's consent for over twenty-four hours. The question here is does that overlap continue through vehicle removal in order to allow a "switch" between statutory provisions at that point.

Section 321.89 provides only for police custody of abandoned vehicles. This section does not exclude the police authority from taking into custody a vehicle originally abandoned on private property and then removed by the owner to a storage facility or other location. Therefore, although it appears that a real property owner could remove a vehicle from his property and at that point transfer to §321.89, he or she would have to convince the police authority to take custody of the vehicle before that authority would have to proceed with notice and sale under that section.

Section 321.90(1) deals strictly with motor vehicles left in commercial garages. A garage keeper would most probably not have occasion to remove a vehicle to another storage facility. However, there appears nothing to prevent a garage keeper from removing a vehicle to other storage and at that point trying to merge into §321.90(1) notice and sale provisions. Here, once again the garage keeper would have to persuade the police authority to take custody in order to proceed under that section.

Finally, §321.90(2) deals with disposal of abandoned vehicles to demolishers. There would be no obstacle to a transfer between statutes here. A vehicle under §321.90(2) can remain in the real property owner's possession. An application must be made to the police though, who then "shall" follow appropriate notification procedures.

6. "Does the sheriff of the appropriate county have a statutory obligation, when a request is made by a real property owner, to give notice of removal of motor vehicles or other personal property under Chapter 556B?"

Once again, §556B.1(2) states:

"If the owner of the motor vehicle or other personal property can be determined, he shall be notified of the removal by the sheriff by certified mail, return receipt requested. If such owner cannot be identified, notice by one publication in one newspaper of general circulation in the area where the personal property was parked or placed shall be sufficient to meet all notice requirements under this section." (Emphasis added)

Section 4.1(36) (a) Code of Iowa, 1977, states that whenever used in a statute enacted after July 1, 1971, "[t]he word 'shall' imposes a duty." Since Chapter 556B was enacted in its present form after 1971 [Acts 1974 (65 G.A.) Ch. 1251,

1], that definition would apply to §556B.1(2). It is clear therefore, that once the real property owner or possessor notifies the sheriff of the county where the real property is located of vehicle removal, the sheriff is under a statutory obligation to give notice of removal of motor vehicles or other personal property. No additional request need be made.

November 9, 1978

TAXATION: PROPERTY TAX—RECAPTURE OF PROPERTY TAXES —§23, Ch. 43, Acts of 67 G.A., 1st Session. §§428.4, 441.17, 441.21, 441.23, 441.26, 441.35, 441.37, 441.46, 443.2, Code of Iowa, 1977. The tax imposed by §23 is first applicable to changes in use occurring subsequent to January 1, 1978. Assessors and boards of review have the duty of determining a change in use, any higher resultant valuation, and valuations necessary for computation of the additional tax. Provision for notice and opportunity to be heard regarding a change in use, and any resultant change in valuations exists in the Iowa Code. The five valuation years used in computing the additional tax are the five years immediately preceding the year in which the new value resulting from a change in use is placed upon the property. In comparing consolidated levies for the year 1974 for purposes of computing the additional tax, the levy in mills should be applied against twenty-seven percent of market value and the assessed value found for that year. The additional tax is for a fiscal year. Section 23 is not unconstitutional as a retroactive tax. (Ludwigson to Bair, Director, Dept. of Revenue, 11-9-78) #78-11-2

Mr. G. D. Bair, Director, Iowa Department of Revenue: We acknowledge receipt of your letter in which you have requested an opinion of the Attorney General and in which you ask several questions regarding construction of §23 of Chapter 43, Acts of the 67th General Assembly (1977) (hereinafter referred to as §23). Section 23 states in full as follows:

"Sec. 23. Chapter four hundred forty-five, Code 1977, is amended by adding the following new section:

"*NEW SECTION.* When agricultural land or residential property which is being or has been valued and assessed under the provisions of section four hundred forty-one point twenty-one (441.21) of the Code is no longer used for the purpose for which it was valued and assessed under the provisions of section four hundred forty-one point twenty-one (441.21) of the Code, such property shall be subject to an additional tax. The tax shall be computed by multiplying the consolidated levy for each of the five preceding years times the fair and reasonable market value for each of the five preceding years less the consolidated levy for the preceding five years by the assessed value of the property for the preceding five years. Such additional taxes shall be entered against the property on the tax list for the current year and shall constitute a lien against the property in the same manner as a lien for property taxes. The additional taxes shall be collected in the same manner as all other property taxes except that such taxes shall be credited to the general fund of the city if such taxes are collected on property located within the city or to the general fund of the county if such tax is collected on property located in the unincorporated area of the county."

You initially ask when the provisions of §23 are first applicable. Chapter 43, Acts of the 67th General Assembly (1977), became legally effective pursuant to Art. III, §26, Constitution of Iowa, and §3.10, Code of Iowa, 1977, on July 29, 1977. However, §23 specifically refers to property which is or has been valued under §441.21, Code of Iowa, 1977, which section deals with valuation

of property. Chapter 43, Acts of the 67th General Assembly (1977) significantly amended §441.21. Section 18 of Chapter 43, Acts of the 67th General Assembly (1977) provides that for valuation (calendar) years 1978 and 1979 agricultural property shall be valued on the basis of productivity. Further, §20 provides that for calendar years 1978 and 1979 certain percentages, to be determined by the Director of Revenue pursuant to a statutory formula, are to be applied to the actual value of agricultural and residential property to reach the assessed value of such property. It is a basic premise of statutory construction that statutes relating to the same subject matter and which are adopted at the same session are to be construed together. *McKinney v. McClure,* 1928, 206 Iowa 285, 288, 220 N.W. 354, 356; *Iowa Motor Vehicle Association v. Board of Railroad Commission,* 1928, 207 Iowa 461, 465, 221 N.W. 364, 366, affirmed, 280 U.S. 529. Further, an amended statute must be construed as if it read originally as amended. *State ex rel. Iowa State Board of Assessment and Review v. Local Board of Review,* 1938, 225 Iowa 855, 856, 283 N.W. 87, 92. As §23 refers to property which has been or is being valued and assessed under 441.21, it must be construed to refer to property valued and assessed under §441.21 as amended. Property cannot be valued under amended §441.21 until 1978. Therefore, §23 first applies to property valued for calendar years 1978. Property valued in 1978 is valued as of January 1, 1978. §§428.4, 441.46, Code of Iowa, 1977. Thus, if property is valued as agricultural or residential as of January 1, 1978, and changes in use subsequent to that date, additional taxes may be imposed pursuant to §23.[1]

You also ask:

"Section 23 provides for the additional tax to be levied when there occurs a change in the use of the property. However, there is no provision as to who is to determine when a change of use takes place. In the absence of such a provision, who would be responsible for making this determination?"

Iowa law provides for appointment of assessors and local boards of review for purposes of determining actual value of real property for assessment purposes. *See* §§428.4, 441.1-.6, 441.17-.19, 441.21, 441.31-.37, 441.51, Code of Iowa, 1977. The actual and assessed value of real property in Iowa initially depends upon the classification of the property. The actual and assessed value of agricultural property is something other than market value; the actual value of residential property is market value, whereas the assessed value is market value times a percentage determined by the Director of Revenue; the actual and assessed value of commercial property is market value. §441.21, Code of Iowa, 1977. If property changes use, such as agricultural property turning commercial, the assessor and board of review must initially determine use, and thus any change in use, before the property can be properly valued.

Section 428.4, Code of Iowa, 1977, requires that property be assessed for taxation purposes every year. Property is assessed as a matter of course in assessment or even-numbred years. *Id.* The assessment process in even-numbered years would thus require an initial determination of the use or classification of each parcel of property. In odd-numbered years, §428.4 requires

[1]It should be noted that due to the computation under §23 not all changes in use would result in imposition of an additional tax, but only those changes which cause the property to be assessed in a higher value. If the computation were applied to a change in use causing a lower assessed value, the result would be a negative tax.

the assessor "...to value and assess or revalue and reassess...any real estate that the assessor finds has changed in value subsequent to January 1 of the preceding real estate assessment year." If property changes in use and thus in value subsequent to January 1 of an even-numbered year, the assessor must revalue or reassess the property accordingly. In addition, §441.35, Code of Iowa, 1977, requires the board of review, in odd-numbered (non-assessment) years, to revalue and reassess any property which it finds has changed in value subsequent to January 1 of the previous even-numbered (assessment) year. Such a change in value might result from a change in use. Thus, a determination of change in use under §23 is made as a matter of course in the assessment and valuation of property pursuant to §§428.4, 441.21, 441.35, Code of Iowa, 1977.

A complete understanding of §23 and the remainder of your questions requires a further examination of the operation of §23. As §3 is silent as to more specific mechanics, they must depend upon the Iowa property tax scheme as it exists in the Iowa Code. It is a fundamental rule of statutory construction that statutes relating to the same subject matter must be construed in pari materia. *Goergen v. State Tax Commission,* 1968, Iowa, 165 N.W.2d 782. Further, the legislature is presumed to have intended a statute to be workable. *Janson v. Fulton,* 1968, Iowa, 162 N.W.2d 438, 442-43. Thus §23 must operate in conjunction with existing Iowa property tax statutes.

Because property is valued and assessed or revalued and reassessed as of January 1 of a calendar year, a change in use subsequent to January 1, 1978, would result in a change in value for 1979, with a new assessment date of January 1, 1979. The values necessary for computation of an additional tax can be determined and gathered as part of the usual assessment and valuation or reassessment and revaluation process pursuant to §428.4, Code of Iowa, 1977, in the year following the change in use.

Section 23 further provides that "[s]uch additional taxes shall be entered against the property on the tax list for the current year." Property values which change during calendar year 1978 resulting in the affixation of a new value for calendar year 1979 are furnished by the assessor to the county auditor for preparation of the tax list. §441.17(6), Code of Iowa, 1977. The tax lists are prepared on a fiscal year basis, the fiscal year commencing six months after the assessment date of January 1. §§441.46, 443.2, Code of Iowa, 1977. The property value as of January, 1979, is placed on the tax list which is prepared during fiscal year July 1, 1979 - June 20, 1980; §443.2, Code of Iowa, 1977, requires these tax lists be completed by June 30, 1980. Thus, the "current year" for the purpose of the tax collected by the assessor for purposes of computation of the additional tax can be entered on the tax list for the current fiscal year along with the new (January 1, 1979) value; the county auditor can then compute the amount of additional tax due.

Property taxes are collected during the fiscal year commencing eighteen months after the assessment date of January 1. §§441.46, 445.36, Code of Iowa, 1977. The levy on a January 1, 1979, value is collected during fiscal year 1980-1981. Thus an additional tax resulting from a change in use during 1978 is collected during fiscal year 1980-1981.

Section 23 not only requires a determination of change in use but also of the preceding five years' values necessary for computation of the additional tax. Again, by construing the property tax statutes in pari materia, a procedure can be found for making such a determination.

The computation of the additional tax under §23 calls for a comparison of taxes levied on market and assessed values for a five year period. With the exception of the market value of agricultural property for calendar years 1978 and 1979, the values necessary for computation of the additional tax have been previously determined by the assessor. Values found by the assessor are turned over to the county auditor. §§441.17(6), Code of Iowa, 1977. Thus assessors may examine their own records. They may also examine the records of the county auditors pursuant to §441.17 (3) which provides assessors with access to all public records of the county. The market value of residential property is (and has been for the previous five years) equivalent to the actual value found by the assessor pursuant to the second unnumbered paragraph of §441.21(1), Code of Iowa, 1977. The assessed value of residential property for calendar years previous to 1978 was equivalent to actual (market) value. The assessed value of residential property for 1978 and 1979 is a percentage of actual (market) value, the percentage to be determined by the Director of Revenue and applied by the county auditor. §441.21(1), Code of Iowa, as amended by Chapter 43, §20, Acts of the 67th General Assembly (1977). The assessed value of agricultural property for years prior to 1978 is the actual value found by the assessor; for 1978 and 1979, it is the actual value after the percentage is applied by the county auditor. *Id.* The assessed (actual) value of agricultural property for years prior to 1978 has been based fifty percent upon market value. §441.21 (1), Code of Iowa, 1977, prior to amendment by the 67th General Assembly (1977). Thus the assessor was required by the Code to find market value of agricultural property as part of his or her duty of assessing agricultural property pursuant to §441.17(2).

The actual value for agricultural property for 1978 and 1979 is based solely on productivity. §441.21(1), Code of Iowa, 1977, as amended by Chapter 43, §18, Acts of the 67th General Assembly, 1977. Thus market value of agricultural property for years 1978 and 1979 is not otherwise found by the assessor. However, as stated *supra,* assessors and boards of review are appointed for the purpose of determining the value of property. Further, §441.17(6) provides that it is the duty of the assessor to prepare the books and records necessary for preparation of the tax list by the county auditor. Section 23 provides that the "...additional taxes shall be entered against the property on the tax list for the current year...." Thus, as part of his or her duty of preparing the information necessary for the tax list, the assessor must determine market values of agricultural property for 1978 and 1979 for the county auditor to use in computing the additional tax due.

You also inquired whether the absence in §23 of any provision for notice and opportunity to be heard of "the determination of a change of use of the property, [and] the higher valuation resulting from a change in use" violates the Iowa or United States Constitution.

Notice of an opportunity to be heard regarding a change in use and a resultant higher valuation is already provided for in the Iowa Code. Section 441.23, Code of Iowa, 1977, provides that if the assessor finds property has increased or decreased in value, the assessor finds property has increased or decreased in value, the assessor must notify the owner in writing of the new valuation placed on the property. The notice must also inform the taxpayer of the opportunity "...to appear before the board of review and show why the assessment should be changed". Section 441.26, Code of Iowa, 1977, provides for the use of assessment rolls which list, among other things, the value and classification of

property and which are delivered to taxpayers if there has been an increase or decrease in valuation. The assessment roll must also inform the taxpayer of the opportunity to appeal to the board of review. Section 441.36 also requires that the taxpayer be notified in the event the board of review changes the value of property pursuant to §441.35.

Appeal is made to the board of review pursuant to §441.37, Code of Iowa, 1977, in the event a taxpayer believes his or her property assessment is excessive or erroneous. Sections 441.38-39 provide for appeal of the decision of the board of review to district court.

Property owners will receive notice of the valuations affixed to their property for the previous five years (for purposes of computation of the additional tax) along with notice of the new value placed on their property due to the change in use, as discussed earlier. Notice is provided through use of the assessment rolls, which rolls would include the new value as well as values for the five previous years.

The Director of Revenue has the authority to prescribe the form of assessment rolls pursuant to §441.26, Code of Iowa, 1977. Thus the Director will adjust the rolls to contain the prior values as determined by the assessors and boards of review.

Section 428.4, Code of Iowa, 1977, prevents the assessor from altering previously affixed values. Further, §441.35 provides that the board of review may not reduce or increase values affixed for previous years. The property owners' opportunity to protest the previously affixed values was during the year those values were determined. Failure of taxpayer to take advantage of their remedy before the board of review constitutes a waiver to complain about excessive or inequitable values, as the administrative remedy is exclusive. *Griswold Land & Credit Co. v. County of Calhoun,* 1924, 198 Iowa 1249, 201 N.W. 11; *Rich Mfg. Co. v. Petty,* 1950, 241 Iowa 840, 42 N.W.2d 80. However, as noted earlier, the market value of agricultural property for 1978 and 1979 is not otherwise determined. Further, if a taxpayer was satisfied with the actual value placed on agricultural property prior to 1978, he or she would not have had any reason or ground to complain about the market value figure which constituted fifty percent of actual value. An administrative remedy is exclusive only if available. *City of Council bluffs v. Pottawattamie County,* 1977, Iowa, 254 N.W.2d 18, 20. If the market value of agricultural property had not been determined or if the taxpayer had no grounds upon which to protest that value, no administrative remedy was available to the taxpayer for the year. Thus, when notified by an assessment roll of market values of agricultural property for prior years, the taxpayer may protest those values pursuant to §§441.23, 441.26, 441.35-.39, Code of Iowa, 1977.[2]

[2]The example, assume for a year prior to 1978 the actual value of agricultural land found by the assessor was $1000 per acre, and that such value was not excessive. Assume the true market value was $1500 per acre, and the true value based on productivity was $500. However, assume the assessor based actual value upon vlaues of $1800 per acre and $200 per acre, respectively. The actual assessment for that year would not be excessive, and the taxpayer would have no reason to protest. However, if the $1800 market value figure is used in computing an additional tax under §23 in a later year, the taxpayer, lacking a remedy in the prior year, would have a remedy in the current year when he or she is notified of the values necessary for computation of the additional tax.

You also ask what are the appropriate market and assessed values to be used for purposes of computation of the additional tax. The term "market value" is defined in §441.21(1), Code of Iowa, 1977, and the definition has remained unchanged for the previous five years. The assessed value of residential property is equivalent to market value for years previous to 1978, and a percentage of market value for years 1978 and 1979. §441.21(1); Chapter 43, §20, Acts of the 67th General Assembly (1977). The assessed value of agricultural property is whatever value is ultimately affixed for each particular year pursuant to §441.21. Prior to 1978, assessed value of agricultural property was based fifty percent on productivity capitalized at a rate of seven percent and fifty percent on market value. For 1978 and 1979, the assessed value is based on a percentage (determined by the Director of Revenue) of productivity capitalized at a rate of seven percent. Chapter 43, §§18, 20, Acts of the 67th General Assembly (1977).

You also ask which years shall constitute the five preceding years for purposes of computing the additional tax. The additional tax is computed by comparing the levy as applied against market value with the levy as applied against assessed value. It is clear that the purpose of §23 is to recapture, over a five year period, the benefits accorded property owners by preferential assessments, that is, assessments below market value. If property changes in use in 1978 and a higher value is affixed in 1979, 1979 would be the first year in which the "preference" is lost. The five years preceding the new valuation year would be thus 1978, 1977, 1976, 1975, 1974. The five years are thus the five years immediately preceding the year the new value is placed on the property.

You also ask, for purposes of computing the additional tax, "...what assessed value is to be used for years prior to 1975 when all realty was assessed at twenty-seven per cent (27%) of its actual value?" Prior to 1975, property was not only assessed at twenty-seven percent of actual value, but the levy was in terms of mills instead of dollars. Beginning with calendar year 1975, property was assessed at full actual value, and the levy was lowered proportionately and stated in terms of dollars. *See* Chapter 1231, §§1, 150, 151, Acts of the 65th General Assembly (1974). Therefore, if the actual value of a particular parcel remained unchanged for calendar years 1974 and 1975, and the budget remained unchanged, the tax owing would also remain the same. As §23 compares taxes on market and assessed values for the purpose of recapturing the tax benefits resulting from preferential assessments, the hypothetical tax owing on market value should be compared with the actual tax paid on assessed value. Thus, for the January 1, 1974, value, the levy in mills should be applied against twenty-seven percent of market value and the assessed value found for that year. For example, assume agricultural property turned commercial during 1978. Using the following hypothetical values and levies (which remain equivalent for the five year period for convenience) the additional tax would be thus computed:

Five Preceding Valuation Years	Market Value	Assessed Value	Levy Rate	Levy on Market Value	Levy on Assessed Value
1978	$200,000	$100,000	$1.08	$216	$108
1977	$200,000	$150,000	$1.08	$216	$162
1976	$200,000	$150,000	$1.08	$216	$162
1975	$200,000	$150,000	$1.08	$216	$162
1974	$ 54,000	$ 40,000	4 mills	$216	$162
			additional tax:	$1080	— $756 = $324

If, for 1974, the levy were applied against full market and full actual value, the levies would be $800 and $600 respectively. The additional tax would thus be grossly inflated, and the intent of the legislature would not be fulfilled.

You also ask, "...in going back the preceding five years, would the additional tax be based upon an assessment (calendar) year or a fiscal year? Furthermore, how would the transition to a fiscal year for tax collections be treated in view of the absence of any levy during calendar year 1974?" Section 23 compares the consolidated levies *"for"* the five preceding years. Levies are applied to the value affixed for the preceding year, §444.1, Code of Iowa, 1977. Section 23 first applies to changes in use in 1978; thus the earliest valuation year used in the computation is 1974. The levy for calendar year 1974 was made in March of 1975. *See* Chapter 1069, §4, 65th General Assembly (1974); §444.9, Code of Iowa, 1975. The levy in 1975 was for fiscal year July 1, 1974-June 30, 1975. Thus, for the preceding five years, the tax is based on a calendar or assessment year, yet is levied for a fiscal year. *See* §441.46, Code of Iowa, 1977. As 1974 is the earliest valuation year used in the computation under §23 the absence of any levy during 1974 is irrelevant for purposes of the operation of §23.

You finally ask whether §23, by using the values of the preceding five years, is unconstitutional as a retroactive tax. Section 23 provides that the additional tax is to be listed in the "current year;" thus, by its own terms, §23 imposes a tax in the current year. Further, §23 first applies to changes in use occurring in 1978, which year is subsequent to the effective date of the Act itself. Finally, reliance upon values in previous years for purposes of computation of the tax does not render the tax retroactive. The United States Supreme Court has stated that a tax statute " 'does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax.' " *United States v. Manufacturers National Bank,* 1960, 363 U.S. 194, 200, *quoting United States v. Jacobs,* 1939, 306 U.S. 363, 367. It is the opinion of this office that §23 is not a retroactive tax, and thus its constitutionality is not an issue.

November 13, 1978

CRIMINAL LAW: PROCEDURE FOR FILING COMPLAINT: S.F. 2200, §§67, 68, 67th G.A., 1977; §§801.4(11), 804.1, 804.2, 804.3, Rules 1(1), 2, 32, 35, 37, 38, I.R.Cr.P., Supplement to the Code of Iowa, 1977; §78.1, Code of Iowa, 1977. A district court clerk or the clerk's deputy may administer the required oath to a complainant, but after the oath is administered, if the complaint charges an indictable offense, the complaint and complainant should be directed to the magistrate for further proceedings consistent with statutory requirements. (Hinman to Gene W. Glenn, State Senator, 11-13-78) #78-11-3

The Honorable Gene W. Glenn, State Senator: We have received your opinion request of August 18, 1978, in which you ask whether the amendment to the definition of "complaint" in §801.4(11) by S.F. 2200, §67, 67th G.A., permits or requires a district court clerk or clerk's deputy to accept for filing a complaint charging the commission of an indictable offense; and, if so, you ask what duties accompany acceptance of such a complaint by the district court clerk or clerk's deputy.

Prior to its amendment, §801.4(11), Supplement to the Code of Iowa, 1977, provided in pertinent part as follows:

" 'Complaint' means a statement in writing, under oath or affirmation, *made before a magistrate,* of the commission of a public offense, and accusing someone thereof...." (Emphasis added).

S.F. 2200, §67, amended the pertinent part of §801.4(11) to provide as follows:

" 'Complaint' means a statement in writing, under oath or affirmation, *made before a magistrate or district court clerk or clerk's deputy as the case may be,* of the commission of a public offense, and accusing someone thereof. ..." (Emphasis added).

The purpose of the amendment to §801.4(11) by S.F. 2200, §67, becomes evident when read in light of the statutory scheme provided in Rule 2, I.R.Cr.P., §804.1 and Rule 35, L.R.Cr.P.

Rule 1, I.R.Cr.P. is applicable only to indictable offenses as provided in Rule 1(1), I.R.Cr.P. Rule 2 provides in part as follows:

"...If the defendant received a citation or was arrested without warrant, the magistrate shall, prior to further proceedings in the case, make an initial, preliminary determination from the complaint, or from an affidavit or affidavits filed with the complaint or from an oral statement under oath or affirmation from the arresting officer or other person, whether there is probable cause to believe that an offense has been committeed and that the defendant has committeed it...."

Similar language requiring a determination by the magistrate of whether there is probable cause to believe an offense has been committed and that the named defendant committed it is found in §804.1, Supplement to the Code of Iowa, 1977. §804.1, which was amended by S.F. 2200, §68, reads in pertinent part as follows:

"A criminal proceeding may be commenced by the filing of a complaint before a magistrate when such complaint is made, charging the commission of some designated public offense in which the magistrate has jurisdiction, and it appears from the complaint or from affidavits filed with it that there is probable cause to believe an offense has been committed and a designated person has committed, the magistrate shall, except as otherwise provided, issue a warrant for the arrest of such person."

"Whenever the complaint charges a *simple* misdemeanor the magistrate may issue a citation instead of a warrant of arrest...." (New matter emphasized).

It is our opinion the legislature intended the first paragraph of §804.1 to apply only to indictable offenses. The second and succeeding paragraphs were intended to apply to simple misdemeanor offenses. So construed, the procedures set forth in the first paragraph of §804.1 and Rule 2, I.R.Cr.P., are compatible. Both require an "initial, preliminary determination" by a magistrate that there is probable cause to believe an *indictable* offense has been committed and that the defendant named in the complaint committed the offense charged prior to further action in the case.

Rule 35, I.R.Cr.P. provides:

"Prosecutions for simple misdemeanors must be commenced by filing a subscribed and sworn to complaint with a magistrate or district court clerk or the clerk's deputy."

Likewise the procedures required of a magistrate, district court clerk or clerk's deputy under the second and succeeding paragraphs of §804.1 are

compatible with procedures set forth in Rules 35, 37 and 38, I.R.Cr.P., to be followed when a complaint alleging a simple misdemeanor is filed. It is clear from a reading of Rule 32, I.R.Cr.P., that Rule 35 applies only to simple misdemeanors.

We also note that following the filing of an indictable offense complaint only a magistrate is empowered to issue a warrant for arrest. (§804.1); the warrant must be signed by a magistrate (§804.2); and, a magistrate must make an endorsement on the warrant regarding bail (§804.3).

We are of the opinion that a district court clerk or clerk's deputy may administer the required oath to a complainant, as authorized by §78.1, Code of Iowa, 1977, but after the oath is administered, if the complaint charges an indictable offense, the complaint and complainant should be directed to the magistrate for further proceedings consistent with §804.1

The amendment to the statutory definition of "complaint" by S.F. 2200, §67, merely brought said definition into harmony with the procedures required by Rules 35, 37 and 38, I.R.Cr.P. We are of the opinion the amendment did not confer new power to the district court clerk or clerk's deputy with respect to complaints charging indictable offenses.

November 13, 1978

HOUSING AGENCIES: NAMES. Chapter 28E, 1975 Code of Iowa, §§403A, 403A.2(1), 403A.5, 403A.9, 1977 Code of Iowa, and §3, Chapter 116 Acts 67th G.A. Housing agencies formed by two or more municipalities pursuant to Chapter 28E, and §403A.9, The Code, need not be named according to the requirements of §403A.5, The Code. (Cosson to Slaybaugh, Director, Region XII, Regional Housing Authority, 11-13-78) #78-11-4

Mr. Tom Slaybaugh, Director, Region XII, Regional Housing Authority: You have informed this office that the Region XII Regional Housing Authority is considering changing its name. You have requested an opinion of the Attorney General as to whether the new name must be styled as the " ..... Municipal Housing Agency" or the "Municipal Housing Agency of ..... ". The answer is that it clearly need not do so.

The Region XII Regional Housing Authority was formed December 20, 1976, by six counties in West Central Iowa. It was formed under the provisions of Chapter 28E, 1975 Code of Iowa, by a document labeled "Joint Exercise of Powers Agreement for the Purpose of Creating a Multi-County Housing Authority to Foster Housing Development in the Participating Counties". Chapter 403A, 1977 Code of Iowa, as amended by Chapter 116, Acts 67th G.A., is a "Municipal Housing Law". Section 403A.1(1), The Code, defines a municipality as meaning "any city or county in the state." Section 403A.5, The Code, as amended by §3, Chapter 116, Acts 67th G.A., provides that "any municipality may create, in such municipality, a public body corporate and politic to be known as the 'Municipal Housing Agency' of such municipality..."

An official with the United States Department of Housing and Urban Development (HUD) has suggested that your agency might need to comply with Section 403A.5, The Code, in its choice of a new name. However, that is not the case.

Section 403A.9, The Code, also applies to this situation. That section provides that:

"Any two or more municipalities may join or cooperate with one another in the exercise of any or all of the powers conferred hereby for the purpose of financing, planning, undertaking, constructing or operating a housing project or projects."

Sections 403A.5 and 403A.9, The Code, should be "construed with the act as a whole and all parts thereof construed together". *Matter of Estate of Bliven,* 236 N.W.2d 366, 369 (1975). Interpreting those sections in that manner, we find two sections which give a municipality the power to create a housing agency.

The existence of both of these sections and the manner in which they are written show that a single municipality forming a municipal housing agency does so only under §403A.5, The Code, and is bound by the provisions of that section dealing with the naming of such agency. A multi-municipality housing agency, however, has additional recognition in §403A.9, The Code, and obviously need not name itself after only one member municipality.

It would obviously be terribly confusing to call a housing agency created by several municipalities by the name of just one municipality. Due to the recognition in §403A.9, The Code, that multi-municipality housing agencies are acceptable, the naming requirements of §403A.5, The code, are not binding on a multi-municipality housing agency.

November 13, 1978

COUNTIES: County Care Facilities. Construction of a separate residence for county care facility administrator is not authorized by a bond issue of $996,000 to construct and equip a new county care facility. (Nolan to Martens, Iowa County Attorney, 11-13-78) #78-11-5

Mr. Kenneth R. Martens, Iowa County Attorney: We have your letter requesting an Attorney General's opinion on the use of county care facility bond funds for an administrator's residence.

In your letter you state:

"Iowa County passed a bonding issue for the purpose of 'Construct and equip a new County Care Facility'. A copy of the official ballot is attached. Approximately $39,000 is left from the original bond issue, which is not necessary for the completion of the new County Care Facility. The Board of Supervisors desires to use this $39,000 for the purpose of constructing a new residence for the County Care Facility Administrators. They feel that the original question submitted on the ballot is broad enough to cover the erection of a residence for the Administrators. I issued an opinion on this matter with said opinion also being attached to this request.

"In an attempt to clarify this matter, I would respectfully request an Attorney General's opinion on the following:

"1. Is the wording 'construct and equip a new County Care Facility' broad enough to encompass the erection of a new residence for the Administrators adjacent to the newly erected County Care Facility when said wording has been approved by the County Electors.

"2. Can the county utilize the funds approved for the construction and equipment of a new County Care Facility for the purpose of erecting a residence for the County Home Administrators.

"If the answers to 1 and 2 are in the affirmative, would these funds be considered funds on hand for the purpose of Iowa Code Section 345.1 of the

1977 Amended Code of Iowa and could said funds thereby be utilized for the purpose of erecting a residence for the County Care Facility Administrators without having to submit this purpose to the qualified electors of the county."

It is the opinion of this office that a negative answer must be given to both of the questions which you have submitted. We find no authority for the construction of a separate dwelling for the administrators of a county care facility. In 1974 the Iowa Legislature amended §253.4 of the Code of Iowa by deleting the words "steward" and "home" as they then appeared and substituting the words "an administrator" and "care facility" so that the section now reads:

"The board may appoint an administrator of the county care facility, who shall be governed in all respects by the rules and regulations of the board and its committees, and may be removed by the board at pleasure, and who shall receive such compensation, perform such duties, and give such security for his faithful performance as the board may direct."

In 1962 this office in an opinion to the Polk County Attorney, advised that there is no statutory authority in the board of supervisors to provide the steward of the county home with a separate residence or to expend money for such purpose. 1962 O.A.G. 173. It is still our view that further legislation is required to authorize a county to expend public monies to construct a separate residence facility for a county care administrator. The term "compensation" has been liberally construed by the Iowa Supreme Court in *McMurry v. Board of Supervisors of Lee County,* 1978, 261 N.W.2d 688. However, we do not believe that even a liberal construction of the term "compensation" would justify building a residence for the county home administrator in the absence of a showing that the duties of that position require his presence on the ground of the county care facility on an around the clock basis. We note that former §340.7 entitled, "compensation for sheriff", which provided for the sheriff to receive either living quarters or a residence allowance as part of his compensation has been repealed.

It is further noted that in §296.1 there is specific authorization for school district voters to approve the issuance of general obligation bonds to defray the cost of "purchasing, building, furnishing,...teachers' or superintendent's home or homes". Chapter 253 of the Code does not provide such specific authority with respect to a home for a care facility administrator.

November 13, 1978

MUNICIPALITIES: Police Retirement System — §411.1(2) and 411.3, Code of Iowa, 1977. A policeman who did not take a civil service examination, in a city where civil service was applicable, could not be a member of the retirement system under Chapter 411 of the Code. (Blumberg to Hansen, State Senator, 11-13-78) #78-11-6

The Honorable Willard R. Hansen, State Senator: You requested an opinion of this office regarding police and fire pensions. Under your facts, a policeman joined a police force without having been given a civil service examination. Nevertheless, he was employed and contributed to the pension system. Approximately three years later he resigned and withdrew his accumulated contributions. A couple of years later, he rejoined the department and has been a member of the retirement system since — approximately thirteen years. He now wishes to replace the accumulated contributions he originally withdrew in order to receive credit for his first years on the force. You ask whether this

is permitted.

There is no section of Chapter 411 of the Code which specifically addresses your question of reinvesting the withdrawn accumulations. However, the resolution of this situation is not difficult. Section 411.1(2) defines "policeman" as a member of a police department who has passed a regular mental and physical civil service examination. Thus, where it is stated in §411.3 that persons who become policemen shall become members of the retirement system, what is meant is persons who have passed a civil service examination and become policemen are members of the retirement system.

Since the individual in question did not take a civil service examination, as was required, he could not be a member of the retirement system. Thus, he cannot now receive credit in that system for those yers. We need not reach the issue of whether withdrawn payments can be reinvested in the system.

Accordingly, we are of the opinion that a policeman who did not take a civil service examination, in a city where civil service is applicable, cannot be a member of the retirement system under Chapter 411 of the Code.

November 13, 1978

STATE OFFICERS AND DEPARTMENTS: Child Abuse Reports: Confidentiality: Ch. 235A Code of Iowa; §§235A.15; 235A.19. The name of the person making a child abuse report may be confidential and withheld upon a determination by the registry staff of the Department of Social Services. A juvenile court may order the release of that name if it deems it to be necessary. (Robinson to Tullar, Sac County Attorney, 11-13-78) #78-11-7

Lon R. Tullar, Esq., Sac County Attorney: You have requested an opinion of this office regarding child abuse reporting under Chapter 235A, Code of Iowa, 1977, as follows:

...My questions regard the confidentiality of the source of child abuse reports. Specifically, when a child abuse report is made to the Department of Social Services, is the name or names of the person making said report or reports confidential (i.e., cannot be given to the person or pesons upon whom a report has been made).

If the information is confidential, would the same be true even if the matter were taken to Court?

It is the opinion of this office that the name of the person making the report may be confidential (withheld) upon a determination by the registry staff. If it is determined that the name of the person making the report is confidential, a juvenile court may order the release of that name if it deems it to be necessary.

This office normally issues its opinions in a more definitive manner. In this instance, we are precluded by the controlling statutes.

The creation and maintenance of a central child abuse registry within the Department of Social Services is provided by §235A.14, The Code. It is to provide a single source for the state-wide collection and dissemination of information, thus, providing a more effective way of dealing with child abuse. The legislature also found that vigorous protection of the rights of individual privacy was an indispensable element in maintaining this child abuse information. §235A.12, The Code.

Section 235A.19 provides in pertinent part:

235A.19 Examination, requests for correction or expungement and appeal.

1. Any person or that person's attorney shall have the right to examine child abuse information in the registry which refers to that person. The registry may prescribe reasonable hours and places of examination.

2. Any person who files with the registry a written statement to the effect that child abuse information referring to such person is in whole or in part erroneous, and requests a correction or expungement of that information, shall be notified within sixty days by the registry, in writing, of its decision or order regarding the correction or elimination. All decisions and orders shall be accompanied by findings of fact, and the registry shall provide the opportunity for a fair hearing when it initially determines that the information should not be corrected or expunged as requested.

* * *

6. In the course of any proceeding provided for by this section, the identity of the person who reported the disputed information and the identity of any person who has been reported as having abused a child may be withheld upon a determination by the registry that disclosure of their identities would be detrimental to their interests.

In order that a person named in a report may have an opportunity to refute or clarify any information, he has the right to examine the registry. The identity of the person who made the report may be withheld upon a determination by the registry staff that this would be detrimental. §235A.19(6).

Section 235A.14 provides in pertinent part:

235A.15 Authorized access.

1. Notwithstanding Chapter 68A, the confidentiality of all child abuse information shall be maintained, except as specifically provided by subsection 2.

2. Access to child abuse information is authorized only:

* * *

e. To an authorized person or agency having responsibility for the care or supervision of a child named in a report as a victim of abuse or a person named in a report as having abused a child, if the juvenile court deems access to child abuse information by such person or agency to be necessary.

A straightforward interpretation of this section means that the juvenile court may "access child abuse information" including the identity of the person making the report [as this would be part of the phrase "all child abuse information" used in §235A.15(1)] to the "person named in the report as having abused the child if the juvenile court deems" it to be necessary. Thus, a discretionary power is vested with the court.

It should be noted that §235A.19 deals with information in the registry [§235A.14(6)] while §235A.15 is broader as it deals with all child abuse information.

Case law dealing with the confidentiality of child abuse reports is very limited. There is none in Iowa. The trend seems to be in granting information

requests to persons named in the reports but not the identities of the informer.

In *Sims v. State Dept. of Public Welfare of the State of Texas,* 438 F.Supp. 1179 (S.D. Texas 1977), the constitutionality of a child abuse statute was tested. Pursuant to Texas statute reports, records and working papers used or developed in the investigation of suspected child abuse were confidential and could be disclosed only for purposes consistent with the purposes of the statute. This is much more restrictive than Iowa's law. The District Court held that this denied due process. At p. 1191 of 438 F.Supp. we find:

Although some intrusion into a family unit is permissable when the state pursues its interest in investigating reports of abuse, there is no compelling reason to deny the family access to the fruits of that invasion or the conclusions reached. Of course, a certain confidentiality must be maintained for sources of information who request such anonymity, but the reports and records of the state compiled during the investigation should be available to the parents so that they may be fully apprised of the nature of any accusation to be made by the state. Due process requires no less. A state may deny the parents access to the records concerning their family only where the source must remain confidential or where there has been a judicial determination of the need for confidentiality in an adversary proceeding.

Since the Iowa statute provides for a judicial determination of the need for confidentiality it will pass constitutional muster.

November 13, 1978

ENVIRONMENTAL PROTECTION: Nuclear Waste Disposal Sites—Section 4.1(2), 4.1(13), 262.7, Chapters 263, 455B, The Code, 1977. The University of Iowa is not a "private person" within Section 455B.88, thus the Solid Waste Disposal Commission has no authority, pursuant to this statute, to approve or prohibit the establishmnt and operation of a nuclear waste disposal site by the University of Iowa. (Benton to Crane, Executive Director, Department of Environmental Quality, 11-13-78) #78-11-8

Mr. Larry Crane, Executive Director, Iowa Department of Environmental Quality: In a letter to this office, you have requested an opinion of the Attorney General concerning the construction of §455B.88, The Code, 1977. Specifically, you have raised the following questions:

"1. Does §455B.88 provide that only a private person and not a public person, may establish and operate with Commission approval a nuclear waste disposal site, or does it provide that the Commission has authority to license private persons but has no control over public persons?

"2. What is a private person?

"3. Is the University of Iowa a private person?"

These questions concerning the scope and operative effect of §455B.88 have arisen due to the construction by the University of Iowa of an incinerator capable of the disposal of low level radioactive waste, as well as other types of waste. To properly construe §455B.88, the term private person should first be defined, and its possible application to the University of Iowa should be discerned. Therefore, this opinion will first address questions 2 and 3.

Division IV of Chapter 455B contains those statutory provisions which pertain to the Solid Waste Disposal Commission. Those provisions concerning the transportation of radioactive waste and the establishment and operation

of nuclear waste disposal sites are found in Part 2 of Division IV. Section 455B.88 provides that:

"The commission may approve or prohibit the establishment and operation of a nuclear waste disposal site in this state by a private person. In determining whether to grant or deny a license to establish and operate a nuclear waste disposal site, the commission shall consider the need for a nuclear waste disposal site and existing physical conditions, typography, soils and geology, climate, transportation, and land use at the proposed site. If the commission decides to issue a license to establish and operate a nuclear waste disposal site, it shall establish, by rule, standards and procedures for the safe operation and maintenance of the proposed site. The commission shall also require the licensee to provide a sufficient surety bond or other financial commitment to insure the perpetual maintenance and monitoring of the nuclear waste disposal site. All rules adopted by the commission under this section shall be subject to the provisions of Chapter 17A and §455B.7, subsection 3."

To determine the scope and extent of the Commission's authority to approve or prohibit nuclear waste disposal sites pursuant to this language, it is essential to define the term "private person".

Although no provision of Division IV defines this term, the word "person" is defined elsewhere within Chapter 455B. For example, §455B.10(7), The Code, 1977, states:

" 'Person' means an individual, partnership, co-partnership, co-operative, firm, company, public or private corporation, political subdivision, agency of the state, trust, estate, joint stock company, or any other legal entity, or their legal representative, agent or assigns."

Section 455B.30(10), The Code, 1977, provides:

" 'Person' means any agency of the state or federal government or institution thereof, any municipality, governmental subdivision, interstate body, public or private corporation, individual, partnership, or other entity and includes any officer or governing or managing body of any municipality, governmental subdivision, interstate body, or public or private corporation."

Similarly, Section 4.1(13), The Code, 1977, states:

"Unless otherwise provided by law 'person' means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity."

In the construction of a statute, its language must be harmonized, if possible, with other statutes relating to the same, or closely allied subjects. *Wonder Life company v. Liddy,* 1973, 207 N.W.2d 27, 32; *Egan v. Naylor,* 1973, 208 N.W.2d 915, 918. Considering this principle, the definition of the word "person" as used in §455B.88 should be at least co-extensive with those definitions found elsewhere within Chapter 455B. As defined in Chapter 455B, the word "person" encompasses individuals, various business enterprises, governmental bodies, and other entities. Section 455B.88 differs from these other provisions however, in that the adjective "private" has been engrafted upon the word "person". The proper definition of the term "private person" turns upon the effect of this distinction.

Neither the word "private" nor the term "private person" are defined in either §455B.88 or elsewhere within Chapter 455B. Given that the statute itself does not define this term, the words must be construed according to their approved usage. *State ex rel. Turner v. Drake,* 1976, 242 N.W.2d 707, 709;

Section 4.1(2), The Code, 1977. Black's Law Dictionary, Revised 4th Ed., 1968, at page 1358 defines "private" as:

"Affecting or belonging to private individuals as distinct from the public generally. Not official; not clothed with office."

"Private person" is defined as:

"An individual who is not the incumbent of an office."

Webster's Seventh New Collegiate Dictionary (1969) defines "private" in pertinent part as meaning:

"...not holding public office or employment...not related to one's official position...."

The corollary which follows from these definitions must be that the word "private" denotes a meaning which is distinct from both the words "public" and "governmental". *Goble v. Falot,* 1943, 144 Neb. 70, 12 N.W.2d 311, 312; 38 C.J.S. Governmental, p. 969. In contrast, the definitions of "person" described earlier encompass both private and governmental entities. When considered together, the definitions suggest that a "private person" within §455B.88 means any entity listed in the definitions of "person", which is non-governmental in nature. Thus the term "private person" would exclude political subdivisions, state or federal agencies and other governmental entities. Similarly, individuals, partnerships, public and private corporations, and other non-governmental legal entities would be included within the definition of a "private person" within §455B.88.

Question three asks whether the University of Iowa is a "private person" within §455B.88. Article 9 of the Iowa Constitution established the University, which is an institution governed by the state board of regents pursuant to §262.7, The Code, 1977. The board of regents is itself a state agency, as that term is defined in §17A.2(1), The Code, 1977. Moreover, the objects, departments of study, and degrees awarded by the University have been prescribed by Chapter 263, The Code, 1977. Considering these indicia, it is our conclusion that although the University of Iowa may be a "person" as defined within Chapter 455B, it is not a "private person" within §455B.88.

Under the language of §455B.88, the Solid Waste Disposal Commission is empowered to approve or prohibit the establishment and operation of a nuclear waste disposal site in this state by a "private person". Turning to the first question concerning the scope of §455B.88, the seminal point in the construction of this language must be ascertainment of legislative intent. *Doe v. Ray,* 1977, 251 N.W.2d 496, 500. If statutory language is plain, and free from ambiguity, it is necessary only to apply to the words used their ordinary sense in connection with the subject considered. *Maguire v. Fulton,* 1970, 179 N.W.2d 508, 510. Moreover, the construction of statutory language must not involve placing upon that language a strained, impractical, or absurd construction. *Doe v. Ray,* 1977, 251 N.W.2d 496, 501. Once the term "private person" is defined, the language of §455B.88 is plain and unambiguous. The Commission's power to approve or prohibit nuclear waste disposal sites with the attendant standards and licensing procedure is confined to the establishment and operation of these sites by private persons, defined as non-governmental entities. The authority granted the Commission under this section does not extend to the establishment and operation of these sites by governmental entities. However, it would place a strained construction upon

§455B.88 to conclude that the section provides that only "private persons" may establish and operate, with Commission approval, a nuclear waste disposal site. This section does not prohibit the establishment and operation of nuclear waste disposal sites by non-private persons. Rather, this section only provides for control by the Commission over the establishment and operation of these sites by non-governmental entities.

Given that the University of Iowa is not a "private person" as used in §455B.88, it is our conclusion that the Commission has no authority over this section to approve or prohibit the establishment and operation of the nuclear waste disposal site constructed by the University. It must be emphasized, however, that this conclusion concerning the scope of §455B.88 does not render the Commission incapable of exercising control over public persons in connection with radioactive waste. For example, under §455B.87, The Code, 1977, the Commission may promulgate rules for the transportation of radioactive material which would apply to the University. Section 455B.84(2) provides that the Executive Director may license "any person", not merely "private persons", who may transport, handle, or store any radioactive material. The executive director is further empowered, pursuant to §455.91, The Code, 1977, to impound the radioactive material of "any person" if an emergency exists. Thus the Commission's regulatory authority is confined to "private persons" only in connection with the establishment and operation of nuclear waste disposal sites.

November 13, 1978

SCHOOLS: Excuses. §257.25(7), Code of Iowa, 1977. A parent's statement that enrollment of child in physical education or health courses may be questioned by school administrators but no determination should be made on whether to deny exemption from enrollment without according due process to the parent and child. (Nolan to Burk, Assistant Black Hawk County Attorney, 11-3-78) #78-11-9

Mr. Peter W. Burk, Assistant County Attorney, Black Hawk County: This is written in response to your letter requesting revival of an opinion request, asking what right school officials have to go behind a written statement for excuse from a physical education or health course, which was submitted as follows:

"We need an interpretation of §257.25(7) which says 'A pupil shall not be required to enroll in either physical education or health courses if his parent or guardian filed a written statement with the school principal that the course conflicts with his religious belief.'

"We have the following fact situation. A parent requested that the child be exempted from physical education. The principal told the parent that that could be done only by means of a doctor's excuse or for religious reasons. The parent told the principal and has told several other school people that they are atheists. Eventually, the parent did bring in a letter which requested that the child be excused because the physical education course conflicted with their religious beliefs.

"The question, as I see it, is may the school district question the sincerity of a parent's statement that a physical education course conflicts with his religious beliefs?

"Apparently, we have a fair number of students who attempt to get exempted from physical education. We are very concerned that if we cannot question

the religious beliefs, that we will then have a fairly large number of students who will opt to not take physical education or health courses."

At first glance, it might appear that this question can be easily answered on ground that enrollment of a child in a physical education or health course could not possibly conflict with the religious beliefs of an atheist because an atheist by definition is a person who has no religious belief. The commonly accepted definition of an atheist as set forth in Webster's Seventh New Collegiate Dictionary is:

"One who denies the existence of God and rejects all religious faith and practice".

Atheists differ from all other people in owning no religion. *Hayle v. Everett,* 35 N.H. 9, 154, 16 Am.Rep. 82.

However, since §257.25(7) clearly appears to confer a statutory right to a pupil not to be required to enroll in either physical education or health courses if his parent files a written statement that the course conflicts with his religious belief, we believe that it is incumbent upon the school administration not to arbitrarily deny such a request for exemption. In *Goss v. Lopez,* 419 U.S. 465, 95 S.Ct. 729, 42 LEd2d 725 (1975) the United States Supreme Court held that once a state mandates and provides for the right to education, the constitutional requirements of due process apply.

In a case involving religious exemption from vaccination, it has been held that the plaintiff had a constitutionally protected right to procedural due process in procedures where a determination was to be made on whether to issue such exemption. *Award v. Dupuis,* 376 Fed. Sup. 479 (DCNH 1974). Where the school administration has reason to question the parent's statement it may require further information from the parent concerning the asserted conflict with religious belief. A final decision should be reserved until the pupil and the parent or guardian have been notified of any deficiency in the statement filed and of the particular questions and have been given an opportunity to present their explanation. See Opinion, Turner to Benton, Supt. of Public Instruction, 1-23-78

November 13, 1978

STATE OFFICERS AND DEPARTMENTS. Contingency Fund. §29C.20, Code of Iowa, 1977. The Executive Council may properly allocate money from the contingent fund to pay the cost of obtaining new keys for the Fort Madison prison made necessary by the loss of a key to CH 19N. (Nolan to Wellman, Secretary, Executive Council of Iowa, 11-13-78) #78-11-10

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: This is written in response to your request for an opinion as to whether or not the Executive Council has the authority to provide the necessary funding pursuant to the provisions of Chapter 29C.20, Code of Iowa, to pay the cost of re-keying CH 19N at the Iowa State Penitentiary. Your letter states that in its meeting on August 7, 1978, the Executive Council gave tentative approval to such allocation of funds in the amount of $15,403 to cover the cost of re-keying and payment of the cost of overtime necessitated by the emergency nature of the situation at the Fort Madison prison when a cell door key from CH 19N proved to be missing.

We also have reviewed a letter from the State Auditor which points out that no evidence was submitted that would indicate "any insurrection or riot actual or threatened."

Code Section 29C.20 provides in pertinent part:

"1. A contingent fund is created in the state treasury for the use of the executive council which may be expended for the purpose of paying the expenses of suppressing any insurrection or riot, actual or threatened, when state aid has been rendered by order of the governor, and for repairing, rebuilding, or restoring any state property injured, destroyed, or lost by fire, storm, theft, or unavoidable cause, ..."

It is the opinion of this office that funds may be allocated by the Executive Council upon its finding that any state property has been lost by theft or unavoidable cause. It would seem that the keys to the cell house at the State Penitentiary are state property beyond a doubt. The provisions of §29C.20 do not require that there be a threat of insurrection or riot to justify the replacement of state property lost by fire, storm, theft or unavoidable cause. The contingent fund may be used to restore such lost property without regard to whether or not a state employee or some other person may have been responsible for the loss.

November 13, 1978

STATE OFFICERS AND DEPARTMENTS: Iowa Energy Policy Council —Pub. Law 94—385; §93.15, Code of Iowa, 1977. The Energy Policy Council has the authority to comply with federal regulations in order to receive federal funds. The Council, therefore, can certify auditors for information energy audits. (Blumberg to Stanek, Director, Iowa Energy Policy council, 11-13-78) #78-11-11

Mr. Edward J. Stanek, Director, Iowa Energy Policy Council: We have your opinion request of September 26, 1978, regarding the Energy Conservation and Production Act, Public Law 94-385, 90 Stat. 1125, et seq. With regard to §432 of that Act, you ask the following questions:

"1. Is the Energy Policy Council legally able to impose "Class A" energy auditor certification requirements (i.e., completion of course work and an examination) for a voluntary program of this nature?

"2. As a prerequisite to auditor certification, the EPC is requiring the prospective "Class A" energy auditors be registered engineers or architects. Does this requirement violate any State statutes?

"3. Does the State of Iowa, through the Energy Policy Council, have the authority to mandate maximum fees to be charged for conducting "Class A" energy audits?

"4. When the State certifies "Class A" energy auditors, can the State then write contracts for energy audits on State-owned or -operated buildings requiring that only these certified energy auditors are eligible to perform the energy audits on said State buildings?"

Section 432 of the Energy Conservation and Production Act (ECPA) amends the Energy Policy and Conservation Act by adding §367 to it. Pursuant to that section, each state is to submit to the Department of Energy (DOE) a supplemental state energy conservation plan. Said plan is a prerequisite to federal aid. Section 367(b)(1)(c) provides that the supplemental plan must include "procedures for encouraging and for carrying out energy audits...." The Administrator is given the duty to adopt regulations for the energy audits, and has done so in 42 Fed. Reg. 26417, et seq. (1977) and 42 Fed. Reg. 33162, et seq. (1977).

Rule 420.100(b), 42 Fed. Req. 26418, indicates that the purpose of the rules is to encourage and facilitate, by a State's supplemental energy plan, energy conservation in the public and private sectors. Rule 420.101(b) provides that the supplemental plan is a requirement for federal financial assistance. Included in the minimum criteria for the supplemental plan are procedures for carrying out a continuing public education effort to increase public awareness, including implementation of energy measures. These measures must, in addition to other requirements, provide a public awareness program regarding energy audits respecting buildings and industries, including a campaign publicizing the availability of energy audits in at least one urbanized area of at least 50,000 population. See, rule 420.104, 42 Fed. Req. 26419. This rule makes it clear that the audits are voluntary. That is, although the State must set up procedures for energy audits, and make them available, there is no requirement that members of the public must submit to such audits.

Rule 450.11, 42 Fed. Reg. 33163, sets forth the three types of audits—Class A through Class C. Only Class A audits require surveys by auditors. It is stated in Rule 450.13 that, subject to the Regional Administrator's approval, each state shall establish procedures for ascertaining that a person conducting a Class A audit is qualified. This would seem to indicate that each state determines the qualifications for auditors. In fact, in discussions with Counsel for the DOE, we have been informed that such was the intent. The auditors are certified only for the informational audits pursuant to the ECPA and the rules promulgated thereunder.

Section 93.15, 1977 Code of Iowa, provides that the Energy Policy Council "shall take steps necessary to obtain federal funds allotted and appropriated for" energy-related projects described in the chapter. We interpret this to mean that the council can comply with federal requirements in order to receive federal funds. Thus, in answer to your first question, the Council can legally certify auditors for the information energy audits.

The answer to your second question is in the negative. Again, the "certified auditors" are only for the informational audits required by the Federal laws. That is, energy audits done voluntarily by others for their own information and the like need not be done by certified auditors. However, if an audit is done pursuant to the ECPA, it must be done by certified auditors in order for the state to be eligible for Federal funds. We are not aware of any state statute which specifically speaks to this issue. In any event, §93.15 would give the Council the authority to so specify the qualifications of the auditors pursuant to Federal law.

There is nothing in Chapter 93 speaking to fees charged by the council. Rule 450.14, 42 Fed. Reg. 33164, sets forth the maximum fees to be charged. There is nothing within that rule which mandates that fees must be charged. However, if fees are charged, they cannot exceed the limits set forth therein, with the lone exception in 450.14(b). That exception allows procedures for higher fees under certain circumstances. The Council is not the one which will be charging the fees. Rather the certified auditors will be charging for their time and costs in doing the audits. However, any charges they make must fit within the limits of rule 450.14. The Federal government is setting the maximum fees, not the Council.

In your last question you speak of energy audits on State buildings. If these audits are pursuant to the state supplemental plan mandated by the ECPA, the

auditors must be certified. However, if the audits are outside of that plan, the Council can use whomever it wishes. If the Council wishes to use certified auditors for state buildings, it need only include those audits in the overall program pursuant to the ECPA.

November 14, 1978

SCHOOLS: Budget Review. §§442.1, 442.12, 442.13, Code of Iowa, 1977. The state school budget review committee may order a reduction in a certified budget by establishing a modified allowable growth. (Nolan to Evans, State Representative, 11-14-78) #78-11-12

Honorable Cooper Evans, State Representative: This will acknowledge your opinion request which states:

"A question has been raised relating to the powers of the Iowa State Budget Review Committee. Specifically, the question is whether the Committee has the power to order a reduction in a school budget after that budget has been certified by the State Comptroller to the county auditor and local school district."

The following sections of the Iowa Code, 1977, are applicable:

§442.1 as amended by Chapter 1095, Acts 67th G.A., 1978 (H.F. 463).

"This chapter establishes the state school foundation program. For each school year, each school district in the state is entitled to receive state school foundation aid, which shall be an amount per pupil equal to the difference between the amount per pupil of foundation base or the district cost per pupil, whichever is less. However, if the amount so determined for any district is less than two hundred dollars per pupil, the district is entitled to receive not less than two hundred dollars per pupil. However, if the receipt of two hundred dollars by a school district plus the money raised by the foundation property tax exceeds the maximum allowed district cost for the budget year, the district shall be entitled to receive in state foundation aid an amount equal to the difference between the money raised by the foundation property tax for the budget year and the district cost for the budget year. In making computations and payments under this chapter, except in the case of computations relating to funding of special education support services, media services and educational services provided through the area education agencies, the state comptroller shall round amounts to the nearest whole dollar.

"§442.3 The state foundation base for the school year beginning July 1, 1972, is seventy percent of the state cost per pupil. For each succeeding school year the state foundation base shall be increased by the amount of one percent of the state cost per pupil, up to a maximum of eighty percent of the state cost per pupil. The district foundation base is the larger of the state foundation base or the amount per pupil which the district will receive from foundation property tax and state school foundation aid.

"§442.5(2). The authorized expenditures during a school year may not exceed the lesser of the budget for that year certified under section 24.17 plus any allowable amendments permitted in this section, or the authorized budget, which is the sum of the district cost for that year plus the actual miscellaneous income received for that year plus the actual unspent balance from the preceding year. If actual miscellaneous income for a school year exceeds the anticipated miscellaneous income in the certified budget for that year, or if an unspent balance has not been previously certified, a school district may amend its certified budget.

"§442.12. A school budget review committee is established, consisting of

the superintendent of public instruction, the state comptroller, and three members appointed by the governor to represent the public and to serve three-year staggered terms. The committee shall meet and hold hearings each year and shall continue in session until it has reviewed budgets of school districts, as provided in §442.13....

"§442.12(3). The committee shall review the proposed budget and certified budget of each school district, and may make recommendations. The committee may make decisions affecting budgets to the extent provided in this chapter. The costs and computations referred to in this section relates to the budget year unless otherwise specifically stated.

"§442.13(4). Subject to the minimum for the school years...as provided in §442.7, the committee *may establish a modified allowable growth by reducing the allowable growth:*

"a. If the district cost per pupil exceeds the state cost per pupil.

"b. *If in the committee's judgment the district cost is unreasonably high in relation to the comparative cost factors of similar districts, even if the district cost per pupil does not exceed the state cost per pupil.* [Emphasis added]

To the extent that the budget review committee may thus reduce "allowable growth" it may order a reduction in an authorized budget. We have attempted to answer the question as submitted. However, we must point out that the question rests on an inaccurate assumption in that the Comptroller *certifies* the budget to the county auditor and the local school district. The Comptroller merely calculates the maximum authorized budget using established cost per pupil and estimates of revenues furnished by the school district.

November 14, 1978

WELFARE: Disability required for General Relief. §§252, 252.1, 252.24, 252.25, 252.26 and 252.43, Code of Iowa, 1977. To be eligible for General Relief an applicant must be unable to earn a living by labor due to either physical or mental disability. A college student who applies for General Relief could be aided if so disabled. (Cosson to Shaw, Scott County Attorney, 11-14-78) #78-11-13

Ms. Elizabeth Shaw, Scott County Attorney: You have requested an opinion of the Attorney General as to whether or not students in a private college qualify as "poor persons" under §252.1, 1977 Code of Iowa, for the purposes of the payment of General Relief under Chapter 252, The Code.

Section 252.1, The Code, reads as follows:

"*Poor person*" defined. 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 opinion that the same will be conducive to their welfare and the best interests of the public. (Emphasis added)

This definition of "poor" and "poor person" is critical to the operation of Chapter 252 and the General Relief program. Under §252.43, the county is permitted to support the "poor" from the county general fund. If that is inadequate, a special "poor tax" can be levied. Under §252.24 the county of settlement is liable for the "reasonable charges and expenses incurred in the relief and care of a poor person". Under §§252.25 and 252.26 the township trustees of overseer of the poor shall "provide for the relief of such poor persons...as should not in their judgment be sent to the county care facility".

The crucial nature of this definition rests on two bases:

(1) When the legislature acts as its own lexicographer, its definiton of words is binding on the courts. *Cedar Memorial Park Cemetery Assn. v. Personnel Associates, Inc.,* 178 N.W.2d 343, 346, (Iowa 1970).

(2) The authority of a county is limited to those powers expressly conferred by statute or necessarily implied from the powers so conferred. *Woodbury County v. Anderson,* 164 N.W.2d 129, 134 (Iowa 1969).

Thus the authority of a county to expend funds for General Relief is limited to needy people who are physically or mentally disabled from earning a living by labor. A student would have to meet this definition of a poor person, just as all other persons receiving General Relief should meet this definition.

A previous opinion of the Attorney General (1972 OAG 62) recognized that this definition of a "poor person" was critical, as it related to strikers, stating at p. 64:

Persons on strike are not necessarily "poor", and they are not on strike because of physical or mental disability which prevents them from earning a living, but rather because they seek a better living. County General Relief is restricted to those who are unable, because of a physical or mental disability, to earn a living.

The above opinion dealt with the eligibility of strikers for ADC, Food Stamps, Soldiers Relief and General Relief, however, the quoted portion was the part which dealt with General Relief. The reasoning behind this part of the opinion was that a striker is out of work because of choice and not because of a physical or mental disability preventing work.

The same logic would apply to students. If the student is physically and mentally able to work, the student is ineligible for General Relief. If the student is disabled and needy, however, General Relief could be granted.

November 14, 1978

COUNTIES: Conveyance of land to city to widen street. §§332.3(13), 332.2(17), Code of Iowa, 1977. The prvisions of §332.3(17) control conveyances of land by county to a city. §332.3(13) applies where county land is no longer needed for public purposes. The manner in which the county acquired title will not affect the conveyance to a city unless there is a specific trust purpose involved. (Nolan to Burk, Assistant Black Hawk County Attorney, 11-14-78) #78-11-14

Mr. Peter W. Burk, Assistant Black Hawk County Attorney: This is written in response to your letter requesting an opinion on the following:

"Black Hawk County owns certain land within the city limits of Waterloo, Iowa, which was formerly used as the Black Hawk County Home. The City of Waterloo desires to widen Midland Street which lies adjacent to this land for the purpose of widening the street and installing storm sewers. The City of Waterloo is requesting Black Hawk County to convey a strip of land thirty feet in width adjacent to Midland Street to be used as street purposes for widening Midland Street. Section 332.3(17) of the Code provides as follows when indicating the powers that the Board of Supervisors has at any regular meeting, to wit:

" 'to sell, lease, exchange, give or grant and accept any interest in real property to, with or from any township, municipal corporation or school district if the

real property is within the jurisdiction of both the grantor and grantee.'

"This subsection appears to give the County authority to convey this thirty-foot strip of land to the City of Waterloo. However, the provisions of §332.3(13) have caused some question to arise as to whether or not this is in fact the case. You will recall that section requires that when the County wishes to dispose of land, it is required to advertise the same for sale and then sell the property at public auction. Our question is if §332.3(17) does not govern the fact situation and forth above and thereby allow the County to convey a strip of ground to the City for street purposes, what type of situation does it apply to?

"From time to time the county desires to enter into other real estate transactions with other political subdivisions. Some of the property that the County desires to convey has been acquired through tax sale, and some by outright purchase, etc. If you should find that §332.3(17) authorizes conveyance other than at public auction, would you kindly advise us what—if any—effect the manner in which the County acquired title has upon the sale to the political subdivision."

It is the view of this office that §332.3(17) controls in the fact situation you have presented rather than §332.3(13). It appears that the public purpose of the land in question will be preserved after the transfer from the county to the city. Section 332.3(17) applies to the disposal of property acquired by the county when it is no longer needed for public purposes.

With respect to your question as to whether or not the manner in which the county acquired title affects a sale to a political subdivision under 332.3(17), it is our view that once the title vests in the county, in the absence of an express or constructive trust provided otherwise, the county may dispose of any of its property by conveyance to another political subdivision pursuant to §332.3(17).

November 14, 1978

COUNTIES: Burial of indigents. §§142.1, 252.27, Code of Iowa, 1977. Supervisors may determine the amount to be spent from the county poor fund for the burial of indigent residents and the statutory limitation on the amount which may be spent for the burial of nonresidents does not apply. (Nolan to Huffman, Pocahontas County Attorney, 11-14-78) #78-11-15

Mr. H. Dale Huffman, Pocahontas County Attorney: You have requested an Attorney General's opinion concerning the county's authority to pay for funeral expenses of indigent residents from the poor fund of the county. According to your letter, you have already determined that the board of supervisors has such authority in the case of indigent veterans.

Your specific questions are as follows:

"(1) Does the County Board of Supervisors, under present law, have authority to pay from the County funds any part of the cost of an indigent resident's funeral, or a non-veteran's funeral, and

"(2) If the Board of Supervisors have such authority, is the Board limited as to how much they may pay toward the cost of such a funeral?"

Authority for the board of supervisors to pay claims for the burial of indigent residents is to be found in §142.1, Code of Iowa, 1977, which provides in pertinent part as follows:

"The body of every person dying in a public asylum, hospital, county care facility, ...in this state, or found dead within the state, or which is to be buried at public expense in this state, except those buried under the provisions

of Chapter 249, and which is suitable for scientific purposes, shall be delivered to the medical college of the state university, or some osteopathic or chiropractic college or school located in this state, which has been approved under the law regulating the practice...but no such body shall be delivered to any such college or school if the deceased person expressed a desire during his last illness that his body should be buried or cremated, nor if such is the desire of his relatives....."

An attorney general's opinion bearing the date December 14, 1927, 1928 O.A.G. 276, advises that if the deceased was a poor person as defined in the Code and had no relatives who were financially able to pay the expenses of his burial "then the expense should be paid out of the poor fund in the county in which he had a settlement, provided, of course, that application was made by said relatives in the same manner as in cases for relief of the support of the poor". That opinion also advised that if there were no relatives the application could be made by a friend or person who has been more or less closely associated with the decedent during his life time.

Under §252.27 available forms of relief and the conditions thereof are spelled out. One of the items specified is money. That section of the Code further provides, "...the amount of assistance issued to meet the needs of the person shall be determined by standards of assistance established by the county board of supervisors."

Accordingly, it is our view that the amount paid from the county poor fund for the burial of a county resident is to be determined by the board of supervisors. The provisions of the statute which place a statutory limitation of $250 on the amount which can be expended for the burial of an indigent nonresident have application only to such burials and do not apply to the burial of county residents.

November 14, 1978

CONFLICT OF INTEREST: MUNICIPAL HOUSING AGENCIES. §§403.16, 403A.22, 597.2, 597.14, 633.238(1), Code of Iowa, 1977, and §721.11, Supplement to the code, 1977. Ownership of real estate by spouse gives a personal interest in such property to board member of municipal housing agency established under §403A.5, The Code. Where such property might be included in a rent subsidy program operated by the agency, the ownership must be properly disclosed and recorded, and the board member shall not participate in any action by the agency affecting that property. (Cosson to Retz, Vice-Chairman Region XII Regional Housing Authority, 11-14-78) #78-11-16

Mr. Dick Retz, Vice-Chairman, Region XII Regional Housing Authority: You have asked for an opinion of the Attorney General on a potential conflict of interest situation involving the Regional Housing Authority. The situation involves a rent subsidy housing program which your agency operates. There are three requirements for this program: First, eligibility of the tenant for the program; secondly, the availability of a rental unit meeting minimum property standards; and third, the consent of both landlord and tenant to participate in this program.

In the situation you described, an eligible tenant located a rental unit meeting minimum property standards, but the rental unit is owned by the husband of your Housing Authority's Executive Board Chairman. As you emphasized, this rental unit was located by the tenant, there is a shortage of qualified rental

housing in your area and the property owner will receive no more (or less) through your low-rent housing program than he would if he merely rented it to someone not interested in the subsidized rental housing program. You asked whether or not this relationship creates a conflict of interest under Iowa law. The importance of that question is highlighted by §721.11, Supplement to the Code, 1977, which states:

"Any officer or employee of the state or of any subdivision thereof who is directly or indirectly intereted in any contract to furnish anything of value to the state or any subdivision thereof where such interest is prohibited by statute commits a serious misdemeanor. This section shall not apply to any contract awarded as a result of open, public and competitive bidding."

Thus, if this transaction is prohibited by statute, criminal liability could result.

The applicable statute is §403A.22, 1977 Code of Iowa, as amended by Chapter 116, Acts 67th G.A. That section deals with three factual situations in the following way:

1) It prohibits certain officials of municipal housing agencies from voluntarily *acquiring* any personal interest in any housing project or property related thereto, whether present or planned.

(2) It requires disclosure of such official's voluntary *acquisition* of a personal interest in such property.

3) It requires disclosure of such officials *present* or past (within two years) *ownership* of any interest in property included or planned to be included in a municipal housing project, and further requires that such official abstain from participating in any action affecting such property.

Of those three situations, it appears that only the third would apply to the circumstances you mentioned in your letter, if any apply. As you mentioned, it is not the board member that owns this property, but rather the board member's husband. Does the ownership of real property by a board member's spouse give the board member any "direct or indirect personal interest" in that property?

In answering that question, the following rules of statutory interpretation from *Matter of Estate of Bliven,* 236 N.W.2d 366, 369 (Iowa 1975) should be followed:

"[N]umerous statutes pertaining to the same subject must be considered, so the concept of *pari materia* comes into play. (citations omitted)

"Furthermore, all relevant legislative enactments must be harmonized, each with the other, so as to give meaning to all if possible. We must thus determine the legislative objective and in so doing proceed upon the premise our General Assembly intended its enactments be accorded a practical application leading to a reasonable result which will accomplish, not defeat, their purpose."

Section 403A.22, The Code, is virtually identical to §403.6, The Code, which deals with conflicts of interest under the Urban Renewal law. Section 403.16, (as written at that time) was examined by the Iowa Supreme Court in *Wilson v. Iowa City,* 165 N.W.2d 813 (Iowa 1969), and the Supreme Court found some actions by former city councilmen in Iowa City to have been improper. Section 403.16 was later amended by the Legislature in specific response to the *Wilson* case, but the holding of the Supreme Court as to the

purpose of this conflict of interest statute is clearly still applicable. The Court stated at 165 N.W.2d p. 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 1976 OAG 393, Blumberg to Rabedeaux.

Keeping this statement of purpose in mind, let us examine the nature of the interest held by the board member in her husband's property. It is true, §597.2, The Code, states:

"When property is owned by the husband or wife, the other has no interest therein which can be the subject of contract between them, nor such interest as will make the same liable for the contracts or liabilities of the one not the owner of the property, except as provided in this chapter."

However, Section 597.14, The Code, provides:

"The reasonable and necessary expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately."

And, in addition, §633.238(1), The Code, permits a spouse electing to take against the provisions of the will of a deceased spouse to claim:

"One-third in value of all the legal or equitable estates in real property possessed by the decedent at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the surviving spouse has made no relinquishment of his right."

It is my opinion, therefore, that where the spouse of a board member of a municipal housing agency owns real estate, the board member also has a personal interest in that real estate. In these circumstances, §403A.22, The Code, requires as a minimum that the board member:

"...immediately disclose this fact in writing to the local governing body, and such disclosure shall be entered upon the minutes of the governing body; and any such official, commissioner or employee shall not participate in any action by the municipality, or board or commission thereof affecting such property, as the terms of such proscription are hereinafter defined."

Thus it is my opinion that there is a potential conflict of interest under Iowa law, but that if the above requirements were met, Iowa law would permit the rental unit in question to be included in the program administered by your agency. The law recognizes the potential conflict, but permits the action to occur if certain steps are taken to neutralize the undesired consequences of the potential conflict of interest.

November 15, 1978

SCHOOLS: Bussing. §321.372, Code of Iowa, 1977. School bus drivers have discretion as to the use of warning lights and signal arm when making stops within a residential or business district of a city which does not require such use by ordinance pursuant to §321.372. City ordinance establishing shorter signaling distance than state statute requires is subject to challenge as

inconsistent. (Nolan to Benton, Superintendent of Public Instruction, 11-15-78) #78-11-17

Superintendent Robert D. Benton, Department of Public Instruction: This is written in response to your request for an interpretation of §321.372, Code of Iowa, 1977. This section of the Code pertains to discharging pupils from school buses and provides in pertinent part:

"1. The driver of any school bus used to transport children to and from a public or private school shall, when stopping to receive or discharge pupils, turn on flashing warning lamps at a distance of not less than three hundred feet nor more than five hundred feet from the point where said pupils are to be received or discharged from the bus. At the point of receiving or discharging pupils the driver of the bus shall bring bus to a stop, turn off the amber flashing warning lights, turn on the red flashing warning lamps, and extend the stop arm. After receiving or discharging pupils, the bus driver shall turn off all flashing warning lamps, retract the stop arm and proceed on the route. No school bus shall stop to load or unload pupils unless there is at least three hundred feet of clear vision in each direction.

* * *

"This section shall not apply to 'business' and 'residence' districts, unless so provided by ordinance, but shall apply in suburban districts of cities where the speed limit is in excess of thirty-five miles per hour."

According to your letter there appears to be three current interpretations of the above quoted language:

(1) the use of stop arm flashing warning lamps is prohibited unless provided for by local ordinance;

(2) the use of the stop arm and flashing warning lamps is discretionary with the school district in that each could establish policies as to their use; and

(3) the use of the stop arm and flashing warning lamps is discretionary with each individual driver.

You ask first for an opinion as to which of these, or other interpretations is the correct one.

The language of §321.372 clearly applies directly to each school bus driver. To comply with the law, each time a driver stops the bus to load or unload children that driver must "bring the bus to a stop, turn off the amber flashing warning lamps, turn on the red flashing warning lamps, and extend the stop arm". However, this restriction on the bus driver does not apply in certain geographic areas, notably "business" and "residence" district unless the governing body having jurisdiction over such districts has made the section part of its law by ordinance.

Accordingly, where there is no such ordinance, it is the view of this office that the use of stop arm and flashing warning lamps in business and residential districts is discretionary with each individual driver. There appears to be no other provision of statute prohibiting the use of stop arm and flashing warning lamps in such district and the statute is clearly directed at the control of such equipment by the school bus driver rather than requiring school districts to promulgate additional rules in this regard.

A second question presented by you concerned the scope of authority of

cities enacting the type of ordinance referred to in the statutes. You ask:

"...whether a city, pursuant to §321.372(4), may adopt an ordinance whose terms vary from those terms set out in that section or whether a city adopting such an ordinance is required to incorporate therein terms identical with those set out in §321.372?"

Under Amendment 25 to the Constitution of the State of Iowa providing for municipal home rule, Article 3 of the Constitution is amended by adding a new section providing:

"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... ."

An ordinance which requires that flashing lamps on school buses be turned on not less than one hundred nor more than three hundred feet from the point of stopping when the statutory distance provides that the lamps be turned on not less than three hundred nor more than five hundred feet from the point of stopping would in our view be "inconsistent with the laws of the general assembly", and would be subject to challenge in the courts on that ground. Accordingly, a local ordinance may not vary the terms and restrictions set out in §321.372 but can make the terms of that section applicable to particular districts within that city as provided in the statute.

November 15, 1978

SOCIAL SERVICES: Transfer of Real Estate; Section 218.94, Code of Iowa, 1977. The Department of Social Services has the power subject to the approval of the Executive Council of Iowa to transfer real estate to the City of Toledo, Iowa, for the purposes of paving an adjoining street, as this is part of the proper use for said real estate for the State Juvenile Home. (Robinson to Wellman, Secretary, Executive Council of Iowa, 11-15-78) #78-11-18

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: References made to your letter of October 16, 1978, with regard to:

a request received from the Department of Social Services asking the Executive Council to approve plans to dedicate to the City of Toledo, Iowa, a strip of State owned land 663 feet long and 10 feet wide which borders Vine Street and the Toledo Juvenile Home.

The city of Toledo is requesting that we dedicate to them this strip of ground so that the city can widen and pave Vine Street. There is a great deal of citizen pressure to pave this gravel street.

This dedication, on behalf of the State of Iowa, would not involve any paving assessment, legal costs, or other transfer expenses to the State of Iowa. Nor will the city of Toledo request any assessment against the remaining State property because the land is being transferred to another government agency, therefore, no fee is attached.

In our opinion, the Department of Social Services has the power subject to the approval of the Executive Council to sell this real estate, as the improvement of the city street is a proper use for the State Juvenile Home in Toledo within the meaning of §218.94, Code of Iowa, 1977. This Code section provides:

The commissioner of the department of social services shall have full power

subject to the approval of the executive council to secure options to purchase real estate and to acquire and sell real estate for the proper uses of said institutions. Real estate shall be acquired and sold upon such terms and conditions as the commissioner may recommend subject to the approval of the executive council. ...

This office, in an earlier opinion, 1968 OAG, 537, Seckington to Gay, Chief of Business Services, Board of Control, January 23, 1968, stated that the Board of Control has the power pursuant to §218.94 to sell real estate on such terms and conditions as they wish subject to the approval of the Executive Council. This opinion dealt primarily with whether or not the Board of Control had the authority to sell real estate on contract. This power has subsequently been transferred to the Department of Social Services.

We believe that the above statute is broad enough to cover the transfer of the strip of land to the city of Toledo as you have outlined.

November 15, 1978

COUNTIES: Subdivision ordinances. §§306.21, 358A.5, 358A.6, Code of Iowa, 1977. Authority for Board of Supervisors to adopt subdivision ordinances exists in Chapter 358A and the requirements of notice and hearing set out therein must be followed. §306.21 does not provide the Board with authority to adopt such ordinances without notice and hearing. (Nolan to Hoth, Des Moines County Attorney, 11-15-78) #78-11-19

Mr. Steven S. Hoth, Des Moines County Attorney: This is written in response to your request for an Attorney General's opinion concerning the validity of subdivision regulations for unincorporated areas in Des Moines County, Iowa, adopted by the board of Supervisors on March 15, 1976. The letter states that the Board relied on §306.21, Code of Iowa, as its authority the regulations, but did not hold hearings on the proposed regulations prior to their adoption or give notice of their intention to adopt such subdivision regulations. The questions you presented are as follows:

"(1) Does §306.21 extend authority to the Board of Supervisors to adopt a comprehensive Subdivision Regulation plan for the county, and

(2) Can a comprehensive Subdivision Regulation plan for the county be adopted by a Board of Supervisors without publishing notice of intent to adopt the Regulations or the holding of a public hearing on the proposed Subdivision Regulation plan?"

The answer to your first question is no. Code §306.21 does not, in our opinion, provide authority for the board of supervisors to adopt a comprehensive subdivision regulation plan for the county. That authority is provided in Code Chapter 358A. It should be noted that §358A.5 requires that county zoning regulations "shall be made in accordance with a comprehensive plan". Section 358A.6 requires that public hearings be held upon at least fifteen days published notice.

We have examined the language of §306.21 which provides in pertinent part as follows:

"All road plans, plats and field notes and true and accurate diagrams of water, sewage and electric power lines for rural subdivisions shall be filed with and recorded by the county auditor and approved by the board of supervisors and the county engineer before the subdivision is laid out and platted,.... Such plans shall be clearly designated as 'completed', 'partially completed' or

'proposed' with a statement of the portion completed and the expected date of full completion. In the event such road plans are not approved as herein provided such roads shall not become the part of any road system as defined in this chapter."

In an opinion dated October 29, 1964, 1964 O.A.G. 74, this office advised that the board of supervisors does have authority to reject a proposed plat if the streets platted do not comply with reasonable requirements.

The resolution which you have submitted purports to enact a subdivision ordinance. An "ordinance" is a local law, as distinguished from an act relating to daily administration of municipal affairs. *Murphy v. Gilman,* 214 N.W. 679, 681, 204 Iowa 58.

The words "ordinances", "rules" and "regulations" are synonymous. *State ex rel. Kribs v. Hoctor,* 120 N.W. 199, 83 Neb. 690. Legislative authority of the state is vested in the general assembly and county board of supervisors have only such powers as are expressly conferred by statute or necessarily implied from the power so conferred. *Mandicino v. Kelly,* 1968, 158 N.W.2d 754.

Under §332.3(2) the board of supervisors at any regular meeting shall have the power:

"To make such roles not inconsistent with law, as it may deem necessary for its own government, the transaction of business, and the preservation of order."

In 1928 O.A.G. 109 it was pointed out that the board of supervisors did not have power to pass ordinances creating misdemeanors and therefore could not by resolution prohibit persons from trespassing on the courthouse yard and lawn. Article 3 of the subdivision regulations submitted for review declares:

"It shall be unlawful for any person being the owner, agent or person having control of any land within Des Moines County and the extra territorial plat jurisdiction of a municipality to create a subdivision unless by a plat, in accordance with the regulations contained herein...."

It is our view that this language exceeds the scope of §306.21 although such an ordinance could properly be enacted if the procedures of Chapter 358A are followed.

Your second question is also answered no for reasons set out above.

November 15, 1978

STATE OFFICERS AND DEPARTMENTS: Contingency Fund. §29C.20 Code of Iowa, 1977. The Executive Council should not allocate contingent funds under §29C.20 for the replacement of funds expended by a university more than a year ago even though such expenditure was necessary to repair storm damaged state property. The contingent fund is for meeting interim needs unforeseen by the legislature. (Nolan to Wellman, Secretary, Executive Council of Iowa, 11-15-78) #78-11-20

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: You have requested an opinion as to whether the Executive Council has the legal right to approve an allocation of $25,000 pursuant to §29C.20 of the 1977 Code of Iowa which has been requested by the Board of Regents to pay that portion of storm loss to the UNI-Dome which was not covered by insurance. In its presentation to the Executive Council the Board of Regents stated that the

field house at the University of Northern Iowa otherwise known as the UNI-Dome suffered damage from a storm on June 30, 1977, and a total of $141,366.95 was expended to repair the damage. There was in force at the time of the loss a casualty insurance policy with the Lexington Insurance Company from which was recovered the amount of $116,366.95. The $25,000 requested by the Regents from the contingent fund is that portion of the cost of repairing the damage which was not covered by insurance.

Your letter further states that in its meeting on August 21, 1978, the Executive Council deferred taking final action on the request pending consideration by the Attorney General by points raised by the State Auditor:

"1. The State of Iowa has elected to be self-insured for all casualty damage to state-owned buildings. If this is in fact a state-owned building, why does the Board of Regents expend $87,159.00 annually to provide insurance? The current loss could have been paid in full with just 19½ months' premium.

"2. The audits of all State Agencies and departments, including the educational institutions, shall be made annually by the Auditor of State. The audit of the UNI Dome has been performed by a private auditing firm and paid for out of income from the UNI-Dome.

"3. The Bond Resolution provided that the Board of Regents agrees to maintain fire and extended coverage insurance for the benefit of bondholders sufficient to provide for full recovery of replacement value, less a reasonable deduction not exceeding $5000 per loss. It further provided that 'within 90 days following the close of each fiscal year cause an audit to be made by an independent certified public accountant...' We question whether the Board of Regents could circumvent the provisions of Chapter 11 and of Chapter 29C.20 by Bond Resolution.

"4. The Bond Resolution provides for a deductible not exceeding $5000. If it is determined that the UNI-Dome is state property and that on this particular property they are exempt from the provisions of Chapter 11 and 29C.20, it would appear that the contingency fund liability would be limited to the $5000 deductible.

"5. The Bond Resolution further provides that the bonds are 'payable solely from the fees charged each student at the University and the net revenues of the operation of the Field House, and are not obligations of the State of Iowa nor payable in any way by taxation.' It would seem that a payment from the contingent fund, which is tax money, would be in contradiction to this statement.

"6. The engineering report stated that 'the prssure sensor in the facility had been reading low by .2 and .3 inches so that actual pressure was less than that recorded on the gauges by this amount. The emergency mode was set to come on at .62 inches of gauge reading. With the pressure gauge malfunction, this would have meant the actual pressure was between .42 and .32 inches. 'This pressure is low enough to account for ponding of water at a cable crossing. Water accumulation on the roof caused the center fabric panel to rip...' Chapter 29C.20 does not provide for replacing, or restoring buildings and equipment damaged as a result of equipment failure or malfunction."

The questions raised by the State Auditor are well founded. However, it is our view that with the exception of the question as to whether the UNI-Dome is a state owned building, the matters presented by the auditor are not determinative of the legal question which you have raised. Further, it is our view that your question must be given a negative reply for other reasons set forth below.

It is clear that under §§262.44 through 262.53 of the 1977 Code of Iowa, the State Board of Regents is authorized to construct self-liquidating and revenue producing buildings and facilities on the campuses of institutions of higher learning under the Board's control. Code §262.46 provides:

"The title to all real estate so acquired and the improvements erected thereon shall be taken and held in the name of the state."

Proceeding from the premise that the UNI-Dome is a state owned building, we then consider the applicability of §29C.20 of the Code. This section provides in pertinent part:

"1. A contingent fund is created in the state treasury for the use of the executive council which may be expended for the purpose of...repairing, rebuilding, or restoring any state property injured, destroyed, or lost by fire, storm, theft, or unavoidable cause,... ."

In an opinion dated May 15, 1969, 1970 O.A.G. 168, this office advised that the "contingent fund is to meet needs arising during the interim which the legislature did not and could not foresee." It is our understanding that all necessary repairs to the UNI-Dome have already been made and the cost of such repairs not covered by the insurance payment were paid from other funds on hand at the University of Northern Iowa. In as much as the storm damage occurred in 1977 and repairs have already been made it can hardly be said that the need for use of contingent funds in August of 1978 is a need which arose during the interim which the legislature did not and could not foresee. Accordingly, it is our view that the Executive Council would not be justified in making an allocation from the contingent funds at this time and that if funds are to be restored to Northern Iowa University it should be by appropriation of the General Assembly.

November 15, 1978

COUNTIES: Leave of absence for deputy. §341.3, Code of Iowa, 1977. When leave of absence is granted to a deputy and no statement is made as to whether the leave is with or without pay, the decision as to whether pay should be suspended rests with the principal officer. A deputy's appointment may be revoked during a leave of absence. (Nolan to Anderson, Howard County Attorney, 11-15-78) #78-11-21

Mr. Mark B. Anderson, Howard County Attorney: Your letter of September 11, 1978, raised the following questions for an opinion of the Attorney General:

"1. When a leave of absence is granted, not stating with or without pay, may it properly be considered that it is with pay?

"2. When an elected official has granted to a Deputy a leave of absence may the same elected official revoke the appointment during the leave of absence?

"3. When a revocation is made, pursuant to §341.3, may the revocation be made retroactive to an earlier date?"

The questions set out above relate to a situation in your county in which a county officer granted a leave of absence to a deputy effective August 9, 1978, to continue until August 31, 1978. On August 18, 1978, the officer revoked the appointment of the deputy pursuant to §341.3 of the Code stating that the revocation was effective August 9, 1978. According to the statement of facts as submitted to this office, both the document purporting to grant a leave of absence and the revocation of appointment were filed with the county auditor

on August 18, 1978.

Research reveals a number of cases in other jurisdictions which interpret the term "leave of absence" to connote continuity of the employment status. *Bowers v. American Bridge Company,* 127 A.2nd 580, 585, 43 NJ Super 48; indicating some voluntary act on the part of the employee as contrasted with "lay-off", *Jones v. Metropolitan Life Ins. Co.,* 39 A.2d 721, 725, 156 Penn. Super. 146; an authorized temporary absence from work for other than vacation purposes. *Michigan Employment Security Commission v. Vulcan Forging Company,* 134 N.W.2d 749, 752, 375 Mich. 374; *Gibbons v. Sioux City,* 45 N.W.2d 842, 242 Iowa 160. However, the majority of cases indicates that the phrase describes a temporary absence from duties, with intention to return—during which time remuneration may be suspended. *Goodyear Tir and Rubber Company v. Employment Security Board of Review,* 469 Pac.2d 263, 268, 205 Kan. 279; *Chenault v. Otis Engineering Corporation, Texas Civil Appeal,* 423 S.W.2d 377, 383. *State ex rel. Cutright v. Akron Civil Service Commission,* 120 N.E.2d 127, 130, 95 Ohio Appellate 385.

Accordingly, it is our view that when a leave of absence is granted and no statement is made as to whether the leave is with or without pay, the determination as to whether or not pay is to be suspended rests with the principal officer granting the leave. Unless it is specifically stated otherwise, fringe benefits such as coverage in group insurance will continue as limited by the policy during the period of leave or suspension even though the pay for such periods is withheld from the employee.

Your second question asks whether a principal officer may revoke the appointment of the deputy during the deputy's leave of absence. This must be answered affirmatively. Deputy county officers serve at the pleasure of the elected official. *McMurry v. Board of Supervisors of Lee County,* 261 N.W.2d 688, 1968.

The third question you presented asks if revocation of an appointment of a deputy may be made retroactive to an earlier date. Under §341.1 of the Code the legislature has clearly provided that each county officer is responsible for the acts of those deputies which he has appointed. It is the opinion of this office that an elected official cannot rid himself of such responsibility by retroactively revoking the appointment. Accordingly, it is our view that a principal officer may revoke the appointment of his deputy effective immediately upon filing with the auditor or at some date in the future but that there is no authority for the officer to make such revocation retroactive. Further, it is our view that it would not be in the public interest to permit retroactive revocations of appointment in view of the statute which makes the elective county official responsible for the official acts of the deputy in that official's office.

November 15, 1978

STATE OFFICERS AND DEPARTMENTS: Office Moves. Since the enactment of Code Chapter 18, the Department of General Services has the duty to assign office space for all executive and state agencies. Consequently, the costs of office moves of departments are to be paid in accordance with the provisions of §18.8 and not from the contingent fund by the Executive Council. (§19.29) (Nolan to Wellman, Secretary, Executive Council of Iowa, 11-15-78) #78-11-22

Mr. W. C. Wellman, Secretary, Executive Council of Iowa: Your letter of

August 29, 1978, asks whether the Executive Council has authority to allocate funds to pay the cost of physical moves of departments and necessary telephone installations pursuant to the provisions of §19.29, Code of Iowa, 1977. You state the request is of paramount importance because of the potential need to move smaller State Agencies to different locations on very short notice and when moves had not been anticipated at the time the agency presented their budget to the legislature.

It is the opinion of this office that Code §19.29 does not provide authority for the payment of such expenses by the Executive Council. Section 19.29 provides:

"The executive council shall not employ others, or incur any expense, for the purpose of performing any duty imposed upon such council when such duty may, without neglect of their usual duties, be performed by the members, or by their regular employees, but, subject to such limitation, the council may incur the necessary expense to perform or cause to be performed any *legal duty imposed on said council,* and pay the same out of any money in the state treasury not otherwise appropriated. [emphasis supplied]

Since the enactment of Chapter 18 of the Iowa Code which establishes the Department of General Services, it has been the duty of the Director of General Services to assign office space in the capitol building and other state buildings for all executive and state agencies. Section 18.8 provides in pertinent part:

"The director shall provide necessary telephone, telegraph, lighting, fuel, and water services for the state buildings and grounds located at the seat of government,. . . .

* * *

"The director shall assign office space in the capitol building, other state buildings,. . . and elsewhere in the city of Des Moines, for all executive and judicial state agencies. Assignments may be changed at any time. The various officers to whom rooms have been so assigned may control the same while the assignment to them is in force. . . . . ."

In §18.12 there are two references to expendirues from the fund provided in §19.29; one is found in subsection 7 which authorizes the director to contract with the approval of the executive council for repair, remodeling or demolition of buildings. The second appears in §18.12(9) where the cost of any lease of necessary office space where no specific provision has been made can be paid from the fund provided in §19.29. In view of these two specific references to §19.29 we believe the maxim "expressio unius est exclusio alterius" must apply. Consequently, we believe that it is not proper to make an emergency allocation of funds pursuant to §19.29 of the Code to pay the cost of physical moves of the department unless such moves must be made into premises leased from a party other than the state or one of its agencies or where emergency repairs to state buildings must be made.

November 15, 1978

BEER & LIQUOR: Section 123.97; H.F. 187, 67th G.A., 2d Sess., 1978. Beer and Liquor Control Department may not set aside surplus bottle deposit funds to be used to administer the Beverage Container Act. (McGrane to Price, Deputy Director, Iowa Beer & Liquor Control Commission, 11-15-78) #78-11-23

Mr. George M. Price, Deputy Director, Iowa Beer & Liquor Control

Commission: You have requested an opinion on the following regarding the Beverage Container Act:

"The Liquor Department will begin collecting the 5 cent deposit on May 1, 1979, and this will require sizable outlays of funds for equipment, special labels and possibly some personnel. Since no money is provided in our appropriation for the fiscal year ending June 30, 1979, we would like your opinion as to the possibility of paying for these added expenses from the surplus of funds created from the excess of deposits over refunds."

It is our opinion that you cannot apply the surplus finds to these added costs.

Section 12.10, The Code, provides that all state officers and agencies must deposit all funds received with the treasurer or to his credit in a designated account. There are exceptions for certain agencies but not for the Liquor Control Department. Section 123.97, The Code, provides that all revenue arising from administration of the Liquor Control Act shall become part of the general fund, except for fees remitted to local authorities. This initially indicates the funds are to go to the treasurer for appropriation.

The Legislature in enacting the Beverage Control Bill provided for part of the deposit funds collected by the Beer and Liquor Control Department to be a special fund for the treatment of alcoholics. There was no further designation of the funds. It is therefore clear that the Legislature did not intend the use of the surplus over and above the designated amount to be assigned for any specific purpose, that would include the administration of the Beverage Container Act as applied to the Beer and Liquor Control Department. See e.g. 1947 OAG 160.

The conclusion therefore seems clear, the surplus cannot be set aside and specially designated by the department to pay the added expenses incurred in implementing the Beverage Container Act.

November 15, 1978

JUVENILES: PARENTAL LIABILITY: §§232.51, 624.23, Code of Iowa, 1977. Parents of juvenile committed to a Mental Health Institute by the Juvenile Court for treatment and evaluation may be held liable for the cost of such care. (Piazza to Wickey, Asst. Woodbury County Attorney, 11-15-78) #78-11-24

Mr. Gene Wickey, Assistant Woodbury County Attorney: In your recent request for our opinion, you ask the question:

When a juvenile facing criminal charges is court ordered by the judicial referee to a Mental Health Institute for treatment or evaluation, and the parents are not a party to the action but do have sufficient assets to pay for the cost of the care, can they be held liable therefor?

Your opinion request refers to those cases where there has been no adjudication of mental illness or mental retardation. Hence the provisions of §222 and §230, specifically §222.78 and §230.15, Code of Iowa, 1977, will not be discussed. Thus, we must look to Chapter 232, Delinquent Children. Section 232.51, Expenses, provides:

Whenever legal custody of a minor is transferred by the court or whenever the minor is placed by the court with someone other than the parents or whenever a minor is given physical or mental examinations or treatment under

order of the court and no provision is otherwise made by law for payment for the care, examination, or treatment of the minor, the costs shall be charged upon the funds of the county in which the proceedings are held upon certification of the judge to the board of supervisors. The court may inquire into the ability of the parents to support the minor and after giving the parents a reasonable opportunity to be heard may order the parents to pay in the manner and to whom the court may direct, such sums as will cover in whole or in part the cost of care, examination, or treatment of the minor. If the parents fail to pay the sum without good reason, the parents may be proceeded against for contempt or the court may inform the county attorney who shall proceed against the parents to collect the unpaid sums or both.

Any such sums ordered by the court shall be a judgment against each of the parents and a lien as provided in §624.23. If all or any part of the sums that the parents are ordered to pay, is subsequently paid by the county, the judgment and lien shall thereafter be against each of the parents in favor of the county to the extent of such payments.

Under this section, the judicial referee is given the discretion of assessing the cost of the juveniles' care at an MHI to the parents. The parents are also provided a due process protection in that they are given an opportunity for a hearing before the court. No mandatory provision for asserting liability is found under the instant circumstances.

Accordingly, it is our opinion that when a juvenile is court ordered to a Mental Health Institute, the cost thereof may be assessed to the parents at the discretion of the judicial referee. [This opinion is not intended to reach the issues of ability to pay or sufficiency of assets.]

November 20, 1978

TAXATION: Valuation of Real Estate Subject to Taxation—§441.21, Code of Iowa, 1977. The assessor is not bound, as a matter of law, to any particular sale or appraisal when determining the actual value of property under §441.21, Code of Iowa, 1977, for assessment purposes. (Kuehn to Harbor and Hultman, 11-20-78) #78-11-25

The Honorable Calvin O. Hultman, The Honorable William H. Harbor: We acknowledge receipt of your letter in which you have requested an opinion of the Attorney General "concerning the relationship between a court ordered sale of real property and the corresponding assessment by the county assessor." Your letter states:

"In the course of a judicial sale, an appraisal of a parcel was obtained by the district court of under $750. An offer to buy was made to the court of $750, and the court approved the sale for $750.

"Subsequently, the county assessor revalued the property for taxation at $3,000. No changes of improvements to the property had been made since the sale of the parcel.

"Section 441.21, subsection 1, unnumbered paragraph 2 of the *Code of Iowa, 1977,* states:

"The actual value of all property subject to assessment and taxation shall be the fair and reasonable market value of such property. 'Market value' is defined as the fair and reasonable exchange in the year in which the property is listed and valued between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and each being familiar with all the facts

relating to the particular property. [Sale prices of the property or comparable property in normal transactions reflecting market value, and the probable availability or unavailability of persons interested in purchasing the property, shall be taken into consideration in arriving at its market value.] In arriving at market value, sale prices of property in abnormal transactions not reflecting market value shall not be taken into account or shall be adjusted to eliminate the effect of factors which distort market value, including but not limited to sales to immediate family of the seller, foreclosure or other forced sales, contract sales, discounted purchase transactions or purchase of adjoining land or other land to be operated as a unit.

* * *

"Does a court approved judicial sale in excess of appraisal meet the 'willing buyer-willing seller' standard?

"Does the court ordered appraisal and sale have any presumption of accuracy over the determination of value by the county assessor for taxation purposes?"

In essence, you are asking whether or not, as a matter of law, the assessor is bound by the court ordered sale or appraisal.

Your question is answered by §441.21, Code of Iowa, 1977, which you cite in your request for an opinion of the Attorney General. First of all, a "willing buyer-willing seller" contemplates that neither party is under *any* compulsion to buy or sell and each party is familiar with all the facts relating to the particular property. This involves an evidentiary situation which must be evaluated by the judicial bodies delegated by the statute to hear disputes between the assessor and a taxpayer when the two cannot agree as to the value of a particular piece of property. See §§441.37, 441.38, and 441.39, Code of Iowa, 1977.

Section 441.21 makes it clear that the assessor is not bound, as a matter of law, to any particular sale when determining the actual value of property. Said section states:

"Sale prices of the property...comparable property in *normal* transactions reflecting market value...the probable availability or unavailability of persons interested in purchasing the property, *shall* be taken into consideration in arriving at its market value." (italicizing added)

If the assessor was bound by a particular sale, the statute would not have mentioned the other factors to be considered by the assessor.

In further support of the proposition that the assessor is not bound, as a matter of law, to any particular sale or appraisal is the language of §441.21 which states:

"In arriving at market value, sale prices of property in abnormal transactions not reflecting market value shall not be taken into account, or shall be adjusted to eliminate the effect of factors which distort market value, including *but not limited* to sale to immediate family of the seller, foreclosure or other forced sales, contract sales, discounted purchase transactions or purchase of adjoining land or other land to be operated as a unit." (italicizing added)

The court-ordered sale situation you present may be a foreclosure or *other forced sale* situation. However, even if the court-ordered sale is not such a situation, the above italicized portion of §441.21 makes it clear that the assessor, as a matter of law, is not bound by any sale or appraisal.

In conclusion, as stated above, the assessor is not bound, as a matter of law,

to any particular sale or appraisal when determining the actual value of property under §441.21 for assessment purposes.

November 20, 1978

TAXATION: Sales Tax on Education Kit. §422.43, Code of Iowa, 1977. Sales at retail to consumers of books, tapes and tape recorders which constitute a motivation and success oriented course kit are subject to Iowa retail sales tax under §422.43, as the sale of tangible personal property. (Donahue to Koogler, 11-20-78) #78-11-26

Honorable Fred Koogler, State Representative: This will acknowledge receipt of your letter in which you request an opinion of the Attorney General in regard to the possible sales tax liability of persons selling a motivation and success oriented course which includes books, tape and a tape recorder. You asked the following:

"The question is whether or not sales tax is required to be paid on the sale of a motivation and success oriented course which includes books, tapes and tape recorder. The sale is made as a package transaction and one sale price is quoted which includes everything. The sale is by a dealer to a customer. There is no allocation of sale price as to the various items sold."

Further investigation by this office has produced the following factual situation upon which this opinion must be based. The motivational course sold comes in a kit form, with the kit containing a manual, plan of action tapes and tape recorder. The seller teaches an optional class which meets weekly. The price for the course is the same whether the purchaser attends the class or not. Some purchasers attend all the classes and some do not attend any of the classes. The seller also stated that he could not determine any dollar value for the class he taught since attendance is not required.

The seller sells the motivation and success oriented course kit to make a personal profit, and does not expend the entire proceeds for educational purposes. In this fact situation, the tax exemption provided for in §422.45 (3), Code of Iowa, 1977, would not be applicable.

Section 422.43, Iowa Code (1977) provides in pertinent part:

"There is hereby imposed a tax of three percent upon the gross receipts from all sales of *tangible personal property,* consisting of goods, wares or merchandise, except as otherwise provided, in this division, sold at retail in the state to consumers or users. . . ." (emphasis added)

The Iowa Supreme Court in *Ramco Inc. v. Director, Department of Revenue,* 248 N.W.2d 122 (Iowa 1976) at page 124 accepted the following definition of tangible personal property:

"Tangible personal property is that which is visible and corporeal having substance and body as contrasted with incorporeal property rights such as franchises, choses in action, copyrights, the circulation of a newspaper, annuities and the like.

* * *

"Thus 'tangible' personal property would be personal property that can be touched or handled."

The United States Supreme Court in *EVCO v. Jones,* 409 U.S. 91, 34 L.Ed. 325, 93 S.Ct. 349 (1972) held that the New Mexico Appeal Court was correct

when it determined that EVCO'S sales of reproducible originals of books, films, and magnetic audio tapes used in education programs constituted the sales of tangible personal property.

It is clear that books, tapes and tape recorders are tangible personal property and the gross receipts from the retail sale thereof would therefore be subject to sales tax. The fact that the seller teaches a class in connection with the sale of this kit is irrelevant because the class is optional for the students and they must pay the same price for the course whether they attend any classes, all the classes or none at all. The seller stated he is unable to separate the cost of teaching the course from the total price of the course. The inference is clear that, under these circumstances, the purchasers buy the tangible books, tapes and tape recorders, and not the teaching services of the seller.

It is the opinion of this office that sales at retail to consumers of books, tapes and tape recorders which constitute a motivation and success oriented course kit are taxable as the sale of tangible personal property under §422.43.

November 20, 1978

MUNICIPALITIES: Fire Departments — §411.15, Code of Iowa, 1977. A call-back system for off-duty firemen in case of serious emergencies would not,in and of itself, violate §411.16 of the Code. (Blumberg to Slater, State Senator, 11-20-78) #78-11-27

The Honorable Tom Slater, State Senator: In your opinion request of August 18, 1978, you are concerned with §411.16, 1977 Code of Iowa. Specifically, Council Bluffs has a management study that if implemented would require off duty firemen to be on call in case of an emergency. You ask what constitutes an emergency, and whether this would conflict with the above section.

Section 411.16 provides:

Firemen employed in the fire department of cities of ten thousand population or more, or under civil service, shall not be required to remain on duty for periods of time which will aggregate in each month more than an average of fifty-six hours per week and no single period of time, or shift, shall exceed twenty-four hours in length, provided that in cases of serious emergencies such firemen may be required to remain on duty until such emergency has passed, when so ordered by the chief of the department or person acting in his place. Firemen called back to duty under this provision shall be duly compensated in accordance with their regular hourly wage.

In short, this means that except in cases of serious emergencies, firemen shall not work a single shift or period of time exceeding twenty-four hours, nor aggregate in each month more than an average of fifty-six hours per week.

You ask for a definition of "emergency." However, §411.16 speaks of a "serious emergency." We believe the Legislature used that term to distinguish the type of situation there from the normal work of firemen. Fires and other rescue operations that make up the normal work load of firemen are emergencies. What the Legislature was stating by using the term "serious emergencies" was that when something occurred beyond the normal type of emergency work, longer hours could be required.

"Emergency" has been defined by the Iowa Court as (1) an unforseen combination of circumstances calling for immediate action; (2) a perplexing contingency of complication of circumstances; (3) a sudden or unexpected

occasion for action; exigency; pressing necessity. *Young v. Hendricks,* 1939, 226 Iowa 211, 215, 283 N.W. 895, 898. See also, *Golden v. Springer,* 238 N.W.2d 314 (Iowa 1976); *Oakes v. Peter Pan Bakers, Inc.* 1966, 258 Iowa 447, 138 N.W.2d 93. These definitions imply that an "emergency" is something beyond the ordinary. Thus, they are applicable to "serious emergency." We cannot list fact situations which would constitute a "serious emergency." Suffice it to say that something out of the ordinary for firemen could be a "serious emergency." Suffice it to say that something out of the ordinary for firemen could be a "serious emergency" which would exempt them from the normal working hours requirement.

Accordingly, we are of the opinion that a call-back system for off-duty firemen in case of serious emergencies would not, in and of itself, violate §411.16.

November 20, 1978

MUNICIPALITIES: Pensions for Firemen and Policemen — §§411.6(8), (9) and (13), Code of Iowa, 1977. The surviving spouse of a police officer who dies after being on an accidental disability pension, receives a pension pursuant to §411.6(13). Upon remarriage, that pension ends and does not go to any minor children. (Blumberg to Neighbor, Jasper County Attorney, 11-20-78) #78-11-28

Mr. Charles G. Neighbor, Jasper County Attorney: We have your opinion request of August 11, 1978, regarding Chapter 411, 1977 Code of Iowa. A city police officer was retired on accidental disability in 1976 pursuant to §411.6(6). Thereafter he died, leaving a widow and three minor children. The spouse received a pension under §411.6(13). The spouse has since remarried. You stated:

"The problem came up when the actuarial consultant for the City requested that a large sum of money be set aside as a reserve account upon which to draw out in monthly installments payable to the children until age 18, the benefit which the widow was receiving until remarriage. The actuarial firm supported its request by citing I.C. 411.6(8) (d) which, although far from clear, imparts a meaning that where there are minor children in such a situation they receive the widow's pension upon her remarriage. The pension and retirement board would like an opinion of your office as to resolving this apparent conflict between these two sections of Chapter 411."

There is no conflict between §§411.6(8)(d) and 411.6(13). Section 411.6(8) provides in pertinent part:

"8. *Ordinary death benefit.* Upon the receipt of proper proofs of the death of a member in service, or a member not in service who has completed fifteen or more years of service as provided in subsection 1, paragraph "c", of this section, there shall be paid to such person having an insurable interest in the member's life as the member shall have nominated by written designation duly executed and filed with the respective board of trustees:

"a. The member's accumulated contributions and, if the member has had one or more years of membership service and no pension is payable under the provisions of subsection 9 of this section, in addition thereto—

"b. An amount equal to fifty percent of the compensation earnable by the member during the year immediately preceding the member's death if the member is in service or an amount equal to fifty percent of the compensation earned by the member during the member's last year of service if the member

is not in service; or

"If there be no such nomination of beneficiary, the benefits provided in paragraphs "a" and "b" shall be paid to the member's estate; or in lieu thereof, at the option of the following beneficiaries, respectively, even though nominated as such for a member in service, there shall be paid a pension which, together with the actuarial equivalent of the member's accumulated contributions, shall be equal to one-fourth of the average final compensation of such member, but in no instance less than seventy-five dollars. In addition to the benefits herein enumerated, there shall also be paid for each child of a member under the age of eighteen years the sum of twenty dollars per month or for a member not in service the pension shall be reduced as provided in subsection 1, paragraph "c", of this section and shall be paid commencing when the member would have attained the age of fifty-five except if there is a child of the member under the age of eighteen, or under the age of twenty-two who is a full-time student, or who is disabled, under the definitions used in section 402 of the Social Security Act as amended to July 1, 1976 42 U.S.C. 402 the pension shall be paid commencing with the member's death until the children reach the age of eighteen, or twenty-two if applicable. The pension shall resume commencing when the member would have attained the age of fifty-five;

"c. To the spouse to continue so long as said party remains unmarried; or

"d. If there be no spouse, or if the spouse dies or remarries before any child of such deceased member shall have attained the age of eighteen years, then to the guardian of his child or children under said age, divided in such manner as the board of trustees in its discretion shall determine, to continue as a joint and survivor pension until every such child dies or attains the age of eighteen;..."

This section refers to a death benefit for those who die before taking retirement. Section 411.6(13) provides:

"13. *Pension to spouse and children of deceased pensioned member.* In the event of the death of any member receiving a retirement allowance under the provisions of subsections 2, 4, or 6 of this section there shall be paid a pension:

a. To the spouse to continue so long as said partner remains unmarried, equal to one-half the amount received by such deceased beneficiary, but in no instance less than seventy-five dollars per month, and in addition thereto the sum of twenty dollars per month for each child under eighteen years of age; or

b. In the event of the death of the spouse either prior or subsequent to the death of the member, to the guardian of each surviving child under eighteen years of age, in the sum of twenty dollars per month for the support of such child."

It speaks to a member *receiving a pension* who dies. Section 411.6(8) is a death benefit, whereas §411.6(13) is a pension. Neither conflicts with the other.

If the member in question received a pension and then died, §411.6(13) is applicable. The spouse receives one-half or seventy-five dollars, whichever is larger, of the decedent's pension, plus twenty dollars per month for each child under the age of eighteen. If the spouse remarries, he or she no longer receives the pension, but does continue to receive the twenty dollars for each minor child.

If the member dies before retirement, the spouse, pursuant to §411.6(8), receives a death benefit in the amount set forth in that section. This can be either

a lump sum payment or a pension. *See,* 1974 O.A.G. 282 and 1970 O.A.G. 86. As we read this section, the person nominated under the first unnumbered paragraph must take only the lump sum benefit, unless he or she is the spouse or minor child, at which point the election to collect a pension can be made. The possibilities are thus:

1. When the nominated beneficiary is not the spouse or child, the lump sum benefit is the only option.

2. When the nominated beneficiary is the spouse or child the lump sum benefit or the pension can be taken.

3. Where there is no nominated beneficiary, the spouse or child can opt to have the lump sum benefit paid to the estate, or to receive a pension.

Section 411.6(9) is referred to by subsection eight of that section. Subsection nine 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 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.

Disease under this subsection shall mean heart disease or any disease of the lungs or respiratory tract and shall be presumed to have been contracted while on active duty as a result of strain or the inhalation of noxious fumes, poison, or gases."

If this subsection is applicable, the following results are possible:

1. If the nominated beneficiary is not the spouse, children or dependent parents, the beneficiary receives the accumulated contributions and the others receive the pension. If there are no spouse, children or dependent parents, the amount provided in §411.6(8)(b) is substituted for the pension and paid to the estate.

2. If the nominated beneficiary is the spouse, children or dependent parents, they receive the accumulated contributions and the pension.

3. If there is no nominated beneficiay nor spouse, children or dependent

parents, the accumulated contributions plus the amount under §411.6(8)(b) is paid to the estate.

4. If there is no nominated beneficiary, but there is a spouse, children or dependent parents, the accumulated contributions are paid to the estate, and the others receive the pension.

See *Lynch v. Bogenrief,* 237 N.W.2d 793 (Iowa 1976).

From your facts, it is obvious that the widow was receiving a pension under §411.6(13). Therefore, upon her remarriage, the pension ends and does not go to the minor children. Only the twenty dollars per month for each minor child continues.

November 20, 1978

GAMBLING: Pool Tournaments — §99B.11, Supplement to the Code, 1977. The game of pool is a bona fide contest within the meaning of §99B.11 (2). A tavern owner may legally conduct a pool tournament if the conditions of §99B.11(1) are met. (Richards to Rush, State Senator, 11-20-78) #78-11-29

The Honorable Bob Rush, State Senator: You have requested an opinion of the Attorney General whether a tavern owner can legally conduct pool tournaments under §99B.11, Supplement to the Code (1977).

According to §99B.11(1), any person may lawfully conduct any of the specified contests and offer and pay awards to winning contestants, provided the following conditions are met:

"a. The contest is not held at an amusement concession.

"b. No gambling divice is used in conjunction with, or incident to the contest.

"c. The contest is not conducted in whole or in part on or in any property subject to Chapter 297, relating to schoolhouses and schoolhouse sites, unless the contest and the person conducting the contest has the express written approval of the governing body of that school district.

"d. The contest is conducted in a fair and honest manner. A contest shall not be designed or adapted to permit the operator of the contest to prevent a participant from winning or to predetermine who the winner will be, and the object of the contest must be attainable and possible to perform under the rules stated."

A gambling license is not required, entry or participation fees may be assessed, and there is no limitation on the kind or value of prizes awarded.

The pivotal issue is whether "pool" is a bona fide contest under §99B.11(2), which provides:

"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 §725.11.

"d. Cribbage, bridge, chess, checkers, dominoes, pinochle and similar contests, leagues or tournaments."

This section was the subject of a prior interpretation by the attorney general which found the game "fussball" to be a bona fide contest. 1976 O.A.G. 213. We adhere to the logic of our earlier opinion and re-emphasize that the words "Athletic or sporting contests, leagues or tournaments," are inclusive of the other words in §99B.11(2)(a) and (b); everything after the words "Athletic or sporting contests, leagues or tournaments," in subparagraphs (a) and (b) is exemplary only, if not superfluous or redundant.

"Pool," according to *Webster's Third New International Dictionary* (1971), is "2b: any of various games of billiards played on a pool table having six pockets with usual 15 object balls that may be numbered or plain and a cue ball." It is unquestionably a game of skill and popularity. Its play in a tournament setting is obviously within the meaning of "Athletic or sporting contests, leagues or tournaments." The fact that such tournaments may be conducted by tavern owners is irrelevant.

November 20, 1978

SENTENCING: MANDATORY SENTENCING FOR USE OF FIREARMS IN COMMISSION OF A FORCIBLE FELONY: Sections 703.2 and 902.7, Supplement to the Code 1977. All persons engaged in joint criminal conduct are subject to a five year mandatory sentence for the commission of a forcible felony while in possession of a firearm, even if only one of them is so armed. (Williams to Forrest Ashcraft, State Senator, 11-20-78) #78-11-31

Senator Forrest Ashcraft: You have requested an opinion of the Attorney General concerning the scope of Iowa's new joint criminal conduct law, §703.2, Supplement to the Code 1977. Specifically, you pose the following hypothetical for our consideration:

"If several persons conspired to commit a forcible felony and there is sufficient joint criminal conduct to charge all with the substantive crime, would this joint criminal conduct be sufficient to sentence all of them to the five year mandatory sentence for forcible felony while in possession of a firearm if only one of them were armed, or would this only pertain to the one who was so armed?"

The relevant sections of the new Criminal Code are as follows:

"703.2 JOINT CRIMINAL CONDUCT. When two or more persons, acting in concert, knowlingly participate in a public offense, each is responsible for the acts of the other done in furtherance of the commission of the offense or escape therefrom, and his or her guilt will be the same as that of the person so acting, unless the act was one which the person could not reasonably expect to be done in the furtherance of the commission of the offense."

"902.7 MINIMUM SENTENCE—USE OF A FIREARM. At the trial of a person charged with participating in a forcible felony, if the trier of fact finds beyond a reasonable doubt that the person is guilty of a forcible felony and that the person represented that he or she was in the immediate possession and control of a firearm, displayed a firearm in a threatening manner, or was armed with a firearm while participating in the forcible felony the convicted person shall serve a minimum of five years of the sentence imposed by law. A person sentenced pursuant to this section shall not be eligible for parole until he

or she has served the minimum sentence of confinement imposed by this section."

To answer your question, Iowa rules of statutory construction and case law from other jurisdictions must be examined since both §§703.2 and 902.7 are new sections to the Iowa Code.

Penal laws are to be strictly constructed with doubts resolved in favor of the accused. *State v. Hill,* 1953, 244 Iowa 405, 57 N.W.2d 58. They are not, however, to be construed so strictly as to defeat the obvious intent of the Legislture. *State v. Hill,* 1953, 244 Iowa 405, 57 N.W.2d 58. Mandatory sentencing provisions such as §902.7 have two purposes, removal of the criminal element from the streets and deterrence of the use of firearms during the commission of forcible felonies. Cf., *People v. Perkins,* 37 Cal.2d 62, 230 P.2d 353 (1951); 114 Cong. Rec. 21778 (1968).

The language of §703.2 is clear. When there is joint criminal conduct, "...each is responsible for the acts of the other done in furtherance of the commission of the offense or escape therefrom, and his or her guilt will be the same as that of the person so acting, unless the act was one which the person could not reasonably expect to be done in the furtherance of the commission of the offense." Federal courts have held that a comparable federal statute, 18 U.S.C., Section 2 (1948), is applicable to the entire United States Code and imposes liability to punishment as a principal upon those who aid or abet in the commission of the offense, in like manner as upon him or her who actually perpetuates the crime. *United States v. Maselli,* 534 F.2d 1197 (6th Cir. 1976); *United States v. Rector,* 538 F.2d 223 (8th Cir. 1976); *United States v. Breeze,* 398 F.2d 178 (10th Cir. 1968).

In addition, other state jurisdictions having statutes very similar to Code §§703.2 and 902.7 have held that special sentencing provisions are equally applicable to co-conspirators. An aider and abettor of an individual who commits armed robbery while armed with a pistol shall be punished as though he were holding the pistol himself. *State v. Jones,* Ohio, 1975, 324 N.E. 2d 770. In *Jones,* an aider and abettor was statutorily denied probation under Ohio Rev. Code Ann. Section 2951.02(f) (3) (Baldwin) (1971), which provided that:

"An offender shall not be placed on probation when any of the following applies:

* * *

"(3) The offense was committed while the offender was armed with a firearm or dangerous ordinance... ."

Although the aider and abettor carried no firearm, he was subject to the no probation provision because of Ohio Rev. Code Ann. Section 2923.03 (Baldwin) (1971), which in relevant part states:

"(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

* * *

"(2) Aid or abet another in committing the offense... .

* * *

"(F) Whoever violates this section is guilty of complicity in the commission

of an offense, and shall be prosecuted and punished as if he were a principal offender. . . ."

Like Iowa Code §902.7, Ohio Rev. Code Ann. Section 2951.02 (Baldwin) (1971), makes reference only to the offender who carries the firearm, but the scope of Ohio's joint criminal conduct statute made §2951.02 applicable to accomplices, as well as principals.

Decisions in the State of California which appear to be contrary to the Ohio cases are distinguished because in 1949, the California Legislature amended West's Annotated Penal Code, §1203, to apply only to an individual who, "was *himself* armed with a deadly weapon." The California law prior to the 1949 amendment was similar to the law of Ohio and other states. *People v. Stevens,* 32 Cal. App.2d 666, 667, 90 P.2d 595, 596 (Dist. Ct. App. 1939). *See, People v. Lewis,* 140 Cal. App. 475, 35 P.2d 561 (Dist. Ct. App. 1934).

Likewise in Iowa, the Legislature has made it clear through §703.2 that each individual engaged in joint criminal conduct is responsible for and guilty of the acts of the other, if committed in furtherance of the offense. Thus, each may be punished as though he was the actual perpetrator.

November 20, 1978

MUNICIPALITIES: Volunteer Fire Departments — A volunteer fire department providing fire protection to townships and cities may sell its fire station and use the proceeds to purchase an ambulance, unless its fire protection agreement with the governmental bodies provides otherwise. (Blumberg to Cochran, Speaker of the House, 11-20-78) #78-11-32

The Honorable Dale M. Cochran, Speaker of the House: In your opinion request of October 27, 1978, you questioned the sale of property to a city. A volunteer fire department provides fire protection to three townships and a city. The townships levy taxes to pay for the fire protection. The fire department wishes to sell its fire station, located in the city, to the city and use the proceeds from the sale to purchase an ambulance. You question the legality of this sale.

Townships, pursuant to §359.42 of the 1977 Code of Iowa, and municipalities, pursuant to §364.16 of the Code, must provide fire protection. The means in which that fire protection is to be provided is not stated in the statutes. Therefore, townships and cities can, and do, contract with volunteer fire departments for that protection. Any cost to a city is made a part of its budget for taxing purposes, whereas townships are authorized to levy a tax within the townships up to forty and one-half cents per each thousand dollars of valuation. The fact that townships are levying taxes to pay for the fire protection should have no bearing on the ownership of a volunteer fire department's equipment or buildings unless it is so provided in the agreement. Since you did not indicate that the agreement with the volunteer fire department contained such a provision, we will assume no such provision exists. With that in mind, the volunteer fire department would be able to sell its fire station and use proceeds as it saw fit.

November 20, 1978

COUNTIES: Building Improvements—§332.7, Code of Iowa, 1977; S.F. 2107, Acts of the 67th G.A. (1978). When the cost of repair to a county building exceeds $5,000.00, the county must enter into a written contract after inviting proposals. (Blumberg to Burk, Assistant Black Hawk

County Attorney, 11-20-78) #78-11-33

Mr. Peter W. Burk, Assistant Black Hawk County Attorney: You requested an opinion regarding §332.7 of the Code. A building owned by the county suffered severe damage this past winter. Operation Threshold, a public organization, wishes to use the building. By agreement with the county, Operation Threshold has agreed to do remodeling work at no cost to the county, except that the county will supply the materials and the plumbing, heating and electrical work. The cost of the materials is approximately $8,000.00. We assume from the materials you sent us that the plumbing, heating and electrical work is necessary for the remodeling. You wished to know whether the county could have the work done this way rather than by bidding and a contract.

In your second letter of October 4, 1978, you expanded upon the facts. It appears that the damage was such that if repairs were not done immediately, further damage would result. The Board of Supervisors contacted contractors in the area to see who would be available to do the repairs. Only one contractor expressed the desire or ability to perform the work. The Board thereupon authorized the work, which has been completed. No formal bidding or written contracts was done. The contractor has not been paid. Additionally, the insurance carrier for the county has paid the county for the damage. That money is now in the county general fund. You now ask whether the county can pay the contractor and if the receipt of insurance money makes a difference. You also ask whether the new amendment to §332.7 of the Code, S.F. 2107, Acts of the 67th G.A. (1978) is applicable.

Senate File 2107 became effective July 1, 1978. The repairs in question occurred prior to that time. Therefor, the new amendments are not applicable. In any event, that amendment allows for emergency repairs up to $2,000.00 without bids. Since the repairs exceeded that amount, the new amendment would not apply.

You cited to us a prior opinion, 1974 OAG 112, wherein we held that a city could do its own repair work notwithstanding the provisions of Chapter 23 of the Code. That opinion is not applicable here. It dealt only with an interpretation of Chapter 23, and as provided in §23.18, if another section of the Code provides for contracting procedures, such section shall prevail.

Section 332.7 of the Code provided at the time of the repairs:

"1. *Contract and bids required.* No building shall be erected or repaired when the probable cost thereof will exceed five thousand dollars except under an express written contract and upon proposals therefor, invited by advertisement for three weeks in all the official newspapers of the county in which the work is to be done. Contracts for the construction or repair of buildings, the probable cost of which does not exceed five thousand dollars, shall be let either through the formal bidding procedures specified herein or through informal bidding by notifying in writing at least three qualified bidders at least two weeks prior to letting the contract. The informal bids received, together with a statement of the reasons for use of said informal procedure and bid acceptance, shall be entered in the minutes of the board of supervisors meeting at which such action was taken.

2. *Bids—plans and specifications.* Contracts for buildings and repairs specified by subsection 1 shall be let to the lowest responsible bidder at a time and place which shall be distinctly stated in the advertisement. The board may on the day fixed for letting such contract adjourn the hearing to some later date and place, of which all parties shall take notice. The board may reject

any and all bids and advertise for new ones. The detailed plans and specifications for such improvements shall be on file and open to public inspection in the office of the auditor of the county in which the work is to be done before advertisement for bids."

Our office has interpreted this section in previous opinions. In 1964 OAG 83, we held that the provisions of §332.7 were mandatory notwithstanding Chapter 23. In other words, the county had to contract for the work pursuant to that section when the cost exceeded the statutory limit. See also, 1964 OAG 81, 1968 OAG 789, and *Madrid Lumber Co. v. Boone County,* 1963, 255 Iowa 380, 121 N.W.2d 523. This section is clear in its meaning. If the cost of repairs to a county building exceeds $5,000.00, the county shall enter into a writen contract after inviting proposals. Thus, whether your question regards the supply of materials exceeding $5,000.00 for remodeling or the repair of the storm damage, exceeding $5,000.00, the result is the same. The fact that the insurance company paid the county does not alter this result. The requirements of §332.7 are mandatory.

This however, does not solve your problem. The county has received the benefits of the work, while the contractor has not been paid. We cannot, nor will not, tell you to pay the contractor. Failure to take bids and enter into written contract may prevent the Board from paying for the repairs. And, if so, any payment by the Board may leave the members liable for repayment to the county. It is possible that the contractor may file suit to recover against the county. At that point, the Court would resolve the matter. It is also possible to wait and attempt to get a legalizing act passed by the Legislature approving the work. We cannot advise beyond the point of restating the statutory interpretation that compliance with §332.7 is mandatory for this type of work.

November 21, 1978

AGRICULTURE: TREASURER. Corn promotion fund. §§185C.26, 453.1, 453.7(2), 1977 Code of Iowa. The state treasurer has the power to invest the moneys in the corn promotion fund and to credit the interest earned to the general fund. (Haskins to Miller, State Representative, 11-21-78) #78-11-34

Kenneth D. Miller, State Representative: You ask our opinion as to whether the interest earned by investing the moneys in the corn promotion fund must be retained in that fund or whether the interest is to be credited to the general fund. By way of backround, money in the corn promotion fund is raised by a special assessment on the sale of corn and is essentially used to promote the sale of corn products. In an opinion of our office dated December 22, 1977, to you, we opined that the expenditure of moneys in the corn promotion fund for the purpose of promoting corn sales is a "public" purpose and hence constitutional. The question remains from our opinion, however, as to whether statutory authority exists to credit the interest earned from investment of the moneys in the corn promotion fund to the general fund — which is apparently the present practice. In resolving this question, the relevant statutes must be examined. Section 185C.26, 1977 Code of Iowa, provides that assessments for the corn promotion fund are to be deposited in the treasurer's office. Section 185C.26 states:

"*Assessments collected by the secretary from a sale of corn shall be deposited in the office of the treasurer of state* together with any gifts, or any federal or state grant as may be received by the board, and placed in a special fund to

be known as the corn promotion fund. Moneys collected shall be subject to audit by the auditor of state. From moneys collected, the board shall first pay all the direct and indirect costs incurred by the secretary and the costs of referendums, elections and other expenses incurred in the administration of this chapter, and thereafter moneys may be expended for the purpose of market development. The fund shall be subject at all times to warrants by the state comptroller, drawn upon the written requisition of the chairman of the board and attested to by the secretary of the board." (Emphasis added.)

Section 453.1, 1977 Code of Iowa, authorizes the treasurer to invest in banks "all funds" held by him. That section states in relevant part:

"All funds held in the hands of the following officers or institutions shall be deposited in banks as are first approved by the appropriate governing body as indicated: For the treasurer of state, by the executive council;..."

This section provides authority to the treasurer to invest the moneys in the corn promotion fund.

Section 453.7(2), 1977 Code of Iowa, then requires that all interest from investments under, inter alia, §453.1 shall be credited to the *general fund* of the governmental body making the investment, here, the State.

Section 453.7(2) states:

"*Interest or earnings on investments and time deposits made in accordance with the provisions of* §§12.8, 452.10, *453.1 and* 453.6 *shall be credited to the general fund of the governmental body making the investment or deposit, with the exception of specific funds for which investments are otherwise provided by law,* constitutional funds, or when legally diverted to the state sinking fund for public deposits. Funds so excepted shall receive credit for interest or earnings derived from such investments or time deposits made from such funds. Such interest or earnings on any fund created by direct vote of the people shall be credited to the fund to retire any such indebtedness after which the fund itself shall be credited." (Emphasis added.)

The above emphasized exception to the requirement of depositing of interest in the general fund does not apply, because the corn promotion fund is not a fund "for which investments are otherwise provided by law". Significantly, it is not Ch. 185C which grants the authority to invest moneys in the corn promotion fund; rather it is §453.1, since these moneys constitute "funds held in the hands of...the treasurer of the state" by reason of §185C.26. Hence, investments of these moneys is not made "otherwise" than in, inter alia, §453.1 and thus the "exception...[for] specific funds" does not apply.

Your concern is that because moneys from corn promotion assessments are held in what you designate as a "special account", there is either a lack of statutory authority to invest the moneys, or if they can be invested, the interest from the investments must be returned to the "special account". However, the above quoted statutes confer both the power to invest the moneys in the corn promotion fund and authorization for crediting the interest earned to the general fund.

November 21, 1978

CERTIFICATES OF BIRTH—ADOPTED PERSONS NOT BORN IN IOWA. House File 547, 67th G.A. (1978). House File 547, which relates to birth certificates for adopted persons not born in Iowa, is applicable only to adoptions which take place after the effective date of the Act, July 1, 1978. The use of certificate of birth established pursuant to House File 547

would be the same as those uses of a certificate of birth established pursuant to §144.23 of the Code except that such is not evidence of United States citizenship. (Johnson to Pawlewski, Commissioner of Public Health, 11-21-78) #78-11-35

Norman L. Pawlewski, Commissioner of Public Health, Iowa State Department of Health: You have requested an opinion of this office on three questions arising from the enactment of House File 547, Laws of the 67th General Assembly, 1978. That legislation amended §144.23 and §600.13(5) of the Code of Iowa 1977, related to birth certificates for adopted persons not born in Iowa.

The questions you raised are as follows:

1. Whether the Act is applicable only to adoptions which take place after the effective date of the Act or whether the Act is retroactive to adoptions for which the decree was signed before the effective date of the Act?

2. How the state registrar of vital statistics may fulfill the mandate of forwarding the certificate of adoption to the foreign nation of birth?

3. What uses the certificate of birth, established pursuant to House File 547, would have?

1.

The answer to your first question is that in the opinion of this office the Act is applicable only to adoptions which take place after the effective date of this Act. The question presented is one of statutory construction (in absence of an express legislative mandate), whether or not the Act operates retrospectively or prospectively only. The primary rule in statutory construction, as evidenced in Iowa case law, is to ascertain and give effect to the intention of the legislature. *Manilla Community School District v. Halverson,* 1960 Iowa, 101 N.W.2d 705; *Grant v Norris,* 1957, 249 Iowa 236, 85 N.W.2d 261 and authorizes cited therein; *Dingman v. City of Council Bluffs,* 1958, 249 Iowa 1121, 90 N.W.2d 742 and cases cited therein.

The legislature itself has provided in Chapter 4, Code of Iowa, 1977, guides for the construction of statutes unless such construction would be inconsistent with the manifest intent of the general assembly or repugnant to the context of the statute. Section 4.5 specifically addresses the question of retrospective or prospective operation:

A statute is presumed to be prospective in its operation unless expressly made retrospective.

This general rule of statutory construction has been set forth in *In Re Marriage of Harless,* 1977 Iowa, 251 N.W.2d 212; *State ex rel Turner v. Limbrecht,* 1976 Iowa, 246 N.W.2d 330; *Walker State Bank v. Chipokas,* 1975 Iowa, 228 N.W.2d 49; *Schnebly v. St. Joseph Mercy Hospital,* 1969 Iowa, 166 N.W.2d 780.

The supreme court of Iowa in the case of *In Re Town of Avon Lake,* 1958 Iowa, 83 N.W.2d 784, expressed the rule that for the purpose of determining legislative intent as to retrospective or prospective application of a statute, the court will look to the language of the Act, second, will consider the manifest evil to be remedied and third, will determine whether there was a previously existing statute governing or limiting the mischief which the new Act is intended to remedy.

Applying that rule to House File 547, the language of section one provides that the state registrar shall establish a new certificate of birth for any adopted person not born in Iowa upon receipt of specified documentation. The language of section one further states "However, a new certificate of birth shall not be established if so requested by the court decreeing the adoption, the adoptive parents or adoptive person." Although not determinative, this language lends support to the presumption of prospectivity in that the language addresses future instances when a court decrees the adoption and has the opportunity to order a new birth certificate not be established.

As to the consideration of the manifest evil to be remedied, in accordance with *In Re town of Avon Lake,* supra, there was no obvious emergency and no apparent evil which required immediate or unusual remedial action by the legislature. The desire of the legislature to include adopted persons not born in Iowa in the class eligible to secure a new certificate of birth in the future doesn't seem to indicate an emergency. If it had been an emergency, surely the legislature would have in express language stated the retrospective effect of House file 547.

Thirdly, there was no previously existing statute governing or limiting the mischief which the new Act is intended to remedy.

Therefore, as previously stated, it is the opinion of this office that there is nothing, except failure to use express language making House 547 perspective only, which would indicate a legislative intent to have House 547 act retrospectively and thus overcome the presumption that a statute is presumed to be prospective in its operation.

2.

Pursuant to §2 of House File 547, amending §600.13(5) of the Code, the state registrar of vital statistics shall forward the certification of adoption to the appropriate agency in the state or foreign nation of birth. In your request you have stated that your Department does not have the information concerning the address of the agency of foreign governments which would have jurisdiction to keep such records and you have found such information is not available.

This office, of course, has no information as to what steps your Department has taken in its attempt to secure this type of information. The legislative mandate to the state registrar of vital statistics is clear. Therefore, this office would advise your Department to contact the State Department in Washington, D.C., which might have the information available or they could contact the United States Embassy in each specific nation which could probably direct you to the proper depository for this type of document. With this information the state registrar would fulfill the mandate upon forwarding of the certificate of adoption.

3.

It is the opinion of this office that the use of the certificate of birth, established pursuant to section one of House file 547, would be the same as those uses of a new certificate of birth established pursuant to §144.23, Code of Iowa 1977. This statutory amendment enlarges the class of persons who may seek a new certificate pursuant to §144.23 and does not specifically limit its use except that a certificate of birth established pursuant to House file 547 is not evidence of United States citizenship.

November 21, 1978

ENVIRONMENTAL PROTECTION: Platting—Chapter 409 as amended by by Chapter 117, Laws of the 67th General Assembly, 1977 Session; Contract purchaser may not plat land without joinder by record title holder and statutory release of encumbrances. (Davis to Bauercamper, Allamakee County Attorney, 11-21-78) #78-11-36

John J. Bauaercamper, Esquire, Allamakee County Attorney: You were issued an opinion of the Attorney General on July 3, 1978, concerning a platting question that developed in late 1977. That opinion did not consider the Amendments to Chapter 409 of the 1977 Code, effective January 1, 1978, which, while not altering the opinion as to your primary question involving platting by contract purchaser, does modify certain perpheral areas of concern in platting. That opinion s therefore distinguished and this opinion issued to coordinate your questions with the present law.

You requested an opinion of the Attorney General as to whether or not the Allamakee County Recorder must file a plat in the following situation, as described by you:

"1. *A* is the fee owner of Blackacre, which is 160 acres of land not located within the corporate limits of any city or town.

"2. In 1967 *A* entered into a real estate installment contract with *B* providing for the sale of Blackacre to *B,* with payment in installments and delivery of Warranty Deed therefore upon performance in full.

"3. In 1970 *A* assigned his vendors interest in the above real estate installment contract to *X* Bank for collateral security for a loan.

"4. In 1977 *B* had a plat prepared of Lots 1 and 2 in Blackacre by a licensed surveyor. Lot 1 consists of one acre and Lot 2 consisted of .3 of an acre. The surveyor prepared a written plat containing a metes and bounds description of each lot and signed and sealed the same. *B* also signed and acknowledged the plat.

"5. *B* entered into a real estate installment contract to sell Lots 1 and 2 in Blackacre to *C*, such contract providing for payment of the purchase price in installments over a period of time and delivery of a Warranty Deed upon performance in full.

"At present, the County Recorder has refused to file and record the plats of Lots 1 and 2 in Blackacre for the reason that they are signed and acknowledged only by *B* and not by *A*. Our question is, then, who must sign the plat before the County Recorder has a duty to file and record the same?"

The laws of Iowa pertaining to the filing of plats and their use are contained in Chapter 409 of the 1977 Code of Iowa, as amended by Chapter 117, Laws of the 67th General Assembly, 1977 Session. Section 409.1 reads in pertinent part:

"Every 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 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 409.14, 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 a 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."

Section 409.8 states:

"Each plat shall be accompanied by a correct description of the land or parcel of land subdivided and by a statement to the effect that the subdivision as it appears on the plat is with the free consent and in accordance with the desire of the proprietor, signed and acknowledged by such proprietor and his spouse, if any, before some officer authorized to take the acknowledgment of deeds."

Section 409.9 states:

"Every plat shall be accompanied by a complete abstract of title and an opinion from an attorney at law showing that the fee title is in the proprietor and that the land platted is free from encumbrance, or is free from encumbrance other than that secured by the bond provided for in section 409.11, and a certified statement from the treasurer of the county in which the land lies that it is free from taxes, and from the clerk of the district court that it is free from all judgments, attachments, mechanics' or other liens as appears by the record in his office, and from the recorder of the county that the title in fee is in such proprietor and that is free from encumbrance or free from encumbrance other than that secured by the bond provided for in section 409.11, as shown by the records of his office; however, the opinion of the attorney or the certificate of the recorder may show a mortgage or encumbrance if the plat is accompanied by a consent to such platting by the holder of the mortgage or encumbrance and a release from the mortgage or encumbrance of all streets, easements and other areas to be conveyed or dedicated to the local governmental unit within which such land is located. Sections 409.10 and 409.11 shall not apply if a mortgage or encumbrance is shown on the opinion of the attorney or the certificate of the recorder and a release from the mortgage or encumbrance is obtained in accordance with the foregoing sentence.

"Utility easements shall not be construed to be encumbrances hereunder and the location thereof with reference to the land platted may be shown by drawing on the plat described under section 409.1. Grantees of said utility easements shall not be construed to be original proprietors of the land to be platted and shall not join in platting or dedicating the platted land."

Section 409.12 states:

"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 local governing body, 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 certified plat approved by the local governing body shall supersede any plat recorded for assessment and taxation purposes and any plat so superseded shall be voided."

We assume from your letter that this land lies beyond two miles distant from the boundaries of any Iowa municipality.

We last addressed a similar question in OAG #69-10-12 on October 23, 1969 (Nolan to Koch) in holding that platting must be done in compliance with Chapter 409 of the Code and if these requirements are met, the Recorder must record the plat.

In considering whether the title in question meets the requirements of

Chapter 409, you have stated that *B's* attorney maintains that the contract between *A* and *B* created an equitable conversion with the interest of the contract purchaser being treated as real estate and the interest of the contract seller being treated as personal property. While that is certainly the general rule in an equity case, it is not and cannot be of the rule in platting property under present Iowa law.

Section 409.9 of the Code, 1977, required that fee title be in the proprietor. The amendment to Section 409.9, which became effective January 1, 1978, did not change that requirement, however, it does make it possible to plat mortgaged or encumbered land provided the holder of the mortgage or encumbrance consents to such platting and signs a release to public areas, such as streets, parks and utility easements.

Iowa is one of the "lien theory" states, and as such varies from the "legal theory" states which regard title as passed to the mortgagee. *Miles Homes, Inc. of Iowa v. Grant,* 257 Iowa 697, 134 N.W.2d 569 (1965). Thus, fee title remains in the mortgagor. An "encumbrance" is defined as "including any formal lien not ordinarily classified as a Chattel mortgaged." *Farmers Butter and Dairy Cooperative v. Farm Bureau Mutual Insurance Co.,* 196 N.W.2d 533, 538 (Iowa 1972). Thus, amendment was necessary for Iowa law to provide for the platting of mortgaged or encumbered property as it now does after the 1977 Amendment.

The present fact situation deals with a land purchase contract, whereby the purchaser *B* does not receive fee title until his last installment payment to *A* has been made. Thus, *B* does not have fee title, and cannot plat the property.

To allow *B* to plat the property is analagous to allowing *X* Bank, as mortgagee, to plat the property. Neither has fee title.

A general proposition of law is that fee title can be either equitable or legal and can even perhaps be obtained through adverse possession, instead of a warranty deed. *Creel v. Hannans,* 234 Iowa 532, 13 N.W.2d 305 (1944). However, the term "abstract of title" has reference to the record title as does the recorder's certificate. Therefore, record fee title is a condition precedent to filing and recording a plat. Both the abstract of title and the recorder's certificate to the land *B* wishes to be platted would indicate that *A* never parted with the record title to the land. They would further show *A's* interest encumbered by his assignment to *X* Bank. With this outstanding title, *B* would not have a good title sufficient to allow him to file a plat under the provisions of Section 409.9. *Fagen v. Hook,* 134 Iowa 381, 105 N.W. 155 (1905).

By dividing his 160 acre parcel into three parcels, two of which are less than 40 acres, *B* has placed himself squarely within the purview of Chapter 409. That being the case, any such plat must be signed by *A* as well as *B* and the mortgage released pursuant to Section 409.9 by *X* Bank and there must be an abstract and an opinion of title filed therewith under the provisions of that statute as well as the certificates therein required.

The recorder was absolutely correct to refuse to record this document as the recorder's certificate endorsed upon a plat is prima facia evidence that the plat was properly recorded and that subsequent purchasers may rely upon the description of their property as a lot within the plat to show that there is fee simple title residing in the person who platted the property. *Pierson v. City of Guttenberg,* 245 N.W.2d 519 (Iowa 1976).

November 22, 1978

STATE OFFICERS AND DEPARTMENTS; DENTISTRY: Dental Assistants. §§153.13, 153.14, 153.17, 1977 Code of Iowa. If the activities of a dental assistant fall under §153.13(2), 1977 Code of Iowa—including giving "prophylactic treatment" to the teeth or gums—then he or she is engaged in the practice of dentistry, for which a license is required. (Haskins to Robinson, State Senator, 11-22-78) #78-11-37

Honorable Cloyd Robinson, State Senator: You have requested our opinion as to whether, in effect, dental assistants are engaged in the practice of dentistry, for which a license is required.

Pertinent here is §153.13, 1977 Code of Iowa, which defines the scope of the practice of dentistry as follows:

"For the purpose of this title, the following classes of persons shall be deemed to be engaged in the practice of dentistry:

"1. Persons publicly professing to be dentists, dental surgeons, or skilled in the science of dentistry, or publicly professing to assume the duties incident to the practice of dentistry.

"2. Persons who treat, or attempt to correct by any medicine, appliance, or method, any disorder, lesion, injury, deformity, or defect of the oral cavity, teeth, gums, or maxillary bones of the human being, *or give prophylactic treatment to any of said organs.*" [Emphasis added]

As can be seen, persons who give prophylactic treatment to the teeth or gums are engaged in the practice of dentistry. Section 153.14, 1977 Code of Iowa, set forth those classes of persons who are not deemed to be practicing dentistry. It states:

"Section 153.13 shall not be construed to include the following classes:

"1. Students of dentistry who practice dentistry upon patients at clinics in connection with their regular course of instruction at the state dental college.

"2. Licensed 'physicians and surgeons' or licensed 'osteopaths and surgeons' who extract teeth or treat diseases of the oral cavity, gums, teeth, or maxillary bones as an incident to the general practice of their profession.

"3. Persons licensed to practice dental hygiene who are exclusively engaged in the practice of said profession."

Notably, the above section provides no exception for dental assistants or even for unlicensed persons practicing entirely under the supervision of a licensed dentist. The case law recognizes no exception for supervised unlicensed persons. *See State v. Cornelius,* 200 Iowa 309, 204 N.W. 222, 223 (1925).

As stated in 70 C.J.S. *Physicians and Surgeons* §10(k), at 845:

"Generally, where a person without a license or certificate performs acts constituting the practice of dentistry, medicine, or surgery, he is not relieved from liability therefor by the fact that he performs the acts as an assistant to, or under the direction and supervision of, a duly authorized practitioner unless he is within an express statutory exemption...."

See also Magit v. Board of Medical Examiners, 336 P.2d 816, 820 (Cal. 1961).

Section 153.17, 1977 Code of Iowa, prescribes the condition for the lawful practice of dentistry—viz., licensure. That section states:

"Exception as herein otherwise provided, it shall be unlawful for any person to practice dentistry or dental surgery or dental hygiene in this state, other than:

"1. Those who are now duly licensed dentists, under the laws of this state in force at the time of their licensure; and

"2. Those who are now duly licensed dental hygienists under the laws of this state in force at the time of their licensure; and

"3. Those who may hereafter be duly licensed as dentist or dental hygienists pursuant to the provisions of this chapter."

The question is whether dental assistants are, under §153.13(2), "[p]ersons who treat, or attempt to correct by any medicine, appliance, or method, any disorder, lesion, injury, deformity, or defect of the oral cavity, teeth, gums, or maxillary bones of the human being, or give prophylactic treatment to any of said organs." This is a factual question, which is not within the province of our office to answer. We do point out, specifically, however, that "prophylactic treatment" of the teeth or gums falls under the practice of dentistry.[1]

In summary, if the activities of a dental assistant fall under §151.13(2), 1977 Code of Iowa, then he or she is engaged in the practice of dentistry, for which a license is required.

[1]"Prophylactic" is defined in *Webster's Third New International Dictionary* as "...adj...1. guarding from disease: preventing or contributing to the prevention of disease...."

November 22, 1978

MUNICIPALITIES: Urban Renewal and Relocation — §§364.7 and 403.6(3), Code of Iowa, 1977. Where urban renewal property is acquired by a city and then demolished, and other property is acquired and rehabilitated for the relocation of those displaced from the demolished property, the requirements of §364.7 are not applicable to the sale of those properties. (Blumberg to Koogler, State Representative, 11-22-78) #78-11-38

The Honorable Fred L. Koogler, State Representative: You requested an opinion from this office regarding the sale of land under the municipal housing law. In your letter you stated:

"The City of Oskaloosa, has a low rent housing agency, established under the provisions of Section 403A of the Code of Iowa. Among the programs involved, with regard to application of funds received under the HUD Grant, is a program whereby the City of Oskaloosa, through its low rent housing agency acquires title to parcels of real estate which are then rehabilitated with funds from the HUD Grant, and then the real estate is offered for sale to persons who are having to be relocated because of the fact that the city is buying their dilapidated homes, which are to be removed from the property.

"The purpose of this request is to obtain an opinion from your office, as to the proper procedure with regard to the disposal or sale of these parcels of real estate, to which the City of Oskaloosa, acquires title. This request not only would include the parcels of real estate that are acquired for rehabilitation and sale, but also those parcels of real estate, which are acquired on which the buildings are removed, and the lots are resold.

"Under the provisions of Chapter 403A, it is provided at 403A.3 subparagraph 4, that the municipality has the power to acquire and to sell real estate. Under the provisions of Section 364.7 of the Code of Iowa, it is provided that

a city may not dispose of an interest in real estate by sale without following the procedure outlined in said Section which includes the publication of a notice and a hearing before sale of real estate. What I would like to know, is whether it is necessary for the City of Oskaloosa to follow the procedures outlined in Section 364.7 in the situation where the city has acquired title to a residential property which has been rehabilitated, and where the city then wants to make this property available for purchase to a person who is being relocated from a property whereby the city is to acquire title to that property for removal of the residential property under the part of the program that provides funds for removal of dilapidated properties.

"I would also like to know, if the procedures of Section 364.7 are applicable where the city has acquired title to the parcels of real estate under the demolition program and later resells these parcels for the construction of new homes to developers."

It is our understanding, by talking to the Regional HUD Office, that the program under which Oskaloosa is operating is a Community Development Block Grant program. Under that program, HUD gives cities a block grant for the sole purpose of buying dilapidated property, rehabilitating it, and then selling it back to the prior owner or to others. It is not low-rent housing, and the grant money is not to be used for low-rent housing. A city's low-rent housing agency may be the contracting agent with HUD for receipt of the grant, but such an agency would only be such on behalf of the city, not because of its low-rent housing authority. Although the Community Development Block Grant is a successor to the Urban Renewal program of HUD, it is not tied specifically to any urban renewal program or authority of a city.

With that in mind, it is obvious that Chapter 403A is not applicable. You indicate that the rehabilitation and relocation is not being done pursuant to an urban renewal project. However the fact that the Federal funds are not tied to any specific Urban Renewal Project does not mean that Chapter 403 of the Code (urban renewal) is not applicable. We can still consider that the city is operating pursuant to its urban renewal powers. We also understand that the Uniform Relocation Assistance program also plays a part in this. Under that program, up to $15,000 in federal money must be used to relocate persons displaced by projects involving federal funds. Thus, these homes are, in part, being rehabilitated to relocate such persons being displaced by the program under the Community Development Block Grant.

Section 364.7 of the Code provides that a city may not dispose of an interest in real property by sale unless the council sets forth its proposal in a resolution and publishes notice of the same, holds a public hearing and then makes a final determination by resolution. We are unable to find any authority indicating the legislative intent of §364.7. Most often, this section applies to real property owned by a city in its general governmental capacity. In other words, it applies to vacated streets and alleys, parks, playgrounds, parking lots, buildings, and the like. Property acquired under this grant, although in a strict sense is pursuant to a governmental purpose, seems to be of a different type and for a different reason than other government property. This property is being acquired pursuant to the grant not with the intent of keeping it for some governmental purpose, but rather with the intent of rehabilitation and then selling it for relocation of displaced persons. Such property is not being sold because the city no longer has a use for it, as is so often the case with property sold pursuant to §364.7. With that in mind, we do not believe that the sale of these rehabilitated homes for relocation of those displaced falls within the purview

of §364.7.

Assuming that the demolition of other property acquired by the city is for urban renewal purposes, the result would be similar. Section 403.6(3) provides that cities can acquire property for urban renewal and then dispose of it. The last part of that section provides:

"Provided, however, that no statutory provision with respect to the acquisition, clearance or disposition of property by public bodies shall restrict a municipality or other public body exercising powers hereunder in the exercise of such functions with respect to an urban renewal project, unless the legislature shall specifically so state."

There are no cases under this section which speak to this issue. However, we believe that the above proviso was intended to permit cities to carry out urban renewal projects without having to deal with all of the restrictions or requisites normally attending public property. This may have been so because the character of urban renewal property is somewhat different than property generally held by a city.

Accordingly, we are of the opinion that where urban renewal property is acquired and demolished by a city, and other property is acquired and rehabilitated for relocation of persons from the demolished property, the requirements of §364.7 are not applicable to the sale of those properties.

November 22, 1978

MUNICIPALITIES: Iowa Rural Community Development Act — §362.2(1), Code of Iowa, 1977; H.F. 557, 67th G.A. (1978). The "Iowa Rural Community Development Act" applies only to incorporated cities. (Blumberg to Van Horn, Director, Iowa Development Commission, 11-22-78) #78-11-39

Mr. Del Van Horn, Director, Iowa Development Commission: We have your opinion request of June 6, 1978, regarding the "Iowa Rural Community Development Act." You ask whether the Act applies only to incorporated cities.

Section 1 of H.F. 557, 67th G.A. (1978), provides:

INTENT. The purpose of this Act is to encourage a sense of community in Iowa's small cities and rural areas through self-help development activities in local communities, to encourage local decisions on the development needs of the community and to encourage local citizens to realize their own resources and participate in decisions on development needs and their implementation. This Act may be cited as the "Iowa Rural Community Development Act."

Section 3 provides in part:

QUALIFICATIONS FOR GRANTS:

1. A sponsor from a city of less than twenty-five hundred population by the last available federal census may apply to the committee for a grant for a community development project. The application must be sponsored by the city government or by an organization representing a broad cross-section of the community.

"City" is defined in §362.2(1) of the Code as "a municipal corporation". By Code Editor's note, it includes town incorporated prior to July 1, 1975. In Black's Law Dictionary at page 311, "city" is defined to include a municipal corporation; a political entity or subdivision for governmental purposes; a

public corporation for public purposes. Webster's New World Dictionary (1959) at page 267 defines "city": "2. in the United States, an incorporated municipality whose boundaries and powers of self-government are defined by a charter from the State...."

A reading of the entire Act leads to the conclusion that grants under the Act are to be given only for incorporated cities. First of all, as shown above, the word "city" generally connotes an incorporated area or political subdivision. Secondly, in Iowa, if an area is not incorporated it cannot be a city. This does not mean that rural areas cannot benefit from this Act. Section 4 speaks to members of the community and the *surrounding area* being involved in the determination of local needs.

Accordingly, we are of the opinion that grants under the "Iowa Rural Community Development Act" are only applicable to incorporated cities.

November 22, 1978

MUNICIPALITIES: Cemeteries—Iowa Const. Art. III, §31; §§384.24(3)(k) and 566.14, Code of Iowa, 1977. Unless there are so many restrictions and conditions upon a conveyance of a cemetery lot by warranty deed to be inconsistent with a conveyance of general ownership, fee title passes to the purchaser. A city can, and may be required to, accept property and money for the operation and maintenance of a cemetery. Such maintenance would not be a violation of the constitutional prohibition of public money for private purposes. (Blumberg to Thatcher, Webster County Attorney, 11-22-78) #78-11-40

Mr. William Thatcher, Webster County Attorney: We have your opinion request of August 9, 1978. The trustees of a cemetery located in Fort Dodge are interested in conveying the cemetery to the city, and the city is interested in accepting the conveyance. The cemetery is run by a private cemetery association. Lots were sold to individuals by way of deed. With this in mind, you ask:

"1. Whether the warranty deeds utilized by the Oakland Cemetery Association in conveying title to cemetery lots were of such a nature as to deprive the Oakland Cemetery Association of fee title to the lot;

"2. If the Cemetery Association does not hold fee title to the property, and could not convey such title to the City, is it within the municipal corporation's power to maintain at public expense, privately-owned cemetery property; or

"3. If the Cemetery Association has retained sufficient title, even if it is just maintenance responsibility, may a municipal corporation assume that responsibility with reference to privately-owned property."

You did not indicate whether this is a perpetual care cemetery. However, checking the copy of a deed issued by the cemetery association which you attached to your request leads us to believe that it is probably a perpetual care cemetery.

Cities may own, operate and maintain cemeteries. In §384.24(3)(k) of the code, the acquisition and improvement of real estate for cemeteries is defined as an essential corporate purpose. Section 566.14 provides, in pertinent part:

"[C]ities, irrespective of their form of government, boards of trustees of cities to whom the management of municipal cemeteries has been transferred by ordinance...shall be and they are hereby created trustees in perpetuity,

and are required to accept, receive, and expend all moneys and property donated or left to them by bequest, and that portion of cemetery lot sales or permanent charges made against cemetery lots which has been set aside in a perpetual care fund, to be used in caring for the property of the donor, or lot owner who by purchase or otherwise had provided for the perpetual care of a cemetery lot in any cemetery, or in accordance with the terms of such donation, bequest, or agreement for sale and purchase of a cemetery lot, and the money or property thus received shall be used for no other purpose."

Not only do these sections indicate that a city can purchase or otherwise acquire cemetery property and maintain same, but that a city is required to accept a donation or bequest of such property and money. Of course, this requirement has its limits. See, *In Re Estate of Scott,* 1948, 240 Iowa 35, 34 N.W.2d 177.

We have found three cases respecting the fee title to cemetery lots. In *Anderson v. Acheson,* 1907, 132 Iowa 744, 110 N.W. 335, the city of Keokuk acquired property and used it for cemetery purposes. By ordinance it set forth the requirements and restrictions for the lots. Lots were conveyed to individuals. Plaintiff sought to have the defendant ejected from the lots, her parents re-interred therein in and for damages. The Court held (132 Iowa at 749):

"The courts quite generally hold, however, that the purchaser of a lot in a public cemetery, though the deed be absolute in form, does not take any title thereto. The mere privilege or license to make interments in the lot so purchased, exclusive of all others, is all that is acquired thereunder. *Kincaid's Appeal,* 66 Pa. 411 (5 Am.Rep. 377); *Stewart v. Garrett,* 119 Ga. 386 (46 S.E. 427, 64 L.R.A. 99); *Partridge v. First Independent Church,* 39 Md. 631; *Humphrey v. Front St. M. E. Church,* 109 N.C. 132 (13 S.E. 793); *Page v. Symonds,* 63 N.H. 17 (56 Am.Rep. 481); 6 Cye. 717; *Jacobus v. Congregation,* 107 Ga. 518 (33 S.E. 853, 73 Am.St.Rep. 141); *Bessemer Land & Imp. Co. v. Jenkins,* 111 Ala. 135 (18 South. 565, 56 Am.St.Rep. 26); note to *Louisville v. Nevin,* 19 Am.Rep. 80; note to *Craig v. First Presbyterian Church,* 32 Am.Rep. 426; *Meagher v. Driscoll,* 99 Mass. 281 (96 Am.Dec. 759). Thus it was in *Dwenger v. Geary,* 113 Ind. 106 (14 N.W. 903):

'The place where the dead are deposited all civilized nations and many barbarous ones regard in some measure, at least, as consecrated ground. In the old Saxon tongue the burial ground of the dead was "God's Acre". One who buys the privilege of burying his dead kinsmen or friends in the cemetery acquires no general right of property; he acquires only the right to bury the dead, for he may not use the ground for any other purpose than such as connected with the right of sepulture. Beyond this his title does not extend. He does not acquire, in strict sense, an ownership of the ground. All that he does acquire is the right to use the ground as a burial place.' "

Although the Court was concerned with a public cemetery, the cases cited therein appear to involve both public and private cemeteries.

The above statement of law was upheld in *Carter v. Town of Avoca,* 1924, 197 Iowa 670, 197 N.W. 897. However, in a case falling between these two, the court held differently. *Northern Light Lodge v. Town of Monona,* 1917, 180 Iowa 62, 161 N.W. 78, was an action to enjoin the collection of a special assessment by the city upon a plot of land owned by the plaintiff and operated as a cemetery. The cemetery lots were conveyed by warranty deed to members of the public. The city maintained that although the lots abutting the public improvement had been conveyed, the title to the property still remained in the plaintiff, citing to the *Anderson* case. After discussing the facts of *Anderson,* the Court

stated (180 Iowa at 77):

"It will be seen at once that there is no likeness or analogy between the issues in that case and those in the case at bar....Counsel fail, however, to notice that said case deals only with a *public* cemetery, in which the conveyance of a lot was made subject to so many conditions and restrictions as to vest the purchaser with little, if anything, more than a mere family privilege or right of burial...."

With reference to the quote from *Anderson* we cited above, the Court continued:

"Such was not the language of the opinion. What we did say was expressly limited to a 'public' cemetery, and, when thus read, shows that the distinction of which we speak was not overlooked. It would certainly be strange if the owner of land by perfect title, were he so disposed, could not plot it as a cemetery and give, sell or convey to a grantee a title as full, complete and absolute as his own."

The Court reviewed the restrictions and rules of the cemetery and found that, whereas in *Anderson* the facts were such that so many restrictions placed on the conveyances vested the purchaser with only a right to burial, no such restrictions or conditions were so imposed upon the conveyances in issue which were inconsistent with a conveyance of general ownership.

The distinction between the cases is not as striking as may first be believed. In short the Court in *Northern Light Lodge* was indicating that the facts control the outcome. Where the conveyance does not palce so many restrictions and conditions as to be inconsistent with a general ownership, fee title to the property is passed. Where, however, such restrictions or conditions are imposed, fee does not pass.

The warranty deed which you attached to your request conveys a cemetery lot "subject to all the provisions and conditions contained in the articles incorporating" the cemetery association. Without such a provision, there could be little doubt that this would be a conveyance of the fee title. Not having the articles of incorporation before us nor all the deeds, we cannot indicate whether fee title was conveyed in all sales of the lots. Nor do we normally rule on such fact questions. Suffice it to say that unless there are such conditions and restrictions evidencing an intent not to convey the title, such titles in the lots pass to the purchasers and their heirs.

You presume in your second question that if title has passed, there would be nothing for the city to acquire. First of all, if, in fact, the city could not or did not acquire title or responsibility of the cemetery, it would not be able to expend public money for it, pursuant to Article III, Sec. 31, of the Iowa Constitution. However, it should not be presumed that the city will be unable to acquire an interest in the cemetery under these facts. There may be property left in the cemetery that has not yet been conveyed. There may also be roads, paths, spaces between graves and other open areas to which the cemetery association still holds title. Such title could be conveyed to the city. In addition, it appears from §566.14, that a city can accept money, such as from the perpetual fund of a cemetery association, to maintain a cemetery. Therefore, if cemetery property is conveyed to the city, if money is given to the city for the care of the lots, the constitutional prohibition cited above would not be applicable. It would be illogical for a city to be able to accept a cemetery and its maintenance responsibilities and then refuse to maintain the lots on the basis of

the constitutional provision.

Accordingly, with reference to the above discussion, we are of the opinion that a fact question exists whether fee title passed from the cemetery association to the lot owners. A city can, and may be required to, accept property and money for a cemetery and its maintenance. Such would not be an unconstitutional use of public money for private purposes.

November 27, 1978

COUNTIES: Open Meetings Law. Chapter 28A, as amended by Chapter 1037, Acts, 67th G.A., 1978 Session. A governing board operating under a 28E agreement is generally required to comply with the open meetings law of this state. (Nolan to Corzatt, Assistant Tama County Attorney, 11-27-78) #78-11-41

Mr. Jeffrey C. Corzatt, Assistant Tama County Attorney: You have requested an opinion on the following question:

"Must a governing board operating under agreement created pursuant to Chapter 28E of the Code of Iowa, as amended, comply with the open meetings law recently passed by the Iowa Legislature?"

The Iowa open meetings law as recently amended (H.F. 2074, Ch. 1037, Acts of the 67th G.A., 1978 session) provides in pertinent part as follows:

"Section 2. This act seeks to insure, through a requirement of open meetings of governmental bodies, that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people. Ambiguity in the construction or application of this act should be resolved in favor of openness.

"Section 3. As used in this Chapter:

"1. 'Governmental body' means:...

"b. A board, council, commission, or other governing body of a political subdivision or tax-supported district in this state.

"c. A multimembered body formally and directly created by one or more boards, councils, commissions, or other governing bodies subject to paragraphs "a" and "b" of this subsection."

In the absence of facts indicating otherwise, it is the opinion of this office that the open meeting law has applicability to a governing board operating under a Chapter 28E agreement.

November 27, 1978

CITIZENS' AIDE: Incompatibility. §601G.7, Code of Iowa, 1977. Language of §601G.7 precludes the Citizens' Aide or any member of its staff from contemporaneously holding office of notary public. (Nolan to Angrick, Citizens' Aide office, 11-27-78) #78-11-42

Mr. William P. Angrick II, Citizens' Aide Office: You have requested an opinion from this office concerning the possible incompatibility for offices of Citizens' Aide and Notary Public. Your letter sets out the pertinent portion of §601G.7, Code of Iowa, 1977, which states:

"...neither the Citizens' Aide or any member of its staff shall: 1. hold any other office of trust or profit under the laws of this state".

It has been well established in this State that the office of Notary Public is a public office. In *Keeney v. Leas and Lyon,* 1863, 14 Iowa 464, 468, it is clearly stated:

"In some respects it is true that a notary, as compared with a justice of the peace, judge of probate, commissioner of elections, or the like, is not a public officer. That is to say, he holds no court; it is not required to hold his office open at any particular time or place; and is not required to deliver his records and papers to anyone as his successor. But he is, nevertheless, a public officer in the sense that his office affects the people generally, and does not concern alone a particular district or private individuals. In this country all offices are public, except such as, though called offices, are, nevertheless, employments of a private nature. To illustrate... president of a bank, or a director of a corporation... Aside from such cases, however (which those just named serve to illustrate), all officers are public. And that this is true as applied to a notary, is shown from the antiquity of the office, the nature of their duties, and the fact that their acts have always been respected by the custom of merchants and the courts of all countries. And when we add that they are appointed and commissioned by the executive; that they are required to give bond to the State, and take an oath; that they are subject to removal by the Governor; and upon their removal or resignation are required to deposit their records and official papers with the clerk of the proper county, their public character in this State is established beyond all reasonable controversy..."

While it is clear that the office of Notary Public is a public office, it remains to be determined whether or not such public office is an office of "trust or profit under the laws of this State". A review of the fees provided by statute will quickly dispel any notion that the office is an office for profit. Section 77.19 provides:

"Notaries Public will be entitled to the following fees:

"1. For all services in connection with the legal protest of a bill or note, two dollars.

"2. For being present at a demand, tender, or deposit and noting the same, seventy-five cents.

"3. For administering an oath, ten cents.

"4. For certifying to an oath under his official seal, twenty-five cents.

"5. For any other certificate under seal, twenty-five cents."

However, it is the opinion of this office that the office of Notary Public is an office of trust. A public office is an office of public trust created in the interest and for the benefit of the people. *Driscoll v. Burlington-Bristol Bridge Company,* 77 A.2d 255, 256, 10 N.J. Super. 545. *State ex rel. Hollibaugh v. State Fish and Game Commission,* 365 P.2d 942, 948. A public office is an agency for the state, or more definitely a charge or trust conferred by public authority for a public purpose, or requiring the performance of duties involving the exercise of some portion of sovereign power. *State ex rel. Zevely v. Hackmann,* 254 S.W. 53, 55, 300 Mo. 59.

Accordingly, it is our opinion that the commission of Notary Public fall within the activity prohibited to the Citizens' Aide and any member of the Citizens' Aide staff under §602G.7 of the Code of Iowa.

November 27, 1978

COUNTIES: Supervisors. §332.3(4)(5)(6), Code of Iowa, 1977. Supervisors

act of establishing a reward for information concerning destruction of county property is legal. (Nolan to Wyckoff, State Representative, 11-27-78) #78-11-43

The Honorable Russell L. Wyckoff, State Representative: You have asked for an opinion as to the legality of action by the Benton County Board of Supervisors establishing a reward for information concerning the recent burning of a county bridge. In your letter you state that §7.6, Code of Iowa, 1977, specifically authorizes a reward to be offered by the Governor when a crime has been committed within the State but that you are unable to find authority which would cover the county board of supervisors.

It is the view of this office that such authority is derived by necessary implication from §332.3, Code of Iowa, which gives the board of supervisors the following general powers:

4. To make such orders concerning the corporate property of the county as it may deem expedient, and not inconsistent wth law.

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.

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.

Accordingly, it is the opinion of this office that the supervisors' act of establishing a reward for information concerning the destruction of county property is legal.

November 28, 1978

TRANSPORTATION, DEPARTMENT OF: §321.467, Code of Iowa, 1956. The Iowa State Highway Commission prior to 1956, not the Governor, had the statutory authority to issue Special Permits for the movement of overweight vehicles in emergency situations. (Paff to Robinson and Drake, State Senators, 11-28-78) #78-11-44

The Honorable Cloyd Robinson and Richard F. Drake, State Senators: Reference is made to your letter of September 26, 1978, in which you describe a problem regarding the movement of oversize and overweight emergency vehicles over the Interstate highways of Iowa. You explained that when there is a train derailment or accident, the emergency cleanup operation requires the use of specialized equipment to clear the track and clear away debris. According to your letter, some of this emergency equipment is overweight, overlength and overwidth for movement on the highway. In Iowa, this equipment is now moved over primary highways by special permits issued by the Iowa Department of Transportation. Movement of the equipment over the interstates in Iowa is not possible because in 1956 Congress passed an Act that grandfathered in the maximum weights and dimensions in effect in each state at that time. Iowa had no rules in effect granting permits for these types of emergency vehicles. You ask whether in 1956 the governor would have the power to order permits issued to these emergency vehicles.

In this opinion, the governor did *not* have the power in 1956 to grant permits for the movement over the highways of the type of vehicles you describe. "Emergencies do not create power or authority in a governor, as the executive, but they may afford occasions for exercise of powers already existing." 38 Am. Jur.

2d *Governor* §14 (1968). The Constitution of Iowa (and the Code of Iowa 1956) contain no provisions for special emergency powers for the governor and hence he would be without authority to issue permits for vehicles even under an emergency situation.

This does not mean that such emergency vehicles would be barred from permit in 1956. The emergency permit provisions are contained in §321.467, Code of Iowa, 1956 (these provisions as amended are now Chapter 321E, Code of Iowa, 1977). The following language was available in 1956:

"Provided further that in an emergency of very special or unusual cases, or as a means of cooperating with national defense officials, the state highway commission may grant permits for moving oversize or overweight vehicles or objects over the highways for a distance exceeding twenty-five miles, if in the judgments of the commission, such special, unusual, emergency or defense movement is essential. . . ."

Special or unusual circumstances within the contemplation of the language above would be those included in your letter.

"1. Human life involved or endangered in actual railroad wreck.

"2. Interstate Commerce and Amtrack service stopped or delayed because of a railroad accident.

"3. Chemicals polluting air or water supplies, endangering human life or a potential for such occurrence.

"4. Potential fire and explosion, endangering nearby communities.

"5. Disruption of communications; water mains severed."

It is this opinion that even though the governor in 1956 would *not* have had the power to grant permits for the movement of emergency vehicles, the then Iowa State Highway Commission *did possess* the power to do the same and the power existed at that time to allow such special movements of vehicles over the roads whether overweight or overlength in an emergency situation. This is reinforced by the issuance and discussions of these types permits found in the records of the Commission. W. O. Price, June 14, 1953, in denying a special permit to haul C Frames noted "that in each of these cases the load proposed to be hauled *is not a special or emergency load, but is an ordinary, usual, and continuing hauling operation."* This would indicate that it was felt where such "emergency" was impending, permits could be issued. Also see commission minute of October 7, 1952, allowing by permit the transportation over Iowa highways of heavy earth moving equipment. These are attached to this letter, the portion underlined relates to this problem.

In sum, it is this opinion, that overweight loads in an emergency situation would be a move subject to the provisions of §321.467, Code of Iowa, 1956. That such moves were granted by the Iowa State Highway Commission prior to 1956 under that authority. Note the type of equipment to which this opinion is directed is that involved in "unusual or emergency" situations and which cannot be divided and hauled. This opinion is limited strictly to the emergency situation.

November, 1978

AGRICULTURE

Treasurer; Corn Promotion Fund. §§185C.26, 453.1, 453.7(2), Code of

Iowa, 1977. The state treasurer has the power to invest the moneys in the corn promotion fund and to credit the interest earned to the general fund. (Haskins to Miller, State Representative, 11-21-78) #78-11-34

BEER AND LIQUOR CONTROL

§123.97, Code of Iowa, 1977; H.F. 187, 67th G.A., 2nd Session, 1978. Beer and Liquor Control Department may not set aside surplus bottle deposit funds to be used to administer the Beverage Container Act. (McGrane to Price, Deputy Director, Iowa Beer & Liquor Control Comm., 11-15-78) #78-11-23

CITIZENS' AIDE

Incompatibility. §601G.7, Code of Iowa, 1977. Language of §601G.7 precludes the Citizens' Aide or any member of its staff from contemporaneously holding office of notary public. (Nolan to Augrick, Citizens' Aide Office, 11-27-78) #78-11-42

CONFLICT OF INTEREST

Municipal Housing Agencies. §§403.16, 403A.22, 597.2, 597.14, 633.238(1), 721.11, Code of Iowa, 1977. Ownership of real estate by spouse gives a personal interest in such property to board member of municipal housing agency established under §403A.5. Where such property might be included in a rent subsidy program operated by the agency, the ownership must be properly disclosed and recorded, and the board member shall not participate in any action by the agency affecting that property. (Cosson to Retz, Vice-Chairman, Region XII Regional Housing Authority, 11-14-78) #78-11-16

COUNTIES

County Care Facilities. Construction of a separate residence for county care facility administrator is not authorized by a bond issue of $996,000 to construct and equip a new county care facility. (Nolan to Martens, Iowa County Attorney, 11-13-78) #78-11-5

Leave of Absence for deputy. §341.3, Code of Iowa, 1977. When leave of absence is granted to a deputy and no statement is made as to whether the leave is with or without pay, the decision as to whether pay should be suspended rests with the principal officer. A deputy's appointment may be revoked during a leave of absence. (Nolan to Anderson, Howard County Attorney, 11-15-78) #78-11-21

Subdivision ordinances. §§306.21, 358A.5, 358A.6, Code of Iowa, 1977. Authority for Board of Supervisors to adopt subdivision ordinances exists in Chapter 358A and the requirements of notice and hearing set out therein must be followed. Section 306.21 does not provide the board with authority to adopt such ordinances without notice and hearing. (Nolan to Hoth, Des Moines County Attorney, 11-15-78) #78-11-19

Conveyance of land to city to widen street. §§332.3(13), 332.3(17), Code of Iowa, 1977. The provisions of §332.3(17) control conveyances of land by county to a city. Section 332.3(13) applies where county land is no longer needed for public purposes. The manner in which the county acquired title will not affect the conveyance to a city unless there is a specific trust purpose involved. (Nolan to Burk, Assistant Black Hawk County Attorney, 11-14-78) #78-11-14

Burial of indigents. §§142.1, 252.27, Code of Iowa, 1977. Supervisors may determine the amount to be spent from the county poor fund for the burial of indigent residents and the statutory limitation on the amount which may be spent for the burial of non-residents does not apply. (Nolan to Huffman,

Pocahontas County Attorney, 11-14-78) #78-11-15

Building Improvements. §332.7, Code of Iowa, 1977; S.F. 2107, Acts, 67th G.A. (1978). When the cost of repair to a county building exceeds $5,000.00, the county must enter into a written contract after inviting proposals. (Blumberg to Burk, Assistant Black Hawk County Attorney, 11-20-78) #78-11-33

Open Meetings Law. Chapter 28A, as amended by Chapter 1037, Acts, 67th G.A., 1978 Session. A governing board operating under a 28E agreement is generally required to comply with the open meetings law of this state. (Nolan to Corzatt, Assistant Tama County Attorney, 11-27-78) #78-11-41

Supervisors. §332.3(4) (5) (6), Code of Iowa, 1977. Supervisors act of establishing a reward for information concerning destruction of county property is legal. (Nolan to Wyckoff, State Representative, 11-27-78) #78-11-43

CRIMINAL LAW

Procedure for filing complaint. S.F. 2200, §§67, 68, 67th G.A., 1977; §§801.4(11), 804.1, 804.2, 804.3, 78.1, Code of Iowa, 1977; Rules 1(1), 2, 32, 35, 37, 38, I.R.Cr.P. A district court clerk or the clerk's deputy may administer the required oath to a complainant, but after the oath is administered, if the complaint charges an indictable offense, the complainant and complaint should be directed to the magistrate for further proceedings consistent with statutory requirements. (Hinman to Glenn, State Senator, 11-13-78) #78-11-3

ENVIRONMENTAL PROTECTION

Nuclear waste disposal sites. §§4.1(2), 4.1(13), 262.7, Chapters 263, 455B, Code of Iowa, 1977. The University of Iowa is not a "private person" within §455B.88, thus the Solid Waste Disposal Commission has no authority pursuant to this statute, to approve or prohibit the establishment and operation of a nuclear waste disposal site by the University of Iowa. (Benton to Crane, Exec. Dir., Dept. of Environmental Quality, 11-13-78) #78-11-8

Platting. Chapter 409, as amended by Chapter 117, Acts, 67th G.A., 1977 Session. Contract purchaser may not plat land without joinder by record title holder and statutory release of encumbrances. (Davis to Bauercamper, Allamakee County Attorney, 11-21-78) #78-11-36

GAMBLING

Pool Tournaments. §99B.11, Code of Iowa, 1977. The game of pool is a bona fide contest within the meaning of §99B.11(2). A tavern owner may legally conduct a pool tournament if the conditions of §99B.11(1) are met. (Richards to Rush, State Senator, 11-20-78) #78-11-29

HEALTH

Certificates of birth; adopted persons not born in Iowa. H.F. 547, Acts, 67th G.A. (1978). H.F. 547, which relates to birth certificates for adopted persons not born in Iowa, is applicable only to adoptions which take place after the effective date of the Act, July 1, 1978. The use of certificate of birth established pursuant to H.F. 547 would be the same as those uses of a certificate of birth established pursuant to §144.23 except that such is not evidence of United States citizenship. (Johnson to Pawlewski, Commissioner of Public Health, 11-21-78) #78-11-35

HOUSING AGENCIES

Names. Chapter 28E, Code of Iowa, 1975; §§403A, 403A.2(1), 403A.5,

403A.9, Code of Iowa, 1977, and §3, Chapter 116, Acts, 67th G.A. Housing agencies formed by two or more municipalities pursuant to Chapter 28E, and §403A.9, need not be named according to the requirements of §403A. 5. (Cosson to Slaybaugh, Director, Region XII, Regional Housing Authority, 11-13-78) #78-11-4

JUVENILES

Parental liability. §§232.51, 624.23, Code of Iowa, 1977. Parents of juvenile committed to a Mental Health Institute by the Juvenile Court for treatment and evaluation may be held liable for the cost of such care. (Piazza to Wickey, Asst. Woodbury County Attorney, 11-15-78) #78-11-24

MOTOR VEHICLES

Abandoned motor vehicles. §§4.1(2) (9) (36), 4.2, 4.6, 321.84, 321.85, 321.89, 321.90, 321.91, 556B.1, Code of Iowa, 1977. Procedures and comparison of procedures between sections in Chapter 321, and Chapter 556B dealing with disposition of abandoned motor vehicles. (Dundis to Redmond, State Senator, 11-2-78) #78-11-1

MUNICIPALITIES

Iowa Rural Community Development Act. §362.2(1), Code of Iowa, 1977; H.F. 557, 67th G.A. (1978). The "Iowa Rural Community Development Act" applies only to incorporated cities. (Blumberg to Van Horn, Director, Iowa Development Commission, 11-22-78) #78-11-39

Urban Renewal and Relocation. §§364., 403.6(3), Code of Iowa, 1977. Where urban renewal property is acquired by a city and then demolished, and other property is acquired and rehabilitated for the relocation of those displaced from the demolished property, the requireemtns of §364.7 are not applicable to the sale of those properties. (Blumberg to Koogler, State Representative, 11-22-78) #78-11-38

Cemeteries. Art. III, §31, Iowa Constitution; §§384.24(3) (k) and 566.14, Code of Iowa, 1977. Unless there are so many restrictions and conditions upon a conveyance of a cemetery lot by warranty deed to be inconsistent with a conveyance of general ownership, fee title passes to the purchaser. A city can, and may be required to, accept property and money for the operation and maintenance of a cemetery. Such maintenance would not be a violation of the constitutional prohibition of public money for private purposes. (Blumberg to Thatcher, Webster County Attorney, 11-22-78) #78-11-40

Volunteer fire departments. A volunteer fire department providing fire protection to townships and cities may sell its fire station and use the proceeds to purchase an ambulance, unless its fire protection agreement with the governmental bodies provides otherwise. (Blumberg to Cochran. Speaker of the House, 11-20-78) #78-11-32

Fire departments. §411.16, Code of Iowa, 1977. A call-back system for off-duty firemen in case of serious emergencies would not, in and of itself, violate §411.16. (Blumberg to Slater, State Senator, 11-20-78) #78-11-27

Pensions for firemen and policemen. §§411.6(8) (9) (13), Code of Iowa, 1977. The surviving spouse of a police officer who dies after being on an accidental disability pension, receives a pension pursuant to §411.6(13). Upon remarriage, that pension ends and does not go to any minor children. (Blumberg to Neighbor, Jasper County Attorney, 11-20-78) #78-11-28

Police retirement system. §§411.1(2), 411.3, Code of Iowa, 1977. A

policeman who did not take a civil service examination in a city where civil service was applicable, could not be a member of the retirement system under Chapter 411. (Blumberg to Hansen, State Senator, 11-13-78) #78-11-6

SCHOOLS

Budget review. §§442.1, 442.12, 442.13, Code of Iowa, 1977. The state school budget review committee may order a reduction in a certified budget by establishing a modified allowable growth. (Nolan to Evans, State Representative, 11-14-78) #78-11-12

Excuses. §257.25(7), Code of Iowa, 1977. A parent's statement that enrollment of child in physical education or health courses may be questioned by school administrators but no determination should be made on whether to deny exemption from enrollment without according due process to the parent and child. (Nolan to Burk, Assistant Black Hawk County Attorney, 11-13-78) #78-11-9

Bussing. §321,372, Code of Iowa, 1977. School bus drivers have discretion as to the use of warning lights and signal arm when making stops within a residential or business district of a city which does not require such use by ordinance pursuant to §321.372. City ordinance establishing shorter signaling distance than state statute requires is subject to challenge as inconsistent. (Nolan to Benton, Superintendent of Public Instruction, 11-15-78) #78-11-17

SENTENCING

Mandatory sentencing for use of firearms in commisison of a forcible felony. §§703.2, 902.7, Code of Iowa, 1977. All persons engaged in joint criminal conduct are subject to a five year mandatory sentence for the commission of a forcible felony while in possession of a firearm, even if only one of them is so armed. (Williams to Forrest Ashcraft, State Senator, 11-20-78) #78-11-31

SOCIAL SERVICES

Transfer of real estate. §218.94, Code of Iowa, 1977. The Department of Social Services has the power subject to the approval of the Executive Council of Iowa to transfer real estate to the City of Toledo, Iowa, for the purposes of paving an adjoining street, as this is part of the proper use for said real estate for the State Juvenile Home. (Robinson to Wellman, Secretary, Executive Council of Iowa, 11-15-78) #78-11-18

STATE OFFICERS AND DEPARTMENTS

Child abuse reports; confidentiality. Chapter 235A, §§235A.15, 235A.19, Code of Iowa, 1977. The name of the person making a child abuse report may be confidential and withheld upon a determination by the registry staff of the Department of Social Services. A juvenile court may order the release of that name if it deems it to be necessary. (Robinson to Tullar, Sac County Attorney, 11-13-78) #78-11-7

Contingency fund. §29C.20, Code of Iowa, 1977. The Executive Council may properly allocate money from the contingent fund to pay the cost of obtaining new keys for the Fort Madison prison made necessary by the loss of a key to CH 19N. (Nolan to Wellman, Secretary, Executive Council, 11-13-78) #78-11-10

Iowa Energy Policy Council. Pub. Law 94-385; §93.15, Code of Iowa, 1977. The Energy Policy Council has the authority to comply with federal regulations in order to receive federal funds. The Council, therefore, can certify auditors for information energy audits. (Blumberg to Stanek, Iowa Energy

Policy council, 11-13-78) #78-11-11

Dentistry; Dental assistants. §§153.13, 153.14, 153.17, Code of Iowa, 1977. If the activities of a dental assistant fall under §153.13(2), including giving "prophylactic treatment" to the teeth or gums—then he or she is engaged in the practice of dentistry, for which a license is required. (Haskins to Robinson, State Senator, 11-22-78) #78-11-37

Office moves. Since the enactment of Chapter 18, Code, the Department of General Services has the duty to assign office space for all executive and state agencies. Consequently, the costs of office moves of departments are to be paid in accordance with the provisions of §18.8 and not from the contingent fund by the Executive Council (§19.29). (Nolan to Wellman, Secretary, Executive Council, 11-15-78) #78-11-22

Contingency fund. §29C.20, Code of Iowa, 1977. The Executive Council should not allocate contingent funds under §29C.20 for the replacement of funds expended by a university more than a year ago even though such expenditure was necessary to repair storm damaged state property. The contingent fund is for meeting interim needs unforeseen by the legislature. (Nolan to Wellman, Secretary, Executive Council, 11-15-78) #78-11-20

TAXATION

Property taxes; county's obligation to bid at tax sale. §§384.69, 446.18, 446.19, Code of Iowa, 1977. Where property being sold at a §446.18 scavenger sale receives no bids sufficient to satisfy delinquent special assessments, and there are no general taxes owing thereon, the county is not required to bid for the property. (Ludwigson to Anstey, Appanoose County Attorney, 11-20-78) #78-11-30

Property tax; recapture of property taxes, §23, Ch. 43, Acts, 67th G.A., 1st Session. §§428.4, 441.17, 441.21, 441.23, 441.26, 441.35, 441.37, 441.46, 443.2, Code of Iowa, 1977. The tax imposed by §23 is first applicable to changes in use occurring subsequent to January 1, 1978. Assessors and boards of review have the duty of determining a change in use, any higher resultant valuation, and valuations necessary for computation of the additional tax. Provision for notice and opportunity to be heard regarding a change in use, and any resultant change in valuations exists in the Iowa Code. The five valuation years used in computing the additional tax are the five years immediately preceding the year in which the new value resulting from a change in use is placed upon the property. In comparing consolidated levies for the year 1974 for purposes of computing the additional tax, the levy in mills should be applied against twenty-seven percent of market value and the assessed value found for that year. The additional tax is for a fiscal year. Section 23 is not unconstitutional as a retroactive tax. (Ludwigson to Bair, Director, Department of Revenue, 11-9-78) #78-11-2

Valuation of real estate subject to taxation. §441.21, Code of Iowa, 1977. The assessor is not bound, as a matter of law, to any particular sale or appraisal when determining the actual value of property under §441.21, for assessment purposes. (Kuehn to Harbor and Hultman, 11-20-78) #78-11-25

Sales tax on educational kit. §422.43, Code of Iowa, 1977. Sales at retail to consumers of books, tapes and tape recorders which constitute a motivation and success oriented course kit are subject to Iowa retail sales tax under §422.43, as the sale of tangible personal property. (Donahue to Koogler, 11-20-78)

#78-11-26

TRANSPORTATION

§321.467, Code of Iowa, 1956. The Iowa State Highway Commission prior to 1956 not the Governor had the statutory authority to issue Special Permits for the movement of overweight vehicles in emergency situations. (Paff to Robinson and Drake, State Senators, 11-28-78) #78-11-44

WELFARE

Disability required for general relief. §§252, 252.1, 252.24, 252.25, 252.26 and 252.43 Code of Iowa, 1977. To be eligible for general relief an applicant must be unable to earn a living by labor due to either physical or mental disability. A college student who applies for general relief could be aided if so disabled. (Cosson to Shaw, Scott County Attorney, 11-14-78) #78-11-13

STATUTES CONSTRUED

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67th GENERAL ASSEMBLY

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S.F. 2200, §§67 & 68	78-11-3
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H.F. 547	78-11-35
H.F. 557	78-11-39
Chapter 43, §23	78-11-2
Chapter 116, §3	78-11-4
Chapter 117	78-11-36
Chapter 1037	78-11-41

CONSTITUTION OF IOWA

Article III, §31	78-11-40

December 4, 1978

AGRICULTURE: CORPORATIONS: Corn promotion board. §§185C.3, 185C.34, 504A.2(1), 504A.28, 1977 Code of Iowa. The state corn promotion board may incorporate itself under Chapter 504A. (Haskins to Lounsberry, Secretary of Agriculture, 12-4-78) #78-12-1

Honorable R. H. Lounsberry, Secretary of Agriculture: You ask the opinion of our office as to whether the state corn promotion board (hereafter referred to as the "board"), whose existence is authorized by §185C.3, 1977 Code of Iowa, may be incorporated as a nonprofit corporation under Ch. 504.A, 1977 Code of Iowa. In essence, the function of the board is to promote the marketing of corn products.

Section 504A, 1977 Code of Iowa, sets forth those who may incorporate under Ch. 504A. That section states:

"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." [Emphasis added].

Section 504A.2(1), 1977 Code of Iowa, provides:

"As used in this chapter, unless the context otherwise requires, the term:

"1. 'Person' means an individual, a corporation (domestic or foreign, whether nonprofit or for profit), a partnership, an *association*, a trust or a fiduciary." [Emphasis added].

For statutory purposes, the board is not a state agency. *See* 1977 Code of

Iowa. Rather, it appears to be an unincorporated association. It possesses selected corporate characteristics including a board of directors, terms for directors, corporate powers, officers and annual reports. Since the board has not been issued a corporate charter, it is not, of course, a corporation.

The key indicia of an unincorporated association are:

1. A body of persons;
2. united in purpose;
3. acting together;
4. without a formal corporate charter but utilizing the methods and forms used by corporations.

See 7 CJS Associations, §1; see also, 4A, Words and Phrases, "Associations", p. 200 et seq.; 43 Words and Phrases, "Unincorporated Associations", p. 475 and 1978 Supplement; Oleck, *Nonprofit Corporations and Associations* §4. (3rd Ed.). Iowa cases consistent with the above include *Lamm v. Stoen,* 284 N.W. 265 (Iowa 1939); *Rhodes v. Rankin,* 249 Iowa 1411, 91 N.W. 2d 399 (1958); *Boyer v. Iowa High School Athletic Association,* 138 N.W. 2d 914 (Iowa 1965); and *Goss v. Johnson,* 243 N.W. 2d 590 (Iowa 1976).

The general rule is that "although an unincorporated association technically does not exist as a legal entity apart from its members, the Legislature may recognize the separate existence of an association by statute." *Day v. State,* 341 N.E. 2d 209, 210 (ind. 1976). We believe that this has been done in the case of the board. Hence, the board is an "association" and a "person" under §504A.2.

Therefore, the board may incorporate itself as an Iowa nonprofit corporation under Ch. 504A.

December 7, 1978

RETIREMENT BENEFITS; LEGISLATORS; CONFLICTS OF INTEREST; Article III, Section 25; Article III, Section 31; Chapter 97B; House File 2426, Section 31. There is no conflict of interest for a legislator to pass an increase in IPERS retirements benefits to which he may later be entitled, provided the effective date of such bill is not prior to the convention of the next following general assembly; and increases in such benefits are for a public purpose not requiring a two-thirds vote of the General Assembly. (Salmons to Millen, State Representative, 12-7-78) #78-12-2

Honorable Floyd H. Millen, State Representative: This office is in receipt of your opinion request seeking counsel on two questions which arise out of legislative passage of House File 2426. That File which amends sections of Chapter 97B, The Code, allows members of the Sixty-eighth General Assembly to become members of the Iowa Public Employee's Retirement System (IPERS) and for previous members of past general assemblies to buy into the system upon proof of such previous service. House File 2426, Section 31.

With respect to this legislation, you ask two questions:

1. Is there a conflict of interest involved in future general assemblies where a legislator could be voting to improve the benefits in a system of which he might be a member?

2. Will future action concerning IPERS benefits require a two-thirds vote to implement changes in the IPERS program?

Section 31 of H.F. 2426 reads:

Chapter ninety-seven B (97B), Code 1977, is amended by adding the following new section:

NEW SECTION: Persons who are members of the Sixty-eighth General Assembly who submit proof to the department of membership in the general assembly during any period beginning July 4, 1953, and ending January 8, 1979, may make contributions to the system for service 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 in the general assembly. The proof of membership in the general assembly and payment of accumulated contributions shall be transmitted to the department not later than December 31, 1979. Persons eligible to receive retirement allowances under this section shall be eligible to commence receiving retirement allowances on January 8, 1979.

There is appropriated from the general fund of the state to the Iowa department of job service an amount sufficient to pay the contributions of the employer based on service of the members in an amount equal to the contributions which would have been made if the members of the general assembly who made employee contributions had been members of the system during their service in the general assembly plus two percent interest plus interest dividends for all completed calendar years and for any completed calendar year for which the interest dividend has not been declared and for completed months of partially completed calendar years at two percent interest plus the interest dividend rate calculated for the previous year, compounded annually, from the end of the calendar year in which contribution was made to the first day of the month of such date.

With the exception of the second full paragraph of Section 31, this section is substantially similar to the Senate File 555, Section 22 of the Sixty-sixth General Assembly [OAG (Lamborn) June 13, 1975, at 146.] which never became law and upon which the Honorable Clifton C. Lamborn received this office's June 13, 1975, opinion by the Attorney General. Senator Lamborn, sensing the same troubles with Section 22, that trouble you about Section 31, asked:

" '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.' "

OAG, (Lamborn) June 13, 1975, at 146.

Observing that Section 22 was to become effective January 10, 1977, "which will be the date the next general assembly convenes," (Id.) the Attorney General opined that Section 22 was not conflicting with Article III, §25, Constitution of Iowa since that provision forbade "increase(s) [in] compensation and allowances effective prior to the convening of the next general assembly following the session in which any increase is adopted."

Your first question, however, is a slight variant of that answered for Senator Lamborn. You wish to know if a legislator in some future general assembly could be said to have a conflict of interest by voting to improve the benefits of

IPERS in which he is a member.

I do not think the variation in questions demands a different answer than appears in the Attorney General's opinion, nor do I believe the minor changes between Sections 22 and 31 require a new analysis. As the Attorney General ruled and Article III, §25, Constitution, says, the organic law of Iowa is not violated by increases in compensation and allowances to members of the general assembly so long as any such become effective in the next assembly following the one in which the increase was passed. I would observe, therefore, that members in future general assemblies will have no conflict of interest in passing legislation increasing IPERS benefits to which they may later be entitled, so long as the vehicle legislation becomes effective during the following general assembly.

As bearing on your question, the Attorney General observed in Senator Lamborn's opinion:

"...It is forseeable 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.

...

"...It is irrelevant that some members of the present general assembly may also be members of such successor body...."

OAG (Lamborn) June 13, 1975, at 148.

Section 31 of H.F. 2426 was passed by the Sixty-seventh General Assembly. The first sentence of that Section contains the language designed to prevent a clash with Article III, §25 of the Constitution in that it restricts membership in IPERS to those members of the Sixty-eighth General Assembly. Hence, membership in IPERS by legislators of the Sixty-eighth General Assembly is proper just as will be increases in benefits similarly conditioned.

Your second question asks: "Will future action concerning IPERS benefits require a two-thirds vote to implement changes in the IPERS program?"

The two-thirds vote provision of your question is that inhering in Article III, Section 31, Constitution of Iowa:

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.

In Senator Lamborn's opinion Mr. Turner wrote:

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.

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."* (emphasis added).

If anything, the law of "public purpose" under Article III, Section 31, has liberalized since Mr. Turner's opinion. *John R. Grubb Inc. v. Iowa Housing Finance Authority,* 255 N.W.2d 89 (Iowa 1977).

There is, thus, no question the IPERS retirement benefits for legislators fall within the "public purpose" provision of Article III, Section 31. Hence, a two-thirds vote of the legislature is not required to effectuate passage of a law to increase IPERS benefits for members of the legislature.

I hope you find these answers helpful.

December 7, 1978

COUNTY AND COUNTY OFFICERS: County Sheriff —Special Deputies; Tort liability of County — §§4.1(18), 337.1, 613A.2, 613A.4, Code of Iowa, 1977. A sheriff may appoint "special" deputies without the knowledge or approval of the board of supervisors, Ch. 613A notwithstanding. The county is liable under Ch. 613A for any torts caused or sustained by such "special" deputies. A sheriff may form and equip a civilian posse, and the county is liable under Ch. 613A for any torts caused or sustained by any member of such posse. A county may not attempt to exonerate itself from tort liability through signed agreements with posse members. (Richards to Kemp, Cedar County Attorney, 12-7-78) #78-12-3

Mr. Edward Kemp, Cedar County Attorney: You have requested an opinion of the attorney general concerning the deputization of persons by the county sheriff without the knowledge or approval of the county board of supervisors, and the county's liability under Chapter 613A, Code of Iowa, (1977) for torts involving such officers. The following questions are specifically raised:

"1.) In light of Iowa Code, §613A (1977), can the county sheriff appoint 'secret deputies' under Iowa Code, §742.2 (1977) without the approval or knowledge of the Board of Supervisors?

"2.) What liability does the County incur for actions of or injury to a 'secret deputy' appointed under Iowa Code, §742.2 (1977)?

"3.) Can a county sheriff create a civilian posse in which citizens would be administered an oath of office as deputy sheriff, be allowed to purchase and wear uniforms, proceed to patrol the County under the direction of the sheriff and be assigned to other related duties normally done by the Office of the County Sheriff? Under such a plan, members of the posse would receive no salary or expense reimbursement?

"4.) If such a posse is created, what liabilities would the County incur for actions of or injury to a posse member?

"5.) Does a 'document' signed by each member of such posse, purportedly releasing the County from liability for their actions, have any validity with regard to the liability of the County for actions of or injury to a posse member?"

A sheriff's authority to appoint "special," "reserve," or "non-pay" deputies without the knowledge or approval of the board of supervisors and without revealing their identities was thoroughly discussed in an opinion of the attorney general of September 18, 1972. This authority was found to derive from §§4.1(19), 337.1, and 742.2, Code of Iowa (1971). Section 742.2, which authorized the sheriff to "call out the power of the county" to overcome resistance to execution of process, was repealed by the criminal code revision, Ch. 1245, §526, Acts of the 66th General Assembly, 1976 Session. However, §4.1(19), now contained in §4.1(18), Code of Iowa (1977), and §337.1, were unaffected by the revision and continue to authorize such deputizations. Section 4.1(18) provides:

"The term 'sheriff' may be extended to any person performing the duties of the sheriff, either generally or in special cases."

And §337.1 states:

"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 state department of public safety in the apprehension of criminals and detection of crime."

In response to your first question, we perceive nothing in Chapter 613A, Code of Iowa (1977), which would limit a sheriff's authority under §§4.1(18) and 337.1, Code of Iowa (1977), to make such "special" deputizations. These sections seem compatible; but even if they conflict, §337.1 is a specific or special statute which controls over the general statute, Chapter 613A. §4.7, Code of Iowa (1977); *Doe v. Ray,* 251 N.W.2d 496, 501 (Iowa 1977).

With regard to your second inquiry, you raise two separate issues: (1) the county's liability to third persons for torts caused by these "special" deputies, and (2) the county's liability for torts sustained by such deputies. Chapter 613A has eliminated any common-law immunity in tort accorded governmental subdivisions, except those claims specifically excluded. *Symmonds v. Chicago, Milwaukee, St. Paul & Pacific R.R.,* 242 N.W.2d 262 (Iowa 1976). Section 613A.2 provides:

"Except as otherwise provided in this chapter, every municipality [which

includes "county" by definition, §613A.1(1)] is subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function.

* * *

"For the purpose of this chapter, employee includes a person who performs services for a municipality *whether or not the person is compensated for the services,* unless the services are performed only as an incident to the person's attendance at a municipality function." (Emphasis added).

"Special" deputies enlisted by and acting under direction of a county sheriff are county "employees" for the purpose of §613A.2. As such, the county is liable to third persons for the torts caused by these county "employees" while acting within the scope of their "employment," unless the claim is exempted under §613A.4. The fact that these "special" deputies are not compensated for their services is of no consequence. Neither is the fact that the deputies act without the knowledge or approval of the board of supervisors.

These conclusions are supported not only by Ch. 613A, but also by general principles of agency. The county sheriff and his "special" deputies stand in the relationship of master and servant, since the sheriff is vested with the right to control the deputies' conduct. *Duffy v. Hardin,* 179 N.W.2d 496, 502 (Iowa 1970); *Bengford v. Carlem Corp.,* 156 N.W.2d 855, 863 (Iowa 1968); Seavey, *Agency* §3 (1964). With the right to control and direct the deputies' acts comes the responsibility for such actions; the deputies' acts are imputed to the county sheriff under the familiar doctrine of *respondent superior. Burr v. Apex Concrete Co.,* 242 N.W.2d 272 (Iowa 1976); *Graham v. Worthington,* 259 Iowa 845, 146 N.W.2d 626 (1966). The sheriff's liability is in turn imputed to the county. The fact that the county board of supervisors and the "special" deputies do *not* stand in the relationship of master and servant is irrelevant.

The other issue raised by your second question deals with the county's liability for torts sustained by these "special" deputies while performing services for the county. Section 613A.2 would render the county liable in such actions, provided the claims are not exempted under §613A.4. One such exemption is for "any claim by an employee of the municipality which is covered by the Iowa worker's compensation law." §613A.4(1). In *Uhe v. Central States Theatre Corp.,* 258 Iowa 580, 139 N.W.2d 538 (1966), the Court held that employer's responsibility for payment of wages is a necessary element of the employer-employee relationship under the worker's compensation law. These "special" deputies serve the county without compensation and, therefore, are not "employees" covered by the Iowa worker's compensation law, Ch. 85, Code of Iowa (1977). Hence the §613A.4(1) exemption is inapplicable and the County would be liable to injured "special" deputies to the same extent it would be liable to injured third persons. *See,* 1979 O.A.G. 672.

Your third and fourth questions relate to the formation and equipment of a civilian posse by the county sheriff. Such authority is also derived from §337.1, which allows the sheriff to "summon the power of the county." The concept of "posse comitatus," which is Latin for the power or force of the County, was also thoroughly discussed in the opinion of the attorney general of September 18, 1972. As there noted, the posse's authority parallels that of the sheriff unless otherwise restricted. Inherent in the power to appoint is the power to outfit and equip these volunteers. *See,* O.A.G. May 3, 1977 (formation and equipment

of municipal police reserve units). As with the "special" deputies, the County would be liable under Ch. 613A, for any torts caused or sustained by a member of a posse.

Finally, you ask whether a signed agreement between the County and each member of a posse would validly release the County from Ch. 613A liability. As a general rule, "agreements between employer and employee attempting to exonerate the employer from liability for future negligence, whether of himself or of his employees, or limiting his liability on account of such negligence, are void as against public policy." 53 Am.Jur.2d *Master and servant* §158 at 221 (1970); 56 C.J.S. *Master and Servant* §197 (1948); *cf., McGuire v. Chicago, B & Q RR.*, 131 Iowa 340, 108 N.W. 902 (1906). Furthermore, "contracts made by a County that are beyond its power or in contravention of expressed statutes are void." *Voogd v. Joint Drainage Dist. N. 3-11, Kossuth & Winnebago Counties,* 188 N.W.2d 387, 393 (Iowa 1971). It is our opinion that an agreement between the county and each member of a posse attempting to exonerate the county from liability for torts caused or sustained by any such member would contravene the purpose of Ch. 613a, and would be void as against public policy.

December 7, 1978

PUBLIC SAFETY—HABITUAL OFFENDER STATUTE: Traffic laws. §321.436, §321.555(1)g. A conviction under §321.436 of the Iowa Code, requiring motor vehicles to be equipped with a proper muffler, is a violation of the traffic laws under 321.555(1)g. (Hogan to Anderson, Howard County Attorney, 12-7-78) #78-12-4

Mr. Mark B. Anderson, Howard County Attorney: Reference is made to your letter of August 14, 1978, in which you ask the following question:

"Does a muffler violation under §321.436 qualify as a violation of the traffic laws under this particular subparagraph?" [§321.555(1)g]

1977 Code of Iowa §321.436 states:

"Every motor vehicle shall at all times be equipped with a muffler in a good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cutout by-pass or similar device upon a motor vehicle on a highway."

A similar question was answered by this office in an opinion requested by Mr. Jim Sween, dated Arpil 5, 1977. In that opinion it was determined that §321.174 Code of Iowa, 1975, which deals with operator license requirements, is to be considered a traffic law for the purposes of §321.555(1)g.

The opinion to Mr. Sween concludes that "A traffic law...would be any law dealing with the use of vehicles or other conveyances on any highway for purposes of travel...". Clearly §321.436, which requires that a motor vehicle be equipped with a proper muffler, deals directly with the use of a vehicle on the highways and would therefore be considered a traffic law.

The opinion of April 5, 1977, also states, "The legislature has also demonstrated its intention that the term 'traffic laws' in §321.555(1)(g) be given broad coverage by specifically excepting parking regulations violations and excepting them only. If the legislature had intended to further limit the definition of 'traffic laws' by excluding licensing provisions (in this case muffler violations) it would have specifically done so."

We are of the opinion that a violation of §321.436 of the Iowa Code would

constitute a violation of the traffic laws for the purposes of §321.555(1)(g).

December 8, 1978

STATE OFFICERS AND DEPARTMENTS: Iowa Board of Parole; Iowa Public Employment Relations Board; Conflict of Interest; Iowa Code §§68B.2; 68B.6; 68B.8; Iowa Code of Professional Responsibility for Lawyers, Canon 9; A state official and lawyer may not for a separate compensation represent those with an interest against the interests of state before any state agency or state court. (Salmons to Ewing, Iowa State Board of Parole, Salmons to Beamer, Public Employment Relations Board, 12-8-78) #78-12-5

Mr. Silas S. Ewing, Member, Iowa State Parole Board; Mr. John E. Beamer, Chairman, Public Employment Relations Board: Each of you has requested an opinion from this office regarding application of Iowa Code §68B.6 to problems which have arisen in the sphere of your official duties. The request of Mr. Ewing was originally submitted October 18, 1978 and, after a request for clarification and supplementation, was modified on November 21, 1978. The request of Chairman Beamer was received on November 23, 1978. Because both requests involve the identical question both are consolidated here for discussion.

The questions submitted for consideration by both Messrs. Ewing and Beamer are questions that involve no more than application of statutory terms to the questions each has submitted for review. They are not infused with any of the complexities of constitutional analysis, either state of federal.

They are submitted, as Mr. Ewing says in his October 17, 1978 letter, because "(s)ection 68B.6 of The Code, 1977, is presenting us with a problem in that a superficial reading of it is in conflict with historical practice and common sense."

The exhaustive series of questions asked by Mr. Ewing is as follows:

"1. Assume that a lawyer who is a Member of the Board of Parole is representing a client in each of these cases (A-E).

"A. Is a unit determination case filed pursuant to §20.13 of The Code, 1977, in a case where employees of the State are at issue, a claim 'against the interest of the State' as provided in §68B.6?

"B. Is a representation case filed pursuant to §20.14 of The Code, 1977, in a case where employees of the State are at issue, a claim 'against the interest of the State' as provided in §68B.6?

"C. If the answer to 1A or 1B is in the affirmative, is the representation of a private client who is *responding* to the bringing or filing of such a case rather than acting as the *Petitioner* within the scope of §68B.6?

"D. Is a prohibited practices complaint where the State is a party such as the attached complaint [Action by certified public employee organization's bargaining representative against the State as public employer for alleged unfair labor practices].

"E. Is representing a Respondent in a prohibited practice complaint before the Public Employment Relations Board, a claim 'against the interest of the State' within the meaning of §68B.6?

"2. Assume that 'Citizen A' is run over by an Iowa Department of Transportation truck and 'Citizen A' asks a lawyer who is a Member of the Iowa

Board of Parole, or any other government board whose members are appointed by the Governor, to represent him in a Chapter 25A lawsuit against the State. Does the lawyer-member run afoul of §68B.6 if he takes the case and files the lawsuit? Is a tort claims case pursuant to Chapter 25A, The Code, 1977, a claim 'against the interest of the State' as provided in §68B.6?

"3. Assume that 'Citizen B' has received an inheritance tax bill from the State which 'Citizen B' wishes to challenge and asks a lawyer-member of the Board of Parole, or any other board, to represent him. Does the lawyer-member run afoul of §68B.6 if he takes the case and files the appropriate pleadings? Is a tax case pursuant to the Iowa Revenue Code, a claim 'against the interest of the State' as provided in §68B.6?

"4. Assume that any worker is either injured or laid off, can a lawyer-member of the Board of Parole, or any other board, represent the worker before these agencies in a claim for worker's compensation or unemployment compensation? Are cases before the Industrial Commissioner (Workers' Compensation), and Job Services (Unemployment Compensation), which call upon the State treasury, claims 'against the interest of the State' as provided in 68B.6?

"5. (A) Assume that an Iowa school district has asked a lawyer-member of the Board of Parole, or any other board, to represent it in defending in the Iowa District Court a claim brought against it by the State;

"(B) Assume the State files a petition for Declaratory Judgement [sic] and a municipality asks a lawyer-member of the Board of Parole, or any other board, to represent it, taking a position contrary to that advanced by the State;

"(C) Assume that a private citizen or association asks a lawyer-member of the Board of Parole, or any other board, to represent it in defending against a claim brought by the State in a federal agency or court: Would this lawyer-member run afoul of §68B.6 if he represented any of these actions? Is the rendering of legal services or advise for a fee to a public (city, county) or private (corporation, association, or person) party which appears and takes a position contrary to that of a state agency or office before a federal or state agency or federal or state court and charging a fee for that service, a claim 'against the interest of the State' as provided in §68B.6?

"6. If any of the answers to questions one through five are in the affirmative:

"A. Can an appointed member of a State Board or Commission represent a private client in these cases?

"B. Can any member of the firm of a lawyer who is an appointed member of a State Board or Commission represent a private client in these cases?

"7. In any of these cases if the appointed member of a State Parole Board or Commission neither accepts nor contracts for a fee for the case does Chapter 68B apply at all?

"8. Where in any of the above cases there is a contract for a fee, can any partner or employee of a law firm in which an appointed member of a State Board or Commission has an interest or that lawyer-member represent the client without violating the provisions of Chapter 68B?"

Chairman Beamer, making reference to the same action with which Mr. Ewing was concerned in his question 1(D), asks simply: "Specifically, I am requesting an opinion as to whether a member of the State Board of Parole as a state official may represent a client before this agency [Public Employment Relations Board] in the type of action designated in this complaint [see question 1(D) above] in light of §68B.6?

I. *The Statute.* Chapter 68B was first passed by 62nd General Assembly and became effective in 1968. Its provisions are broad as the legislature has chosen to be its own lexicographer in definition of controlling terms, which have been amended several times each time to modify, enlarge, or extend its key provisions. The Chapter is remedial in the clearest sense of that term. Its objects are clear and may be discerned in a cursory reading. It was, no doubt, passed to alter 'historical practice' and abrogate the prevailing conventional wisdom and contemporary notions of 'common sense' about which these requests are concerned. It bears repeating that the terms of the Act are broad, and their breadth indicates an attempt to fundamentally restructure and classify conduct deemed inimical to the interests of the State and the public served thereby.

Criminal penalties are provided for violation of certain sections. Section 68B.8, as amended by Acts 1977 (67 G.A.) Ch. 147, §114. See OAG 77-10-2 (October 5, 1977) Turner to Rush; OAG 72-8-10 (August 25, 1972) Turner to Gallagher. And it is of course true that penal statutes are to be construed strictly with any doubt resolved in favor of the accused. OAG 72-8-10 (August 25, 1972) Turner to Gallagher, at 567. But these requests do not ask for a resolution of guilt, and if they did this office would decline the request. *Id.*, at 564-5; OAG 77-10-2 (October 5, 1977) Turner to Rush. Rather, the concern here is whether certain conduct is proscribed by the Act. Hence, the Act must be liberally construed to effectuate the apparent purposes its drafters had in mind. Iowa Code §4.2; *State ex.rel. Turner v. Koscot Interplanetary, Inc.,* 191 N.W.2d 624, 629 (Iowa 1971).

The heart of this request involves §68B.6 which remains unchanged since original passage. That Section reads in its entirety:

No official, employee, or legislative employee shall receive, directly or indirectly, or enter into any agreement, express or implied, for any compensation, in whatever form, for the appearance or rendition of services by himself or another against the interest of the state in relation to any case, proceeding, application, or other matter before any state agency, any court of the state of Iowa, any federal court, or any federal bureau, agency, commission or department.

At the outset it is obvious a member of the Board of Parole is an 'official' as that term is defined in §68B.2(6).[1] A parole board member is appointed by the Governor and receives, in addition to a salary, travel expenses incident to official duties. Iowa Code §247.2.

Although neither opinion request states whether the parole board member in his private capacity as a lawyer, receives compensation for his services in that capacity, it would seem unreasonable to assume this member-lawyer provided his legal services without compensation. Hence, it stands assumed this 'official' receives compensation as that term is defined in §68B.2(1)[2] and above and beyond his official salary and expense payments as a member of the Board

[1] " 'Official' means any officer of the state of Iowa receiving a salary or per diem whether elected or appointed or whether serving full time or part time. Official shall include but not be limited to all supervisory personnel and members of state agencies...."

[2] " 'Compensation' means any money, thing of value, or financial benefit conferred in return for services rendered or to be rendered."

of Parole.[3]

Finally, the numerous hypothetical questions submitted for consideration each contemplate legal representation before several different state or regulatory agencies. "Regulatory agency" is defined in §68B.2(4) and has been occasionally amended to reflect the changing designations of state bureaus. While it does not name the Public Employment Relations Board, the term does include department of revenue, the industrial commissioner and the department of job services, all departments with which you are concerned. However, the failure to include the Public Employment Relations Board in §68B.2(4) is vitiated by the more expansive definition of "state agency" in §68B.2(7). The term " 'state agency' means any state department or division, board, commission, or bureau of the state including regulatory agencies." Hence, it will be seen the Public Employment Relations Board, while not a 'regulatory agency', is a 'state agency' and treated by Section 68B.6.

Consequently, a parole board member who, for compensation, represents another before any state agency or Iowa Court commits a statutory violation of §68B.6 if the representation is "against the interest of the state."

II. *Against the interest of the state.* The legislature has not seen fit to define the phrase "against the interest of the state" anywhere in Chapter 68B. And before a reasonable mind could conclude the rendition of services in any case, proceeding or application was against or in opposition to the state, the "interest of the state" must be known.

The state's interests are as broad and inclusive as are its constantly expanding activities and far flung enterprises. Those interests are the interests all state workers have in pursuit of their official duties; interests the state's organizational units have in meeting their statutory mission; interests the state's citizenry has in being served and protected by an efficient government. It is an interest somewhat delimited by the statutory laws under which all government lives but in no true sense is coextensive with that law. It is as mixed, varied and infinite as are the combinations of shade and hue between the red and violet. It is an abstraction distilled only in particular cases, on particular occasions in particular settings.

No serious contention could seem to be made that representation of another by a state official before a state agency or in a state court concerning variously a tax refund, a tort claim or an adverse possession of government property would not be "against the interest of the state." In each case the win or loss or partial win or loss deprives the state either of monies in its treasury or realty within its realm. Here the interest of the state may be seen to be concrete, not abstract, tangible, not evanescent.

Representation of an injured or unemployed state worker before either the Industrial Commissioner or Department of Job Sevice presents much the same situation. In either case the state, as self-insuror for workmen's compensation or unemployment purposes, pays claims directly from the state treasury. Thus, this representation may be seen to be "against the interest of the state."

[3]In *Triplett v. Azordegan,* 421 F. Supp. 998, 1002 (N.D. Iowa 1976) it was held that 'compensation' as defined by §68B.2 (1) did not include an employee's state salary but contemplated separate outside consideration in return for the questioned legal services.

And the same is true regarding representation of an employee organization before the Public Employment Relations Board where the public employer is the State of Iowa. Again the state's interest as public employer by necessity is adverse to those of the bargaining unit comprised of state employees. While the interests of the state may be seen in this situation to be most demonstrably opposed by the resultant collective bargaining agreement which awards state employees greater wages and benefits out of state funds, the interest of the represented state workers is no less adverse to the interests of the state in the several adjunctive agency determinations and proceedings which lead ultimately to the bargained agreement.

Given the expansive definitions supplied by the legislature it does not appear possible to avoid the prohibition of §68B.6. An appointed, as well as elected officer is an 'official' (§68B.2(6)) and subject to stringences of 68B.6, as are members or partners of such official in his firm or association of a corporation in which such official owns more than ten percent of the stock, directly or indirectly. Section 68B.7, last paragraph. Of course, if there is no 'compensation' (§68B.2(1)) there is no violation. OAG 72-8-10 (August 25, 1972) Turner to Gallagher at 565. See also, *Triplett v. Azordegan,* 421 F.Supp. 998, 1002 (N.D. Iowa 1976).

It will not always be that the interests of the state are subject to such clear definition and sharp relief. But in the instances above, the hypothetical representation is seen to be in some sense "against the interest of the state" and therefore, subject to the bar of §68B.6.

III. *Canon 9.* This opinion is about lawyers in state government. While the legislature has conditioned employment with the government in Chapter 68B for all state workers, there is a separate but coordinate duty owed by members of the Iowa bar.

Canon 9 of the Iowa Code of Professional Responsibility for Lawyers intones: "A lawyer should avoid even the appearance of professional impropriety." Ethical Consideration 9-1 is reflective of the Canon:

"Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession."

The question what is "against the interest of the state" will certainly be as ill-defined on occasion as the examples above are relatively clear. But where the question is raised, it is essential that Canon 9 be consulted. The public's perception of a lawyer's conduct is not dependent on fine semantic distinctions often made by others with the words and terms in a statute. It does not extend to the technical cleavage between that statutorily permissable and prohibited. The public's perception is a separate reality which must be borne in mind when questions such as these arise.

It may be enough to say that any question carries with it its own answer.

Accordingly, it is the opinion of this office that a member of the Iowa Board of Parole may not represent those with an interest against the state in these situations explored above.

December 13, 1978

TAXATION: Property Tax. Assessor's obligation to disclose information — §441.21. Assessor must disclose at written request of taxpayer all information

in any formula or method used to determine the actual value of his property. (Ludwigson to Van Gilst, 12-13-78) #78-12-6

The Honorable Bass Van Gilst, State Senator: You request an opinion of the Attorney General concerning the following:

"Are county assessors required to provide the public with any or all information in any formula or method used to determine the actual value of any given property subject to taxation by the county assessor?"

Section 441.21, Code of Iowa, 1977, provides in part as follows:

"The assessor and department of revenue shall disclose at the written request of the taxpayer all information in any formula or method used to determine the actual value of his property."

The quoted provision is applicable to county assessors. Section 441.54, Code of Iowa, 1977. Thus it is the opinion of this office that the answer to your question is yes, provided the taxpayer's request for information is in writing.

December 14, 1978

CONSTITUTIONAL LAW: SALES: MOTOR VEHICLES: FAIRS. §322.5, Code of Iowa, 1977, as amended. A nonresident motor vehicle dealer may *not* display motor vehicles at fairs, vehicle shows, or vehicle exhibitions in the State unless that dealer is licensed under the provisions of Chapter 322, Code of Iowa, 1977. (Hogan to Kassel, Director, Iowa Department of Transportation, 12-14-78) #78-12-7

Mr. Raymond L. Kassel, Director, Iowa Department of Transportation: Reference is made to your letter of October 18, 1978, in which you inquire as to "...whether a nonresident motor vehicle dealer may display motor vehicles at fairs, vehicle shows or vehicle exhibitions in the State, without being required to obtain a motor vehicle dealer's license under the provisions of Chapter 322 of the Code...."

You provide a fact situation in which the nonlicensed out-of-state dealer would display motor vehicles at fairs and shows but would not solicit sales in any manner other than displaying a sign indicating the name and address of the dealership.

We have today responded to a similar inquiry (Hogan to Priebe, 12-14-78). That inquiry involved the same provision of the Code that is the basis of your inquiry (Iowa Code §322.5 as amended by S.F. 2187 (Ch. 1113, §43), Acts of the 67th G.A. (1978 Session): Whether the statute was constitutional since it forbids *out-of-county* licensed motor vehicle dealers from displaying motor vehicles at counties outside the location of their principle place of licensed business. Our opinion was that the statute was constitutional as it showed a sufficient nexus to a legitimate state interest: ensuring the proper maintenance and repair of vehicles by providing a sufficient number of service facilities in Iowa.

The legislature has delineated the State interests in the regulation of motor vehicle dealers. Iowa Code §322.3 prohibits a person engaging in the business of selling motor vehicles in the State unless the person has been issued a license by the Department of Transportation to sell motor vehicles. Iowa Administrative Rule 820-(07,D)10.1(4) defines the term "engage in the State in the business" to include the display of motor vehicles for the purpose of sale.

The question of whether a motor vehicle dealer *licensed* in the State of Iowa can be precluded from exhibiting at fairs in another county is a far closer case than out-of-state dealers exhibiting at the same show.

Since a motor vehicle dealer licensed to do business in Iowa can not do business at a fair or trade show in an adjoining county, an out-of-state dealer *not licensed* in Iowa should also not be allowed to do so.

It is our opinion that an out-of-state motor vehicle dealer not licensed to do business in Iowa would be precluded from displaying at fairs and vehicle shows in Iowa.

December 14, 1978

CONSTITUTIONAL LAW: SALES: MOTOR VEHICLES: FAIRS. §322.5 (1977) as amended by SF 2187 (Ch. 1113, §43) 67th G.A. (1978) and 820-10.2(4)(F) I.A.C. A statute which prohibits motor vehicle dealers from offering motor vehicles for sale at fairs and trade shows outside the county where their principal place of business is located is constitutional. (Hogan to Priebe, State Senator, 12-14-78) #78-12-8

Senator Berl E. Priebe: Reference is made to your letter of September 22, 1978, in which you state, "...it has recently been brought to my attention that some licensed Iowa motor vehicle dealers are prohibited from offering for sale and negotiating sales of new self-propelled motor vehicles at fairs and trade shows outside the county where their principal place of business is located...I request your opinion on whether the restriction found in the Code and departmental rules are constitutional."

Your inquiry involves §322.5 Code of Iowa, 1977, as amended by S.F. 2187, Acts of 67th G.A. (1978 Session) and 820-10.2(4)(F) I.A.C.

§322.5, as amended, provides in relevant part:

"...A motor vehicle dealer may display new motor vehicles at fairs, vehicle shows and vehicle exhibitions. Motor vehicle dealers, *in addition* to selling vehicles at their principal place of business and car lots, may, upon receipt of a temporary permit approved by the department, display and offer new motor vehicles for sale and negotiate sales of new motor vehicles only at county fairs ...vehicle shows and vehicle exhibitions which fairs, shows and exhibitions are approved by the department *and are held in the county* of the motor vehicle dealer's principal place of business...No sale of a motor vehicle by a motor vehicle dealer shall be completed nor any sales agreement signed at any such fair, show or exhibition. All such sales shall be consumated at the motor vehicle dealer's principal place of business...." (emphasis added)

820-10.2(4)(F) I.A.C. states "...Dealers may exhibit at state and county fairs and other community events...."

We are of the opinion that neither the statute nor administrative rule is violative of the United States or Iowa Constitution. (U.S. Constitution, Amend. XIV, Iowa Constitution, Art. 1 & 6)

If the statute does not involve a suspect class or fundamental right, the standard to be applied is whether it rationally furthers some legitimate state purpose. *San Antonio School District vs. Rodriquez,* 1972, 411 U.S. 1, 17, 362 L.Ed. 16, 93 S.Ct. 1278; *State vs. Wehde,* 1977, 258 N.W.2d 347. Traditionally this has not been a difficult standard for the government to meet.

Statutes are presumed to be constitutional and will not be declared invalid

unless they are clearly, palpably and without doubt infringe the constitution. *Lee Enterprises, Inc. vs. Iowa State Tax Commission,* 1968, 162, N.W.2d 730. If the constitutionality of a statute is merely doubtful or fairly debatable, the courts will not interfere. *Burlington S. Summit Apts. vs. Mandate,* 1957, 248 Iowa 15, 7 N.W.2d 26. All reasonable grounds upon which a statute may be held valid must be overcome before the statute will be declared unconstituional. *Collins v. State Board of Social Welfare,* 1957, 248 Iowa 369, 81 N.W.2d 4....

The regulation of motor vehicle dealers is a legitimate state interest. The State has an interest in whether the motor vehicles operating upon its highways are properly serviced and maintained and can properly legislate to facilitate the maintenance and repair procedures. The State also has an interest to see that buyers of motor vehicles are not misled nor defrauded. The rationale of the statute is to prevent a motor vehicle dealer from operating at trade shows or fairs when the dealer does not maintain a service facility in that area. Such a flooding of the area could create a strain on the capacity of the existing franchised service facilities.

The selection of a geographical classification by *county* for motor vehicle dealers is an acceptable classification. The Equal Protection clause relates to equality between persons rather than between areas. The statute and rule in question apply equally to all motor vehicle dealers in the state. In addition, the classification need not be ideal nor even the best classification. The classification will be upheld if any reasonable ground can be conceived to justify it. *Lundy vs. Vogelmann,* 1973 213 N.W.2d 904, 907.

In requiring that only *in-county* dealers be allowed to sell as well as exhibit at fairs and the shows, the statute protects against an influx of dealers who would be gone with the closing of the show or fair, leaving behind motor vehicles to be serviced by someone else. Local dealers will be expected to service them at their dealerships. In addition, in requiring the sales agreement to be consumated at the dealer's principal place of business, the statute allows consumers time to reflect on the provisions of sales agreement away from the fairs or shows *but* within the county.

S.F. 2187, Acts of 67th G.A. (1978 Session) and 820-10.2(4)(F) I.A.C. shows a sufficient nexus to a legitimate state interest and under the appropriate test of constitutionality do not deny equal protection of the law under the 14th Amendment of the U.S. Constitution or Art. 1 & 6 of the Iowa Constitution.

December 14, 1978

PHYSICIANS AND SURGEONS; DENTISTS: §§153.13, 153.15, 153.17, 153.34(5), 1977 Code of Iowa; Ch. 1097, §14, Acts 67th G.A. (1968); Art. III, §29 Iowa Constitution. Ch. 1097, §14, Acts, 67th G.A. (1968) has the effect of precluding the suspension or revocation of the license of a licensed dentist or dental hygienist for permitting an unlicensed person to perform work which constitutes the practice of dentistry under 153.13, 1977 Code of Iowa. However, the unlicensed person could still be charged with the unlawful practice of dentistry under §153.17, 1977 Code of Iowa. §14 of Ch. 1097, is not unconstitutional under Art. III, §29, Iowa Constitution, requiring the subject of an Act to be reasonably connected to its title. (Haskins to Doderer, State Senator, 12-14-78) #78-12-9

Ms. Minnette F. Doderer, State Senator: You asked our opinion as to the effect and constitutionality of Ch. 1097, §14, Acts 67th G.A. (1978) striking,

inter alia, subsection 5 of §153.34, 1977 Code of Iowa.[1] 153.34(5) states:

"The board shall suspend for a limited period or revoke the license and the last renewal thereof of any licensed dentist or any licensed dental hygenist for any of the following reasons:

* * *

"5. For conducting the practice of dentistry so as to permit directly or indirectly an unlicensed person to perform work which under this chapter can legally be done only by persons licensed to practice dentistry or dental hygiene in this state."

The clear effect of §14 of Ch. 1097 striking subsection 5 of §153.34 is to make unavailable as a ground for suspending or revoking the license of a licensed dentist or dental hygenist the fact that he or she permitted an unlicensed person to perform work which constitutes the practice of dentistry under §153.13, 1977 Code of Iowa or of dental hygiene under §153.15, 1977 Code of Iowa.[2]

You ask whether the striking of subsection 5 of §153.34 means that a dentist "may...delegate to an unlicensed person duties which constitute the practice of dentistry as defined in section 153.13, 1977 Code?" Put less broadly, the question is whether, in light of the statutory change, a licensed dentist or dental hygenist may have his or her license revoked for permitting an unlicensed person to perform work which constitutes the practice of dentistry as defined in Chapter 153. It is clear that he or she may not have his or her license suspended or revoked for doing so. This does not, of course, mean that the unlicensed person himself or herself may not be charged with the unlawful practice of

[1]Chapter 1097, §14, Acts 67th G.A. (1978) states:
"Section one hundred fifty-three point thirty-two (153.32), subsections one (1) through four (4), and sections one hundred fifty-three point thirty-four (153.34), subsections five (5), six (6), eight (8), and ten (10), Code 1977, are amended by striking those subsections."

[2]Section 153.13 states:
"For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of dentistry:
"1. Persons publicly professing to be dentists, dental surgeons, or skilled in the science of dentistry, or publicly professing to assume the duties incident to the practice of dentistry.
"2. Persons who treat, or attempt to correct by any medicine, appliance or method, any disorder, lesion, injury, deformity, or defect of the oral cavity, teeth, gums, or maxillary bones of the human being, or give prophylactic treatment of any of said organs."
Section 153.15 states:
"A licensed dental hygenist may perform those services which are educational, therapeutic, and preventative in nature which attain or maintain optimal oral health as determined by the board of dentistry and may include but are not necessarily limited to complete oral prophylaxis, application of preventative agents to oral structures, exposure and processing of radiographs, administration of medicants prescribed by a licensed dentist, obtaining and preparing nonsurgical, clinical and oral diagnostic tests for interpretation by the dentist, preparation of preliminary written records of oral conditions for interpretations by the dentist. Such services shall be performed under supervision of a licensed dentist and in a dental office, a public or private school, public health agencies, hospitals, and the armed forces, but nothing herein shall be construed to authorize a dental hygenist to practice dentistry."

dentistry or of dental hygiene under §153.17, 1977 Code of Iowa.[3] Indeed, he or she can be so charged, but no action can be taken against the license of a licensed dentist or dental hygenist for permitting the unlicensed person to perform work constituting the practice of dentistry or of dental hygiene.

You ask whether §14 of Ch. 1097 striking §153.34(5) is unconstitutional under Art. III, §29, Iowa Constitution, requiring the subject of an Act to be reasonably connected to its title. Art. III, §29, states:

"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 case of *Motor Club of Iowa v. Department of Transportation,* 265 N.W.2d 151, 153 Iowa (1976) sets forth the manner in which Art. III, §29, is to be interpreted as follows:

"Several well established principles quide our determination of plaintiff's challenge to the sufficiency of this title. Foremost is the principle that the constitutional provision is to be given a liberal construction to permit one act to embrace all matters reasonably connected with the subject expressed in the title and not utterly incongruous thereto. *Webster Realty Company v. City of Fort Dodge,* 174 N.W.2d 413, 418 (Iowa 1970). In addition:

" '[T]he title need not be indexed or opitome 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 *State v. Talerico*, 227 Iowa 1315, 1322, 290 N.W. 660, 663, (1940).'

"See Lee Enterprises, Inc. Iowa State Tax Commission, 162 N.W.2d 730, 737 (1968), and citations."

Section 14 of Ch. 1097 limits the grounds for suspension or revocation of the license of a licensed dentist or dental hygenist. The title of Ch. 1097 is:

"AN ACT making technical corrections and relating to chapter ninety-five (95) of the Acts of the Sixty-seventh General Assembly, 1977 session."

Chapter 95, Acts 67th G.A. (1977) provides for continuing education for health care and other professionals. However, it also contains many provisions relating to the discipline of such professionals, including dentists and dental hygenists. Section 14 limiting the power to discipline such professionals thus is reasonably related to Ch. 95. Section 14 of Ch. 1097 is therefore not subject to constitutional attack as not being reasonably connected to the title of Ch. 1097.

[3]Section 153.17 states:
"Except as herein otherwise provided, it shall be unlawful for any person to practice dentistry or dental surgery or dental hygiene in this state, other than:
"1. Those who are now duly licensed dentists, under the laws of this state in force at the time of their licensure; and
"2. Those who are now duly licensed dental hygenists under the laws of this state in force at the time of their licensure; and
"3. Those who may hereafter be duly licensed as dentists or dental hygenists pursuant to the provision of this chapter."

December 15, 1978

COUNTY AND COUNTY OFFICERS: County Sheriff—Special Deputies—Civilian Posse; Arrest—§§4.1(18) and 337.1, Code of Iowa, 1977. Special deputies and members of civilian posses summoned by a sheriff under §337.1, may perform every function the sheriff could perform, unless the sheriff expressly limits their duties and power. (Richards to Hullinger, State Representative, 12-15-78) #78-12-10

The Honorable Arlo Hullinger, State Representative: You have requested an opinion of the Attorney General concerning the scope of authority vested in members of a sheriff's posse and other special deputies. You specifically ask whether such persons may make arrests, issue traffic citations, and perform other law enforcement functions.

A sheriff's authority to appoint special deputies and form posses has been thoroughly discussed in prior opinions of the attorney general of September 18, 1972, and December 7, 1978. This authority derives from §§4.1(18) and 337.1, The Code. The latter section 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 state department of public safety in the apprehension of criminals and detection of crime." (Emphasis added).

Thus, the duties and power of special deputies are expressly delineated in §337.1: keeping the peace, preventing crime, arresting persons liable thereto, and executing process of law. In short, special deputies may perform every function the sheriff could perform, unless the sheriff expressly limits their duties and power. *See, State ex rel. Geyer v. Griffin,* 80 Ohio App. 447, 76 N.E.2d 294, 298 (1947).

Section 337.1 also allows a sheriff to summon "the power of the county," the *posse comitatus.* According to *Black's Law Dictionary* 1324 (Rev. 4th Ed. 1968), *posse comitatus* is "the entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases; as to aid him in keeping the peace, in pursuing and arresting felons, etc." *See,* 80 C.J.S. *Sheriffs and Constables* §34 (1953); 70 Am.Jur.2d *Sheriffs, Police and Constables* §30 (1973). Members of a sheriff's posse also may perform every function the sheriff could perform, unless the sheriff expressly limits their duties and power.

December 19, 1978

SCHOOLS: Merged Area school emloyees travel. Article VII, §1, Constitution of Iowa; §§91A.3, 279.29, 279.30, Code of Iowa, 1977. A merged area school is not authorized to make advance payments to employees for anticipated travel expense. (Nolan to Benton, Superintendent of Public Instruction, 12-19-78) #78-12-11

Superintendent Robert D. Benton, Department of Public Instruction: This letter is written in response to your letter requesting an opinion of this office on the following matter:

"Your opinion is requested on a question involving advance payment to employees of merged area schools for travel and other necessary expenses in conjunction with their employment. Chapter 279, The Code 1977, is made applicable to merged area schools by Section 280A.23, Subsection 4, to the

extent that the same subject matter is not contained in Chapter 280A. Article VII, Section 1 of the Constitution of the State of Iowa and Sections 279.29 and 279.30, The Code 1977, have been determined by the State Auditor in the past to prohibit the advance payment of reasonably anticipated travel expenses to employees traveling on official business.

"Section 91A.3, Subsection 6, requires employers to reimburse expenditures in advance or not later than thirty days after the employee's submission of an expense claim. It has been inferred by some persons that this provision of the Wage Payment Collection Law authorizes advance payments for travel allowances to employees of merged area schools.

"In your opinion, is a merged area school precluded by law from making advance payments to employees for reasonably anticipated travel and other expenses incurred in conjunction with their employment with the merged area school?"

Chapter 91A of the Iowa Code is a general statute which has application to employers in the State of Iowa both in the private and the public sector. The language of 91A.3(6) provides:

"Expenses by the employee which are authorized by the employer and *incurred* by the employee shall either be reimbursed in advance of expenditure or be reimbursed not later than thirty days after the employee's submission of an expense claim. If the employer refuses to pay all or part of each claim, the employer shall submit to the employee a written justification of such refusal within the same time period in which expense claims are paid under this subsection." [Emphasis supplied]

We believe that the crux of the question you have presented is whether the expenses involved in any particular case are merely "reasonably anticipated" or are in fact actually "incurred". A merged area school may only reimburse its employee the authorized expenses for which the employee has become liable and is thereby precluded for making advance payments to such employees for obligations which have not yet occurred. Article VII Sec. 1 of the Iowa Constitution provides:

"The credit of the State shall not, in any manner, be given or loaned to, or in aid of, any individual...and the State shall never assume, or become responsible for, the debts or liabilities of any individual...."

The Iowa Code sections to which your letter referred provide in pertinent part:

"§279.29. The board shall audit and allow all just claims against the corporation and no order shall be drawn upon the treasury until a claim therefore has been audited and allowed....

"§279.30. Each warrant shall be made payable to the person entitled to receive such money...."

To loan money to employees for travel would be in contravention of Article VII Sec. 1 of the Constitution where the employee is entitled by statute to claim reimbursement for travel. Accordingly, we concur with the view expressed by the State Auditor that travel advances to an employee are not permitted. This rule does not prohibit purchase of airline tickets or the payment of advance registration fees for conferences by the business office of an area school to be used by employees authorized to travel on school business. Nor does it preclude the school from chartering a bus or making similar travel expenditures on behalf of the school where appropriate.

December 19, 1978

COURTS: Court Records. §§606.21, 606.22, Code of Iowa, 1977. Court records which have been microfilmed may be destroyed upon order of the court 10 years after a decree or judgment entry is signed. Without such court order, the records cannot be destroyed until forty years after the disposition of the case. (Nolan to Hutchins, State Senator, 12-19-78) #78-12-12

Honorable C. W. Hutchins, State Senate: In response to your letter of April 3, 1978, the following two questions have been considered and the opinion of this office is rendered thereon.

"1. Chapter 606.21 states that, 'Original court files cannot be destroyed until the passage of ten years.' Would this also include probate files if they were microfilmed?

"2. Chapter 606.22 states that, 'probate records, and orders of court shall not be destroyed unless reproduced as in 606.20.' Does this mean that probate files must not be destroyed until after forty years at all, or can they be destroyed immediately upon microfilming?"

It is our view that original court files of probate records and orders of court may be destroyed after they are microfilmed upon the passage of ten years if a court order authorizing such destruction has been obtained by the clerk of court. Section 606.21 provides:

"After the clerk has reproduced the original records as authorized in 606.20, and upon the application of the clerk, a majority of the judges of the district court may order the clerk to destroy the original records, including, but limited to, dockets, journals, scrapbooks, files, and marriage license applications. Any order of the court authorizing destruction of any of the records referred to in this division shall state what records are to be destroyed.

"Original court files cannot be destroyed until passage of ten years after a decree or judgment entry is signed and entered of record and after the contents have been reproduced as authorized in §606.20, however, if the matter is dismissed with prejudice before judgment or decree the file may be destroyed one year from the date of the dismissal and after reproduction as authorized in §606.20."

Your second question refers to the forty year limitation which applies when a court order authorizing destruction has not been obtained. Section 606.22 of the Code provides:

"The following may be destroyed by the clerk without court order or reproduction of any kind:

"(1) All records including, but not limited to, dockets, journals, ...forty years after final disposition of the case. However, ...probate records, and orders of court shall not be destroyed unless they have been reproduced as provided in §606.20."

Accordingly, probate records which have been microfilmed may be destroyed upon court order ten years after the decree or judgment is signed and entered on the record and in the absence of such court order authorizing destruction of the original records no probate record shall be destroyed until the passage of forty years, even though they have been microfilmed.

December 19, 1978

USURY: Interest: Chapter 535, Code of Iowa, 1977, as amended. §535.2,

Code of Iowa, 1977, sets the rate of interest for late charge that can be assessed by a landlord against a tenant on overdue rent. (Garrett to Doyle, State Representative, 12-19-78) #78-12-13

Honorable Donald V. Doyle, State Representative: We are in receipt of your opinion request of October 20 concerning late payment penalties assessed by a landlord against a tenant.

You ask whether a late payment penalty assessed by a landloard against a tenant is subject to Chapter 535, 1977 Code of Iowa, the Iowa usury law. Section 535.2 of the Iowa Code, as amended, contains the general law regarding usury and interest rates. This law applies to all situations unless there is an exception created by another section of law. There are many exceptions to this provision but there is no exception regarding the leasing of real estate.

Section 535.2 as amended states:

"1. Except as provided in subsection 2 hereof, the rate of interest shall be five cents on the hundred by the year in the following cases, unless the parties shall agree in writing for the payment of interest at a rate not exceeding the rate permitted by subsection 3 of this section:

"* * *

"b. Money after the same becomes due.

"* * *"

Subsection two has to do with corporations, trusts and persons borrowing large amounts of money and is not applicable to your question. Subsection three sets the actual rate of interest and provides for a fluctuating rate to be announced by the superintendent of banking during each quarter of the year.

Your real question is not so much what rate this section allows, but rather whether or not the situation you describe is governed by the provisions of Chapter 535.

The late charges you describe clearly are subject to the provisions of Chapter 535, or particularly, §535.2. Rent that is overdue clearly falls under the category of "Money after the same becomes due."

To specifically answer your question then, a landlod may only assess a late charge to a tenant of 5% per year in the case of an oral rental agreement, and in the case of a written agreement for the payment of interest, the amount announced each quarter by the superintendent of banking as being the legal rate for written contracts.

December 19, 1978

COUNTIES: §§613A.1(3), 321.30, Code of Iowa, 1977. County may be liable to automobile purchaser for county treasurer's negligent misrepresentation on Motor Vehicle's Certificate of Title. (Miller to Schild, Poweshiek County Attorney, 12-19-78) #78-12-14

Mr. Donald L. Schild, Poweshiek County Attorney: You have requested an opinion of the Attorney General with reference to the issue of a county's liability to a remote purchaser of an automobile for erroneous information appearing on a certificate of title prepared by the county treasurer.

You state:

"1. Mr. A purchased an automobile, made "Application for Certificate of

Title and/or Registration for a Vehicle" in July, 1975. He listed the automobile as a 1975 Peugeot station wagon.

"2. The Z automobile dealership had sold the car to Mr. A providing odometer certification indicating that it was a 1974 automobile.

"3. The "Importers and Manufacturers statement of origin to a motor vehicle" indicated that the automobile was a 1974 Peugeot, four door wagon.

"4. Mr. A sold or traded the said automobile to car dealer B as a 1975 automobile.

"5. In December, 1976, car dealer B sold the automobile to Mr. C as a 1975 automobile.

"6. Mr. C alleges that the difference in average retail value between a 1974 and 1975 automobile at the time that Mr. C purchased the car was $925.00 (for our purposes assume that is correct).

"7. The Poweshiek County Treasurer's office indicates that their standard operating procedure is to check both the "Importers and Manufacturers statement of origin to a motor vehicle" and the "Application for Certificate of Title and/or Registration for a Vehicle" when preparing a "Certificate of Title and/or Registration for a Vehicle."

The remote purchaser's claim against the county would ultimately be based on the theory of "Negligent Misrepresentation" pursuant to the Municipal Tort Claims Act. Section 613A.4, Code of Iowa 1977. Courts have traditionally limited recovery for negligent misrepresentation to third party, to those situations where the third party was either in privity of contract or in a fiduciary relationship with the person making the misrepresentation. See, generally, Prosser, Torts §107 (4th ed 1971). This position was rejected in *Ryan v. Kanne,* 170 N.W.2d 395 (Iowa 1969).

In *Ryan v. Kanne,* the court held an accountant liable to third parties for the negligent preparation of accounting statements. The court stated that:

"It is unnecessary at this time to determine whether the rule of no liability should be relaxed to extend to all foreseeable persons who may rely upon the report, but we do hold it should be relaxed as to those who were actually known to the author as prospective users of the report and take into consideration the end and aim of the transaction. In other words, we believe the position announcement in the Restatement proposed draft may be accepted to the extent that it extends the right to recover for negligence to persons for whose benefit and guidance the accountant *knows the information is intended,* especially when the party to be benefited is identified before the statement or report is submitted by the accountant." *Ryan* at p. 403.

The trend in the law is clearly to extend the right of recovery to third party purchasers regardless of privity where, as in this case, the county treasurer knew or should have known that the information contained on the certificate of title is intended to be relied on by those purchasers. See *Freese v. Lemmon* 210 N.W.2d 576 (Iowa 1973). In *Freese,* Justice Uhlenhopp stated "the privity concept has been greatly weakened, if not completely scrapped, when circumstances exist from which it is apparent the wrongdoer should have anticipated reliance by a third party upon his conduct and which present facts making it manifestly unfair to allow him to escape responsibility for his negligence." (Concurring opinion at 581).

In *Durant-Wilton Motors, Inc. v. Tiffin Fire Ass'n,* 164 N.W.2d 829 (IA

1969), the court stated that the title and registration requirements of Chapter 321, "reveal a legislative purpose to prevent fraud in the purchase and sale of motor vehicles..." at p. 831. Since the purpose of the title and registration laws is to protect a limited class of remote purchasers, we are of the opinion that the county has a duty to these third party purchasers, and may be held liable to those purchasers who rely on erroneous information contained in the vehicle's title and registration to their detriment.

The county treasurer must exercise ordinary care under the circumstances and comply with any relevant statutory direction in preparing titles and registrations. *Lindquist v. Des Moines Union Ry. Co.*, 239 Iowa 356, 30 N.W.2d 120 (1948). Section 321.30, Code of Iowa, 1977 states:

Grounds for refusing registration or title. The treasurer shall refuse registration and issuance of a certificate of title or any transfer of title and registration upon any of the following grounds:

1. That the application contains any false or fraudulent statement or that the applicant has failed to furnish required information or reasonable additional information requested by the department or that the applicant is not entitled to registration and issuance of a certificate of title of the vehicle under this chapter.

* * *

7. If application for registration and certificate of title for a new vehicle is not accompanied by a manufacturer's or importer's certificate duly assigned.

It is, therefore, incumbent on the treasurer to make certain that the information appearing on the application is correct, as evidenced by the manufacturer's or importer's certificate, prior to the issuance of a certificate of title or registration.

From your fact situation it appears that the county treasurer failed to cross check and verify the year of manufacture on the "Importers and Manufacturers' Statement of Origin" with that contained on the "Application." Accordingly, we are of the opinion that Poweshiek County may be liable to the purchaser of an automobile who suffered damages due to his detrimental reliance upon erroneous information appearing on a certificate of title caused by the county treasurer's negligence.

December 19, 1978

COUNTIES: Board of Health. §§136.20, 24.25(3), 33.21, Code of Iowa, 1977. County board of health is not required to disclose to board of supervisors the names of all persons receiving public health nursing services. (Nolan to Bauercamper, Allamakee County Attorney, 12-19-78) #78-12-15

Mr. John J. Bauercamper, Allamakee County Attorney: You have requested an Attorney General opinion on the following:

"Must a County Board of Health disclose the names of all persons receiving public health nursing services from nurses employed by that board, to the Board of Supervisors?"

Your letter advises that the Board of Health provides the Board of Supervisors with summaries and statistical information regarding the number and type of nursing services rendered but omits the names of the persons served. Under §137.7 Code of Iowa (1977) a County Board of Health (therein

designated "local board") is empowered to do the following:

"1. May provide such personal and environmental health services as may be deemed necessary for the protection and improvement of the public health.

* * *

"3. May charge reasonable fees for personal health services. No person shall be denied necessary services within the limits of available personnel because of inability to pay the cost of such services."

Funding for Board of Health activities is obtained "from federal appropriations, from local taxation, from licenses, from fees for personal services, or from gifts, grants, bequests, or other sources" which are deposited in the local health fund. Code §136.20 provides:

"Board of Supervisors of any county may appropriate from the county general fund for the purpose of providing local health services. The county appropriation shall not exceed the statutory limitation found in chapter 444. Monies appropriated for this purpose shall be deposited in the local health fund as specified in §137.18."

In order to qualify for county appropriation the provisions of the local budget law and particularly §24.25 must be observed. Subsection 3 of this section provides that the Board of Supervisors in the appropriation of the county budget "shall have authority to consult with any such county officer or board concerning his budget estimates and requests and to adjust the budget requests for any such county office or department."

We do not interpret §24.25(3) to require an affirmative answer to the question you presented. Nor do we find such requirement is imposed under §331.21 of the Code which provides:

"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 payments thereof refused or neglected."

The County Health Board is a county agency. It is not like the community mental health centers which submit claims to the county for services rendered pursuant to contract. These community mental health centers previously could be required to submit the names of individuals for whose benefits the services were rendered. (1978 O.A.G. 78-2-6, February 9, 1978). However, since that opinion was rendered, the Iowa Legislature has amended 230A.9 relating to community mental health centers by providing that the identity of persons treated at a community mental health center is not to be required if the center's budget has been approved by the county board of supervisors and the center complies with statutory standards. Chapter 1087, §12, Acts of the 67th G.A., 1978 Session.

The foregoing provision is consistent with the general public purpose expressed in §688.7(2) to keep confidential medical records of the care or treatment of the patient. Accordingly, it is our view that the County Board of Health cannot be required to disclose to the Board of Supervisors the names of all persons receiving public health nursing services from nurses employed by that

Board.

December 19, 1978

STATE OFFICERS AND DEPARTMENTS: State Building Code. — §§4.3, 103A.7, 103A.10, 103A.12, 103A.19, and 380.10, Code of Iowa, 1977. Governmental subdivisions have the responsibility to enforce their building codes. Amendments to the State Building Code are applicable in those governmental subdivisions which have accepted the applicability of the State Building Code. (Blumberg to Appell, State Building Code Commissioner, 12-19-78) #78-12-16

Mr. Donald W. Appell, Building Code Commissioner, Office of Planning and Programming: You have requested an official opinion on the State Building Code. You ask:

1. If a governmental subdivision adopts a building code, are they also required to perform inspections?

2. Once a governmental subdivision has accepted the application of the State Building Code, do revisions and changes automatically become effective in those subdivisions?

We will take your questions in reverse order.

Chapter 103A, 1977 Code of Iowa, establishes the State Building Code. Section 103A.7 provides that the Commissioner is empowered and directed to formulate, adopt and amend or revise rules which are the building code. Pursuant to §103A.10, the State Building Code shall be applicable in each governmental subdivision where the governing body has adopted a resolution accepting the application of the Code. Section 103A.12 provides:

The state building code shall be applicable in each governmental subdivision of the state in which the governing body has adopted or enacted a resolution or ordinance accepting the applicability of the code and shall have filed a certified copy of the resolution or ordinance in the office of the secretary of state. The state building code shall become effective in the governmental subdivision upon the date fixed by the governmental subdivision resolution or ordinance, if the date is not more than six months after the date of adoption of the resolution or ordinance.

A governmental subdivision in which the state building code is applicable may by resolution or ordinance, at any time after one year has elapsed since the code became applicable, withdraw from the application of the code, if before the resolution or ordinance shall be voted upon, the local governing body shall hold a public hearing after giving not less than twenty nor more than thirty days' public notice, together with written notice to the commissioner of the time, place, and purpose of the hearing. A certified copy of the vote of the local governing body shall be transmitted within ten days after the vote is taken to the commissioner and to the secretary of state for filing. The resolution or ordinance shall become effective at a time to be specified therein, which shall be not less than one hundred eighty days after the date of adoption. Upon the effective date of the resolution or ordinance, the state building code shall cease to apply to the governmental subdivision except that construction of any building or structure pursuant to a permit previously issued shall not be affected by the withdrawal.

A governmental subdivision which has withdrawn from the application of

the state building code may, at any time thereafter, restore the application of the code in the same manner as specified in this section.

The main issue you have raised is whether, when something has been adopted by reference, all amendments and changes to it are applicable. There is no doubt that cities can adopt codes or standards by reference. See, §§103A.12 and 380.10 of the Code. The majority of case law, however, concerns the adoption of statutes by reference. In 82 CJS *Statutes* §70 (1953), it is stated (at page 124):

Future provisions. Reference adopting future provisions of acts of congress by states is invalid, but the act may nevertheless be valid in so far as it purports to adopt existing laws. State statutes which provide primary standards may, for the purpose of filling in details, validly adopt by reference codes subsequently to be formulated and issued by federal executive authority. When there is no constitutional inhibition against it, a reference to other laws of the state may subsequently be enacted is not objectionable.

In the same volume, under §370, it is stated (at pages 847-878):

Effect of modification of adopted statute. The question whether one statute absorbing or incorporating be proper reference provisions of another will be affected by amendments made to the latter is one of legislative intent and purpose. As a rule the adoption of a statute by reference is construed as an adoption of the law as it existed at the time the adopting statute was passed, and, therefore, is not affected by any subsequent modifications of the statute adopted unless an intention to the contrary is clearly manifested, but, where the legislative intent to do so clearly appears, the adopting statute will include subsequent modifications of the original act.

A well-established exception to, or qualification of, the general rule exists where the reference in an adopting statute is to the law generally which governs the particular subject, and not to any specific statute or part thereof; in such case the reference will be held to include the law as it stands at the time it is sought to be applied, with all the changes made from time to time, at least as far as the changes are consistent with the purpose of the adopting statute.

It can also be said that this issue is one of delegation of legislative authority. However, it has been held that courts are willing to approve a broader delegation of discretionary authority where public safety is significantly involved. *See,* 1 F. Cooper, State Administrative Law 63-64 (1965).

Generally, when a statute adopts the general law on a particular subject rather than a specific statute, it adopts the existing law in addition to later changes. When a state adopts a specific statute or section, it only adopts the existing law. *State v. District Court (Delaware County),* 1962, 253 Iowa 903, 114 N.W.2d 317. Section 4.3, Code of Iowa, changed the latter part of the above statement, and provides:

Any statute which adopts by reference the whole or a portion of another statute of this state shall be construed to include subsequent amendments of the statute or the portion thereof so adopted by reference unless a contrary intent is expressed.

Thus, the rule in Iowa is now that the adoption by reference of either a specific statute or the general law on a subject includes future amendments. However, since §4.3 refers only to a statute of this state, a question still exists as to which concept is applicable when a statute of another state or the Federal Government

is adopted by reference.

In *Palermo v. Stockton Theaters,* 1948, 32 Cal. 2d 53, 195 P. 2d 1, 5, it was held:

It is a well established principle of statutory law that, where a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified, and that the repeal of the provisions referred to does not affect the adopting statute, in the absence of a clearly expressed intention to the contrary....

This principle applies to the adoption of a statute of another jurisdiction... and inasmuch as treaties have the force and effect of federal statutes (52 Am.Jur. §§4, 17, pp. 807, 815), it [ ] [seems reasonable to hold] that it applies to a treaty to the same extent that it would to an act of Congress.

It also [ ] [must] be noted that there is a cognate rule, recognized as applicable to many cases, to the effect that where the reference is general instead of specific, such as a reference to a system or body of laws referred to not only in their contemporary form, but also as they may be changed from time to time, and (it may be assumed although no such case has come to our attention) as they may be subjected to elimination altogether by repeal. [citations omited]

See also, *Fireman's Benevolent Association v. City Council,* 1959, 168 Cal. App 2d 765, 336 P. 2d, 273, 275; *Harrington v. Albedo,* 1977, 140 Cal. Rptr. 294, 72 Cal. App. 3d 705; *State v. Buckingham,* 1938, 58 Nev. 340, 80 P. 2d 910, 913; *In Re Sullivan,* 219 So. 2d 346, 354 (Ala. 1969); *Carruba v. Meeks,* 150 So. 2d 195, 198, (Ala. 1963); *State v. Smith,* 189 So. 2d 846, 847 (Fla. 1966); *Turner v. Missouri-Kansas-Texas R. Co.,* 1940, 346 Mo. 28 142 S.W.2d 455, 458.

The Connecticut Court stated a similar rule in *Legal v. Adorno,* 1951, 138 Conn. 134, 83 A. 2d 185, 194, but added an exception:

Answer is found in the thoroughly established principle of statutory construction which has been thus summarized: "As a general rule, the subsequent modification or repeal of a statutory provision adopted by another statute through incorporation by reference is inoperative so far as the adopting statute is concerned, in the absence of expressed or implied legislative intent to the contrary. Where a particular statute is incorporated into another statute by specific or descriptive words, the presumption is that the legislature did not intend that modification or repeal of the adopted statute should affect the adopting statute." Note, 168 A.L.R. 627, 636. Of the great number of authorities which could be cited to substantiate this proposition, we mention only a few. In these, the reason given is that, subject to the qualification discussed in the next paragraph, the adoption of a statute by specific reference is an adoption of the law as it existed at the time the adopting statute was passed, and the adopting statute is therefore not affected by any subsequent modification or repeal of the statute adopted. Thus, the Supreme Court of the United States as early as 1838 stated: "And such adoption has always been considered as referring to the law existing at the time of adoption; and no subsequent legislation has ever been supposed to affect it. And such must necessarily be the effect and operation of such adoption. No other rule would furnish any certainty as to what was the law; and would be adopting prospectively, all changes that might be made in the law." *Kendall v. United States ex rel. Stokes,* 12 Pet.

524, 625, 9 L. Ed. 1181....

However, as is suggested in the first sentence of the first quotation in the preceding paragraph, *the presumption that the legislature did not intend that modification or repeal of the adopted statute should affect the adopting state does not prevail where either an express or implied intention to the contrary clearly appears.* Among cases so holding are *Ramish v. Hartwell,* 126 Cal. 443, 446, 58 P. 920; *Vallejo & N.R. Co. v. Reed Orchard Co.,* 177 Cal. 249, 254, 170 P. 426; and *Haas v. Commissioner of Lincoln Park,* 339 Ill. 491 500, 171 N.E. 526. See note, 168 A.L.R. 630. Such intention may appear as incident to the passage of the adopting statute. *Vallejo & N.R. Co. v. Reed Orchard Co.,* supra; *Ramish v. Hartwell,* supra; *Haas v. Commissioners of Lincoln Park,* supra. Or it may appear in the enactment of the statute modifying or repealing the adopted statute. State ex rel. *Washington-Oregon Investment Co. v. Dobson,* 169 Ore. 546, 551, 130 P. 2d 939; *Martin v. Stumbo,* 282 Ky. 793, 797, 140 S.W.2d 405; *O'Flynn v. Village of East Rochester,* 292 N.Y. 156, 161, 54 N.E.2d 343. In ascertaining whether such a contrary intention has affected the validity of the incorporation of §2859 into §1 of the bond act, it must be remembered that where, as here, the adopting statute is one of specific reference, only the appropriate parts of the statute referred to are taken. 2 Sutherland, Statutory Construction (3d Ed.) p. 549; *State v. Board of County Commissioners,* 83 Kan. 199, 203, 110 P. 92. The concrete question, therefore, is whether the incorporation by reference into §1 of the bond act of so much of §2859 as was necessary to designate the committee referred to continues as a part of the former, notwithstanding the subsequent repeal of the latter, for lack of expressed or implied intention to the contrary either in the adoption of §1 of the bond act or on the repeal of §2859 by §18 of the act establishing a public works department. [Emphasis added]

See also, *State v. Dobson,* 1942, 169 Or. 546, 130 P.2d 939, 941; *Howard v. State,* 1954, 223 Ark. 634, 267 S.W.2d 763, 764; *Simmons v. State,* 1971, 160 Conn. 492, 280 A.2d 351, 354; *Weigel v. Planning and Zoning Commission of Town of Westport,* 1971, 160 Conn., 329, 78A.2d 766; *Hartford Electric Light Company v. Sullivan,* 1971, 161 Conn. 145, 285 A.2d 352.

In *Seale v. McKennon,* 336 P.2d 340, 345 (Or. 1959), a case dealing with a legislative direction for an agency to adopt federal rules, the pronouncement in *Palermo v. Stockton Theater,* supra, was used, and it was then stated, citing to *Palermo* and quoting from *Santee Mills v. Query,* 122 S.C. 158, 168, 115 S.E.2d 202, 205:

"While the language used with respect to said 'rules and regulations' is perhaps broad enough to cover future rules and regulations. in the absence of a clear indication of a different intention, it will be presumed that it was the intent of the lawmakers to restrict the application of the statutory provision in question to the legitimate field of legislation*** [citing authorities], and that the rules and regulations thus adopted by reference were those in force at the time of the approval of the act.***"

We believe, from a reading of Chapter 103A, that the Legislature intended future amendments to the State Building Code to be automatically applicable in those governmental subdivisions which adopted the Code. Pursuant to §103A.12, when a subdivision adopts the State Building Code, it must do so by resolution or ordinance, and then file a certified copy of the same with the Building Code Commissioner and the Secretary of State. Pursuant to that same section, the only manner in which a subdivision may withdraw from the

application of the State Building Code is if, after a year has elapsed since its applicability, a public hearing is held, and a resolution or ordinance on the same is voted upon. The certified copy of the vote must be filed with the State Building Code Commissioner and the Secretary of State. That resolution or ordinance shall not become effective for at least six months. To hold otherwise would mean that every time the State Building Code is amended, it no longer is applicable in a subdivision that has adopted it. If that were the case, the Legislature would not have set forth such an elaborate procedure for withdrawing from the applicability of the State Building Code.

It can also be said that what the subdivisions are doing is merely indicating an intent to have the State Building Code apply to that government, rather than adopting it by reference. If that is the case, subsequent amendments to it would automatically be applicable. In either event, the result is the same.

Your other question deals with the duty of a governmental subdivision to enforce a building code by inspections. You do not limit your question to the State Building Code. Section 103A.19 provides in pertinent part:

The examination and approval or disapproval of plans and specifications, the issuance and revocation of building permits, licenses, certificates, and similar documents, the inspection of buildings or structures, and the administration and enforcement of building regulations shall be the responsibility of the governmental subdivisions of the state and shall be administered and enforced in the manner prescribed by local law or ordinance. All provisions of law relating to the administration and enforcement of local building regulations in any governmental subdivision shall be applicable to the administration and enforcement of the state building code in the governmental subdivision.

The remainder of that section deals with the administration and enforcement of the State Building Code in the governmental subdivisions. There, they *may* examine and approve plans, require compliance with the State Building Code, order remedies, issue certificates and the like. We interpret this last part of §103.19 to be applicable to those governmental subdivisions where the State Building Code is applicable to buildings within its jurisdiction.

In 1976 OAG 362, we held that local officials had no duty to inspect State Buildings for compliance with the State Building Code. This was not meant to imply that they have no duty to enforce the State Building Code if it is applicable in their subdivision.

Section 103A.19 appears to be broken down into two parts. The first, quoted above, seems to apply to all building regulations, and requires the governmental subdivisions to be responsible for the examination; approval or disapproval of plans; the issuance or revocation of permits; the inspection of buildings; and, the administration and enforcement of building regulations. The second part appears to be applicable to the State Building Code. Thus, it can be said that all governmental subdivisions shall enforce the building regulations applicable therein. For further support of this, see 7 E. McQuillen, *Municipal Corporations,* §24.554 (3rd Ed. 1968), wherein it is stated: "Unquestionably it is the official duty of city officials charged with the responsibility of administering and enforcing municipal building codes and ordinances to discharge that responsibility faithfully...." As a caveat to that, it is also stated therein that courts will not interfere with their exercise of discretion, except for an abuse thereof, and that mandamus will not lie to compel a city to enforce building regulations. Also, neglect to enforce the detailed provisions of a building code

creates no civil liability to individuals. In support of this last statement McQuillen cites to *Meadows v. Village of Meniola,* 1947, 190 Misc. 815, 72 N.Y.S. 2d 369; and, *Rivera v. Amsterdam,* 1958, 5 A.D.2d 637, 174 N.Y.S.2d 530. Similar holdings have been made in other New York cases. See, *Stranger v. New York State Electric & Gas Corporation,* 1966, 25 A.D.2d 169, 268 N.Y.S.2d 214; *Speigler v. City of New Rochelle,* 1963, 19 A.D.2d 751, 243 N.Y.S. 74; and *Motyka v. City of Amsterdam,* 1965, 15 N.Y.2d 134, 204 N.E.2d 635. See also the dissent in *Sanchez v. Village of Liberty,* 1975, 49 A.D.2d 507, 375 N.Y.S.2d 901. In *Meisner v. Healey,* 1963, 18 A.D.2d 368, 239 N.Y.S.2d 352, it was held that a city's failure to enforce an ordinance is not actionable. We have not found any recent Iowa cases on this subject. Nor, is the resolution of this issue necessary in order to answer your question.

Accordingly, we are of the opinion that governmental subdivisions have the responsibility to enforce their building codes. Amendments to the State Building Code are applicable in those governmental subdivisions which have accepted the applicability of the State Building Code.

December 21, 1978

STATE OFFICERS AND DEPARTMENTS: Center for Industrial Research and Service (CIRAS) of Iowa State University; Appropriations, use for public purposes. Article IV, §4, Constitution of the United States; Article III, §31, Constitution of Iowa; §8.38, Code of Iowa, 1977. It is improper for CIRAS to spend public funds to make and disseminate an audio visual presentation designed to promote legislation aimed at furthering the interests of manufacturers by limiting their liability for defective products as such expenditure is not for a public purpose. (Haesemeyer to Jesse, State Representative, 12-21-78) #78-12-17

The Honorable Norman C. Jesse, State Representative: Reference is made to your letter of December 19, 1978, in which you request an opinion of the Attorney General and state:

"Is the production and dissemination by a State funded agency, CIRAS, of audio visual presentations 'Product Liability Crisis in Iowa', created for the purpose 'to educate the people for the need of tort reform in Iowa', a proper, i.e., for a 'public purpose', expenditure of State funds?"

CIRAS is the Center for Industrial Research and Service, a part of the University Extension of Iowa State University.

Article IV, §4 of the United States Constitution provides:

"[t]he United States shall guarantee to every State in this Union a Republican Form of Government... ."

Taxation for a private purpose is prohibited since a Republican form of government forbids the raising of taxes for anything but a public purpose. *Heimeral v. Ozaukee County,* 256 Wis. 151, 40 N.W.2d 564, 567 (1949).

Article III, §31, Constitution of Iowa, provides that "...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." This does not mean, however, that merely by reason of the fact that a particular appropriation happens to have been passed by two-thirds vote, it may be used for private purposes unless such private purpose is expressed in terms in the appropriation measure. *Dickinson v. Porter,* 31 N.W.2d 110 (Iowa 1948). Thus, it is clear

that as a general rule no appropriation shall be made for other than a "public purpose".

Section 8.38, Code of Iowa, 1977, provides, in part, that:

"[n]o state department, institution, or agency, or any board member, commissioner, director, manager, or other person connected with any such department, institution, or agency, shall expend funds or approve claims in excess of the appropriations made thereto, nor expend funds for any purpose other than that for which the money was appropriated, except as otherwise provided by law."

Thus, no state funds or appropriations may be expended for any other purpose than for which they were made and since the purpose of all appropriations is a "public purpose" no appropriations may be expended for anything but a "public purpose". Accordingly, under the foregoing closely interrelated constitutional and statutory provisions, public funds derived from taxation may be spent *only* for a public purpose.

The phrase "public purpose" has been defined by many courts. In Iowa, the Supreme Court has stated that our state constitution makes no attempt to define what is a public purpose nor have the Iowa courts adopted any inflexible definition. *Dickinson v. Porter,* 35 N.W.2d 66, 80 (Iowa 1948). The Iowa Supreme Court has held that the determination of such a question inheres largely in the legislative power. *Dickinson, supra,* at page 80, See also, *Graham v. Worthington,* 146 N.W.2d 626, 635 (Iowa 1966). The only real guidance the Iowa Supreme Court gives concerning the definition of "public purpose" is a citation to *Words and Phrases.* Other jurisdictions have defined the phrase "public purpose" as follows:

"A 'public purpose' is such activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government. ***The mere fact that some private interest may derive an incidental benefit from the activity does not deprive the activity of its public nature if its primary purpose is public. On the other hand, *if the primary object is to promote some private end, the expenditure is illegal, although it may incidentally also serve some public purpose." Port Authority of City of St. Paul v. Fisher,* 132 N.W.2d 183, 192 (Minn. 1964). (Emphasis in opinion)

See also, *City of Pipestone v. Madsen,* 178 N.W.2d 594, 599 (Minn. 1970):

"The paramount test should be whether the expenditure confers a direct public benefit of a reasonably general character, that is to say a significant part of the public, as distinguished from a remote and theoretical benefit. ***Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare." *Opinion of the Justices,* 208 N.E.2d 823, 826 (Mass. 1965).

"However beneficial in any general or popular sense it may be that private interests should prosper and thus incidentally serve the public, the expenditure of public money to this end is not justified." *Opinion of the Justices,* 98 N.E. 611, 612 (Mass. 1912).

"The concept of public purpose is a broad one. Generally speaking, it connotes an activity which serves as a benefit to the community as a whole, and which, at the same time is directly related to the function of government." *Roe v. Kervick,* 42 N.J. 191, 199 A.2d 834, 842, (1964).

"As a general rule a public purpose has for its objective the promotion of public health, safety, morals, general welfare, security, prosperity, and

contentment of all inhabitants, residents, or at least a substantial part thereof. Legislation does not have to benefit all of the people in order to serve a public purpose." *Anderson v. Baehr,* 217 S.E.2d 43, 47 (S.C. 1975).

We have listened to and viewed the audio visual presentations produced and disseminated by CIRAS ostensively for the purpose "to educate the people for the need of tort reform in Iowa" and have examined the script used in connection therewith. Of course the fundamental question is whether or not this is a public purpose. If it is not, the use of state funds in the production and dissemination of such audio visual presentations is improper and illegal. On the other hand, if the production and dissemination of these presentations were for a bona fide public purpose within the guidelines laid down above, then the expenditure of state funds therefor would be proper.

While it has been stated that the underlying purpose of the presentations is to educate the people of the need for tort reform it appears to us from our examination of the same that the real purpose is to lobby the people of Iowa as to the desirability of legislation drastically curtailing their rights to recovery for damages they may suffer from defective products. Moreover, the presentations on their face appear to further and promote the interests of private industry through reduction of product liability insurance premiums rather than benefiting the public interest as a whole.

The 1912 Massachusetts court opinion states succinctly that:

"[h]owever beneficial any general or popular sense it may be that private interests should prosper and thus incidentally serve the public, the expenditure of public money to this end is not justified." *Opinion of the Justices,* 98 N.E. 611, 612 (Mass. 1912).

In order to fall within the concept of a public purpose, the activity must serve as a benefit to the community as a whole and, at the same time, directly relate to the functions of government. The CIRAS audio visual presentations do not appear to serve as a benefit to the community as a whole nor do they at the same time appear to be directly related to the function of government. The presentations appear to be a lobbying effort by private manufacturers, through an arm of the State, CIRAS. Expenditure of funds for such purpose is clearly improper. The activities of CIRAS in the production and dissemination of the audio visual presentations "Product Liability Crisis in Iowa" do not fall within any of the definitions cited for "public purpose". It is my conclusion that the expenditure of State funds in the production and dissemination of the audio visual presentations was improper.

If said audio visual presentations had been "educational", i.e., objective in nature and presented all sides of the issue of defective products liability, the production and dissemination of said materials might well have been within the definition of "public purpose".

However, on the basis of what we have seen, it is our opinion that the CIRAS effort in behalf of legislation limiting the public's right to full compensation for injuries sustained as a result of defective products is not within the public interest and is therefore improper and illegal.

December 21, 1978

JUDICIAL NOMINATING COMMISSIONS: State and District. Iowa Constitution Amendment 21, Article V, §§15, 16, 18; Chapter 28A, Code of Iowa, 1977, Chapter 17A, §§17A.1(2), 17A.2(7), 17A.2(2), 17A.12, 17A.19,

Code of Iowa, 1977; §§46.1 and 46.2, Code of Iowa, 1977. State and District Judicial Nominating Commissions were created and authorized by amendments to the Iowa Constitution not by statutes of the State of Iowa and therefore are not subject to the open meetings law or the Iowa Administrative Procedure Act. (Murray to Beckman and Tinley, Members, State and District Judicial Nominating Commissions, 12-21-78) #78-12-18

Mr. Harold T. Beckman, Member, State Judicial Nominating Commission; Mr. Emmet Tinley, Member, Fourth Judicial District Nominating Commission: You have requested an opinion with respect to the following:

"Does Chapter 28A of the Iowa Code, commonly known as the 'Open Meetings Law' apply to Judicial Nominating Commissions?"

"Does Chapter 17A of the Iowa Code, commonly known as the Iowa Administrative Procedures Act, apply to the Judicial Nomintating Commissions?"

Iowa Code Section 28A.1(1) effective January 1, 1979, provides that the Open Meetings Law applies to:

"Any board, counsel, or commission *created* or *authorized* by the *statutes* of this State." (Emphasis added)

The Judicial Nominating Commissions were not created or authorized by the Statutes of the State of Iowa. Rather, they were created and authorized by the 21st Amendment to the Iowa Constitution, Article V, §16, paragraphs 1 and 2, which provide:

There shall be a State Judicial Nominating Commission. Such commission shall make nominations to fill vacancies in the Supreme Court. Until July 4, 1973, and thereafter unless otherwise provided by law, *the State Judicial Nominating Commission shall be composed and selected as follows:* There shall be not less than three or more than eight appointive members, as provided by law, and an equal number of elective members on such Commission, all of whom shall be electors of the state. The appointive members shall be appointed by the Governor subject to confirmation by the Senate. The elective members shall be elected by the resident members of the bar of the state. The judge of the Supreme Court who is senior in length of service of said Court, other than the Chief Justice, shall also be a member of such Commission and shall be its Chairman.

There shall be a District Judicial Nominating Commission in each judicial district of the state. Such commissions shall make nominations to fill vacancies in the District Court within their respective districts. Until July 4, 1973, and thereafter unless otherwise provided by law, *District Judicial Nominating Commissions shall be composed and selected as follows:* There shall be not less than three nor more than six appointive members, as provided by law, and an equal number of elective members on each such commission, all of whom shall be electors of the district. The appointive members shall be appointed by the Governor. The elective members shall be elected by the resident members of the bar of the district. The district judge of such district who is senior in length of service shall also be a member of such commission and shall be its chairman. (Emphasis added)

Thus, with the passage of the 21st Amendment to the Iowa Constitution, there was created constitutionally mandated entities, vacant in incumbency. Cf. *State v. Birdsall,* 186 Ia. 129, 133 (1919):

In each case we have above set forth in support of the proposition that the creation of an office creates a temporary vacancy in its incumbency which may be filled by appointment of the governor, the office under consideration was

created by an act of the legislature. *Its creation was complete, and subject to no contingency. There was presented, therefore, an office complete in its creation, but vacant in its incumbency.* In the case at bar, such is not the situation confronting us. The legislature did not create a municipal court for the city of Waterloo. It did enact legislation whereby cities of such class could create municipal courts by complying with certain prerequisites." (Emphasis added)

Nor can it be said that those provisions of Chapter 46 of the Iowa Code relative to the Judicial Nominating Commissions create or authorize them. Rather, they merely describe the mechanics of appointment and selection. Code §46.1 provides:

"The governor shall appoint, subject to confirmation by the senate, one eligible elector of each congressional district *to the State Judicial Nominating Commission* for a six-year term beginning July 1. The terms of no more than three nor less than two of such members shall expire within the same two-year period." (Emphasis added)

Similarly, Code §46.2 provides:

"The resident members of the bar of each congressional district shall elect one eligible elector of such district *to the State Judicial Nomintating Commission* for a six-year term beginning July 1." (Emphasis added)

Thus, the express language of Code §§46.1 and 46.2 clearly refers to pre-existing commissions.

Insofar as the second question is concerned, does Chapter 17A of the Iowa Code apply to State and District Judicial Nominating Commissions, it is our opinion that it does not. While we recognize that Iowa Code §17.2(1) defines "agency" as

"...each board, commission, department, officer or other administrative office, or unit of the State. 'Agency' does not mean the General Assembly, the courts, the governor or a political subdivision of the State of its offices and units."

and as such does not explicitly exempt bodies subordinate to and distinct from the courts, the governor or the General Assembly, the doctrine of "separation of powers" would seem to preclude application of §17A of the Iowa Code, including its rule making requirements, to the Judicial Nominating Commissions. See for example, the case cited by Professor Bonfield in his article, The Iowa Administrative Procedure Act, 60 Law Rev. 731, 761 (1975), *State ex rel. Sholes v. University of Minnesota,* 54 N.W.2d 122, 126 (Minn. 1952), an action to compel the Board of Regents of the University of Minnesota to adopt certain rules and regulations. The court relied heavily upon the distinction between the Board and an administrative agency:

The board of regents of the university is much more than that. It is a body corporate, created by our constitution and endorsed by it with the power to govern the institution which it controls, *free from interference by either legislature or the courts so long as it stays within the scope of its constitutional powers.* An administrative agency, on the other hand, is given life by the legislature. Its powers and duties are prescribed by the legislature. As it is created, so may it be destroyed. Its powers may be curtailed or enlarged by legislative action. The legislature has no such power over the board of regents of our university. Its charter may be amended only by action of the people. (Emphasis added)

Furthermore, the Judicial Nominating Commissions do not perform

functions covered by the Iowa Administrative Procedure Act. Chapter 17A. The sole function of the Judicial Nominating Commissions is explained in Article V, §16 of the Iowa Constitution which provides that the sole function of the Judicial Nominating Commissions is to make nominations to fill vacancies in the courts. While Chapter 17A does not expressly exempt the Judicial Nominating Commissions, one would be hard pressed to find the function of the Judicial Nominating Commissions within the meaning or purpose of the Iowa Administrative Procedure Act. Iowa Code §17A.1(2) provides in part:

...This chapter is meant to apply to all rulemaking and contested case proceedings and all suits for the judicial review of agency action that are not specifically excluded from this chapter or some portion thereof by its express terms or by the express terms of another chapter.

The purposes of the Iowa Administrative Procedure Act are: to provide legislation oversight of powers and duties delegated to administrative agencies; to increase public accountability of administrative agencies; to simplify government by assuring a uniform minimum procedure to which all agencies will be held in the conduct of their most important functions; to increase public access to governmental information; to increase public participation in the formulation of administrative rules; to increase the fairness of agencies in their conduct of contested case proceedings; and to simplify the process of judicial review of agency action as well as increase its case and availability.

Clearly, the Judicial Nominating Commissions have no authority to make rules, much less be required to follow the procedures in the Iowa Administrative Procedure Act for the publication of them. As their sole function is the nomination of individuals whose qualifications are prescribed in the Iowa Constitution, Article V, §18, their activities do not fall within Chapter 17A.2(7)'s definition of "rule" ...means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that defines organization, procedure, or practice requirements of any agency.

Nor can it be said that the function of the Judicial Nominating Commissions can give rise to a "contested case" proceeding, as such proceedings are adversarial in nature, see Code §17A.2(2), §17A.12. Nor is there any basis for "judicial review" of nominations of individuals to fill vacancies in the courts as "judicial review" presupposes a party aggrieved or adversely affected by final agency action. See Code §17A.19. Article V, §15 of the Iowa Constitution commits the choice of nominees to the discretion of the Judicial Nominating Commissions, subject only to the constitutional requirement that the nominees be members of the bar (Article V, §18). Therefore, no one would have standing to seek "judicial review" because they were dissatisfied with the choice of nominees submitted to the governor by the Commissions. Furthermore, Article V, §15 of the Iowa Constitution requires the governor to make an appointment from the list of nominees submitted. When the Iowa Constitution was amended in 1962 providing for a new manner of selection and retention of judges, it made no provision for a "cause of action" by a disappointed potential nominee to challenge the lists submitted by the Judicial Nominating Commissions to the governor. If the Iowa Administrative Procedure Act was found to grant such a "cause of action", the Act would subvert the purpose of the constitutional amendments and violate the doctrine of separation of powers.

The people of the State of Iowa created the Judicial Nominating Commissions and gave them the power and duty to submit nominees to the governor. The Iowa Administrative Procedure Act cannot be imposed upon the Judicial

Nominating Commissions undermining the direct will of the people as exemplified by Article V, §§15 and 16.

December 27, 1978

SOCIAL SERVICES: Adoption: Termination of parental rights and consent. §600.3(2), Code of Iowa, 1977, as amended by Ch. 140, §2, Acts of the 67th G.A., 1977 [1st] session. A voluntary release for adoption by the biological parents, taken in another state and in accordance with that state's statute shall be accepted as a valid release in lieu of a termination of parental rights proceeding. (Robinson to Jacobson, 12-27-78) #78-12-19

Ms. Bernita Jacobson, Chief, Bureau of Child Advocacy: Your request for an opinion of the Attorney General was as follows:

We have an urgent need for an immediate official Attorney General's Opinion on whether a voluntary release for adoption by biological parents, taken in another state and in accordance with that state's statutes, can be accepted as a valid release in lieu of Court termination of parental rights? The interpretation by Iowa judges of the Iowa adoption law pertaining to this matter in 600.3(2), Code of Iowa, varies. Some judges will not recognize a voluntary release, valid in the state where the child was relinquished, and are requireing a Court termination of the parental rights in Iowa before the adoption is finalized.

A critical issue is a child who was placed by a licensed child-placing agency in Nebraska through the provisions of the Interstate Compact on the Placement of Children. The child has been in the adoptive home since December, 1977, and both biological parents signed voluntary relinquishments to that agency in October, 1977. At that time, according to Nebraska law, the biological parents relinquished all rights to that child.

In our opinion, a voluntary release for adoption by the biological parents, taken in another state and in accordance with that state's statute shall be accepted as a valid release in lieu of a termination of parental rights proceeding.

Section 600.3(2), Code of Iowa, 1977, has been amended by Chapter 140 §2, Acts of the 67th G.A., 1977 [1st] session to read as follows:

Sec. 2. Section six hundred point three (600.3), subsection two (2), Code 1977, is amended by striking the subsection and inserting in lieu thereof the following:

2. An adoption petition shall not be filed until a termination of parental rights has been accomplished except in the following circumstances:

a. The person to be adopted is an adult.

b. The parent's spouse is the adoption petitioner.

For the purposes of this subsection, a consent to adopt recognized by the courts of another jurisdiction in the United States and obtained from a resident of that jurisdiction shall be accepted in this state in lieu of a termination of parental rights proceeding.

We were told by the Iowa Supreme Court in *Hanover Ins. Co. v. Alamo Motel,* 264 N.W.2d 774 (Iowa, 1978) that in interpreting a statute for the first time, we should examine both the language and legislative purpose and consider all its parts together without according undue importance to single or isolated portions. This we have done. A straight forward interpretation of the amended

statute above leads us to the conclusion that it was enacted to solve the very problem you presented.

December 27, 1978

DEPARTMENT OF SOCIAL SERVICES: Duties of a custodian of a child. §§600A.2(8), 232.2(9), Code of Iowa, 1977. A custodian has the authority to consent to a driver's license, extra-curricular school activities, out-of-state travel with a foster parent and emergency medical care. A custodian may not consent to enlistment in the armed forces or to the marriage of a ward. (Robinson to Preisser, 12-27-78) #78-12-20

Mr. Victor Preisser, Commissioner, Department of Social Services: You asked the following:

This is a request for an Attorney General's Opinion concerning the rights and duties of a custodian as defined in Section 600A.2(8), 1977 Code of Iowa.

Under Section 232.33 and 232.34, 1977 Code of Iowa, a court may place legal custody of a child with the Department of Social Services. Section 600A.2(8) defines the rights and duties of the custodian as follows:

a. To maintain or transfer to another the physical possessions of that child.

b. To protect, train, and discipline that child.

c. To provide food, clothing, housing, and ordinary medical care for that child.

d. To consent to emergency medical care, including surgery.

e. To sign a release of medical information to a health professional. All rights and duties of a custodian shall be subject to any residual rights and duties remaining in a parent or guardian.

We recently had a social worker seek a court order requesting authority to sign a child's application for a driver's license. The Department had legal custody of the child and the guardian was not available. The court granted the authority but questioned the need for the order. The order directed the local office to seek clarification of the definition of "legal custody" from the Attorney General. The question then is, how broad is the authority of the custodian to give consents?

Do the rights and duties of the custodian as spelled out in Section 600A.2(8) include:

1. Giving consent for operator's license or instructor's permit as required in Section 321.184?

2. Giving consent to enlistment in the armed forces of the United States?

3. Giving consent to marriage as required in Section 595.2(2)?

4. Giving consent for participation in extra-curricular school activities or other school activities.

5. Giving consent for out-of-state travel with foster parents?

Section 600A.2(8), Code of Iowa, 1977, applies to children in need of assistance and delinquent children by virtue of §232.2(9), Code of Iowa 1977, which states:

Definitions. When used in this chapter, unless the context otherwise

requires: * * *

9. "Custodian" means custodian as defined in Section 600A.2, subsection 8. * * *

In our opinion a custodian does have the authority to consent for an operators license or instructor's permit. Driver's training is required in school, and, thus, would come under §600A.2(8)(b). Code of Iowa, 1977.

Giving consent to enlistment in the armed forces and giving consent to marriage are specifically enumerated as powers given to a guardian in §600A.2(7)(a). The express mention of these matters under the powers given to a guardian and their absence under the powers of a custodian indicate to us the intent of the legislature that these powers not be given to a custodian. *In re Wilson's Estate,* 202 N.W.2d 41 (Iowa 1972).

A custodian may consent for participation in extra-curricular school activities and other school activities as this is consistent with §600A.2(8)(b).

A custodian may also consent to out-of-state travel with a foster parent as this is part of "protecting a child" in §600A.2(8)(b).

For those matters where the custodian does not have the authority to consent and the parent or guardian are absent or object then application should be made to the court for an appropriate order. We note that a custodian has the authority and duty to consent to emergency surgery where the best interest and welfare of the child require it *even if opposed by a parent.* §600A.2(8)(d) and *In re Karwath,* 199 N.W. 2d 147, 150 (Iowa 1972).

December 27, 1978

COLLEGE AID: Debt Collection. College Aid Commission has power to employ services of debt collection agencies to collect defaulted medical tuition loans as an incidental power of authority to receive and administer such tuition loan fund. (Nolan to Wolff, Iowa College Aid Commission, 12-27-78) #78-12-21

Mrs. Willis Ann Wolff, Executive Director, Iowa College Aid Commission: This is written in response to your request for a legal opinion as to whether the College Aid Commission has the authority to contract with a collection agency to pursue borrowers of twenty-one defaulted loans and any future defaulters under the Iowa Medical Tuition Loan Program. Your letter indicates there are presently twenty-one delinquent Iowa medical loan accounts totally $93,870 in face value plus accrued interest.

Authority for the Iowa Medical Loan program is found in §261.2(5), Code of Iowa, 1977 as amended by §5, Chapter 1049, Acts of the 67th G.A., 1978 Session:

"The commission shall...

* * *

"receive, administer, and allot a tuition loan fund for the benefit of Iowa resident students enrolled in Iowa studying to be physicians or osteopathic physicians and surgeons and who agree to become general practitioners (family doctors) and practice in Iowa.

"Said fund shall be allotted to students for not more than three years of study and shall be in the nature of a loan. Such loan shall have as one of its terms that

fifty percent thereof shall be canceled at the end of five years of the general practice in Iowa with an additional ten percent to be canceled at each year thereafter until the entire loan may be canceled. No interest shall be charged on any part of the loan thus canceled. Additional terms and conditions of said loan shall be established by the college aid commission so as to facilitate the purpose of this section."

It is the view of this office that the power to receive and administer a tuition loan fund for the benefit of Iowa resident students carries the additional incidental power to contract with a collecting agency to recover funds from borrowers who have defaulted on their loan payments. Although your letter does not speak to this point, it is my understanding that the majority of the defaulting borrowers have moved outside the State of Iowa and accordingly, have broken their contractual agreement to practice as family doctors in Iowa. Further, since the terms of the student loan contract did not require the furnishing of collateral security for the medical tuition loan it is unlikely that the debt can be satisfied by judicial process in this state.

December 27, 1978

CRIMINAL LAW: Initial Appearance: Unnecessary Delay — Rules 1(2)(c) and 2(1), I.R.Cr.P. Under Rules 1(2)(c) and 2(1), an accused person should be taken before a committing magistrate within twenty-four hours of arrest. The twenty-four hour period imposed by Rule 1(2)(c) and the intervention of a weekend or legal holiday during the period of detention are merely other factors to be considered in determining the reasonableness or excusableness of a delay. (Richards to Ashcraft, State Senator, 12-27-78) #78-12-22

The Honorable Forrest F. Ashcraft, State Senator: You have requested an opinion of the Attorney General concerning Rules 1(2)(c) and 2(1) of the new Iowa Rules of Criminal Procedure, Supplement to the Code of Iowa (1977). Rule 2(1) provides in part:

An officer making an arrest with or without a warrant shall take the arrested person without *unnecessary delay* before a committing magistrate as provided by law. (Emphasis added.)

"Unnecessary delay" is defined in Rule 1(2)(c) as:

any *unexcused* delay longer than *twenty-four hours,* and consists of a shorter period whenever a magistrate is accessible and available. (Emphasis added.)

You specifically ask "whether or not this applies to weekends, holidays, etc., i.e. if a person is arrested at 5:00 P.M. on Friday evening for an indictable offense, must he then be taken before a committing magistrate before 5:00 P.M. on Saturday evening?"

The requirement of a "speedy" initial appearance of an arrested person before a committing magistrate is not new to our laws. Section 757.7 (arrest by warrant) and 758.1 (warrantless arrest), Code of Iowa (1977), provided that an arrested person was to be taken before a committing magistrate "without unnecessary delay." Rule 2(1) is obviously derived from these statutes. However, the definition of "unnecessary delay" in Rule 1(2)(c) is apparently novel.

The general contours of the requirement are neatly summarized in 6A C.J.S. *Arrest* §§63 and 64, 141-148 (1975):

[I]t is ordinarily the duty of an officer after making an arrest, either with or without a warrant, to take the person arrested, *within a reasonable time,*

before a...magistrate,...in order that he may be examined and held, or dealt with as the case requires. The purpose of the requirement is to avoid evil implications of secret interrogation of persons accused of crime, to abolish unlawful detention, and to protect the rights of the accused and assure him due process by making sure that he is fully advised of all of his constitutional rights by a judicial officer before making an incriminating statement. The rule, however, confers no rights in the constitutional sense.

* * *

[T]he term "unnecessary"...suggests an element of flexibility. The rule does not call for mechanical or automatic obedience, and what is unnecessary delay or reasonable period of detention must depend on the peculiar facts of the case, since no hard and fast rule can be laid down as to what constitutes unnecessary delay.

* * *

The rule...does not prohibit all delays, but only unnecessary ones, and in determining whether a delay is unnecessary, various factors such as the availability of a committing magistrate, the extent of the delay before the arrested person is taken before the magistrate, and the police purpose or justification, if any, for the delay are considered.

See, State v. Hansen, 225 N.W.2d 343, 350 (Iowa 1975); *State v. Milford,* 186 N.W.2d 590, 592 (Iowa 1971).

We view the twenty-four hour period imposed by Rule 1(2)(c) as merely another factor to be considered in determining the reasonableness of a delay. The term "unexcused" also suggests an element of flexibility. Rule 1(2)(c) does not lay down a hard and fast rule, since the reasonableness or excusableness of a delay must depend on the peculiar facts of a case. We do not, however, intimate that the twenty-four hour period can be ignored. Any delay longer than twenty-four hours in taking an arrested person before a committing magistrate would be suspect and presumptively unnecessary.

Given these basic principles, we turn to your specific question whether Rule 1(2)(c) applies to weekends or holidays. Put another way, is a delay in initial appearance of more than twenty-four hours unnecessary or excusable when occasioned by the intervention of a weekend or legal holiday? It is generally recognized that "an officer may detain a person arrested in custody for a *reasonable* time until he can conveniently and safely take him before a magistrate, if the circumstances are such as to preclude an immediate examination, hearing, or trial, as...where the arrest was made...over the course of a weekend," or holiday. 6A C.J.S. *Arrest* §64 at 148-149 (1975) (emphasis added); *and see, Rogers v. United States,* 330 F.2d 535, 538 (5th Cir. 1964) ("When a commissioner is honestly unavailable over a weekend or holiday and the detention stretches for two or three days, there may be no violation of [Federal Rule 5(a)..."]; *Goliher v. United States,* 362 F.2d 594, 599 (8th Cir. 1966) ("Under the circumstances of a rural Nebraska community and the Sunday arrest, we do not believe that a delay until Monday was 'unnecessary'."); *United States v. Mihalopoulos,* 228 F.Supp. 994 (D.D.C. 1964); and cases cited at 6A C.J.S. *Arrest* §64, n. 52 (1957). *But see, Reimers v. State,* 143 N.W.2d 525, 532 (Wis. 1966) ("While we are aware that magistrates cannot be available at all times in all localities, a reasonable effort should be made to accommodate the police and the defendants so that a defendant may appear to be informed of the nature

of the charge against him and be admitted to bail without an unreasonable delay. Henceforth, the fact that Sundays and holidays intervene, standing alone, will not justify unreasonable detention."); *Mitchell v. United States,* 316 F.2d 354 (D.C. Cir. 1963).

However, we decline to lay down a hard and fast rule on the question of intervening weekends and holidays, since the reasonableness or excusableness of a resulting delay necessarily depends on the peculiar facts and setting of each case. In our opinion, the intervention of a weekend or holiday is simply one more factor to be considered in determining the excusableness of a delay. Nonetheless, an officer making an arrest over a weekend or legal holiday must conscientiously make every effort to locate an available magistrate before whom the defendant can appear without unnecessary delay.

Finally, we note that the accepted remedy available to a person detained without initial appearance for a period longer than twenty-four hours is habeas corpus. *State v. Henderson,* 268 N.W.2d 173, 176 (Iowa 1978). Additionally, statements elicited from a defendant during such detention may be inadmissible. *State v. Hansen,* 225 N.W.2d 343, 350 (Iowa 1975); *State v. Milford,* 186 N.W.2d 590, 592 (Iowa 1971). In any event, such detention would not void a subsequent conviction on the merits. *State v. Henderson,* 268 N.W.2d 173, 176 (Iowa 1978); *state v. Beyer,* 258 N.W.2d 353, 356 (Iowa 1977); *Gerstein v. Pugh,* 420 U.S. 103, 119, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975).

December 27, 1978

LEGISLATIVE APPROPRIATIONS: Reversion of funds. Chapter 8.33, Code of Iowa, 1977, requires reversion of funds appropriated to the Commission on the Aging by Chapter 7, Acts, 67th G.A., 1977 Session, for a senior center when such funds were not encumbered or obligated prior to the end of the fiscal term in which the appropriation was made. (Yocom to De Koster, State Senator, 12-27-78) #78-12-23

The Honorable Lucas J. De Koster, State Senator: You have requested an Attorney General's Opinion concerning reversion of appropriated funds to the State treasury under §8.33, 1977 Code of Iowa. You specifically ask:

"Is the employment of an architect to specifically design a certain building of a certain type with full intention of entering into a contract sufficient commitment of funds under Section 8.33 to avoid reversion? Does §8.33 apply to the appropriations made under S.F. 302?"

To answer your second question first, yes, §8.33 does apply to S.F. 302 (Chapter 7, 67th G.A., 1977 Session). §8.33 states "No obligation of any kind whatsoever shall be incurred or created subsequent to the last day of the fiscal term for which an appropriation is made, except when specific provision is made in the Act making the appropriation." No specific provision is made in S.F. 302. Therefore, any expenditures of the S.F. 302 appropriations must comply with the provisions of §8.33.

Section 8.33 also states, "On September 30, or as otherwise provided in an appropriation act following the close of each fiscal term, all unencumbered or unobligated balances of appropriations made for said fiscal term shall revert to the State treasury and to the credit of the fund from which the appropriation or appropriations were made, except that capital expenditures for the purchase of land or the erection of the buildings or new construction shall continue in force until the attainment of the object or the completion of the work for which

such appropriations are made unless the Act making the appropriations for the capital expenditure contains a specific provision relating to a time limit for incurring an obligation or reversion of funds."

The employment of an architect is not sufficient to obligate the whole appropriated sum. All that is obligated would be the fee charged for the architect's services.

The only possible exception to the reversion of funds required by §8.33 is for capital expenditures. This does not apply in this situation because the senior center is not a capital expenditure on a building or property actually to be owned by the state. Since the state would not hold title to the center on its completion it does not qualify as a capital expenditure under §8.33.

To prevent reversion, therefore, appropriated funds must be obligated or encumbered. Since there is no contract for construction of the senior center, the funds are not obligated and are required to revert to the State treasury.

December 27, 1978

DEPARTMENT OF SOCIAL SERVICES: Continuing jurisdiction of the juvenile court; Ch. 1088, §§32, 33, 80 and Ch. 1018, §4(3), 67th G.A., 1978 [2d] session. "Continuing jurisdiction" with the juvenile court means that jurisdiction is retained after the dispositional order; the legislature should clarify the conflict between Ch. 1088 and Ch. 1018 pertaining to whether delinquent juveniles should be placed at the state juvenile home; the statute which states that juveniles adjudicated delinquent shall not be placed at the Juvenile Home at Toledo has prospective application only as the legislature did not intend that children currently in the program at Toledo should be removed; no juveniles will be "grandfathered" into the system. The six-month review and hearing requirements will depend upon whether commitment was made prior to or subsequent to July 1, 1979; after July 1, 1979, juvenile records may be sealed upon court order. (Robinson to Preisser, 12-27-78) #78-12-24

Mr. Victor Preisser, Commissioner, Iowa Department of Social Services: You recently asked for an Attorney General's Opinion as follows:

To insure that we appropriately proceed with the implementation of H.F. 248 — Juvenile Justice Law — effective July 1, 1979, it is necessary that certain issues be clarified. Therefore, we are requesting your response to the following questions:

1. Under the current law, H.F. 232.35 states that in a commitment to the state director the state becomes guardian and the court's jurisdiction is terminated. In those cases, the state has assumed total administration of the service and the operation and intake of the three children's institutions. In H.F. 248, however, §*32* Disposition of a Child Found to Have Committed a Delinquent Act, paragraph 2-e, states that the transfer of guardianship to the state is subject to the *continuing jurisdiction of the court.* The question is: What is "continuing jurisdiction"? Does this give the courts the authority to place children in and subsequenty release from the children's institutions at their discretion"? Must all authorizations now issued by the state guardian be sought from the courts? Must guardianship cases go back to court in order to be closed?

2. Will the stipulations of H.F. 248 apply to only those children entering the Juvenile System on or after the effective date of July 1, 1979, or will it be required that children currently in the system be "grandfathered" in and subject

to the conditions set forth in 248? *Section 58,* paragraph 6 calls for a hearing and review of every CHINA case every six months. Does this mean that on January 1, 1980, all those cases in the system prior to July 1, 1979, will require a hearing and review? Similarly, are the requirements set forth in H.F. 248 concerning the sealing of records (*§80,* Sealing of Records) applicable to those cases in the Juvenile System prior to the implementation of this law?

H.F. 248 the juvenile revision law, is now Chapter 1088, Acts 67th G.A., 1978 [2d] session. Section 32(2)(e) provides:

2. The dispositional orders which the court may enter are as follows:

* * *

e. An order transferring the guardianship of the child, *subject to the continuing jurisdiction of the court for the purposes of section thirty-four (34) of this Act,* to the commissioner of the department of social services for purposes of placement in the Iowa Juvenile Home at Toledo, the Iowa Training School for Boys, the Iowa Training School for Girls, or other facility provided that:

(1) The child is at least twelve years of age; and

(2) The court finds such placement to be in the best interests of the child or necessary to the protection of the public. [Emphasis added]

* * *

The various dispositional options the court may exercise for a child found to have committed a delinquent act of the new law are similar to those under the present law except that the court is given "continuing jurisdiction". This means that the court's jurisdiction is retained after the dispositional order. *Curtis v. Gibbs,* Tex., 511 S.W.2d 263, 266. This allows for termination or modification of the order "for the purposes of §34" without starting a new case. Section 34 of Chapter 1088, 67th G.A., 1978 [2d] session, addresses termination, modification, or vacation and substitution of a dispositional order. The provisions of subsections 2 to 5 of §34 establish procedures by which interested parties may move for termination, modification, or vacation and substitution of a dispositional order. There is no provision granting the court authority to terminate, modify, or vacate and substitute on its own motion as is found in §80 of the Act which we will discuss later. The phrase "only in accordance with the following provisions" [at the beginning of §34] limits the power of the court in a significant way.

Section 32(2)(e) gives the court authority to transfer guardianship of the child to the commissioner of social services for the purpose of placement in the training schools or *juvenile home.* We note a conflict with S.F. 2163 [Ch. 1018 §4(3), 67th G.A., 1978 (2d) Session], the appropriation bill for the Department of Social Services for the Fiscal Year 1978-79, where the following statement is included in the Family and Children's Services section:

Juveniles adjudicated delinquent shall not be placed at the State Juvenile Home at Toledo.

S.F. 2163 as an appropriation bill became effective on July 1, 1978. It was signed into law on June 22, 1978. H.F. 248, which gives the courts power to place delinquent juveniles at Toledo, was signed July 3, 1978, but becomes effective July 1, 1979. See §101 of H.F. 248. *TVA v. Hill,* U.S. 98 S.Ct. 2279, 57 L.Ed. 2d 117 (1978) involved the construction of the Tellico Dam by the

TVA and the endangered species popularly known as the snail darter. Pertaining to the doctrine of repeal by implication, the court states the following:

[8] There is nothing in the appropriations measures, as passed, which state that the Tellico Project was to be completed irrespective of the requirements of the Endangered Species Act. These appropriations, in fact, represented relatively minor components of the lump sum amounts for the *entire* TVA budget. To find a repeal of the Endangered Species Act under these circumstances would surely do violence to the "cardinal rule...that repeals by implication are not favored". *Morton v. Mancari,* 417 U.S. 535, 549 41 L. Ed.2d 290, 94 S.Ct. 2474 (1974), quoting *Posadas v. National City Bank,* 296 U.S. 497 503, 80 L. Ed. 351, 56 S.Ct. 349 (1936). In Posadas this Court held, in no uncertain terms, that "the intention of the legislature to repeal must be clear and manifest". Ibid. See *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 456-457, 89 L. Ed. 1051, 65 S.Ct. 716 (1945) ("Only a clear repugnancy between the old and the new [law] results in the former giving away..."); *United States v. Bordon Co.,* 308 U.S. 188, 198-199, 84 L. Ed. 181, 60 S.Ct. 182 (1939) ("Intention of the legislature to repeal must be clear and manifest... A positive repugnancy [between the old and the new laws]"); *Wood v. United States,* 41 U.S. 343, 363, 10 L. Ed. 987 (1842) ("[T]here must be a positive repugnancy..."). In practical terms, this "cardinal rules" means that "in the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Mancari, supra,* at 551, 41 L. Ed. 2d 290, 94 S.Ct. 2474.

[9] The doctrine disfavoring repeals by implication "applies with full vigor when...the subsequent legislation is an appropriations measure". *Committee for Nuclear Responsibility v. Seaborg,* 149 U.S. App. D.C. 380, 382,463 F2d 783, 785 (1971) (emphasis added); *Environmental Defense Fund v. Froehlke,* 473 F2d 346, 355 (CA8 1972). This is perhaps an understatement since it would be more accurate to say that the policy applies with even *greater* force when the claimed repeal rests solely on an appropriations act. We recognize that both substantive enactments and appropriations measures are "acts of Congress", but the latter have the limited and specific purpose of providing funds for authorized programs. [footnotes omitted] [98 S.Ct. at 2299, 2300 57 L. Ed. 2d at 143-144]

In Iowa, appropriation bills often contain legislation. We do not have authorization bills followed by appropriation bills as is the procedure in Congress. In our opinion, the language of §4(3) of Ch. 1018, the Appropriation Bill, has the force and effect of law. A later enacted statute such as H.F. 248 which becomes law on July 1, 1979, cannot by implication repeal this prior appropriation act. This is true at least until such time as the latter act becomes effective. We trust the legislature will clarify this matter in their next session.

In the meantime, what should be done with children adjudicated delinquent who are currently in the program at the juvenile home. In our opinion, the legislature did not intend that children currently in the program at Toledo should be removed. The statutory language quoted above relates only to placement.

This opinion is supported by the familiar rule of construction which provides that statutes have prospective application only unless a clearly contrary intent appears. *In re marriage of Harless* 251 N.W. 2d 212 (Iowa, 1977). Also, whether a statute operates prospectively only or both prospectively and retrospectively

is a matter of legislative intent. *Walker State Bank v. Chipokas*, 228 N.W. 2d 49 (Iowa, 1975). See §4.5, Code of Iowa, 1977.

Section 34(2) of Chapter 1088 governs the termination of a dispositional order. The second unnumbered paragraph of subparagraph two provides:

Notwithstanding the dispositional order, an agency, facility or institution to whom custody has been granted under section thirty-two (32), subsection two (2), paragraphs d or e of this Act may terminate the order and discharge the child, modify the order by imposing less restrictive conditions, or vacate the order and substitute a less restrictive order without leave of court.

We do not offer an opinion as to the constitutionality of this subsection.

Subsection 33(1) governs the duration of dispositional orders. It provides:

1. Any dispositional order entered by the court pursuant to section thirty-two (32) of this Act until the child becomes eighteen years of age unless otherwise specified by the court or unless sooner terminated pursuant to the provisions of section thirty-four (34) of this Act. No dispositional order made under section thirty-two (32), subsection two (2), paragraph e shall remain in force longer than the maximum possible duration of the sentence which may be imposed on an adult for the commission of the act which the child has been found by the court to have committed.

The revision of the juvenile justice laws as found in Chapter 1088 is effective July 1, 1979. No children will be "grandfathered in" the system. In other words, Chapter 1088 will apply only to dispositional orders made after July 1, 1979. As you pointed out, under current law in §232.35, 1977 Code of Iowa, the court loses jurisdiction by commitment to the state director. Thus, on January 1, 1980, and subsequent dates, the determining factor as to whether a hearing and review of every case involving a child in need of assistance is required is the individual dispositional order. Those entered before July 1, 1979, will not require a review every six months. Those subsequent to that date will require a hearing and review pursuant to §58(6).

The provisions of §80 pertaining to sealing of records also becomes effective July 1, 1979. Section 80 provides:

1. Upon application of a person who was taken into custody for a delinquent act or was the subject of a complaint alleging delinquency or was the subject of a delinquency petition, or upon the court's own motion, the court, after hearing, shall order the records in the case including those specified in §§seventy-seven (77) and seventy-nine (79) of this Act sealed if the Court finds that:

* * *

In our opinion, the records may be sealed even though the "delinquent act" or the "delinquent petition" was before July 1, 1979. These provisions apply to court records rather than the jurisdiction of the court. Thus, the dates we discussed earlier pertaining to the loss of jurisdiction have no application here.

December 28, 1978

CIGARETTES: Sales by Distributors. Chapter 98, 98.1(12), 98.1(13), 98.13, 98.36(7), Code of Iowa, 1977; Chapter 551A, 551A.2(3), 551A.5, Code of Iowa, 1977. A distributor licensed only as a distributor under Chapter 98 cannot make sales under provisions of §551A.5. (Murray to Schroeder, State

Representative, 12-28-78) #78-12-25

The Honorable Laverne W. Schroeder, State Representative: You have requested an Attorney General's opinion in respect to the following question; does a cigarette distributor licensed only as a distributor under §98.13 of the Code have the authority to sell cigarettes to a licensed cigarette wholesaler under §551A.5.

The sale of cigarettes in the State of Iowa was first authorized in Chapter 98 of the Iowa Code in 1924. Chapter 551A entitled "Cigarette Sales" was adopted in 1949, in the 53rd General Assembly and found in Chapter 226 the Acts of the Regular Session 53 G.A., 1949. A distributor is defined in Chapter 98.1(12) as follows:

" 'Distributor' shall mean and include every person in this state who manufactures or produces cigarettes or who ships, transports, or imports into this state or in any manner acquires or possesses cigarettes without stamps affixed for the purpose of making a "first sale" of the same within the state."

Wholesaler is defined in Chapter 98.1(13) as follows:

" 'Wholesaler' shall mean and include every person other than a distributor or distributing agent who engages in the business of selling or distributing cigarettes within the state for the purpose of resale."

You will note that the definition above makes an exception for a distributor and distribution agent. The Attorney General issued an opinion, 1958 O.A.G. 25, which states as follows:

" 'Cigarette Tax — Permits' — Persons acting in dual capacity of distributor and distributing agent. A person acting in capacity as distributor and distributing agent must purchase both a distributor's permit and a distributing agent's permit as those permits are required in Chapter 98 of the Code of Iowa (1958)." (Brinkman to Keleher, Dir., Cig. & Beer Rev. Div., 7/30/58) #58-7-9

When Chapter 98 was adopted, the legislature intended a distinction between the various state permits which were authorized. It is clear that a distributor has the same function as a wholesaler but with one additional function, that of making the "first sale" within the state. Neither a wholesaler nor a distributor can sell cigarettes at retail without a retail permit. A wholesaler may not act as a distributor without a distributor's permit even though he holds a wholesaler permit. Nor can a distributor or wholesaler sell cigarettes at retail without a retail permit.

Chapter 551A was enacted in 1949, some 28 years after the enactment of Chapter 98 of the Code. Did the legislature intend to formulate a new definition for a wholesaler or did they intend to use the definitions previously adopted? Both Chapters deal with the sale of cigarettes. Only licensed persons within the State are authorized to sell cigarettes at either wholesale or retail levels, see §98.36(7):

"It shall be unlawful for a person other than a holder of a retail permit to sell cigarettes at retail. No state permit holder shall sell or distribute cigarettes at wholesale to any person in the State of Iowa who does not hold a permit authorizing the retail sale of cigarettes or who does not hold a state permit as a manufacturer, distributing agent, wholesaler, or distributor."

It is a common rule of law in statutory interpretation that "Statutes which are part of the same general scheme or plan or are aimed at the accomplishment of

the same results and the suppression of the same evil, will also be considered as in Pari Materia." 73 AM JUR 2nd, 388. *Chicago and N.W. Ry. Co. v. City of Osage,* 176 N.W.2d 788 (1970); *Rush v. Sioux City,* 240 N.W.2d 431 (1976).

In §551A.2(3), reference is made to persons licensed under this Act. There are no licensing provisions in Chapter 551A for the sale of cigarettes. Chapter 98 of the Code provides for licensing for sale of cigarettes within this state. It is obvious that the legislature intended these two chapters to be construed together.

The next logical question to ask, did the legislature in passing of Chapter 551A intend to include a distributor in their definition of a wholesaler? Chapter 98 defines a wholesaler as "Wholesaler which means and includes every person *other than a* distributor or distributing agent... ." It is clear from the definition that a wholesaler under his license may not perform the function of a distributor, however, a distributor may perform the functions of a wholesaler under his distributor's license. Did then the legislature overlook this distinction in passing Chapter 551A, or did they intend to mean licensed wholesaler as found in Chapter 98? Senate File 199, which became Chapter 236, Laws of the 53 G.A., and now Chapter 551A of the Code, makes only one reference to distributors. This is the preamble of this bill which states "Whereas, such practices affect collection of taxes and license fees imposed on distributors, wholesalers, retailers and persons engaged in the sale of cigarettes... ." Obviously the legislature in passing Senate File 199 was aware of the distinction between a distributor and a wholesaler. Generally words defined in prior statutes are, prima facie, to be regarded as used in the same sense in a subsequent statute, and will be so interpreted unless the contrary appears. 73, AM JUR 2nd, 414, *Fitzgerald v. State,* 220 Ia. 547, 260 N.W. 681 (1935).

Cigarettes may only be sold in this state by persons licensed for that particular purpose. It is therefore our opinion, that the provisions of §551A.5 of the Code are only availble to those persons who are licensed as a wholesaler under Chapter 98, Code of Iowa.

December 28, 1978

STATE OFFICERS AND DEPARTMENTS—IOWA DEPARTMENT OF SUBSTANCE ABUSE — PROGRAM AUDITS: Ch. 11, Iowa Code (1977); Ch. 74, §44, 67th G.A., 1977 Ses. Neither the Iowa Department of Substance Abuse nor individual licensed substance abuse programs are required to pay to the state auditor's office the costs or expenses of an audit conducted in accordance with Ch. 74, §44, 67th G.A. 1977 Ses. Such costs and expenses incurred by the state auditor's office should be paid from the appropriations allocated to the state auditor's office. (Cook to Hall, Chief of Administration, 12-28-78) #78-12-26

Don L. Hall, Chief of Administration, Iowa Department of Substance Abuse: You have requested an opinion of the Attorney General concerning payment for audits of licensed substance abuse programs. Specifically, you ask whether the Iowa Department of Substance Abuse (IDSA) or individual substance abuse programs licensed by IDSA are required to pay for program audits conducted by the state auditor's office.

Chapter 74, §44, Acts of the 67th G.A., 1977 Reg. Ses. & Extra Ses. amended Chapter 125 of the 1977 Code of Iowa to add the following new section:

"All licensed substance abuse programs shall be subject to regular audit

by the auditor of state or to special audits requested by the director."

Thus, §44 imposes the responsibility of conducting certain audits of licensed programs upon the state auditor's office as a part of the duties of that office. Neither Chapter 11 of the 1977 code of Iowa, which defines generally the duties and responsibilities of the auditor's office, nor Chapter 125, as amended, authorize the collection of costs or expenses incurred as a result of an audit conducted in accordance with §44.

Accordingly, it is our opinion that neither the IDSA nor individual licensed substance abuse programs are required to pay to the state auditor's office the costs or expenses of a §44 audit. Such costs and expenses should be paid from the appropriations allocated to the state auditor's office.

December 28, 1978

JUDGES AND JUDICIAL RETIREMENT FUND: Iowa Constitution Art. V, §18; Chapter 605A; §605.24; §605.25; Iowa R.Civ.P. 375. Judges retired and temporarily recalled to active service are entitled to annuity increases measured by the duration of and pay for such temporary services. (Salmons to O'Brien, 12-28-78) #78-12-27

Mr. William J. O'Brien, Court Administrator: This office is in receipt of your September 28, 1978, opinion request seeking clarification of several issues concerning the Judicial Retirement Fund which arise when a retired judge or justice has been recalled to temporary service on the bench.

In Iowa all judges of the Supreme Court, Court of Appeals or district courts shall be mandatorily retired either upon reaching the age of seventy-five years or seventy-two years depending upon the date any such judge took the bench. Iowa Code §605.24. Retirement may also be voluntary either for a physical or mental disability (§605A.12) or if either a judge has attained the age of sixty-five years with at least six years judicial service or has provided twenty-five consecutive years of service on the bench. Section 605A.6.

Once retired, a judge may be recalled to temporary active service if eligible. Iowa Constitution Article V, §18; Iowa R.Civ.P. 375; §605.25. He or she may not serve in a position higher than that last held before retirement but may be appointed to a seat at the same level or subordinate to that of last service. Section 605.25. Any retired member of the judiciary is subject to recall unless that judge has filed an election to practice law with the Clerk of the Supreme Court. Section 605.25. When recalled, a judge is entitled to the compensation received by others at the particular level to which he has been assigned. Section 605.25. But upon recall, that judge's annuity payments from the Judicial Retirement Fund must cease for the duration of his temporary assignment. Section 605.25.

To become eligible for participation in the Judicial Retirement System (Section 605A.1) a judge must supply the Treasurer and Comptroller a notice of intent to participate in the retirement system within one year after taking office. Section 605A.3. Provision for a lump-sum payment into the Judicial Retirement Fund and for continuing salary deductions by the judiciary is made in Section 605A.4(1) and consent for such deductions is deemed by §605A.4(3).

Those participating in the Judicial Retirement System are entitled to an annuity upon retirement, mandatory, voluntary, or for disability if the specifications of §605A.6 are met. Section 605A.5 provides:

No person, except the survivor of a person qualified to receive an annuity, shall be entitled to receive an annuity under this chapter *unless he shall have contributed, as herein provided, to the judicial retirement fund for the entire period of his service as a judge of one or more of the courts included in this chapter.* (emphasis added).

In light of this statutory scheme you first ask, "[d]oes the 'service' referred to in §605A.5 include temporary service under §605.25, requiring the deduction?"

Judicial pension legislation is to be liberally construed to effectuate its purposes. *Wilson v. Nielson,* 269 P.2d 762, 764 (Idaho 1954); *Gorman v. Cranston,* 50 Cal.Rptr. 533, 413 P.2d 133, 136 (1966). One purpose of this legislation "...is to bring about a better and more efficient service in [the judicial branch] by improving their personnel and morale, through the retention of faithful and experienced employees." *Talbott v. Independent School District,* 230 Iowa 949, 963, 299 N.W. 566, (1941) (teacher's pensions). Another obvious purpose of the statutory provisions explored above is the maintenance of a well qualified and seasoned pool of judicial retirees from which the Supreme Court may choose in filling the periodic vacancies which arise in the Judicial Department. It is telling of the legislative importance attached to the creation of this bank of qualified judicial officers that all who retire are presumed eligible for later temporary service unless a certificate has been filed by the retiree stating his intentions to enter the private sector. Section 605.25. While a retired and temporarily reassigned judge receives a salary commensurate with the post to which he is assigned, his annuity payments abate for the length of his temporary assignment. Section 605.25. If the period of a judge's temporary service was one which neither required the deductions funding the judicial retirement system (§605A.5) nor could be used in increasing that judge's annuity at the end of his recall, (§605A.7) a valuable incentive for maintenance of this supply of able and willing judicial officers would be lost.

Consequently, aside from the express language of §605A.5 stating contributions to the judicial retirement fund must be made "for the entire period of his service as a judge", therefore reasonably including periods of temporary recall service, it is the opinion of this office that deductions for the fund must be made during recall service to add an inducement for such service.

Iowa Code §605A.7 reads:

The annuity of a judge under this system shall be an amount equal to three percent of his average annual basic salary for his three years as a judge of one or more of the courts included in this chapter, multiplied by his years of service as a judge of one or more of such courts, but no such annuity shall exceed 50 percent of the salary that he is receiving at the time he becomes separated from such service.

In light of this section you ask two questions: "May the time served and salary received during the temporary service be used when computing the amount of annuity?" and "Is the maximum amount [of annuity] 50 percent of the annual salary he is receiving when separated from temporary service or the annual salary he was receiving prior to the temporary service?" Given the discussion above, the time served and salary received during recall service must be considered in reformulating the amount of a judge's annuity at the end of a temporary assignment. It will be seen these financial rewards are key to

preservation of this well qualified pool of judges from which the chief justice may choose in making temporary assignments and in enticing retirees to remain eligible for such appointment.

The 50 percent ceiling of 605A.7 must rise for the judge responding to a temporary assignment.

Conceivably if the 50 percent ceiling on a retirement annuity were fixed to the salary a retiree received at the end of his regular duties, the annuity otherwise increased at the end of a temporary assignment reflecting more years of service and perhaps greater annual basic salary could be limited by the lower 50 percent amount in some cases. The encouragement provided by the promise of a greater annuity would, in these instances, be lost. Therefore, it is only reasonable to conclude that the 50 percent ceiling must be measured against the salary a judge receives at the end of his temporary service.

You correctly observe a problem arising out of the preceding construction; a judge recalled to service to sit at a post lower than that of his regular service will perhaps have his annuity reduced by the 50 percent ceiling applied against this lower temporary salary. But as you point out, "a judge could, of course, prevent such reduction by not consenting to serve." Inherent to your solution is an understanding by a judge in such circumstances that his annuity could suffer by appointment to a post inferior to that of last service. It is incumbent that a judge be informed of this possibility prior to acceptance of his new post.

Another solution to this particular problem is legislative. If the 50 percent ceiling measured by temporary service salary acts as a disincentive to service in lower posts by qualified judges, and to availability of satisfactory numbers of candidates it would seem a legislative remedy would clearly be in order.

December 28, 1978

STATE OFFICERS AND DEPARTMENTS: Motor Vehicle Reciprocity—§§326.6, 326.7, 326.13, 326.15, 326.19, 326.25 and 326.31, Code of Iowa, 1977. If, upon audit, it is determined that an interstate carrier based in Iowa has paid too low a percentage to Iowa, the state may assess the carrier for the additional percentage even though the total percentage may exceed 100 percent. The carrier should seek a refund of excess fees paid from the other states.(Blumberg to Forrest, Director, Office of Operating Authority, 12-28-78) #78-12-28

Mr. Robert W. Forrest, Director, Office of Operating Authority: We have your opinion request of May 8, 1978, regarding refunds for license fees paid in excess of 100 percent. Pursuant to your facts, an audit performed on interstate carriers based in Iowa may reveal an underpayment to Iowa because of a percentage that is too low. If the total percentage paid to each state is 100 percent, payment to Iowa of the additional percentage would create a total composite paid to each of the states in excess of 100 percent. With reference to §326.15, 1977 Code of Iowa, you ask whether Iowa can legally assess the additional percentage to the carrier, and require the carrier to seek a refund for any overpayment from the other states. As an example, if an Iowa carrier prorating with Iowa and two other states, paying 60 percent to Iowa and 20 percent to each of the others, is audited and it is determined that the correct percentage to be paid Iowa is 65 prcent, a problem is created. If Iowa assesses the carrier the additional 5 percent, the total composite paid to all the states would be over 100 percent.

Fees are computed pursuant to Chapters 321 and 326 of the Code, and are based upon historic mileage.[1] With its yearly application to the Office of Operating Authority, the carrier indicates the historic mileage and the fees are computed. The number of miles driven in a state are divided by the total miles driven in all states. The resulting percentage is multiplied by the applicable total fee for each vehicle as provided in Chapter 321. The result is the fee due each state. Theoretically, the percentages paid to each state should equal 100 percent, and in most cases do. However, there are times when the total percentage exceeds 100 percent. Thus we find §326.15, which 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 100 percent percentage wise, the fleet owner may file a claim with the department for a refund of registration fees paid in excess of 100 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.

We discussed this section in an earlier opinion, 1976 O.A.G. 435. There, we had a situation where the percentage and fees computed at the beginning of the registration year, based upon historic mileage, were correct. However because of a statute or rule in another jurisdiction, such as a recomputation of fees based upon miles actually driven in that jurisdiction during the current registration year, the percentage due the other jurisdiction was increased at the end of the year. Upon payment of additional fees to the other jurisdiction, the carrier's total percentage would exceed 100 percent.

Section 326.15, on its face, appears to provide that no Iowa based carrier shall ever pay over 100 percent, and in such a case a claim for refund may be filed. However, in the earlier opinion we found exceptions. We realized there, as we must here, that this section does not give any indication regarding the reasons for a percentage being over 100 percent. It could be said that the Legislature therefore intended that the State make refunds in all cases. As applied to your specific situation, it would mean that you would not be able to assess in excess of 100 percent since a refund, if filed, would have to be made. However, we found otherwise in the earlier opinion, and continue to do so here.

In the earlier opinion we held that as long as another jurisdiction's statutes or rules and the proportional registration agreements to which Iowa and the other jurisdiction were members, permitted a recomputation which resulted in a percentage exceeding 100 percent a refund pursuant to §326.15 should be made. However, we also held that if the excess percentage was caused by another jurisdiction's error, a refund need not be made. The rationale was that the State should not suffer because of someone else's error. Similar reasoning can be applied here.

[1]Historic mileage is mileage generated by a fleet owner over a preceding twelve-month period.

The *Uniform Vehicle Proration and Reciprocity Agreement,* of which Iowa is a member, provides in §60 that if it be determined by audit or otherwise that an improper fee has been paid to a State, the administrator can require payment of fees. Section 59 provides that information from audits shall be made available to administrators from other states. Similar provisions can be found in the *International Registration Plan.* Article XIV provides that the base jurisdiction (in this case, Iowa) shall audit its carriers as to the authenticity of mileage figures. This Article also provides that the base jurisdiction shall notify all other jurisdictions of the audit, and that information on an underpayment shall be forwarded for collection. Article XV provides that the jurisdiction shall assess for any deficiency in accordance with its statutes.

There appears to be no reason why Iowa should have to be content with an incorrect and low percentage, except for those situations explained in the earlier opinion. We are not faced with a situation like that in the earlier opinion where the percentages and fees were initially correct. We are faced with a situation where the percentages to Iowa and other jurisdictions are initially incorrect. Sections 326.6 and 326.7 set forth the procedure for proportional registration, including the filing of information upon which the fees are computed. Section 326.13 requires that the information be filed under oath. Records shall be preserved by the carrier pursuant to §326.19, while §§326.25 and 326.31 detail the authority to investigate records and information and the penalties if same be incorrect. From these sections alone it can be surmised that the Legislature never intended the State to be content with incorrect information, percentages or fees. Section 326.15 further indicates this wherein it is stated that the Department of Transportation shall insure that claims are paid to carriers *who have complied with proration registration requirments.* Surely, paying an incorrect percentage and fees is not compliance with registration requirements.

Accordingly, we are of the opinion that the State may assess an additional percentage of license fees due it, even though the total percentage may exceed 100 percent. The carrier should seek a refund from the other jurisdictions where an overpayment was made. Although statutory provisions of another jurisdiction may prevent a refund, that should not force Iowa to suffer by not being able to collect the full amount due.

December 28, 1978

COUNTIES: Mental Health. Counties with a population of less than 40,000 are limited by §230A.14 in the amount which can be expended for mental health treatment outside a state institution. (Nolan to Sutton, Floyd County Attorney, 12-28-78) #78-12-29

Mr. Roger L. Sutton, Floyd County Attorney: You have requested an Attorney General's opinion on the following:

"Floyd County is a member of the North Iowa Community Health Center pursuant to Chapter 230A of the Iowa code. The Family Counseling Coalition is a private entity which receives funding from the City of Charles City, the Floyd County Board of Supervisors and the United Way as well as fees. The Floyd County Veterans Memorial Hospital is established pursuant to Chapter 37 of the Iowa Code.

"The Board of Supervisors is giving consideration to funding a local program either in conjunction with or in lieu of the program provided by Chapter 230A.

"The questions that the Board of Supervisors have are as follows:

"1. Can the Floyd County Board of Supervisors expend funds for mental health with a private facility while they are a member of the North Iowa Community Health Center pursuant to Chapter 230A?

"2. Should the Board of Supervisors withdraw from the North Iowa Community Health Center which has been set up pursuant to Chapter 230A, would the county be permitted to fund a private facility in Floyd County?

"3. If a private facility was set up in Floyd County with the Floyd County Veterans Memorial Hospital would the County be required to enter into a 28E agreement in light of the provisions of Chapter 37.20 and the other provisions of the chapter?"

Included in the pertinent sections of the Iowa Code are the following statutory provisions:

§230A.1

"...A county of affiliated counties having a total of combined population of thirty-five thousand or more may by action of the board or boards of supervisors, with the approval of the Iowa Mental Health Authority, establish a community mental health center to serve the county or counties.... Nothing in this section shall limit the authority of the board or boards of supervisors of any county or group of counties, which prior to July 1, 1974, established or joined in establishing a community mental health center in a manner consistent with the requirements of §230A.3 to continue to expend money from the county mental health and institutions fund to support operation of the center, and to form agreements with the board of supervisors of any additional county for that county to join in supporting and receiving services from or through the center.

§230A.14

"The board of supervisors of any county served by a community health center established or continued in operation as authorized by §230A.1 may expend money from the county mental health and institutions fund, federal revenue-sharing funds, or other federal matching funds designated by the board of supervisors for such purpose, without a vote of the elector of the county, to pay the costs of any services described in §230A.2 which are provided by the center or by an affiliate under contract with the center, or to pay the costs of or grant funds for establishing, reconstructing, remodeling or improving any facility required for this center. However, the county board shall not expend money from that fund, except for designated revenue-sharing or other federal matching funds, for mental health treatment obtained outside a state institution in an amount exceeding eight dollars per capita in any county having less than forty thousand population."

The population of Floyd County according to the 1970 census is 19,860. Accordingly, it would appear that pursuant to §230A.14 Floyd County would be limited to an amount of $8 per capita for all of the expenditures made pursuant to Chapter 230A. Your letter does not indicate whether this amount is now committed to the support of the North Iowa Community Health Center. If this is the case, it would be our opinion that the provisions of §230A.14 require a negative answer to your first question.

The answer to your second question assumes that the funding of a private facility in Floyd County meets the public purpose test. While a private facility may enter into a contract with a county to provide services required by the county and such contract may be a joint exercise of powers contract pursuant

to the statutory authority contained in Chapter 28E of the Iowa Code, it does not appear that such an arrangement is consistent with the provisions of Chapter 230A.1 in Floyd County since the population is less than 35,000. Accordingly, it would appear that the county could only allow appropriate claims for persons who might be treated at such private facility at county expense.

As we understand it, the Floyd County Veterans Memorial Hospital is the county hospital. Under §37.27 the operation of additions to the hospital is to be carried out "with the commissioners acting in the same manner and fashion as the hospital trustees under Chapter 347, and with the procedure in all other respects to be identical." Section 347.14(10) authorizes hospital trustees to do all things necessary for the management control and government of the hospital and to exercise all rights and duties pertaining to hospital trustees generally.

Section 347.24 specifically states:

"Hospitals organized under Chapter 37 or Chapter 347A may be operated as provided for in this chapter in any way not clearly inconsistent with these specific provisions of their chapters."

Section 347.29 authorizes the county hospital to use property received "by gift,, devise, bequest or otherwise, or the proceeds from the sale of such property, for the construction of facilities for lease or sale as a medical clinic... subject to the approval of the local health plan agency." If the provisions of §347.29 have application to the situation which you describe, then it would not be necessary for the hospital to enter into a 28E agreement with the private facility for the location of the private facility on the hospital ground. However, such an agreement would be required if the location of such facilities required something more than a lease or sale of the real estate upon which the facility is to be located.

December 28, 1978

COUNTIES: Minutes of Board. A summary of votes on matters of county business prepared by one of the supervisors and given to the Auditor does not meet statutory requirements for the keeping of minutes of the meetings of the board of supervisors. (Nolan to Eller, Crawford County Attorney, 12-28-78) #78-12-30

Mr. Thomas R. Eller, Crawford County Attorney: You requested an opinion concerning the requirements of minutes of meetings of the board of supervisors. In your letter you state:

"Minutes of the meetings of the Crawford County Board of Supervisors are kept in the following manner: the Board meets and discusses its business without someone from the Auditor's office present to record a summary of business before the Board. The Board presents a summary of its business in the form of votes on resolutions and motions to the Auditor and these constitute the record of the Board's business.

"Is this method of keeping minutes sufficient? I am enclosing a copy of my letter of February 5, 1975, to Vern Kruse, then the chairman of the Board of Supervisors. The sections on minutes are contained in paragraphs 3 and 4. The Crawford County Board and the Auditor have apparently believed that a detailed history of each meeting is not necessary."

In the opinion of February 3, 1972, 1972 O.A.G. 348, issued by this office we

advised that the auditor is required to be present and to take minutes of meetings of the board of supervisors in order to perform the duties prescribed by §333.1 and §333.19 of the Iowa Code. Those sections require the auditor to "record all the proceedings of the board" making full entry of all its resolutions and decisions on questions of raising money or spending funds from the county treasury.

As originally contemplated by statutes the board of supervisors would hold five regular meetings ("on the second secular day in January and on the first Monday in April and the second Monday in June, September, and November in each year". §331.15). The statute also provides for the holding of special meetings. However, in practice, the board of supervisors in most counties in the state today meet at least once a week on a regular schedule and the members of the board are usually present in the courthouse at other times when a meeting of the board is not in session. Consequently, numerous questions have arisen as to what constitutes a meeting of the board of supervisors when two or more supervisors are directing attention to the same matter at any given time. In counties where there are only three members of the board, the presence of two supervisors may be thought to be a quorum for a meeting whether or not the supervisors intend that what they do constitutes a meeting. This office has advised from time to time that the supervisors carefully observe the requirements of the open meetings law. Iowa Code Chapter 28A as now amended by Chapter 1037, Laws 67 G.A. 1978.

When the board discusses and acts officially on any matter of county business it must do so in an open public meeting as required by statute. At such meetings the auditor or the auditor's deputy should be present to keep the minutes of the meeting. Accordingly it is our view that it is not sufficient for the board to summarize its actions and to present such summary to the auditor. Such action deprives the auditor of an opportunity to fully perform the duties prescribed by Iowa Code Chapter 333 and also gives an impression of surreptitious activity to the actions of the board.

With respect to whether or not the minutes must be published, §349.16 and §349.18 of the Code require publication of the board "proceedings". This means the publication of the official record of the actions taken by the board at its meeting and should include among other things the information which is subsequently transcribed into the minute book, the highway record, the bridge book, the warrant book, and claim register. As you pointed out in your letter to the board, "succinct initial reporting of the minutes will not make it necessary to edit the minutes for publication". We agree.

December 28, 1978

SCHOOLS: Garnishment. §§642.21, 627.11, 627.12, Code of Iowa, 1977. By specifying only §627.11 relating to decrees for child support, the legislature has not lifted the $250 garnishment limitation on other orders including a judgment or decree for temporary or permanent alimony. (Nolan Hoth, Des Moines County Attorney, 12-28-78) #78-12-31

Mr. Steven S. Hoth, Des Moines County Attorney: You have requested an opinion of this office by recent letter which states as follows:

"I am writing to request an Attorney General's opinion on behalf of the Burlington Community School District. I would appreciate your advising if the $250.00 garnishment limitation provided for in §642.21 of the Iowa Code

applies to garnishment for alimony. Section 642.21 states that the limitation does not apply to support payments referred to in §627.12. No mention is made of §627.11 which refers to alimony. There appears to be some conflict between §§627.11 and 642.21. An opinion on this matter would be reatly appreciated because the problem has arisen on a garnishment."

Section 642.21 provides in pertinent part:

"(1) The disposable earnings of an individual shall be exempt from garnishment to the extent provided by the Federal Consumer Credit Protection Act, Title III. The term 'consumer protection act' means the act of Congress approved May 29, 1968, 82 Stat. 163, officially cited as the Consumer Credit Protection Act, Title III."

The maximum amount of an employee's earnings which may be garnished during any one calendar year is $250 for each judgment creditor, except as provided in §627.12.

We agree with the conclusion that no mention is made of §627.11 which provides that the personal earnings of a debtor shall not be exempt from any order, judgment or decree for temporary or permanent alimony. However, we must conclude that by specifying only §627.12 which refers to decrees for support for minor children, the Iowa Legislature has lifted the $250 garnishment limitation only for the purpose of reaching the personal earnings of a judgment debtor under an order for the support of minor children. Expresio unius est exclusio alterius.

December 29, 1978

PHYSICIANS AND SURGEONS: Practice of Medicine and Surgery — §148.1, Code of Iowa, 1977. The rule of the Board of Medical Examiners defining the "practice of medicine and surgery" in terms more specific than the definition of §148.1 is not contrary to law. (Blumberg to Monroe, State Representative, 12-29-78) #78-12-32

The Honorable William R. Monroe, Jr., State Representative: You requested an opinion on the legality of a rule by the Board of Medical Examiners. You ask whether the definition of medicine and surgery set forth in the rule is beyond the scope of the definition set forth in §148.1, 1977 Code of Iowa.

Section 148.1 provides:

"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."

Rule 470-135.1(6), 1 Iowa Administrative Bulletin, No. 13 (Nov. 29, 1978), provides that the practice of medicine and surgery means:

"[H]olding one's self out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical or mental condition and who shall either offer or undertake, by any means or methods, to diagnose, treat, operate or prescribe for any human disease, pain, injury,

deformity or physical or mental condition."

As a general rule, the plain provisions of a statute cannot be altered by administrative rule. Rules must be reasonable and consistent with legislative enactments, and cannot be at variance with statutory provisions. *Schmitt v. Iowa Department of Social Services,* 263 N.W.2d 739, 745 (Iowa 1978); *Iowa Dept. of Rev. v. Iowa Merit Employ. Com'n,* 243 N.W.2d 610, 616 (Iowa 1976); *Nishnabotna Valley Rural Elec. Coop. v. Iowa P. & L. Co.,* 161 N.W.2d 348, 352 (Iowa 1968). The question here, then, is whether the rule in question is at variance with §148.1.

The Iowa Court has interpreted this section and its predecessors on several occasions. In *State v. Hughey,* 1929, 208 Iowa 842, 226 N.W. 371, the Court stated that the first duty of a physician is to diagnose, and the following duty is to treat. Thus, one who publicly professes to be able to diagnose and prescribe the proper treatment is engaged in the practice of medicine and surgery. See also, *State ex rel. Bierring v. Robinson,* 1945, 236 Iowa 752, 756, 19 N.W.2d 214. In *State v. Boston,* 1939, 226 Iowa 429, 278 N.W. 291, supplemented 284 N.W. 143, the Court held that the whole field of the healing arts is open to the practitioner of medicine and surgery.

The rule in question, although more specific than §148.1, does appear to be consistent with judicial interpretations of that section. Even though a definition of the "practice of medicine and surgery" is unnecessary and mere surplusage, its inclusion in the rules is not contrary to law, nor does the definition exceed the limits of rule making authority. We must emphasize that if the definition is kept in the rules it should not be applied to other practitioners of the healing arts who are engaged exclusively in the practice of their professions.

December 29, 1978

MUNICIPALITIES: Incompatibility of Office; City Councilman, School Board Member. §§298.1, 298.2, 384.16, 384.17, 441.2, Code of Iowa, 1977. The office of city councilman and school board member are incompatible. (Haesemeyer to Spear, State Representative, 12-29-78) #78-12-33

The Honorable Clay Spear, State Representative: On November 28, 1977, we issued an opinion to you to the effect that the positions of school board member and city council member were not incompatible and the same individual could hold both simultaneously. In so doing, we withdrew an earlier letter opinion of April 16, 1964, 1964 OAG p. 141, which concluded that the office of mayor and member of the community school board were incompatible.[1]

Since issuing our November 28, 1977, opinion to you, we have had occasion to reconsider the conclusions reached therein and now conclude that we were in error. Accordingly, we are withdrawing our November 28, 1977, opinion

[1]Earlier Attorneys General differentiated between opinions which were considered more important and ones which were considered not so important, the former being characterized staff opinions which were published in full in the Biennial Report of the Attorney General. The latter were called letter opinions which are reported only in summary form. The present Attorney General has discontinued this practice and all opinions are treated as being of equal importance.

and reinstating the April 16, 1964, opinion.

The point of departure in any consideration of matters of this kind have been decisions of the Iowa Supreme Court in *State, ex rel Crawford v. Anderson,* 1912, 155 Iowa 271, 136 N.W. 128, and *State, ex rel Le Buhn v. White,* 1965, 257 Iowa 606, 133 N.W.2d 903. As stated by the Court in *State, ex rel LeBuhn v. White, supra:*

"* * *

" '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." ' " (Cases omitted)

"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.' " 133 N.W.2d at 905.

Applying these tests to the office of the mayor and member of the community school board, the author of the April 16, 1964, opinion referred to above concluded that the offices were incompatible, stating:

"Incompatibility is based upon the fact that both the city council and the community school board are certifying bodies and conflict arises when the same person is participating in both budgets and levies of these agencies."

A 1970 opinion of the Attorney General reached the same conclusion with respect to the offices of city mayor and member of a county school board.[2]

In reaching the conclusion it did, the 1970 opinion pointed at the fact that under §441.2, the mayors of all incorporated cities and towns in the county whose property is assessed by the county assessor, and members of county boards of education were members of the conference board established by such §441.2.

Sections 298.1 and 298.8 provide respectively:

§298.1

"School taxes. The board of each school district shall estimate the amount of the proposed expenditures and proposed receipts for the general school purposes at a time and in a manner to effectuate the povisions of Chapter 442 and §§281.9 and 281.11. Compliance with Chapter 24 shall be observed."

§298.8

[2]But an opposite result was reached in an opinion dated May 17, 1948, from Assistant Attorney General Oscar Strauss to Ringgold County Attorney Grant L. Hayes. However this opinion was evidently a letter opinion ans was never published and we have been unable to locate a copy of it anywhere. The only record we have of the opinion is a card from a card index file stating, "Office of mayor and member of board of education are compatible."

"Levy by board of supervisors. The board of supervisors shall at the time of levying taxes for county purposes levy the taxes necessary to raise the various funds authorized by law and certified to it by law, but if the amount certified for any such fund is in excess of the amount authorized by law it shall levy only so much thereof as is authorized by law."

Under §384.16, cities are required to prepare and adopt a budget and certify taxes which are levied by the county board of supervisors pursuant to the provisions of §384.17 which provides:

"Levy by county. At the time required by law, the county board of supervisors shall levy the taxes necessary for each city fund for the following fiscal year. The levy must be as shown in the adopted city budget and as certified by the clerk, subject to any changes made after a protest hearing, and any additional tax rates approved at a city election. A city levy is not valid until proof of publication or posting of notice of a budget hearing is filed with the county auditor."

Thus, both school boards and city councils are involved in the preparation of budgets and certifying them to the county board of supervisors which is then required to levy taxes as necessary.

In addition to the foregoing, there are certain practical difficulties which might be encountered were the same person to serve on both bodies. For example, a school board might deem it highly desirable to have a traffic light installed adjacent to a school under its jurisdiction. The city council however would be the body which would determine whether the traffic light would indeed be installed and might well feel there were other areas having greater priority insofar as the installation of traffic lights was concerned. Other problems might arise with respect to the location and equipping of parks and playgrounds and in the sale and purchase of property involving both bodies.

The Attorneys General of the other states have not been consistent one with the other insofar as this question is concerned. In Colorado, the Attorney General ruled, "A person may legally be a member both of the town board and of the school board." 1925-26 Ops. Col. Atty. Gen. 122. But in California, the offices of city council member and school district trustee were found to be incompatible. 48 Ops. Cal. Atty. Gen. 141. The Attorney General of Florida concluded that the office of county superintendent of public instruction was compatible with that of mayor. 1943-44 Ops. Fla. Atty. Gen. 251. Similarly in Georgia, it was concluded that a position on a city council was compatible with that of membership on a county board of education. 1954-56 Ops. Ga. Atty. Gen. 174. So, too, in Louisiana, a position on a school board was found to be compatible with the office of mayor. 1966-68 Ops. La. Atty. Gen. 307.

However, the Attorney General of Maine concluded that the position of school administration district director was incompatible with that of a town selectman since the duties of both as set forth in the statute were inconsistent. 1967-72 Ops. Me. Atty. Gen. 121. The office of mayor was found to be incompatible with that of a school board member according to the Attorney General of Minnesota. 1940 Ops. Minn. Atty. Gen. 232. Similarly in Minnesota, a position on a school board was found to be incompatible with that of town supervisor. 1940 Ops. Minn. Atty. Gen. 234. However, an opinion of the Mississippi Attorney General concluded that the position of alderman was compatible with that of school board member. 1959-61 Ops. Miss. Atty. Gen. 39. And in New Mexico, the positions of city council member and school board member were found to be compatible. 1951-52 Ops. N.M. Atty. Gen. 41. In North

Carolina, however, where there was a constitutional prohibition, a position on the school board was incompatible with that of one on the town board. 32 Ops. N.C. Atty. Gen. 292.

In North Dakota, the office of mayor and member of the school board may be held by the same person. 1944-46 Ops. N.D. Atty. Gen. 218. The Attorney General of Ohio concluded that the position of township trustee is incompatible with that of school board member since under the statutes both boards would be competing for allotment of funds. 1966 Ops. Ohio Atty. Gen. #66-060. In South Dakota, on the basis of a specific statutory prohibition, the Attorney General concluded that a position on a school board was incompatible with the office of city councilman. 1939-40 Ops. S.D. Atty. Gen. 198. In Virginia, the Attorney General concluded that the office of mayor was compatible with a position of county school board member. 1958-59 Ops. Va. Atty. Gen. 231.

In Wisconsin there have been a number of opinions of the Attorney General on this general subject. Thus, in 1948 the Attorney General concluded that the position of city supervisor was compatible with that of school district director. 37 Ops. Wis. Atty. Gen. 470. However, in an earlier 1930 opinion, it was concluded that a position on a town board was incompatible with that of school board member since under the existing statutes the town board had the power to create, alter, consolidate and dissolve school districts. 19 Ops. Wis. Atty. Gen. 353. In that same year, however, the Attorney General concluded that the position of village supervisor was compatible with that of village school board member. 19 Ops. Wis. Atty. Gen. 368. And in 1922, the Attorney General of Wisconsin had concluded that an alderman could at the same time hold office as a school board member. 11 Ops. Wis. Atty. Gen. 192.

From the foregoing, it can be seen that the opinions of the Attorneys General of the various states that have been called upon to address the question are by no means uniform. However, we believe the better view, the one which is consistent with our earlier opinions in this area and the view which represents a salutary public policy against dual office holding, is the view that the same person may not hold the offices of city councilman and member of the school board at the same time.

December 29, 1978

CRIMINAL LAW: Sentencing for first offense OMVUI. §§321.281 and 903.1, Supplement to the Code (1977). §321.281, Supplement to the Code (1977) does not provide a "specific penalty" making the maximum penalties available in §903.1 inapplicable to a first offense OMVUI case. §321.281 defines a minimum sentence to be imposed and §903.1 provides maximum penalties available to a sentencing court in such cases. (Cook to Hoffman, State Representative, 12-29-78) #78-12-34

The Honorable Betty Hoffman, State Representative: You have requested an opinion of the Attorney General on sentencing under §321.281, Supplement to the Code (1977). Specifically, you pose the following question for our consideration:

"Does Section 321.281 of the Iowa Code provide for a 'specific penalty' by the words 'shall be imprisoned in the County Jail not less than two days' for a first offense OMVUI and thereby prohibit a Judge from imposing a sentence of both a fine and jail term under [§903.1, Supplement to the Code 1977] which states in part that a Court may determine the sentence when a 'specific penalty' is not provided for, i.e., may the Court impose both a monetary fine and jail

sentence for a conviction of a first offense OMVUI under the present Code of Iowa?"

§321.281 of the 1977 Code of Iowa was amended by §284, Ch. 1245, Acts of the 66th G.A., 1976 Ses. (Criminal Code Revision). As amended, §321.281 is codified and appears as §321.281, Supplement to the Code 1977. In parts relevant to your question, §321.281 of the Supplement provides:

"whoever operates a motor vehicle upon the public highways of this state while under the influence of an alcoholic beverage...*shall,...be guilty of a serious misdemeanor* for the first offense *and shall be imprisoned in the county jail not less than two days"* (Emphasis added)

§903.1 of the Supplement provides, in relevant parts, as follows:

"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:

* * *

"2. For a serious misdemeanor, imprisonment not to exceed one year, or a fine not to exceed one thousand dollars, or both." (Emphasis added).

The words "not less than two days" in §321.281 clearly fix a minimum jail sentence for a first offense.[1] Moreover, these words imply that more than two days may be imposed or the words would have no meaning and would not have been included. See, *Binkley v. Hunter,* 170 F.2d 848 (10 Cir. 1949). However, the statute does not specify the maximum penalty which may be fixed by a court following conviction.[2]

As amended, §321.281 expressly provides that upon a plea of guilty or conviction for the first offense, the defendant "shall be guilty of a serious misdemeanor." Reference to a "serious misdemeanor" comports with the general sentencing scheme adopted by the legislature in the new criminal code. Generally, the code revision removed from the criminal definition sections the penalties which may be imposed following conviction. A general sentencing provision for misdemeanor violations (§903.1) was thus incorporated to provide sentencing parameters for all crimes falling within the specified classification. Accordingly, §903.1 authorizes a court to set a sentence within the established limits in all misdemeanor cases where "a specific penalty" is not already established within a particular statute.

In terms of §903.1, the words "not less than two days" in §321.281 do not appear to designate a "specific penalty" in the sense contemplated by the general sentencing provision. As previously noted, while it specifies a minimum sentence and implies that more may be imposed, §321.281 is indefinite as to the maximum sentence which may be imposed. We discern a legislative intent to supply the maximum available penalty by calling a violation a "serious

[1]We decline to express our view whether a court may defer judgment, defer sentence, or suspend a sentence pursuant to §907.3, Supplement to the Code (1977) for a first offense OMVUI.

[2]Compare §§88.14(5)-(7); 88A.10(1); 189A.17(5)(a), (b) and (d); 204.401(3); 327F.9; and 328.41, Supplement to the Iowa Code (1977), wherein minimum and maximum penalties are provided.

misdemeanor" consistent with the general sentencing scheme of the code revision.

It is therefore our opinion that §321.281 does not provide a "specific penalty" making the §903.1 sentencing provisions inapplicable. Rather, we believe that §321.281 defines a minimum sentence to be imposed and §903.1 provides maximum penalties available to a sentencing court in a first offense OMVUI case. As a result, the provisions together require a sentencing court to sentence a defendant to a minimum of two days in the county jail following conviction. The court may, in its discretion, increase the jail sentence "not to exceed one year." Additionally, §903.1 authorizes a sentencing court to fix "a fine not to exceed one thousand dollars" in those cases where the court determines that both a fine and jail term are warranted.

December 29, 1978

COUNTIES: Mental Health. §225.16, Code of Iowa, 1977. The provisions of §225.16 which authorize a person to be treated at the state psychiatric hospital at state expense do not permit continued outpatient treatment at state expense. Such costs, in case of voluntary public patients, must be borne by the county. (Nolan to Conlon, State Representative, 12-29-78) #78-12-35

Representative Walter Conlon: This is written in response to your request for an opinion on the following questions related to the issuance of "state papers" to persons who need medical services and cannot afford to pay for them. Specifically you ask:

"(1) Do 'State Psychiatric Papers' cover outpatient treatment at the State Psychiatric Hospital in Iowa City?

"(2) For what period are the papers valid? (Calendar year, fiscal year, spell of illness, etc.?)"

The authority for the issuance of "state papers" is contained in §225.16, Code of Iowa, 1977, which provides as follows:

"If the judge of the district court, or the clerk of the court, as aforesaid, finds from the physician's information which was filed under the provisions of §225.10, that it would be appropriate for the person to enter the state psychiatric hospital, and the report of the county attorney shows that neither the person nor those legally responsible for him or her, are able to pay the expenses thereof, or able to pay only a part of the expenses, the judge or clerk shall enter an order directing that the said person shall be sent to the state psychiatric hospital at the State University of Iowa for observation, treatment, and hospital care as a voluntary public patient.

"When the said patient arrives at the hospital, he or she shall receive the same treatment as is provided for committed public patients in §225.15."

The care provided for persons under §225.15 is as follows:

"When the respondent arrives at the state psychiatric hospital it shall be the duty of the admitting physician to examine the respondent and determine whether or not, in the physician's judgment, the patient is a fit subject for such observation, treatment and hospital care. If, upon examination, the physician decides that such patient should be admitted to the hospital, the patient shall be provided a proper bed in the hospital; and the physician who shall have charge of the patient shall proceed with such observation, medical treatment, and hospital care as in the physician's judgment are proper and necessary, in compliance with §§229.13 to 229.16.

"A proper and competent nurse shall also be assigned to look after and care for such patient during such observation, treatment, and care as aforesaid."

In addition to the above consideration must also be given to §225.8 which provides in pertinent part:

"...and the voluntary public patients and committed public patients shall be kept and maintained by the state."

Also important to this consideration is §444.12, Code of Iowa, 1977, which provides in pertinent part:

"The board of supervisors of each county shall establish a county mental health and institutions fund, from which shall be paid:

"1. All charges which the county is obligated by statute to pay for:

* * *

"(c) Care and treatment of patients by the psychopathic hospital at Iowa City."

It appears to be the policy of the state psychiatric hospital to charge all outpatients for ongoing treatment visits subsequent to the initial evaluation with the allowance of one free visit in order for the physician to explain his findings to the patient.

It is the opinion of this office that the "state papers" issued by the court pursuant to §225.16 do not, unless specifically set forth in such order, cover more than the cost of the original admission evaluation and treatment at the state psychiatric hospital, provided under §225.15; and the additional return visit which is made for the purpose of obtaining the findings as of the examination from the physician. Costs for continued outpatient treatment must be borne by the county. Such payments the county makes shall be paid from county mental health and institutions fund.

The answer to the first question also disposes of the second in that, unless the "state papers" issued by the court specifically provide otherwise, they are valid for the period of time involved in sending the patient to the state psychiatric hospital for observation treatment and hospital care as provided in §225.15. Upon being discharged from inpatient care regardless of whether or not further outpatient treatment is indicated, the responsibility of the state to keep and maintain such patient at state expense under order expires. Should it be necessary for the patient to be readmitted for hospitalization a further order of court directing the state to be responsible for the costs of hospital treatment and medical services should be obtained.

December 29, 1978

COURTS: Judicial Retirement System; Funding. House File 2426, 67th G.A., Second Session (1978). It is not unconstitutional to earmark certain court costs to fund the judicial retirement system. (Turner to Garrison, Director, Iowa Legislative Service Bureau, 12-29-78) #78-12-36

Mr. Serge H. Harrison, Dirctor, Iowa Legislative Service Bureau: You have requested an opinion of the Attorney General and state:

"During the 1978 Session, the House of Representatives adopted a funding measure for the judicial retirement system which would have provided a filing fee for all cases docketed in the courts in the state of Iowa. The fee would have

been annually calculated as an amount necessary to fund the unfunded liabilities of the judges' retirement system (Chapter 605A, Iowa Code 1977) plus the needed funding requirements in excess of the current 4% of salary contribution by judges and the 3% of salary by the employer. The unfunded liability of the system—that is the liability of the system for currently vested benefits in excess of the funds available for payment of benefits—would be amortized over a period of twenty years.

"The question: Would such a system of funding the retirement system for the judges through the assessment of a prefiling fee for all cases docketed in any court in the state, be in violation of any constitutional provison? (See attached House File 2426, §63)."

Section 63 of House File 2426 states:

"Section six hundred five A point four (605A.4), Code 1977, as amended by Acts of the Sixty-seventh General Assembly, 1977 Session, Chapter forty-eight (48), section forty-six (46), is amended by adding the following new subsection:

"NEW SUBSECTION. 5. Beginning January 1, 1979, there shall be assessed as court costs in all actions before any judge of the district court, the court of appeals and the supreme court an amount to be credited to the judicial retirement fund to be used to pay for benefits provided under this chapter of the Code. Such court costs shall be paid by the losing party to any action. Such costs shall be collected in the manner provided in chapter six hundred twenty-five (625) of the Code and shall be forwarded by the collecting official to the treasurer of state to be deposited to the credit of the judicial retirement fund and said fund is hereby appropriated for the payment of annuities, refunds and allowance provided in this section.

"Fees assessed under the provisions of this subsection shall be an amount calculated by the court administrator of the judicial department prior to December fifteenth of each year equal to an amount determined actuarially necessary to fund the judicial retirement system liabilities *for future benefits for active members in excess of the projected contributions by contributing judges and the state* plus an amount *for the period beginning January 1, 1979, and ending December 31, 1998,* to amortize the unfunded liabilities of the judicial retirement system in excess of assets on January 1, 1979, over a twenty-year period. Actuarial evaluations shall be made annually prior to December fifteenth of each year. The annual amount so calculated shall be divided by the total number of cases docketed in all courts in the state in the latest annual report available from the *court administrator of the judicial department* on December fifteenth. The amount so calculated shall be assessed as court costs in each court action in the following calendar year. The court administrator of the judicial department shall notify all courts in the state of court costs calculated under this subsection effective for each calendar year."

Since the General Assembly adjourned without enacting House File 2426, the measure is no longer pending and presumably if action is desired on it, it will have to be reintroduced in the next session of the legislature. Hence, the question you have raised is probably moot.

Nevertheless, we would observe that we have been unable to find any constitutional infirmity in the method of funding of the Judicial Retirement System contemplated by §63 of House File 2426. Whether or not this method of earmarking particular fees and charges to fund specific state activities is wise as a matter of policy is not for us to decide. We are simply pointing out that we do not see any constitutional problems in following this route so long as it is done by statute. We should note too that this particular practice is not unique. Section 606.15 of the 1958 Code, for example, provided for a judicial statistics

fund made up of fees collected by the clerk of the district court and earmarked specifically for supporting the activities of the judicial statistician's office.

December 29, 1978

STATE DEPARTMENTS: Treasurer, Ch, 1190, Acts 67th G.A., 1978.Red-lining §453.1, Code of Iowa. The deposit of state funds by Treasurer is controlled by §453.1, Code of Iowa, 1977. Chapter 722 is not applicable to the fact situation presented. Only the penalties specified in Ch. 1190 may be imposed against banks engaged in "red-lining". (Turner to Krause and Garrison, State Representatives, 12-29-78) #78-12-37

Honorable Robert A. Krause, Honorable Gilbert L. Garrison, State Representatives: Each of you have requested an opinion of the Attorney General concerning the deposit of state funds in financial institutions which "engage in the practice of red-lining".

In Section 1 of Chapter 1190, Acts of the 67th G.A., 1978 Session, the term "red-lining" is defined to mean "the practice by which a financial institution may designate certain areas as unsuitable for the making of mortgage loans and reject applications for mortgage loans or vary the terms of a mortgage loan upon property within that area because of the prevailing income, racial or ethnic characteristics of the area, or because of the age of the structures in the area."

Section 2 provides that:

"It is a discriminatory practice for any financial institution accepting mortgage loan applications to engage in the practice of red-lining as defined. . . ."

Representative Krause asks:

"1. Does the state bribery law apply to private officials like bank officers as well as public officials?

"2. If the bribery law is applicable to both public and private officials, would it prevent the Treasurer of State from using his investment powers against red-lining?

"3. If the bribery law is not applicable, would any other law prevent the Treasurer of State from using his investment power against red-lining?"

The answer to the first question is yes. The answer to the second question is no. The provisions of §722.1 of the new Iowa Criminal Code, Supplement to Code of Iowa, 1977, do not, in our view, have application in the question presented. Section 722.1 entitled Bribery provides:

"*A person who offers, promises or gives anything of value or benefit to any person* who is serving or has been elected, *selected, appointed, employed or otherwise engaged to serve in a public capacity,* including any public official or employee, any referee, juror or venireman, or any witness in any judicial or arbitration hearing or any official inquiry, or any member of a board of arbitration, with intent to influence the act, vote, opinion, judgment, decision or exercise of discretion of such person with respect to his or her services in such capacity commits a class D felony. In addition, any person convicted under this section shall be disqualified from holding public office under the laws of this state." [emphasis added].

While a bank may clearly be a corporate "person" under Iowa law [§4.1(13), Code of Iowa, 1977], it does not follow that such bank serves in a public capacity by being selected as the depository for public monies. Other sections of

Chapter 722 pertain to acceptance of a bribe by a public official, bribery in sports, and bribery in connection with voting at an election and have no application to the matter in question.

In answer to Representative Krause's third question, there appear to be several laws which prevent the Treasurer of State from using his investment power against red-lining. Your attention is invited to the provisions of §453.1, code of Iowa, 1977, which provides:

"All funds held in the hands of the following officers or institutions shall be deposited in banks as are first approved by the appropriate governing body as indicated:

"1. For the treasurer of state, by the executive council;...the treasurer of state...shall invest all funds not needed for current operating expenses in time certificates of deposit in banks listed as approved depositories pursuant to this chapter or in investments permitted by §452.10."

Thus, it should be readily apparent that the Treasurer of the State of Iowa has no power on his own to select the banks in which state funds are to be deposited. Further, there is no express provision by statute which provides the State Treasurer with authority to reward a financial institution, or to penalize, as the case may be in connection with alleged practices of red-lining. In the absence of such express authority, it is our view that the State Treasurer taking such action would be subject to criticism and possible criminal charges of misconduct in office by acting under color of office in excess of the authority conferred on him by that office. (See §722.1 Criminal Code, supra.) If the Legislature had intended to give the State Treasurer such power it clearly could have made appropriate provisions in Chapter 1190, supra. Now, under the present language of the law, the Treasurer is given no enforcement duties under the act, and in fact is not even mentioned. He is not endowed with powers of office to make fact determinations as to whether or not a financial institution is acting legally or illegally under the act. There is not even any provision in the act for those state officers charged with the responsibility of supervising state chartered financial institutions to apprise the State Treasurer of actions taken under the law when a financial institution approved for the deposit of state funds by the executive council has been found to have engaged in illegal practices such as red-lining. Chapter 1190 recognizes the present supervision of the various financial institutions by the Superintendent of Banking, State Auditor, Credit Union Administrator, a newly established office which will commence operation in 1979, and the Commissioner of Insurance. (§5) The law does not impose any duties upon the State Treasurer.

Further consideration has also been given to the result of a state officer threatening to withhold from an approved financial institution the deposit of state monies in an effort to coerce the cessation of an illegal practice of red-lining. Such action would be a violation of §711.4 of the Iowa Criminal Code, supra:

"A person commits extortion if the person does any of the following with the purpose of obtaining for oneself or another anything of value, tangible or intangible, including labor or services:

* * *

"4. Threatens to harm the credit or business or professional reputation of any person.

"5. Threatens to take or withhold action as a public officer or employee, or to cause some public official or employee to take or withhold action.

* * *

"Extortion is a class D felony."

Clearly, while the present section of the Code entitled Bribery does not control the investment of public funds by the state treasurer, his independent use of such investment power is proscribed by other sections of the Code.

Representative Garrison's question touches the same subject matter asking:

"Whereas it is against the Code of Iowa for a financial institution to engage in the practice of red-lining, an opinion is requested of the Office of Attorney General of the State as to the legality of the State of Iowa placing state deposits with institutions that engage in the practice."

In answer to Representative Garrison's question as to the legality of the state placing deposits in institutions that engage in the practice of red-lining, we look to the provisions of Chapter 1190, Acts of the 67th G.A., 1978 Session.

The penalty provisions of Chapter 1190 are spelled out in §8 as follows:

"Any person who in bad faith fails to comply with the provisions of section one (1) through ten (10) of this Act, is subject to punitive damages not to exceed one thousand dollars in addition to actual damages as set forth in section six (6) of this Act."

It is noted that §6 of the Act provides a civil remedy for any person aggrieved by a violation of the Act and §7 makes it a serious misdemeanor for any person to knowlingly engage in a discriminatory practice in violation of the Act. However, there is no provision which authorizes or contemplates the removal of state funds as an additional penalty—or conversely, the selective investment of such funds as a reward for not violating the Act. It is a well settled doctrine of law that courts do not favor imposition of penalties or forfeitures not specifically provided for by statute. Further, it is our view that the express mention of criminal and civil penalties in Sections 7 and 8 of Chapter 1190 precludes any other penalty. *Expressio unius est exclusio alterius.* Statutes must be interpreted according to what is said therein. The courts will not further legislate by interpreting such statutes according to what might have been said.

Accordingly, Representative Garrison's question must be answered affirmatively.

December 29, 1978

GENERAL ASSEMBLY: Constitutional Law; Confirmation of Governor's Appointees to Office. Article III, §§8 and 17, Constitution of Iowa. In absence of a specific constitutional or statutory requirement specifying the number, percentage or portion of the senators who must approve an appointment, a statute requiring "approval", "advice and consent", "confirmation" or "consent" requires no more than an affirmative vote from a simple majority of the senators present, assuming there is a quorum. (Turner to Neu, Lt. Governor, 12-29-78) #78-12-38

The Honorable Arthur A. Neu, Lieutenant Governor of Iowa: You have requested an opinion of the attorney general as to the number of votes required for Senate confirmation of a governor's appointment where a statute requires confirmation but is silent as to the margin required.

You note that in some instances the statute requires approval of two-thirds of the members of the Senate (§147.12, Code of Iowa, 1975) but others require only the "advice and consent of the senate" (§601A.3), "confirmation of the senate" (§307.3) or "consent of the senate" (§80B.6).

You state that the Senate rules have no provision regarding the vote required but that it is traditional that two'thirds is required. You also note "It is plain that where an extraordinary majority is required by law for confirmation, nominees must be confirmed by such a majority." You then specifically ask:

"1. What majority is required on a vote in the Senate to confirm an appointee when no majority is specifically set out in the Code?

"2. Where an extraordinary majority is not required by law for confirmation, may the Senate, by rule or tradition, require an extraordinary majority for confirmation?"

Article III, §§8 and 17, Constitution of Iowa, provide respectively:

"*Quorum.* SEC. 8. A majority of each house shall constitute a quorum to transact business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members in such manner and under such penalties as each house may provide.

* * *

"*Passage of bills.* SEC. 17. No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the General Assembly, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal."

It is clear from the foregoing that a majority of either house is a quorum for the transaction of the ordinary business of either such house. But where passage of bills is involved a majority of the full number of members elected to either such house is required even though this might be a number greater than a majority of a quorum.

However, the act of confirmation by the Senate of an appointment made by the governor is not a legislative act. 63 Am.Jur.2d 697 and 698, Public Officers and Employees §§110 and 112. It is merely an act required by law, or, as in some states, by the constitution. Thus, no greater approval can be required, by rule or tradition, than is required by the law or the constitution. See also 67 C.J.S. 160, Officers §§31 and 32; 81 C.J.S. 1001, States §68; and *State v. Hagemeister,* 161 Neb. 475, 73 N.W.2d 625 (1955).

In each of the examples you present, the language used indicates that to acquire his office a nominee must gain the approval of the Senate but the actual vote needed is not, as you point out, set forth in some of these particular sections or in any other sections of the Code. Neither is it found in the Constitution.

Thus, it is my opinion that, in absence of a specific constitutional or statutory requirement specifying the number, percentage or portion of the senators who must approve an appointment, a statute requiring "approval," "advice and consent," "confirmation" or "consent" requires no more than an affirmative vote from a simple majority of the senators present, assuming there's a quorum.

December 29, 1978

STATE OFFICERS AND DEPARTMENTS: GOVERNOR: TRANSFER

OF FUNDS: SIGNATURE REQUIRED. §8.39, Code of Iowa, 1977. While the approval of a transfer of funds is a discretionary act which must be performed by the Governor, the signing of the approval of such a transfer was properly delegated to and performed by the governor's executive assistant and even if approval was after the signature the transfer was nevertheless valid and sufficient. (Turner and Haesemeyer to Redmond, State Senator, 12-29-78) #78-12-39

Honorable James M. Redmond, State Senator: You have requested an opinion of the Attorney General concerning the application of §8.39, Code of Iowa, 1977, to a transfer of funds involving the Department of Social Services. Specifically you inquire whether the authorization for the transfer was properly approved where it was signed:

Approved By The Governor

By Wythe Willey

And in the event we find as we do, that the requirements of §8.39 are met, whether the delegation of power by the Governor is permitted by the laws or Constitution of Iowa.

The transfers in question were internal within the Department of Social Services, i.e., from one Social Services account to another. Thus, the applicable law is the first paragraph of §8.39 which provides:

"Use of appropriations-transfer. 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.

"* * *"

We have ascertained from the Governor's Office that the principal act, in this case the approval, was in fact done by the Governor and it was only the ministerial act of signing the document which was delegated to his Executive Assistant. As stated in 63 Am.Jur.2d p. 926, *Public Officers and Employees,* §487:

"Generally, a deputy must sign in the name of his principal, since where the authority exercised by the deputy is a derivative and subsidiary one, it is the authority conferred on the principal and not an authority inherent in the deputy, and accordingly, the authority must be exercised in the name of him in whom it exists, and not in the name of him who has no recognized authority. Where this doctrine prevails, whatever official act is done by a deputy must be done in the name of his principal, and not in the name of the deputy. If he undertakes to act in his own name and on his own authority, he no longer acts as deputy, but in an independent capacity, and his acts can then no longer be recognized as official. A related rule has been applied to an official act which consists of a main or principal act which must be followed by a ministerial or clerical act to effectuate the principal one, it having been held in such case that the principal act must be performed by the principal officer in his own name, but that the ministerial act may be validly performed by an authorized assistant. . . ."

In Iowa, what is "ministerial" and what is "discretion" have been defined as

follows:

"* * *

" 'A ministerial act has been defined as "one which a person or board performs upon a given state of facts, in a prescribed manner, in observance of the mandate of legal authority and without regard to or the exercise of his own judgment upon the propriety of the act being done." '

"* * *

" '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.'

"* * *"

Arrow Exp. Forward Co. v. Iowa State Commerce Comm., 256 Iowa 1088, 130 N.W.2d 451, 453 (1964); See also, 63 Am.Jur.2d p. 789, *Public Officers and Employees,* §273.

In the case of the transfer you are questioning, the discretionary act was the approval of the transfer and that certainly was performed by the Governor. The ministerial act of signing the approval form was properly delegated to and properly performed by the Governor's Executive Assistant.

Reed v. City of Cedar Rapids, 138 Iowa 366, 116 N.W. 140 (1908) involved a challenge to the validity of taxes on the ground that the assessments were not made by the assessor but by one of his assistants and that they were not sworn to as required by law. The Iowa Supreme Court upheld the assessments stating:

"* * *

"While it is true that the property owner is entitled to the judgment of the assessor as to the value of his property, it is also true that the statute does not require the assessor to personally list all property. Such work is clerical, and even where the assistant fixes the value in the first instance, the assessment is not invalid if the assessor afterward examines the valuation so made and adopts it as his act. *Snell v. City of Ft. Dodge*, 45 Iowa, 564; *Meservey v. Webster County*, 46 Iowa, 702; *Burnham v. Barber*, 70 Iowa, 87, 30 N.W. 20.

"Section 1365 of the Code provides that the assessor shall attach to the assessment rolls his oath in the form therein provided. . . . The evidence shows that the assessor made the required oath for each year, but that his name was in one or two instances written thereon by a clerk at his request. If his name was placed on the written oath by his direction, it was his signature as truly as if he had written it himself...." 116 N.W. at 141.

Thus, it would appear that even if the governor had not given his approval to the transfer of funds until after the fact of the signing of the form by his Executive Assistant, the approval would still have been sufficient.

Thus, in answer to your first question, it is our opinion that the requirements of §8.39 were satisfied when signed as indicated above.

In answer to your second question, we have found that the Governor delegated the power and such delegation was permitted under §8.39. We note no statute or constitutional provision which specifically authorizes the Governor to delegate this power nor do we know of any which would prohibit it. Obviously, the Governor would be physically incapable of performing each and

every power and duty thrust upon him and must delegate various ministerial responsibilities to his assistants and we do not consider the absence of a specific statutory or constitutional authorization to do this to in any way limit the Governor's ability to effectively perform his duties through delegations of this kind.

December 30, 1978

STATE OFFICERS AND DEPARTMENTS: Board of Nursing; Administration of Prescription Medications — Iowa Const. Art. III, §29; §§135C.1, 152.1, 155.30, 204.101, 204,201, 204,301, 204,401, and 687.6, Code of Iowa, 1977; §§701.2 and 701.8. Supplement to the Code, 1977; §§16 and 23, S.F. 2200, Acts of the 67th G.A. (1978); §165 of Ch. 4, Ch. 1245, Acts of the 66th G.A. (1976). Section 23 of S.F. 2200, amending §204.101 of the Code to permit "qualified individuals" to administer controlled substances outside the presence of a phyician is constitutional. These "qualified individuals" may administer prescription medications outside the presence of a physician. The Board of Pharmacy has the authority to promulgate rules regarding these "qualified individuals" relating to controlled substances. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 12-30-78) #78-12-40

Mrs. Lynne M. Illes, Executive Director, Iowa Board of Nursing: We have your opinion request of August 21, 1978, regarding Senate File 2200, Acts of the 67th G.A. (1978). You first ask whether the inclusion of Section 23 of that Act violates Article III, §29, of the Iowa Constitution. Assuming we find it constitutional, you then ask the following questions:

"1. The amendment strictly relates to the administration of controlled substances. Since this amendment addresses only controlled substances, can a 'qualified individual' who is not defined in any other section of the Code of Iowa as being authorized to execute the medical regimen of a physician, administer medications not listed as being a controlled substance?

"2. S.F. 2200 clearly states that a physician, dentist, podiatrist and veterinarian may delegate the administration of controlled substances to a nurse, intern or other 'qualified individual' yet it provides that only a veterinarian in delegating his or her authority must provide direction and supervision of the person(s) to whom the responsibility has been delegated. §152.2, Code of Iowa, states that a registered nurse may execute regimen prescribed by a physician and a licensed practical nurse may perform services in the provision of supportive or restorative care under the supervision of a registered nurse or physician. §148.2 states that 'Students of medicine or surgery who have completed at least two years' study in a medical school, approved by the medical examiners, and who prescribe medicine under the supervision of a licensed physician and surgeon, or who render gratuitous service to persons in case of emergency.' The members of the Board believe that §152.2 and §148.2, Code of Iowa, 1977, clearly denote the scope of practice and legal jurisdiction for the nurse as well as the intern. Since the scope of practice of the 'qualified individual' is not defined elsewhere in the Code, the concern and question of the Board is: Does the 'qualified individual' in the administration of controlled substances have to be supervised; and if so, by whom and how is the word 'supervision' to be interpreted (i.e., in the presence of, not in the presence of, etc.)?

"3. Is the physician legally accountable for the acts of the 'qualified individual' to whom he or she delegates the administration of controlled substances; and if so, how is this accountability to be determined and/or documented? For example, will the physician be required to delegate the administration of controlled substances by written prescription to the

'qualified individual' or will they be able to accept telephone orders, etc.?

"4. §152, Code of Iowa, 1977, states in part that the registered nurse is responsible for 'supervising and teaching other personnel in the performance actions relating to nursing care.' May a registered nurse refuse to supervise and/or teach the 'qualified individual' who is neither defined by the Code in relation to education/experience nor licensed under any section of the Code?

"5. Since the registered nurse is responsible, by code authority, for supervising and teaching other personnel in the performance of activities relating to nursing care, and since the administration of medications is considered to be a vital component of nursing care, can another licensing authority (Board of Pharmacy Examiners) promulgate rules and regulations governing a 'qualified individual' when the supervision of said 'qualified individual' may fall within the legal jurisdiction of a profession which is governed by another licensing authority (Iowa Board of Nursing)? If the response to this question is yes, should then the board of Pharmacy Examiners promulgate rules governing interns, physician assistants, dental assistants, etc. that are under the supervision of other licensed personnel?"

Section 204.101(1), 1977 Code of Iowa, provided:

"As used in this chapter:

"1. '*Administer*' means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:

"a. A practitioner, or in his presence, by his authorized agent; or

"b. The patient or research subject at the direction and in the presence of the practitioner.

"Nothing contained in this chapter shall be construed to prevent a physician, dentist, podiatrist or veterinarian from delegating the administration of controlled substances under this chapter to a nurse or intern, or, as to veterinarians, to an orderly or assistant, under his direction and supervision; all pursuant to rules adopted by the board."

That section, and others within that chapter, were the subject of a prior opinion of this office to you. *See,* 1972 OAG 308. In that opinion we held that a physician may:

1. Delegate the administration of Schedule II drugs to a nurse or intern under his direction and supervision without a written prescription. This administration could be done outside of a physician's presence.

2. Delegate the administration of Schedule II drugs to his authorized agents, other than a nurse or intern, but only upon a written prescription and in his presence.

3. Delegate the administration of Schedule III and IV drugs to his authorized agents or a nurse or intern with either oral or written prescriptions. The agents must administer in his presence.

That opinion caused some consternation among those involved with health care facilities, specifically nursing homes. The problem was that there were instances where, because of a shortage of nurses in some facilities, or because nurses are not required in all facilities, medications, including controlled substances, were being administered by aides. Section 135C.1 defines residential and intermediate care facilities. Residential facilities are not required to have

nurses. Intermediate care facilities under a certain bed capacity are not required to have nurses twenty-four hours each day. Thus, in order for certain residents of such facilities to receive their prescribed medications, including controlled substances, aides would have to administer them, most often, outside of a physician's presence. The same was true of emergency medical technicians, ambulance attendents and the like who administered such medications outside a physician's presence. In other words, a violation of Chapter 204 was being committed.

Section 204.401 sets forth the penalties for violation of the chapter by possession and delivery of controlled substances. Such actions by the above enumerated individuals could be considered a violation of either §204.401(1) or §204.401(3). In addition, when such substances are administered outside a physician's presence and not under the supervision of a physician or nurse, which could occur in a residential care facility, a violation of the nurse practice act, Chapter 152 of the Code, may also be committed. Even if the above sections do not provide a specific penalty for the administration or dispensing of controlled substances by an aide or other such individual outside of a physician's presence, a criminal penalty may still exist. *See,* §687.6, Code of Iowa, 1977; §§701.2 and 701.8, Supplement to the Code 1977; *State v. Conlee,* 1868, 25 Iowa 237; *State v. Shea,* 1898, 106 Iowa 735, 72 N.W. 300; *State v. Social Hygiene, Inc.,* 1968, 261 Iowa 914, 156 N.W.2d 288. With this in mind, it was suggested that legislative change be sought to allow patients to receive their medications when a physician or nurse was not present.

Section 23 of Senate File 2200 was passed, we assume, to effectuate this change. That section provides:

"Section two hundred four point one hundred one (204.101), subsection one (1), paragraph b, unnumbered paragraph two (2), Code 1977, is amended to read as follows:

"Nothing contained in this chapter shall be construed to prevent a physician, dentist, podiatrist or veterinarian from delegating the administration of controlled substances under this chapter to a nurse, intern, *or other qualified individual,* or, as to veterinarians, to an orderly or assistant, under his or her direction and supervision; all pursuant to rules adopted by the board." [Emphasis added]

The emphasized portion sets out the words added to the original section. Your first question is whether the inclusion of §23 in Senate File 2200 violates the Iowa Constitution.

The title of Senate File 2200 provides: "An Act making technical changes of a corrective nature to the new criminal code." Arficle III, §29 of the Iowa Constitution 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."

This provision is to be liberally construed to permit one act to embrace all matters reasonably connected with the subject expressed in the title and not utterly incongruous thereto. *Motor Club of Iowa v. Department of Transp.,* 265 N.W.2d 151, 153 (Iowa 1978); *Webster Realty Company v. City of Fort Dodge,* 174 N.W.2d 413, 418 (Iowa 1970). It was stated in the *Motor Club* case (265 N.W.2d at 152-153):

"This provision contains two requirements. One is the single subject requirement. It refers to the content of the legislation and limits it to 'one subject, and matters properly connected therewith * * *.' This precept is designed to prevent political 'logrolling' which could result from attaching unrelated and unpopular riders to bills certain of being passed. *Long v. Board of Supervisors,* 258 Iowa 1278, 1284, 142 N.W.2d 378, 382 (1966)....

"The second requirement, which is relied on by plaintiff, provides that the subject of the act must be expressed in its title. 'It was designed to prevent surprise in legislation, by having matter of one nature embrace in a bill whose title expressed another.' *State v. Talerico,* 227 Iowa 1315, 1322, 290 N.W. 660, 663 (1940). See Rudd, No Law Shall Embrace More Than One Subject, 42 Minn.L.Rev. 389, 392 (1958)."

See also, *Lee Enterprises, Inc. v. Iowa State Tax Com'n,* 162 N.W.2d 730, 737 (Iowa 1968). Citing to *Long v. Board of Supervisors,* 1966, 258 Iowa 1278, 1282-3, 142 N.W.2d 378, the Court in *State v. Social Hygiene, Inc.,* held (261 Iowa at 917-918):

"It has been uniformly held that §29, Article III, of the Iowa Constitution, 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."

That Court further held (261 Iowa at 918):

"We referred to the landmark case of *State v. Talerico*, supra, noting that 'this constitutional provision was designed to prevent surprise in legislation, to prevent the union in one bill of matters having no fair relation to each other.' In the Talerico case this appears:

" '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. It is unnecessary that each thought or step toward the accomplishment of an end or object should be embodied in a separate act. Nor is it important that a law contain matters which might be and usually are contained in separate acts or would be more logically classified as belonging to different subjects provided only they are germane to the general subject of the act in which they are put.' "

For examples of cases where the subject matter of an act was in violation of Article III, §29 of the Constitution, see, *In re Breen,* 1928, 207 Iowa 65, 222 N.W. 426, and *State v. Bristow,* 1906, 131 Iowa 664, 109 N.W. 199. In *Breen,* the defendant's license to practice medicine was suspended for a violation of a federal act concerning narcotics. The statute in question was included in an Act, the title of which indicated it was to amend several enumerated chapters of the Code relating to the sale and transportation of intoxicating liquors under permits. The Court held that narcotics and intoxicating liquors were different and that including the revocation or suspension of a physician's license for narcotic violations in an Act relating to the sale and transportation of intoxicating liquors under permits was in violation of Article III, §29 of the Iowa

Constitution. In *Bristow,* the defendant was charged with a violation of an Act, the title of which referred to fees paid by peddlers. The term "peddler" was defined in the Act, and the defendant contended he did not fall within the definition. The Court held that the taxing of a new and independent occupation cannot be germane to the original Act, the title of which concerned a different occupation.

From the above discussion, we do not find that the amendment to Chapter 204 in S.F. 2200 is so incongruous to the other subject matter of the Act or so unrelated to the title that said Section 23 of S.F. 2200 if void. Accordingly, said section is constitutional.

In your next question, number one, you ask whether these "qualified individuals" can administer medications not listed as controlled substances. There is no specific Code section which speaks to this. We assume you are asking if a criminal violation would occur if such happened. Section 152.1(1)(c) sets forth an applicable exception to the practice of nursing:

"As used in this chapter:

"1. The *'practice of nursing'* means the practice of a registered nurse or a licensed practical nurse. It does not mean any of the following:

. . .

"c. The performance of services by employed workers in offices, hospitals, or health care facilities, as defined in section 135C.1, under the supervision of a physician or a nurse licensed under this chapter, or employed in the office of a psychologist, podiatrist, optometrist, chiropractor, speech pathologist, audiologist, or physical therapist licensed to practice in this state, and when acting while within the scope of the employer's license."

Thus, such an employee who is supervised by a physician or a nurse can administer other medications. In addition, Rule 57.19(3)(a), Chapter 470, I.A.C. provides, for a residential care facility, that a properly trained person shall be charged wih the responsibility of administering medications. The qualifications for training are set forth therein. Rule 58.21(15) of Chapter 470, for intermediate care facilities, does not contain the same language as rule 57.19. It only prescribes that nurses or physicians shall administer controlled substances. However, subsection "c" provides that the health service supervisor shall be responsible for the supervision and direction of all personnel administering medications. Rule 59.26(17) of Chapter 470, for skilled nursing facilities is the same as Rule 58.21 (15).

However, we must also look to Chapter 155 of the Code. Section 155.30 as amended by §165 of Ch. 4, Ch. 1245, Acts of the 66th G.A. (1976), and §16, S.F. 2200, Acts of the 67th G.A. (1978), provides:

"Any person who sells or offers for sale, gives away, or administers to another person any prescription drug shall be deemed guilty of violating the provisions of this section or who violates any provisions of §155.29 is guilty of a public offense.

"If the prescription drug is a controlled substance as defined in §204.101, subsection 6, the person shall be punished pursuant to section 204.401, subsection 1, and §204.411. If the prescription drug is not a controlled substance, the person shall upon conviction of a first offense be guilty of a serious misdemeanor. For a second offense, or if in case of a first conviction of violation of any provision of §155.29 or of violation of any provision of this section,

the offender shall previously have been convicted of any violation of the laws of the United States or of any state, territory, or district thereof relating to prescription drugs, the offender shall be guilty of an aggravated misdemeanor. For a third or subsequent offense in violation of this section or in violation of §155.29, or if the offender shall previously have been convicted two or more times in the aggregate of any violation of the laws of the United States or of any state, territory, or distict thereof relating to prescription drugs, the offender shall be guilty of a class 'D' felony.

"Any person violating any provision of this chapter by selling, giving away, or administering any prescription drug to a minor shall be guilty of a class 'C' felony.

"Nothing in this section shall be construed to prevent a licensed practitioner of medicine, dentistry, podiatry, nursing, veterinary medicine, or pharmacy from such acts necessary in the ethical and legal performance of his profession."

This section appears to provide that unless one falls within the exception contained in the last paragraph of that section, an individual shall not sell, give away or administer a prescription drug. In the only case under this section, *State v. Webb,* 1968, 261 Iowa 1151, 156 N.W.2d 299, it was held that this section was void as unworkable as to those listed practitioners in the last paragraph. However, it was delcared to still be applicable to other individuals. In 1976 OAG 296, we held that manufacturers' representatives who carried samples of prescription drugs did not violate this section. Our reasoning was based on a reading of this section, §155.26 and Chapter 204. We reasoned that since, under Chapter 204, a manufacturers' representative could legally have possession of controlled substances, the same individual could not be in violation of this section. We stated therein that every prescription drug contained in §155.3(10) was also a controlled substance as defined in §204.101(6). In retrospect, we feel that this statement was overbroad since not all prescription drugs are, in fact, controlled substances. However, the logic contained in that opinion that a manufacturer's representative should not be held criminally liable for a violation of Chapter 155 for merely doing his or her job, which is otherwise legal, is still sound. Can we, therefore, extend the application of that opinion to our present fact situation?

There exist more than one possible interpretation of §155.30. It can be said that this section only applies to the sale, giving away, or administration of prescription drugs *without* a prescription. Under such an interpretation "qualified individuals" could administer medications for which there is a prescription. However, if that were to be the correct interpretation of this section, there would be no need for the last paragraph excepting certain practitioners.

It can also be said that this section has no application to your fact situation. This section falls within a chapter regarding pharmacists and pharmacies. In your situation, a prescription has been made and the drug has been dispensed, pursuant to that prescription, to the ultimate user—in this case the patient. Said patient has paid for the drugs and now owns them. Since what so far occurred has been legal, the fact that the patient may not be physically or mentally capable of keeping and self-administering the medication should not mean that §155.30 suddenly becomes applicable. This interpretation may sufficiently answer your problem, but it would still fail to answer the problem of the EMT's, ambulance attendants and the like. We do not believe that the Legislature intended this section to have a different application for unlicensed

individuals in a health care facility setting than that for licensed[1] or unlicensed individuals outside of such a setting who are rendering emergency assistance. In his dissent in the *Webb* case, Mr. Justice Mason, joined by Mr. Chief Justice Garfield and Mr. Justice Rawlings, stated, with respect to §155.30, that "everyone is prohibited from selling [administering] prescription drugs but the general prescription is later made inapplicable to certain professional people ...." 156 N.W.2d at 304.

We believe that the above interpretation of §155.30 by Mr. Justice Mason is the proper one. When considered in light of the majority's statement that the amendment placing this section in the Code "was to make illegal individual acts not otherwise proscribed, make *unlicensed* persons subject thereto and provide penalties therefore" [156 N.W.2d at 301, emphasis added], this conclusion becomes clearer. Pursuant to this interpretation, unlicensed individuals such as nurses aides, could not administer medications, except for controlled substances, to others. The amendment to §204.101 creates the exception for controlled substances. There may also be additional exceptions for EMT's. Section 1 of S.F. 2076, along with §§8 and 9 permit certain emergency medical procedures, including the administration of certain medications. Section 10(1) specifically provides that an EMT or paramedic shall not be subject to criminal liability for having executed a physician's orders. The language of §155.30 is so broad, however, that EMT's and paramedics in some cases, and nurses aides in many cases, would not be able to administer prescription medications. It could also mean that a parent could not administer prescription drugs to his or her child. Although we do not believe that a court would interpret this section in such a manner to prevent the administration of prescription drugs by and among family members, the language is broad enough that such a result is possible. In short, we do not know what specific acts the Legislature was trying to prohibit by this section. Without being able to ascertain this, it would be foolish for us to set forth a definitive interpretation of this section.

Outside of those obvious situations where an unlicensed individual administers a prescription drug when there is no prescription for either that drug or that user, we cannot state with any certainty to what this section applies. In actuality, we do not believe, outside of §23 of S.F. 2200, that the Code of Iowa speaks directly to your fact situation. Keeping in mind the fact that the Legislature did not require nurses in residential care facilities, and only required nurses part-time in intermediate care facilities, and realizing that the Legislature must surely have realized that certain residents in either of those facilities might require prescription medications, we cannot state that the Legislature also intended that the administration of those medications by an unlicensed individual would be a crime. Therefore, the administration of medications by a "qualified individual" pursuant to a physician's prescription and order is permissible. However, because the various sections we have discussed are either somewhat incongruous, too broad, too vague or do not speak to the specific fact question at hand, we strongly recommend that the Legislature take a careful look at the situation and amend, clarify, repeal or adopt appropriate statutes to clarify, once and for all, the permissible acts of licensed and unlicensed individuals in the administration of medications.

[1]Emergency Medical Technicians (EMT's) are now licensed by S.F. 2076, Acts of the 67th G.A. (1978).

Your next question is whether the "qualified individual" must be supervised in the administration of controlled substances, and of what the supervision must consist. Pursuant to our original opinion, *supra,* we held that the agents could only administer controlled substances in the physician's presence. Because we assume that the amendment in question to §204.101 was intended to change that interpretation, we must hold that the administration of controlled substances by a "qualified individual" need not be in the physician's presence.

In your fourth question, you ask about the accountability of "qualified individuals", the documentation of the same, and whether the delegation of the administration of controlled substances must be done by written prescription. In our original opinion, we found that the last unnumbered paragraph of §204.101(1) provided an exception to §204.308, which requires that unless dispensed directly by a practitioner, no Schedule II substance may be dispensed without a written prescription. We, therefore, held that where a practitioner delegated the administration of a Schedule II substance to a nurse or intern, a written prescription was not necessary. Now, since §23 of S.F. 2200 included "qualified individuals" along with "nurse or intern", written prescriptions for Schedule II substances are not needed for the "qualified individuals". Since written prescriptions were not then necessary for Schedule III and IV substances, none would now be necessary.

You ask, in your fifth question, whether a nurse could refuse to supervise or teach a "qualified individual" in performance relating to nursing care. You refer to §152.1(2), which proides in pertinent part:

"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 provision which is supportive to or restorative of life and well-being.

"b. Executive regimen prescribed by a physician.

"c. *Supervise and teach other personnel in the performance of activities relating to nursing care."* [Emphasis added]

The emphasized portion outlines the basis for your question. This provision does not stand for the proposition that a registered nurse is the only one who can teach or supervise others in activities relating to nursing care. It is merely an indication of what a registered nurse may permissibly do in the practice of that profession. What you have asked is not a legal question. In the setting of a health care facility it is a matter between the nurse and the employer. The refusal to perform all the functions required of a nurse by the employer may lead to dismissal. We cannot, nor will not render a legal opinion as to whether a nurse should agree with the employer.

Your last question is similar to the previous one in that it relates to §152.1 (2)(c), set forth above. The amendment to §204.101 concerns the administration of controlled substances. The Board of Pharmacy is given the authority to promulgate rules relating to controlled substances. *See,* §§204.201(1) and 204.301, in addition to §204.101(1). Again, §152.1(2)(c) does not mean that only nurses can legally supervise or teach others in nursing practices. Thus, the Board of Pharmacy may adopt rules regarding the dispensing and administration of controlled substances pursuant to §204.101(1). Such does not invade

the authority or power of the Board of Nursing. Of course, any final determination regarding the legality of rules by the Board of Pharmacy cannot be made until the rules have been promulgated.

Again, as we discused earlier in relation to your second question, we do not believe that the Legislature has specifically addressed the problems with which you are concerned. These are not simple problems, and some difficulty arose in answering your questions. We feel it incumbent upon the Legislature to address the problems. Until such time that it does, these questions and problems, in addition to others, will arise.

Accordingly, we are of the opinion that §23 of S.F. 2200, Acts of the 67th G.A. (1978) is constitutional. These "qualified individuals" may administer prescription mediations outside the presence of a physician. The Board of Pharmacy had authority to promulgate rules regarding these "qualified individuals" relating to controlled substances.

December 30, 1978

PHYSICIANS AND SURGEONS: Physician's Assistant — §§148B.1, 148B.4 and 148B.7, Code of Iowa, 1977. Chapter 470-136 IAC. Nurses should generally accept and follow orders from physicians' assistants especially when the orders whether oral or written originated from a physician. (Turner to Nystrom, State Senator, 12-30-78) #78-12-41

The Honorable Jack Nystrom, State Senator: You have requested an opinion of the Attorney General as to whether nurses must follow the orders of a legally approved physician's assistant. You indicate that such physicians' assistants are communicating orders to nurses regarding patient care. Some of the nurses, however, are reluctant to accept these orders even when they are directed in writing by the physician.

Chapter 148B, 1977 Code of Iowa, regulates physicians' assistants. Section 148B.1(6) defines "physician's assistant":

"6. *'Physician's assistant'* means a person who has successfully completed an approved program or is otherwise found to be qualified as a physician's assistant and is approved by the board to perform medical services under the supervision of one or more physicians approved by the board to supervise such assistant. The term 'supervision' shall not be construed as requiring the personal presence of a supervising physician at the place where such services are rendered except insofar as the personal presence is required by the rules and regulations adopted pursuant to this chapter or as is expressly required in this chapter."

Section 148B.4 provides:

"A physician's assistant may perform medical service when such services are rendered under the supervision of a licensed physician or physicians approved by the board. A trainee may perform medical services when such services are rendered within the scope of an approved program."

Pursuant to §148B.7, the Board of Medical Examiners has the authority to adopt rules and regulations on physicians' assistants. Such regulations are to be designed to encourage the utilization of physicians' assistants consistent with quality health care and medical services for Iowa citizens through better utilization of available physicians, and to develop sound programs to educate and train physicians' assistants in providing health care and medical services.

Rule 470-136.1 IAC provides in part:

"A physician's assistant is a person qualified by general education, training, experience, and personal character to provide patient services under the direction and supervision of an actively licensed physician in good standing. The purpose of the physician's assistant program is to enable the physician to extend high quality medical care to more people throughout the state."

The duties of a physician's assistant are contained in Rule 470-136.5(1) IAC, and contained, in addition to others, the following:

"a. The initial approach to a patient of any age group in any setting to elicit a detailed and accurate history, perform an appropriate physical examination and record and present pertinent data in a manner meaningful to the physician.

"b. Performance or assistance in performance of routine laboratory and related studies as appropriate for a specific practice setting, such as the drawing of blood samples, performance of urinalyses, and the taking of electrocardiographic tracings.

"c. Performance of such routine therapeutic procedures as injections, immunizations, and the suturing and care of wounds.

"d. Instruction and counseling of patients regarding physical and mental health on matters such as diets, disease, therapy, and normal growth and development.

"e. Assisting the physician in the hospital setting by making patient rounds, recording patient progress notes, accurately and appropriately transcribing and executing standing orders and other specific orders at the direction of the supervising physician, and compiling and recording detailed narrative case summaries.

"f. Providing assistance in the delivery of services to patients requiring continuing care (home, nursing home, extended care facilities) including the review and monitoring of treatment and therapy plans.

"g. Independent performance of evaluation and treatment procedures essential to providing an appropriate response to life-threatening, emergency situations.

"h. Maintain an awareness of the community's various health facilities, agencies, and resources in order to facilitate the physician's referral of appropriate patients.

"i. Assist the physician in the office in the ordering of drugs and supplies, in the keeping of records, and in the upkeep of equipment."

Finally, Rule 470-136.5(5)(b) IAC, speaking to the supervision by a physician, provides in part:

"(1) The supervising physician shall review at least weekly all patient care provided by the physician's assistant if such care is rendered without direct consultation with the physician and shall countersign all notes made by the physician's assistant.

"(2) In the temporary absence of the supervising physician, the physician's assistant may carry out those tasks for which he is registered, if the superivsory and review mechanisms are provided by a delegated alternative physician supervisor.

"(3) The physician's assistant may not function as such if these supervisory and review functions are impossible."

What is significant because of its absence in both the rules and Chapter

148B is any indication regarding the relationship of physicians' assistants and nurses. From a reading of the Chapter and the rules, it is apparent that physicians' assistants may perform acts which, prior to their advent, were purely in the domain of licensed physicians. This must necessarily be the role of physicians' assistants if the concept of a physician's assistant is to have any effective meaning. That is, they must be able to do some things — although under the supervision of a licensed physician — which heretofore could only be done by a licensed physician.

Of necessity, we can only give you an opinion setting forth general guidelines. The absence of a specific statute, or of specific regulations of the board of medical examiners, on the relationship of the physicians' assistant to the nurse compels us to write on a clean slate. In doing so, we do not feel that a blanket statement one way or the other — that physician's assistants can in all cases give orders which must be followed by nurses or that they cannot in any case do so — is proper. Rather, we say only that they can give orders to a nurse when such is necessary to effectuate the intent of the physician who is supervising them and to carry out the duties which the rules of the board of medical examiners allow them to perform. The essence of the physician's assistant concept is his relationship to the physician who supervises him. If the physician's assistant can carry out the intent of the physician under whose supervision he acts and perform his duties under the aforesaid rules only by giving certain orders to a nurse, then he has a legal right to give those orders and the nurse is under a legal obligation to obey them.

To allow a nurse to refuse them would frustrate the functioning of the physcian's assistant and thereby thwart the intent of the legislature in recognizing the legal status of that profession and in giving substance to it.

This is not to say that in all circumstances a nurse must blindly follow the dictates of a physician's assistant — or for that mater, even the orders of the physician himself. There may be instances where a nurse may properly wish to confer with a physician on an interpretation of an order. There may also be instances where a nurse may wish to confer with the physician to determine if, by rendering an order, a physician's assistant has overstepped his legal authority or the extent of his delegation from the physician. However, we believe that it is not in the best interest of good medical care for a nurse to be reluctant to follow orders merely because they are transmitted by a physician's assistant.

In *1976 OAG 835,* we were faced with a similar problem. There, however, unlicensed personnel such as a secretary, were transmitting physician's orders. We held that under those circumstances a nurse should accept and follow those orders. If this is so for unlicensed individuals, it must necessarily be so for physicians' assistants. Without having specific facts before us it is difficult to state under what circumstances physicians' assistants may overstep their authority in transmitting orders.

Accordingly, we are of the opinion that nurses should generally accept and follow orders from physicians' assistants, especially when the orders whether oral or written, originate from the physician. We must emphasize that this opinion does not specifically relate to the delegation of authority regarding controlled substances.

December, 1978

COUNTIES AND COUNTY OFFICERS

Board of Health. §§136.20, 24.25(3), 33.21, Code of Iowa, 1977. County board of health is not required to disclose to board of supervisors the names of all persons receiving public health nursing services. (Nolan to Bauercamper, Allamakee County Attorney, 12-19-78) #78-12-15

Liability to automobile purchaser. §§613A.1(3), 321.39, Code of Iowa, 1977. County may be liable to automobile purchaser for county treasurer's negligent misrepresentation on Motor Vehicle's Certificate of Title.(Miller to Schild, Poweshiek County Attorney, 12-19-78) 78-12-14

Minutes of Board. A summary of votes on matters of county business prepared by one of the supervisors and given to the Auditor does not meet statutory requirements for the keeping of minutes of the meetings of the board of supervisors. (Nolan to Eller, Crawford County Attorney, 12-28-78) #78-12-30

Mental Health. §255.16, Code of Iowa, 1977. The provisions of §225.16 which authorize a person to be treated at the state psychiatric hospital at state expense do not permit continued out-patient treatment at state expense. Such costs, in case of voluntary public patients, must be borne by the county. (Nolan to Conlon, State Representative, 12-29-78) #78-12-35

Mental Health. Counties with a population of less than 40,000 are limited to §230A.14 in the amount which can be expended for mental health treatment outside a state institution. (Nolan to Sutton, Floyd County Attorney, 12-28-78) #78-12-29

County Sheriff — Special Deputies. Tort liability of County—§4.1(18), 337.1, 613A.2, 613A.4, Code of Iowa, 1977. A sheriff may appoint "special" deputies without the knowledge or approval of the board of supervisors, Ch. 613A notwithstanding. The county is liable under Ch. 613A for any torts caused or sustained by such "special" deputies. A sheriff may form and equip a civilian posse, and the county is liable under Ch. 613A for any torts caused or sustained by any member of such posse. A county may not attempt to exonerate itself from tort liability through signed agreements with posse members. (Richards to Kemp, Cedar County Attorney, 12-7-78) #78-12-3

County Sheriff — Special Deputies — Civilian Posse. Arrest — §§4.1(18) and 337.1, Code of Iowa, 1977. Special deputies and members of civilian posses summoned by a sheriff under §337.1, may perform every function the sheriff could perform, unless the sheriff expressly limits their duties and power. (Richards to Hullinger, State Representative, 12-15-78) #78-12-10

COURTS

Court Records. §§606.21, 606.22, Code of Iowa, 1977. Court records which have been microfilmed may be destroyed upon order of the court 10 years after a decree or judgment entry is signed. Without such court order, the records cannot be destroyed until forty years after the disposition of the case. (Nolan to Hutchins, State Senator, 12-19-78) #78-12-12

Judicial Retirement System; Funding. House File 2426 67th G.A., Second Session (1978). It is not unconstitutional to earmark certain court costs to fund the judicial retirement system. (Turner to Garrison, Director, Iowa Legislative Service Bureau, 12-29-78) #78-12-36

AGRICULTURE

Corporations: Corn promotion board. §§185C.3, 185C.34, 504A.2(1), 504A.28, 1977 Code of Iowa. The state corn promotion board may incorporate itself under Chapter 504A. (Haskins to Lounsberry, Secretary of Agriculture, 12-4-78) #78-12-1

CRIMINAL LAW

Initial Appearance. Unnecessary Delay — Rules 1(2)(c) and 2(1), I.R.Cr.P. Under Rules 1(2)(c) and 2(1), an accused person should be taken before a committing magistrate within twenty-four hours of arrest. The twenty-four hour period imposed by Rule 1(2)(c) and the intervention of a weekend or legal holiday during the period of detention are merely other factors to be considered in determining the reasonableness or excusableness of a delay. (Richards to Ashcraft, State Senator, 12-27-78) #78-12-22

Sentencing for first offense OMVUI. §§321.281 and 9.031, Supplement to the Code (1977). §321.281, Supplement to the Code (1977) does not provide a "specific penalty" making the maximum penalties available in §903.1 inapplicable to a first offense OMVUI case. §321.281 defines a minimum sentence to be imposed and §903.1 provides maximum penalties available to a sentencing court in such cases. (Cook to Hoffman, State Representative, 12-29-78) #78-12-34.

JUDGES

Judges and Judicial Retirement Fund. Iowa Constitution Art. V, Section 18; Chapter 605A; §605.24; §605.25; Iowa R.Civ.P. 375. Judges retired and temporarily recalled to active service are entitled to annuity increases measured by the duration of and pay for such temporary service. (Salmons to O'Brien, 12-28-78) #78-12-27

Judicial Nominating Commission. State and District. Iowa Constitution Amendment 21, Article V, §§15, 16, 18; Chapter 28A, Code of Iowa, 1977, Chapter 17A, §§117A.1(2), 17A.2(7), 17A.2(2), 17A.12, 17A.19, Code of Iowa, 1977; §§46.1 and 46.2, Code of Iowa, 1977. State and District Judicial Nominating Commissions were created and authorized by amendments to the Iowa Constitution not by statutes of the State of Iowa and therefore are not subject to the open meetings law or the Iowa Administrative Procedure Act. (Murray to Beckman and Tinley, Members, State and District Judicial Nominating Commissions, 12-21-78) #78-12-18

LICENSING

Cigarettes: Sales by Distributors. Chapter 98, 98.1(12), 98.1(13), 98.13, 98.36(7), Code of Iowa, 1977; Chapter 551A, 551A.2(3), 551A.5, Code of Iowa, 1977. A distributor licensed only as a distributor under Chapter 98 cannot make sales under provisions of §551A.5. (Murray to Schroeder, State Representative, 12-28-78) #78-12-25

MOTOR VEHICLES

Constitutional Law: Sales: Motor Vehicles: Fairs. §322.5, Code of Iowa, 1977, as amended. A nonresident motor vehicle dealer may *not* display motor vehicles at fairs, vehicle shows, or vehicle exhibitions in the State unless that dealer is licensed under the provisions of Chapter 322, Code of Iowa, 1977. (Hogan to Kassel, Director, Iowa Department of Transportation, 12-14-78) #78-12-7

Constitutional Law: Sales: Motor Vehicles: Fairs. §322.5 (1977) as amended

by SF 2187 (Ch. 1113, §43) 67th G.A. (1978) and 820-10.2(4)(F) I.A.C. A statute which prohibits motor vehicle dealers from offering motor vehicles for sale at fairs and trade shows outside the county where their principal place of business is located is constitutional. (Hogan to Priebe, State Senator, 12-14-78) #78-12-8

MUNICIPALITIES

Incompatibility of Office; City Councilman, School Board Member. §§298.1, 298.2, 384.16, 384.17, 441.2, Code of Iowa, 1977. The office of city councilman and school board member are incompatible. (Haesemeyer to Spear, State Representative, 12-29-78) #78-12-33

PHYSICIANS AND SURGEONS

Dentists. §§153.13, 153.15, 153.17, 153.34(5), 1977 Code of Iowa; Ch. 1097, §14, Acts 67th G.A. (1978); Art. III, §29, Iowa Constitution. Ch. 1097, §14, Acts, 67th G.A. (1978) has the effect of precluding the suspension or revocation of the license of a licensed dentist or dental hygenist for permitting an unlicensed person to perform work which constitutes the practice of dentistry under §153.13, 1977 Code of Iowa. However, the unlicensed person could still be charged with the unlawful practice of dentistry under §153.17, 1977 Code of Iowa. §14 of Ch. 1097 is not unconstitutional under Art. III, §29, Iowa Constitution, requiring the subject of an Act to be reasonably connected to its title. (Haskins to Doderer, State Senator, 12-14-78) #78-12-9

Practice of Medicine and Surgery. §148.1, Code of Iowa, 1977. The rule of the Board of Medical Examiners defining the "practice of medicine and surgery" in terms more specific than the definition of §148.1 is not contrary to law. (Blumberg to Monroe, State Representative, 12-29-78 #78-12-32

Physician's Assistant. §§148B.1, 148B.4 and 148B.7, Code of Iowa, 1977. Chapter 470-136 IAC. Nurses should generally accept and follow orders from physicians' assistants, especially when the orders whether oral or written originated from a physician. (Turner to Nystrom, State Senator, 12-30-78) #78-12-41

PUBLIC SAFETY

Habitual Offender Statute: Traffic Laws. §321.436, §321.555(1)g. A conviction under §321.436 of the Iowa Code, requiring motor vehicles to be equipped with a proper muffler, is a violation of the traffic laws under §321.555(1)g. (Hogan to Anderson, Howard County Attorney, 12-7-78) #78-12-4

SCHOOLS

Merged Area school employees travel. Article VII, §1, Constitution of Iowa; §§91A.3, 279.29, 279.30, Code of Iowa, 1977. A merged area school is not authorized to make advance payments to employees for anticipated travel expense. (Nolan to Benton, Superintendent of Public Instruction, 12-19-78) #78-12-11

Garnishment. §§642.21, 627.11, 627.12, Code of Iowa, 1977. By specifying only §627.11, relating to decrees for child support, the legislature has not lifted the $250 garnishment limitation on other orders, including a judgment or decree for temporary or permanent alimony. (Nolan to Hoth, Des Moines County Attorney, 12-28-78) #78-12-31

College Aid; Debt Collection. College Aid Commission has power to employ services of debt collection agencies to collect defaulted medical tuition

loans as an incidental power of authority to receive and administer such tuition loan fund. (Nolan to Wolff, Iowa College Aid Commission, 12-27-78) #78-12-21

SOCIAL SERVICES

Adoption: Termination of parental rights and consent. §600.3(2), Code of Iowa, 1977, as amended by Ch. 140, §2, Acts of the 67th G.A., 1977 [1st] session. A voluntary release for adoption by the biological parents, taken in another state and in accordance with that state's statute shall be accepted as a valid release in lieu of a termination of parental rights proceeding. (Robinson to Jacobson, 12-27-78) #78-12-19

Duties of a custodian of a child. §§600A.2(8), 232.2(9), Code of Iowa, 1977. A custodian has the authority to consent to a driver's license, extra-curricular school activities, out-of-state travel with a foster parent and emergency medical care. A custodian may not consent to enlistment in the armed forces or to the marriage of a ward. (Robinson to Preisser, 12-27-78) #78-12-20

Continuing jurisdiction of the juvenile court. Ch. 1088, §§32, 34, 33, 80 and Ch. 1018, §4(3), 67th G.A., 1978 [2d] session. "Continuing jurisdiction" with the juvenile court means that jurisdiction is retained after the dispositional order; the legislature should clarify the conflict between Ch. 1088 and Ch. 1018 pertaining to whether delinquent juveniles should be placed at the state juvenile home; the statute which states that juveniles adjudicated delinquent shall not be placed at the Juvenile Home at Toledo has prospective application only as the legislature did not intend that children currently in the program at Toledo should be removed; no juveniles will be "grandfathered" into the system. The six-month review and hearing requirements will depend upon whether commitment was made prior to or subsequent to July 1, 1979; after July 1, 1979, juvenile records may be sealed upon court order. (Robinson to Preisser, 12-27-78) #78-12-24

STATE OFFICERS AND DEPARTMENTS

Iowa Board of Parole; Iowa Public Employment Relations Board; Conflict of Interest. Iowa Code Sections 68B.2; 68B.6; 68B.8; Iowa Code of Professional Responsibility for Lawyers, Canon 9; A state official and lawyer may not for a separate compensation represent those with an interest against the interests of state before any state agency or state court. (Salmons to Ewing, Iowa State Board of Parole, Salmons to Beamer, Public Employment Relations Board, 12-8-78) #78-12-5

State Building Code. §§4.3, 103A.7, 103A.10, 103A.12, 103A.19, and 380.10, Code of Iowa, 1977. Governmental subdivisions have the responsibility to enforce their building codes. Amendments to the State Building Code are applicable in those governmental subdivisions which have accepted the applicability of the State Building Code. (Blumberg to Appel, State Building Code Commissioner, 12-19-78) #78-12-16

Center for Industrial Research and Service (CIRAS) of Iowa State University; Appropriations, Use for Public Purposes. Article IV, §4, Constitution of the United States; Article III, §31, Constitution of Iowa; §8.38, Code of Iowa, 1977. It is improper for CIRAS to spend public funds to make and disseminate an audio visual presentation designed to promote legislation aimed at furthering the interests of manufacturers by limiting their liability for defective products as such expenditure is not for a public purpose. (Haesemeyer to Jesse, State Representative, 12-21-78) #78-12-17

Iowa Department of Substance Abuse — Program Audits. Ch. 11 Iowa Code (1977); Ch. 74, §44, 67th G.A., 1977 Sess. Neither the Iowa Department of Substance Abuse nor individual licensed substance abuse programs are required to pay to the state auditor's office the costs or expenses of an audit conducted in accordance with Ch. 74, §44, 67th G.A., 1977 Sess. Such costs and expenses incurred by the state auditor's office should be paid from the appropriations allocated to the state auditor's office. (Cook to Hall, Chief of Administration, 12-28-78) #78-12-26

Motor Vehicle Reciprocity. §§326.6, 326.7, 326.13, 326.15, 326.19, and 326.31, Code of Iowa, 1977. If, upon audit, it is determined that an interstate carrier based in Iowa has paid too low a percentage to Iowa, the state may assess the carrier for the additional percentage even though the total percentage may exceed 100 per cent. The carrier should seek a refund of excess fees paid from the other states. (Blumberg to Forrest, Director, Office of Operating Authority, 12-28-78) #78-12-28

Board of Nursing; Administration of Prescription Medications. Iowa Constitution Art. III, §29; §§135C.1, 152.1, 155.30, 204.101, 204.201, 204.301, 204.401, and 687.6, Code of Iowa, 1977; §§701.2 and 701.8, Supplement to the Code, 1977; §§16 and 23, S.F. 2200, Acts of the 67th G.A. (1978); §165 of Ch. 4, Ch. 1245, Acts of the 66th G.A. (1976). Section 23 of S.F. 2200, amending §204.101 of the Code to permit "qualified individuals" to administer controlled substances outside the presence of a physician is constitutional. These "qualified individuals" may administer prescription medications outside the presence of a physician. The Board of Pharmacy has the authority to promulgate rules regarding these "qualified individuals" relating to controlled substances. (Blumberg to Illes, Executive Director, Iowa Board of Nursing, 12-30-78) #78-12-40

Governor: Transfer of Funds: Signature Required. §8.39. Code of Iowa, 1977. While the approval of a transfer of funds is a discretionary act which must be performed by the Governor, the signing of the approval of such a transfer was properly delegated to and performed by the Governor's executive assistant and even if approval was after the signature the transfer was nevertheless valid and sufficient. (Turner and Haesemeyer to Redmond, State Senator, 12-29-78) #78-12-39

Deposit of State Funds by Treasurer. Treasurer, Ch. 1190, Acts of 67th G.A., 1978. Red-lining §453.1, Code of Iowa. The deposit of state funds by Treasurer is controlled by §453.1, Code of Iowa, 1977. Chapter 722 is not applicable to the fact situation presented. Only the penalties specified in Ch. 1190 may be imposed against banks engaged in "red-lining." (Turner to Krause and Garrison, State Representatives, 12-29-78) #78-12-37

General Assembly: Constitutional Law; Confirmation of Governor's Appointees to Office. Article III, §§8 and 17, Constitution of Iowa. In absence of a specific constitutional or statutory requirement specifying the number, percentage or portion of the senators who must approve an appointment, a statute requiring "approval," "advice and consent," "confirmation" or "consent" rquires no more than an affirmative vote from a simple majority of the senators present, assuming there is a quorum. (Turner to Neu, Lt. Governor, 12-29-78) #78-12-38

Legislative Appropriations: Reversion of funds. Chapter 8.33, Code of Iowa, 1977, requires reversion of funds appropriated to the Commission on the

Aging by Chapter 7, Acts, 67th G.A., 1977 Session, for a senior center when such funds were not encumbered or obligated prior to the end of the fiscal term in which the appropriation was made. (Yocom to DeKoster, State Senator, 12-27-78) #78-12-23

Retirement Benefits; Legislators; Conflicts of Interest. Article III, Section 25; Article III, Section 31; Chapter 97B; House File 2426, Section 31. There is no conflict of interest for a legislator to pass an increase in IPERS retirements benefits to which he may later be entitled, provided the effective date of such bill is not prior to the convention of the next following general assembly; and increases in such benefits are for a public purpose not requiring a two-thirds vote of the General Assembly. (Salmons to Millen, State Representative, 12-7-78) #78-12-2

TAXATION

Property Tax. Assessor's obligation to disclose information — §551.2. Assessor must disclose at written rquest of taxpayer all information in any formula or method used to determine the actual value of his property. (Ludwigson to Van Gilst, 12-13-78) #78-12-6

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Interest. Chapter 535, Code of Iowa, 1977, as amended. §535.2, Code of Iowa, 1977, sets the rate of interest for late charge that can be assessed by a landlord against a tenant on overdue rent. (Garrett to Doyle, State Representative, 12-19-78) #78-12-13

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